
NEW BRUNSWICK ADMIRALTY DISTRICT

1937

May 13 & 20
1941
Jan. 9.

1941
Jan. 20.

BETWEEN:

ALEXANDER C. FRASER.....PLAINTIFF;

AND

SCHOONER *JEAN & JOYCE*, Her Tackle and Apparel.....DEFENDANT.

Shipping—Action for wages as master—Plaintiff a partner and temporary owner in operation of defendant vessel—Plaintiff's claim barred by laches—Loss of maritime lien through failure to prosecute claim diligently.

The plaintiff seeks to enforce a claim for wages as master of defendant vessel. The Court found that the plaintiff was really in partnership with another in operating the vessel and therefore a temporary owner, and further that his claim was barred by laches.

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Held: That a maritime lien may be lost by negligence or delay where the rights of third parties may be compromised.

2. That what contributes reasonable diligence depends upon the facts of each case and does not mean doing everything possible, but doing that which under ordinary circumstances and having regard to expense and difficulty, could be reasonably required.

ACTION by the plaintiff to recover wages as master of defendant vessel and to enforce a maritime lien therefor.

The action was tried before the Honourable Mr. Justice Baxter, Deputy District Judge in Admiralty for the New Brunswick Admiralty District, at Saint John, N.B.

E. T. Richard for plaintiff.

C. F. Inches, K.C. for defendant.

The facts and questions of law raised are stated in the reasons for judgment.

BAXTER, D.D.J.A., now (January 20, 1941) delivered the following judgment:

The writ in this cause was issued 2nd October, 1936, and the action was heard by me on the 13th and 20th days of May, 1937. The matter then stood for the plaintiff's solicitor to submit a brief which he failed to do and the hearing was brought on by the defendant who obtained an appointment for that purpose. I heard argument on 9th January instant, over three and a half years after the trial of the action. Needless to say it has been necessary to familiarize myself again with the testimony by carefully reading it and endeavouring to recall the impression made upon me by the witnesses.

The plaintiff's claim is that on 1st April, 1933, he was appointed by the owner of the *Marion L. Mason,* now called the *Jean & Joyce,* to serve on board of her as master at wages after the rate of $60 per month, also that on 25th November, 1933, the owner wrongfully and without reasonable cause discharged him and appointed another master. The ship was arrested and bail given on a claim of $420.

There is in evidence the crew's agreement which is dated 9th May, 1933, in the handwriting of the plaintiff. The document is stamped by the Customs at Belleoram on 9th May, 1933. According to that document the master

was to be on board 1st April, 1933, and his wages per calendar month were "as agreed." The mate's wages also were "as agreed" until the vessel reached Richibucto where the shipping master initialled an insertion of $30 per month. The mate was William Long who was one of the witnesses.

The plaintiff alleges that he was hired by Nowlan, the then owner, as master. Nowlan says that he did not so hire the plaintiff; that he was owner of the schooner *Marion L. Mason,* now known as the *Jean & Joyce;* that Alex. C. Fraser Sr., father of the plaintiff, wanted to get the use of the vessel and that he let him have her for the summer of 1933, without any charge except that he was to make such repairs as were necessary, pay the bills against her and the caretaker. Fraser Sr. represented that he had money in the bank to pay the bills. Whether he had or not, later on he borrowed money from Nowlan to pay schooner's disbursements. The fact that Nowlan put out money for such purposes is strongly relied upon as evidence that the schooner was being run for him by the plaintiff as master.

The defendant put in evidence a letter dated at Rexton, 28th March (presumably 1933). It is addressed to Thos. Nowlan and says that "the bearer, Alex Fraser, my son, is going down to N.f'ld to bring Mason up to Halifax. From there she will bring 150 tons salt to Richibucto for O'Leary's. I want you to give him full authority to take charge of this vessel. I would like if you could go down with them and sell some cattle, if not, try and send your son. I understand the Gulf is full of ice so there would be no use to try that route before the middle of April. P.S. if you have anything to bring up whatever bargain you can make with him will be satisfactory." Shown this note, Fraser Sr. denies that he gave it to his son but admits that he may have given it to Wm. Long (the mate) to give to his son—the plaintiff. He admits that he had asked Nowlan for another vessel—the *Marion Emily,* which he did not get. This makes it clear that Fraser Sr. was at least looking for some vessel which he could get and intended to run. Now the plaintiff says he received a letter from Nowlan to the man in charge of the *Marion L. Mason* to hand her over to the plaintiff—who took charge of her in Belleoram, Nfld. He says that he had

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no agreement with Nowlan about wages, but that after he brought the vessel to Canada, Nowlan said he would get customary wages. He never received any wages. Nowlan would not pay him wages and never came to any settlement with him. Plaintiff collected for the ship and paid expenses out of what he received. He never gave any accounting and apparently never was asked for one. Now the plaintiff says he doesn't think his father gave him a letter to take to Nowlan, he might have but if he did plaintiff forgets about it. His father had told him that he was talking to Nowlan about the *Mason*. Shown the letter the plaintiff quibbled about it and in my opinion lied when he said he did not know whose writing it was and that he could not tell his father's writing from anybody else's. He admits that his father told him that Nowlan offered him the vessel for a year, to run it and put it in repair and see if there were anything to be made with her.

On 24th November, 1933, the crew were paid off at Richibucto. Capt. Ryan who was buying the vessel was present. The plaintiff, who had no fixed rate of wages on the articles, swears that he said there were his claim and those of the other two boys aboard the vessel, but did not state the amount of his claim. No one else heard him make this demand and I conclude that he stood by, made no claim, knowing that the vessel's ownership was to be changed and that the reason he acted as he did was because he knew that he had simply taken charge of the schooner for his father with whom there is some evidence that he was really in partnership, and who had been allowed the use of her on condition of paying what was against her and what was needed for repairs. The plaintiff confirms this by his statement that he did not communicate with Nowlan as to cargoes, but accepted them without reference to him.

The defence is corroborated by William Long whose testimony I accept. An attempt was made to discredit him with reference to a casual conversation but I do not consider that his testimony was in any way impeached. There was a material difference between what he was supposed to have said and what he did say.

I simply do not believe either the plaintiff or Fraser Sr., not only because of the self-contradictions in their testi-

mony, but as well because of the shifting and evasive manner of giving their testimony. I accept the evidence of Nowlan which has not been impeached in any particular and is consistent with Fraser's letter and many of the plaintiff's actions. I believe that Nowlan found that Fraser Sr. was unable to finance the vessel as he had undertaken to do and was placed in the unpleasant situation of having to advance money to save his vessel.

It is not necessary, I think, to pursue further an analysis of the evidence, a thorough re-reading of which convinces me that the plaintiff was not engaged as master by Nowlan.

This effectively disposes of the claim for breach of contract of hiring but the fact remains that Fraser Sr. was a charterer of the vessel. If he were the sole charterer the master engaged by him would have a remedy against the vessel. The articles did not specify his wages but he would be entitled to a reasonable amount.

Under the unusually peculiar circumstances of this case, I feel that I am obliged to invoke the rule which requires reasonable diligence in the prosecution of a claim. *The Bold Buccleugh* (1); *The Europa* (2). The law is summed up in *The Fairport* (3) by Sir Robert Phillimore who says:

> The law on this subject is established by the cases of *The Bold Buccleugh* (*supra*) and *The Europa* (*supra*). It results from these cases that a maritime lien is not indelible and may be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien travels with the thing into whosesoever possession it may come.

I have carefully considered the case of the *Charles Amelia* (4), where the plaintiff had not an opportunity of asserting his claim such as he had in the present case. I believe the witnesses who swear that he did not make any claim when the crew were being paid off. I also find that he knew that the transfer of the vessel was in immediate prospect. Under these circumstances he betrayed the new owner into believing that he had no claim. There is also the case of *The Chieftain* (5), where the master delayed for ten months but was allowed to bring his action

(1) (1849-51) 7 Moo. P.C. 267 at 285.
(2) (1863) Br. & Lush. 89; (1863-5) 2 Moo. P.C.N.S. 1; (1863) 167 E.R. 313.
(3) (1882) 52 L.J.P. 21 at 22.
(4) (1869) 38 L.J. Adm. 17.
(5) (1863) Br. & Lush. 212; (1863) 167 E.R. 340.

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though mortgages had intervened. Dr. Lushington thought that was not a stale claim. This case was decided in 1863 and though the authority is undoubtedly a very high one, yet the circumstances are not the same as those of the present case. What constitutes reasonable diligence must depend upon the facts of each case,—*The Fairport* (*supra*). Reasonable diligence means not doing everything possible, but doing that, which under ordinary circumstances and having regard to expense and difficulty, could be reasonably required,—*The Europa* (*supra*). The plaintiff made no such effort as in that case to find and follow the vessel. It is true her name was changed but he knew her purchaser and where he came from.

The Kong Magnus (1) was a claim for damages by collision. Though twelve years elapsed the plaintiffs were permitted to recover. It was held that sale of shares in a company owning the ship was not equivalent to a change of ownershhip. The case turned upon the opportunities which the plaintiffs had of enforcing their claims by arrest of the ship. The cases are not analagous.

The master, in the present case, has not only failed to use due diligence; he has not used any diligence.

The pay-off took place on 24th November, 1933. The writ was issued 2nd October, 1936. The plaintiff has given no explanation of his failure to enforce his demand. He has not shown when the vessel's name was changed, nor that the change of name impeded him in the prosecution of his claim. He has not shown that the vessel was not at all times in the jurisdiction of this Court, nor has he given evidence of any efforts made by him to locate her.

The plaintiff fails upon two grounds: First, that there is evidence that the plaintiff was in partnership with his father and was therefore acting as a temporary owner in running the ship. He can not claim against his own property. Secondly, that in any view of the case his claim is barred by laches.

The action will be dismissed with costs.

Judgment accordingly.

(1) (1890-91) 63 L.T.N.S. 715.