

1902

NEW BRUNSWICK ADMIRALTY DISTRICT.

Jan. 7.

No. 73.

MILES L. MUNSEN AND ELMER }  
 D. TINGLEY. .... } PLAINTIFFS ;

AGAINST

THE SHIP *COMRADE*.

No. 75.

GEORGE SAUNDERS ..... PLAINTIFF.

AGAINST

THE SHIP *COMRADE*.

No. 76.

JAMES MORTON DICKSON AND }  
 ALMON DICKSON ..... } PLAINTIFFS ;

AGAINST

THE SHIP *COMRADE*.

*Maritime law—Actions in rem—Wages—Equality—Priority—Costs—Pro rata payment of subsequent claims.*

*Held*, following the *Saracen* (6 Moo. P. C. 56), that when claimants against a fund in the registry are of equal degree, the court will give priority to the diligent creditor.

2. Where the parties are not of equal degree, and one claiming subsequently has a legal priority over another, such priority will be protected if he make his claim before a decree has passed for distributing the fund, but not afterwards.
3. Where two claims for seamen's wages were prosecuted to judgment before two similar claims were allowed by the court, the costs of the prosecution of the first two claims were ordered to be paid out of the fund in the registry in full in preference to the last two claims. In respect of the latter it was directed that they should be paid in full if the balance of the fund permitted it, if not they were to be paid *pro rata*.

THESE were three actions *in rem* for the recovery of seamen's wages.

The facts are stated in the reasons for judgment.

October 19, 1901.

Dr. Stockton, for the plaintiffs *Munsen* and *Tingley* :

In this case my clients have a claim for seamen's wages. They were prompt in pressing their claims and obtained a decree of the court assessing the amounts due; and under that decree the vessel has been sold and the proceeds brought into the Registry. No application was made by other parties to the court to stay final judgment, or to ask that the decree be conditional upon other claimants ranking according to priority of claims. The costs must first be paid out of the fund in court, (1). The *prior petens*, or one first getting a final decree, if, *in pari conditione* with competing claims, ranks next after the claims for costs. (He cites *The Margaret* (2); *The Saracen* (3); *The W. F. Safford* (4); *The Clara* (5). See also, *The Markland* (6). The case of *The Desdemona* (7) in no way conflicts with the authorities cited. In the latter case there was no final judgment or decree. It was a case of *primum decretum*, by which the court put the plaintiff in possession of the vessel where the proceedings were in pain, no appearance having been given for the owner. The authorities, it is submitted, fully support the contention of the plaintiffs, that as their claims are for wages, and are *in-pari conditione* with all competing claims, the judgment in their favour must be paid in full. After payment of the costs of suit

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Argument  
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(1) See *William & Bruce's Adm. Prac*, p. 468; *The Immacolata Concezions*, 9 P. D. 37.  
 (2) 3 Hagg. 240.  
 (3) 6 Moore, P. C. 56.  
 (4) Lush. 71; 29 L. J. Ad. 109.  
 (5) Swa. 1.  
 (6) L. R. 3 A. & E. 340.  
 (7) Swa. 158.

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bringing the funds into court, the balance of the fund, if any, must be paid according to the priorities among the other claimants.

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Argument  
 of Counsel.

*G. H. F. Belyea* for the plaintiff *Geo. Saunders*, whose claim amounted to \$211.93, filed an affidavit of insolvency of owner and captain, being all the parties responsible to him for his wages, and contended that the court should administer funds on equitable principles by first paying all the costs of the party bringing the vessel into court, and then dividing the remainder *pro rata*.

The cases cited by Dr. Stockton have nothing to show to the court that there was not sufficient property outside of the ship to pay claims, and the equitable jurisdiction of the court not being invoked, they are distinguished from this case.

That *Saunders* being in court before decree made in the first claim, the court must recognize his equitable right to payment on equitable principles as in insolvent estates.

The fact of a decree being had in the first claim should not debar *Saunders* from participating in proceeds of sale, as the vessel had been attached previous to decree and he was, therefore, before the court; and, according to practice, the decree in first claim was asked for and obtained without notice, and notwithstanding the second suit in court. We are all here now before the court and the proceeds of sale are still in court.

(Cites *The Markland* (1), *The Saracen* (2), *The William F. Safford* (3).

*J. K. Kelley* for the plaintiffs *J. M. Dickson* and *A. Dickson*. My clients are seamen whose claims amount

(1) L. R. 3 A. & E. 340.

(2) 6 Moore P. C. 56.

(3) Lush. 69.

to \$278.72. The court, while created by a statute of the Parliament of the Dominion of Canada, is governed by the general rules applicable to the court when it was one of the system of Ecclesiastical Courts of England, and where there is no express rule will adjudicate upon principles of equity and natural justice. The doctrine that the *prior petens* should be paid in full, *in eadem conditione*, does not apply to seamen. The proceeds of the *res* having been brought into court will be administered for the benefit of all seamen claiming for wages, as a court of equity would administer an insolvent estate. The master and owner of the *Comrade* being insolvent, the seamen cannot have recourse to them, but must rely for payment out of the *res*. It is established by the *Saracen* (1) that the court has power to administer equity. The costs of the *prior petens* and officials' fees it is admitted should be paid in full; but the principal should rank *pro rata* with the claims of the other seamen whose actions for wages have been brought later in time but before a decree for distribution of the funds has been made in the first suit. The *William F. Safford* (2) is relied on by text book-writers as the authority for the general rule cited in *Williams & Bruce* (3); that parties being *in pari conditione* the first successful suitor is paid in full. A judgment in a case is authority for nothing more than the legal issues decided. The *William F. Safford* decided nothing more than: (a) That seamen's wages should be paid in full; (b) That a bottomry bond given under circumstances as in that particular case will be paid next; (c) That necessaries rank after these. The *raison d'être* for the proposition laid down in *The Saracen* that the *prior petens* should be paid first, is that diligence should be rewarded. This argument is fully

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(2) Lush. 69.

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met by conceding the payment of costs, leaving the balance of the proceeds or the *res* as assets in the hands of the court for administration. "If different demands are of the same nature, priority in beginning the suit will not give priority in payment if the other demands are brought to the attention of the court before a decree in the first suit brought is rendered." (1) The court will take judicial notice of its records, therefore, the argument that a *caveat* should have been filed to have brought the other claims to notice of the court does not apply. The *caveat* is used where no other suits are pending at the time of decree in first suit. The court will not make an order prejudicial to the interests of one suitor against another claiming from the same fund without giving all claimants a hearing, and if without full information a prejudicial order is made the court, having power to control its own orders, will vary an order or decree in the interest of justice. In the cases of *The Markland* (1), *The Saracen* (2), *The William F. Safford* (3), the matter of the payment of seamen's wages otherwise than in full over other claimants, was not before the court; and it is not possible to say what the court would have decided had the funds been insufficient to pay all the seamen in full. In all these cases the *prior petens* was not a seaman.

McLEOD, L. J. now (January 7, 1902) delivered judgment.

in this case an action *in rem* was commenced against the ship *Comrade* by Miles L. Munsen and Elmer D. Tingley, seamen, for wages, on September 19, 1900. The ship was arrested but no bail was given and no appearance was filed, and on October 12, 1900, the

(1) L. R. 3 A. & E. 340; Parsons' Admiralty, p. 234. (2) 6 Moore P. C. 56. (3) Lush. 69.

plaintiffs obtained leave to proceed *ex parte* and set the cause down for trial and it was tried on the 19th of October, being undefended, judgment was given for the plaintiffs and their claims assessed as follows,—Munsen's at \$116 and Tingley's at \$89; and the ship was ordered to be sold, and on the 27th of October she was sold by the Marshall for \$600, which money is now in the Registry.

On the 26th of September, 1900, Geo. Saunders, another seaman, commenced an action *in rem* for wages, the summons and warrant were served on the 29th September and filed on the 2nd October. No appearance was entered. On the 11th October James M. Dickson and Almon Dickson, seamen, issued a summons *in rem* for wages. No appearance was entered. Two other claims were made, one for necessaries supplied the ship and one for repairs made on her, but as she did not sell for enough to pay the costs and wages due the seamen it will not be necessary to consider them.

On the 3rd of December, 1900, Dr. Stockton, the counsel for Munsen and Tingley, moved to have their taxed costs and also the amount of their claims paid out of the fund. And on the same day the claim of Geo. Saunders was assessed at \$211.93, that of Jas. M. Dickson at \$169.17 and Almon Dickson at \$130. When Dr. Stockton moved to have the plaintiffs' costs and claims paid, Mr. Kelley and Mr. Belyea, representing James M. and Almon Dickson and Saunders, whilst admitting that the plaintiffs' costs were a first lien on the fund and entitled to be first paid, claimed that the parties for whom they appeared being seamen and having an equal maritime lien for wages with the plaintiffs were entitled to rank *pro rata* with them on the balance of the fund for their claims.

The question then is, whether I have a right to direct that these parties, being of equal degree, have a right

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to rank equally on the fund now in the Registry. In *The Saracen* (1) it was decided that when claimants were of equal degree the court would give the priority to the diligent creditor, that is, to the one obtaining the first judgment and that decision appears to have been followed since in all cases where the parties were of equal degree.

It is also held that when they are not of equal degree, but when the party subsequently claiming has a legal priority over the other, his priority will be protected if he makes application before the money has actually been paid out.

The first question is, has there been a final decree? I think there has been. The plaintiffs have had the ship seized, a decree for sale made and the ship sold, and the proceeds brought into the Registry and their own claims assessed, and all that now remains for them is to reap the fruits of their diligence by having the money paid over to them.

If an application were made to the court before a decree is made, the court would, so far as it could facilitate the proceedings, impose such conditions as might be necessary so that the parties might share proportionately. In this case no application was made until after decree was made in favour of the plaintiffs, and I think I cannot now deprive them of the benefits of their diligence.

The order of distribution will be:—

(a) Payment of plaintiffs Munsen and Tingley's taxed costs.

(b) Payment of plaintiffs' claims.

(1) 6 Moore P. C. 56.

(c) Payment of claims of Geo. Saunders, James M. Dickson and Almon Dickson if there is sufficient to pay them in full, if not, they will be paid *pro rata*.

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*Judgment accordingly.*

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Solicitor for plaintiffs Munsen and Tingley: A. A. Stockton.

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Solicitor for plaintiff Saunders: G. H. V. Belyea.

Solicitor for plaintiffs J. M. and A. Dickson: J. K. Kelley.

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