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Sept. 8.

TORONTO ADMIRALTY DISTRICT.

THE JESSIE STEWART.

Maritime law—Action to recover seaman's wages—Motion to dismiss—Bill of sale—Registration—The Merchant Shipping Act, 1854 *s.* 55—*Jurisdiction of Exchequer Court—The Inland Waters Seamen's Act (R. S.C. c.* 75 *s.* 34)—*Insolvent owner.*

In the year 1887, A. sold a vessel to M. and S. under an agreement stipulating, among other things, that the vessel was to remain in the name and under the control of A. until the purchase-money was fully paid, and that, in the event of the terms of the contract not being performed by the vendees, A. was entitled to take possession and the vendees would thereupon lose all claim or title they might have to the ship or to moneys paid by them in respect of the contract. This agreement was not registered. For some time the vendees performed the terms of the agreement, but having failed to do so after a certain period A. resumed possession of the vessel. Upon an action *in rem* for wages due to a seaman employed by the vendees and which were earned during their possession of the vessel,—

Held, that the amount of the claim being below $200, the Exchequer Court had no jurisdiction under sec. 34 of *The Inland Waters Seamen's Act.*

2. That the property in the vessel had not passed to the vendees under the agreement, and that whatever rights the seaman had *in personam* must be enforced against the persons who employed him and not against the vendor.

3. That the agreement was not a bill of sale within the meaning of *The Merchant Shipping Act*, 1854, s. 55.

4. That if summary proceedings had been taken as provided by *The Inland Waters Seamen's Act*, a direction might have been made to provide for the realization of the seaman's claim against the vessel, and she might have been tied up by the court on his showing that the vendees who employed him were then the supposed owners of the vessel and when action was brought were insolvent within the meaning of section 34 of the said Act.

MOTION to dismiss an action brought on a claim for seaman's wages.

The facts upon which the motion was based appear upon the argument.

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The motion was argued before His Honour Judge McDougall, local judge for the Toronto Admiralty District.

Mulvey, for the intervener, in support of the motion:

This is a motion to dismiss an action brought in the Admiralty Court for seaman's wages claiming the sum of $83.60.

The ground on which I ask the action to be dismissed is section 34 of *The Inland Waters Seamen's Act* (1). The facts of the case are these: In the year 1887, Joseph Adamson, the defendant in this action, sold his vessel the *Jessie Stewart* to John Marks and Frederick Stoner, the latter a brother of the plaintiff. The terms on which she was sold were that Stoner and Marks were to pay Adamson $850 for the vessel and were to work the vessel in the building-stone trade. In 1887 this contract was entered into, and for some two or three years they continued to live up to the terms of the agreement, that is, to deliver to Adamson all the stone they carried, and he credited them for the amount, and, also advanced them money at different times to do repairs, &c., to the vessel—they being in difficulties. These advances were made time and again. Early in the last season they ceased to deliver any stone whatever to Adamson and did not deliver any from about a year ago last July until a couple of days before the vessel was arrested in this action. The cause of that being done was that Adamson had written several times asking them to comply with the terms of the contract, otherwise he would have to take the vessel from them. When they were coming in from one trip he brought them to his wharf and there they agreed to give up the vessel and deliver her over to

(1) R.S.C. c. 75.

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Adamson. Then the plaintiff, a brother of one of the parties who contracted with Adamson, brought this action for the recovery of his wages.

Now, the point to be considered is whether Stoner and Marks were the owners of this vessel at the time she was arrested. I say Stoner and Marks had delivered her over to Adamson, as the cross-examination of the defendant on his affidavit shows, and that they had delivered up all rights in the vessel under the contract at that time. And I further say whether that is so or not that nevertheless Adamson must be still considered to be her owner. Adamson is the registered owner, and the register never was transferred; he held it all the time. (Here he refers to sections 30 and 34 of *The Inland Waters Seamen's Act*) (1).

(1) R.S.C. c. 75, s. 30. Any seaman or apprentice belonging to any ship subject to the provisions of this Act, or any person duly authorized on his behalf, may sue in a summary manner before any judge of the Superior Court for Lower Canada, judge of the sessions of the peace, judge of a county court, stipendiary magistrate, police magistrate, or any two justices of the peace acting in or near the place at which the service has terminated, or at which the seaman or apprentice has been discharged, or at which any master or owner or other person upon whom the claim is made is or resides, for any amount of wages due to such seaman or apprentice not exceeding two hundred dollars over and above the costs of any proceeding for the recovery thereof, as soon as the same becomes payable; and such judge, magistrate or justices may, upon complaint on oath made to him or them by such seaman or apprentice, or on his behalf, summon such master or owner, or other person to appear before him or them to answer such complaint.

Ibid. s. 34. No suit or proceedings for the recovery of wages under the sum of two hundred dollars shall be instituted by or on behalf of any seaman or apprentice belonging to any ship subject to the provisions of this Act, in any court of Vice Admiralty, or in the Maritime Court of Ontario, or in any Superior Court, unless the owner of the ship is insolvent within the meaning of any Act respecting insolvency, for the time being in force in Canada, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid, or unless any judge, magistrate or justices, acting under the authority of this Act, refer the case to be adjudged by such court, or unless neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore.

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I say, moreover, Stoner and Marks cannot be considered the owners of the vessel, because *The Merchant Shipping Act*, 1854, expressly states how ownership in vessels is transferred and states that the transfer must be by bill of sale, and that bills of sale must be registered. The clauses in the Act relating to that are 19, 43 and 50. They say that ownership can only be transferred by bill of sale ; and that bills of sale must be registered. I contend, therefore, that Adamson is still the registered owner of this vessel.

Then there is a distinction drawn between charterers and owners of vessels. As to that, I will refer your Honour to the case of *Meiklereid* v. *West* (**1**).

The authorities are numerous which point to the distinction between those cases where the effect of the charter is to retain the ownership in the owner and the ownership is vested in the charterer temporarily only.

In this case the contract expressly reserves the control of the vessel to Adamson. He is the registered owner, and they could only use the vessel as he directed. Under the terms of the contract, if they used it in any way whatsoever, they must come to him for a written consent. They could not take it out of Lake Ontario. They could not trade in Lake Ontario except with his express consent; and I say, under authority of section 81 of *The Merchant Shipping Act*, 1854, which impliedly says the owner means the registered owner, the owner is he who has control of the vessel; and a charterer cannot be held to be the owner except he has absolute control of it.

[His Honour : In the case cited he did not bind the registered owner of the ship.]

No. He did not bind the registered owner. He only bound the charterer, the person to whom the allotment note was addressed and who accepted it.

(1) 1 Q.B.D. 428.

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I say that this word "owner" in *The Inland Waters Seamen's Act* can only apply to Adamson and Adamson resides in Toronto, and it has not been shown he is insolvent. Supposing it can be shown that Stoner, the man who entered into the contract with Adamson, is insolvent and cannot pay this claim, I say that is not sufficient ground to bring an action within the meaning of the Act. I say he must have made an assignment for the benefit of his creditors; he must have taken advantage of an insolvent Act.

[His Honour: I take it to mean a person who is in fact insolvent. I do not think it means that you have to produce evidence of his having made an assignment before you can hold he is insolvent, though it is notorious he cannot pay ten cents on the dollar.]

Section 189 of *The Merchant Shipping Act*, 1854, reads "adjudged bankrupt or declared insolvent." The only Act we have is the Act touching assignments for the benefit of creditors.

[His Honour: I should read our statute to mean a person in insolvent circumstances, that is, who is in effect insolvent, although perhaps not legally adjudged to be such.]

With regard to the effect of such a clause, I would refer you to the case of *The Harriet*, decided by Dr. Lushington (1).

I may state the object of this section is quite plain and clear. A mode of procedure is given to seamen to recover their wages without arresting the ship because that always puts an owner to a great deal of expense, and he can recover no costs as a rule against the seamen and the vessel is likely to be tied up at any time of the year when incalculable damage may be sustained. We say Stoner and Marks are liable, but we are not liable in any way at all, and that the plaintiff must proceed

(1) Lush. 285.

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against them in the way set out in the statute, and if he cannot recover against them, and if the magistrate before whom the matter is brought decides the amount can be recovered from the vessel, we will pay the amount rather than have any proceedings taken against the vessel; but we say that the present plaintiff must do that before he can take proceedings in the Admiralty Court.

Smyth, for the plaintiff, *contra*:

The plaintiff brought this action against the vessel because he knew the owners Stoner and Marks were insolvent. Mr. Marks as a fact left the vessel some time last fall—a year ago—and transferred whatever interest he had to Capt. Stoner and the plaintiff, knowing that Stoner was unable to pay, brought this action against the vessel, and he brought it against the vessel before it had been delivered over to Adamson, because, as he stated to me at the time, "I have the key of some part of the vessel in my pocket"; and the fact is the vessel was still in the possession of Capt. Frederick Stoner, who was then negotiating with Adamson as to what terms he would deliver up the vessel and sell to Adamson. As Capt. Stoner states in an affidavit on this motion, he had come to the conclusion that there was not much money in his keeping the vessel and it was a question upon what terms he would deliver the vessel to Adamson. Adamson promised to pay the wages that were due the plaintiff, to pay another account due for repairing sails, or something of that sort, and give Capt. Stoner a small money consideration, if he would give him over the vessel and her load of sand which Stoner states was worth some $32.

A vessel is personal property, and is so declared by *Maclachlan on Shipping* (1). He says that ships, according to the law of England, are personal property and

(1) P. 1.

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the common law relating to personal property is in general applicable to them. Therefore a sale and delivery, in so far as passing the property is concerned, is sufficient, and that is all that is required. In regard to the registration of vessels, chapter 72 of the *Revised Statutes of Canada* simply requires a vessel to be registered in some port, but there is no provision whatever that in order to pass title, to pass property, in that vessel a bill of sale must be executed and that that bill of sale must be registered. There is no law in regard to the registration of bills of sale of vessels as in regard to chattel mortgages or bills of sale to protect creditors. There is a section (1) stating that mortgages executed on ships would take priority according to the date of their registration, but there is no section whatever in the whole Act that lays down that a bill of sale must be executed and registered. This action was brought under section 34 of *The Inland Waters Seamen's Act* for the reasons I have mentioned, that the owners were insolvent, and, therefore, it would be useless to bring an action under section 30, which provides for a summary proceeding before a police magistrate or a judge, as that would necessarily lead to a dismissal of the action, or a direction, at least, to bring the action under the section under which it has been brought. I claim, therefore, the property in this vessel passed to Stoner and Marks, and that at the time this action was brought Capt. Stoner was the owner. The document under which the vessel was delivered to Stoner and Marks recites the fact that it was sold, and recites the price and the terms upon which it was to be paid for. That is very clear. Then in addition to that there are certain conditions giving Adamson certain rights, the rights of a mortgagee and nothing more. This document further provides the vessel is to be paid for in

(1) R. S. C. c. 72, sec. 35.

full on or before the 1st day of October, 1892, unless a further extension of time is given by Adamson to Stoner and Marks. Under this agreement I submit it is clear on the authorities that the property in the vessel passed. Mr. Adamson simply, by this agreement, provides a means, such as a mortgagee would provide, whereby he may take the vessel if there is any default in the payment. The authorities are numerous as to the passing of property. I have grouped together a number of English authorities, and will refer to them hereafter.

It will be observed that Adamson does not say that until such an amount of consideration is paid that the vessel will be his property or that he will remain the owner of it or anything of that sort; he sells the vessel out and out, though no bill of sale is executed and though the vessel remains registered in his own name.

[His Honour: According to that there would not be any protection to him at all; he would not cease to be the owner.]

He would not cease to be the owner in this respect, —he would have this security, that Stoner and Marks could not sell the vessel to any person else and pass title because of the legal title.

[His Honour: But you claim the title passed?]

I claim the property passed. I claim so far as the abstract of registration is concerned that it could not be made perfect without a conveyance from Adamson; and Adamson just held the vessel in that way because he could say "You cannot sell to any person else."

[His Honour: If he could sell to Stoner as you describe, what was to prevent Stoner selling to some person else in the same way?]

He could, if any person else cared to take the risk.

[His Honour: There would be no risk if the property passed, as you say. There would be no risk if the legal

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title to the property passed. I do not understand how the property can pass and the legal title not pass, because "property," as I understand it, is legal title to goods, the right to their possession together with the right to their disposition.]

It gave Adamson a right to exercise an ownership over it or a lien on the property, but the property itself passed to these parties. I submit no other construction can be given to that agreement; it only reserves the control. The intention of the parties must be looked to in a case of this kind. It is clear it was the intention that the boat should be the property of Stoner and Marks.

The authorities say in a case of this kind, more particularly where there is a document, that if there is any doubt about the matter it is a question for the jury to say what was the intention of the parties as to the sale, whether it was the intention that the property should pass or not. Of course it is the province of the court to say whether the document is a mortgage or a deed. As to the property passing, I can refer your Honour to a case of the *Yorkshire Railway Wagon Company* v. *Maclure* (1), where a railway company borrowed £30,000 from the plaintiffs and sold them their rolling-stock. The company then made a contract for the hire of the stock, paying a rent that would represent the £30,000, and interest, in five years. An action was brought against the sureties, and a question, as to whether the property passed, arose and it was held to be a sale out and out and the evidence there plainly showed that was merely a surety for the repayment of that £30,000. I would also refer to the case of *The North Central Wagon Company* v. *The Manchester, &c., Railway Company* (2), which decides in the same way on a similar state of facts.

(1) 21 Ch. D. 309. (2) 35 Ch. D. 191.

[His Honour: There was a bill of sale in those cases?]

Yes; and the question was whether it was a sale out and out or whether it was a hiring.

[His Honour: They complied with all the requirements of the law?]

No. The bills of sale were not registered.

[His Honour: They must have been, because they could not sell their wagons and have them in their possession, and use them; or at least there would be no change of title unless there was a bill of sale duly registered.]

I would also refer to the case of *Beckett* v. *Tower* (1), which says it is the real question to determine what the intention of the parties was. There are several Canadian cases on the same ground, and touching on the same point. I say here that there was a complete sale and transfer of the property and that this document, if anything, gave Adamson nothing more or less than the privilege of a mortgagee. The evidence also shows that Stoner and Marks were to pay Adamson $850. This vessel was sold in May, 1887, and in the year 1887 Stoner and Marks received credit from Adamson for $548.71, and in 1888 credit for $665.30, making altogether $1,214; and I claim that with a proper adjustment of the credits the vessel was paid for in the year 1888.

[His Honour: Were there not advances made?]

Yes. But they were advances he made on account of repairs, &c.

[His Honour: But the agreement says they were only to be credited for the final balance on the purchase-money? You cannot take one side of the account and say the payments are so much.]

$352.52 is what Adamson charges for interest on the purchase-money.

(1) [1891] 1 Q. B. 1.

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If your Honour should ultimately hold that Stoner and Marks were not the owners, I would refer to the section which says no costs should be awarded to the plaintiff. As to the question of costs, it does not state that the action shall be dismissed with costs, but it seems to state the fact clearly that the plaintiff is not entitled to his costs, therefore it seems to be in the discretion of the court to say whether, from the circumstances of the case, the plaintiff's action should be dismissed with costs. I submit in this particular case, where the vessel has been in the hands of what were supposed to be the owners by every person for the last three or four years, no costs should be given against the plaintiff.

[His Honour : There is always one very simple way of finding out who owns the ship, and that is by examining her register. She is bound to carry her certificate on board. If you cannot get access to that, then the custom-house is the place.

There is a good deal of force in the plaintiff's contention that the present owner of the vessel sold her to another party and gave a bill of sale, and the other party did not choose to register. The question would become a question of fact, as to which was the owner. I do not think registration is done to pass the title ; but it may prevent the owner from conveying to somebody else. If you can argue that this agreement amounts to a bill of sale which could have been registered at Montreal ; or even, if it were defective in part but yet amounted to a bill of sale, there is some force in your contention ; but how do you account for the clause providing that Adamson retains the control, and merely intrusts the possession to these parties ? That seems to be against your contention. I think if that expression had not been used you might well argue this was a bill of sale of the vessel. You cannot say "entire

control of the said vessel" shall not mean "any control of the vessel." If the expression had been ambiguous, you might introduce evidence to show what was the intention of the parties.

You are arguing that, granting there is no jurisdiction against the vessel, yet Adamson is liable. On what principle would Adamson be liable if I should hold Marks and Stoner are not the owners of the boat?]

He agreed with this plaintiff, and with the owner of the boat, Capt. Stoner, that if he would deliver over the boat, he (Adamson) would pay the plaintiff the amount of his wages, and the plaintiff was present when that agreement was made, and there is, therefore, privity on his part to it.

Mulvey: Adamson denies that in his examination.

[His Honour: You could not make out any privity of contract with the seaman who was merely standing by and happened to hear the conversation between Mr. Adamson and Capt. Stoner.]

Mulvey, in reply:—With regard to the fact of ownership, section 55 of *The Merchant Shipping Act*, 1854, says that every transfer and every disposition of a vessel or any share in it must be in the form of a bill of sale; it must be in the form given in that act; the custom-house authorities would not have taken that agreement; it is not in the form required by the act at all. The registered owner can make a bill of sale and give a clear title under section 73; and section 55 says every transfer or disposition must be by bill of sale in the form given. I think the question of ownership is settled by Frederick Stoner's own affidavit. I contend, and I think there is not much to be said to the contrary, that the circumstances which give rise to these exceptions in section 34 of *The Inland Waters Seamen's Act* (1) must exist at the time the action is brought,

(1) R. S. C. c. 75.

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that is to say the owner must be away, the master must be more than twenty miles from the port, or he must be insolvent at the time the action is brought, so that it must be the owner of the vessel at the time the action is brought, not the owner of a month ago or a month hence, but at the time the action is brought. Frederick Stoner says he gave up possession on the 27th August, while this action commenced on the 26th August.

[His Honour: Assuming that Mr. Adamson, the real owner of the vessel or the legal owner of the vessel, had been sailing the vessel this season himself and claims had arisen in respect of wages, and this fall he sold the vessel to you and gave you a transfer of it would that cut out any claims by those seamen whose wages had been earned and which were liens against the hull at the time you got the transfer?]

He cannot do it because they have a maritime lien on the vessel and it attaches to the vessel.

[His Honour: Then, if Mr. Stoner was the owner at the time this debt was contracted, anything he did towards divesting himself of the title would not discharge the maritime lien once created; that brings us back to the question, was Stoner at any time the owner of the vessel or was he at the time this debt was incurred?]

Yes. But I submit that the plaintiff must proceed under sec. 30 (1) when the claim is under $200, and if the claim cannot be recovered from the owner who employed the seaman, it is a clear case for a judge to refer to this court for the enforcement of his maritime lien. Proceedings can only be taken before a magistrate on the contract, not to enforce a lien; it must be taken against the person who employed the seamen, not against the owner if the ownership is

(1) R. S. C. c. 75.

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changed. If the wages cannot be recovered from the person who made the contract to pay them, it is a proper case then to be referred to this court to enforce the maritime lien. And then we say, rather than have the lien enforced against the vessel, we will pay it. But we want him to proceed against Stoner; he should have first proceeded against him. You have no right to bring this action until you have exhausted your remedies against the other man who is liable for the wages.

[His Honour: What about the vessel?]

The vessel is liable, but you must exhaust your other remedies first against the employer before you enforce your lien.

MACDOUGALL, L.J.—I am of the opinion that there is no jurisdiction to try this case here. I am not so clear if it were tried in the other court that a direction could not be made to proceed for the realization of the claim against the vessel, I mean if it had been commenced in the other court. I have very little doubt but what the vessel would have been ultimately tied up, the court saying, it is quite clear you cannot succeed against this man, but you are entitled to proceed against the vessel because you cannot make your claim against Stoner.

I cannot get over feeling that had the plaintiff commenced his action regularly, he would have reached this court ultimately; but I will fix the costs at $25, including disbursements. It is a small claim, and I feel some sympathy with the plaintiff, looking at all the circumstances.

My judgment is, the action will be dismissed so far as the vessel is concerned, with costs fixed at $25, including disbursements. Of course I cannot make any order as to payment of the wages because Adamson is

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not before me, but I will express the opinion that there is a maritime lien on this boat for the amount of the wages because the men supposed to be the former owners of the vessel are worthless, and the difference between costs and wages will doubtless yet have to be paid by the intervener to the plaintiff.

Judgment accordingly.