1901

Jan. 23.

TORONTO ADMIRALTY DISTRICT.

THE ROCHESTER & PITTSBURG COAL AND IRON COMPANY..... | PLAINTIFFS;

AGAINST

THE SHIP "*THE GARDEN CITY*."

(THOMAS NIHAN—REGISTERED OWNER.)

Action for necessaries—Meaning of word 'owner'—'Domicile.'

An action *in rem* for necessaries will not lie against a ship if supplied to a charterer, who also engages the crew, in a port other than her home port, if it is shown at the time the writ issued an owner or part owner was domiciled in Canada.

The Admiralty Act of 1861, sec. 5 (Imp.) enacts: "That the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." By the *Colonial Courts of Admiralty Act*, 1890, and the Canada Admiralty Act, 1891, the Admiralty Act of 1861 (Imp.) is brought into force in Canada.

Held, That the word 'owner' used in sec. 5 of the Admiralty Act of 1861, means 'registered owner' or a person entitled to be registered as owner, and not a *pro hâc vice* owner. The word 'Canada' is to be read in the place of 'England and Wales.' The word 'domicile' must be understood in the ordinary legal sense.

Semble, That wherever a maritime lien is created in favour of any one against the ship, it is not essential to further establish personal liability against the owner.

THIS was a motion made by the owner of the ship to set aside the Writ of Summons and all proceedings herein, on the ground of want of jurisdiction, this being an action for necessaries, and an owner of the ship resident in the Province of Ontario.

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Argument of Counsel.

The motion came on for argument on the 6th day of July, 1900.

H. J. Wright, for owner of ship, cited the following cases in support of motion: *Dean* v. *Hogg* (1); *Fletcher* v. *Braddick* (2); *Cox* v. *Reid* (3); *Harder* v. *Brotherstone* (4); *The Aneroid* (5); *Lucas* v. *Nockells* (6); *The Pacific* (7); *The Two Ellens* (8); *The Druid* (9).

T. Mulvey for plaintiffs:

The only point in question on the pending motion is the interpretation of sec. 5 of 25 Vict. c. 10 (Imp.), worded as follows:

"The High Court of Admiralty shall have jurisdiction for any claims for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

The defendant contends that the words 'any owner or part owner of the ship' relate to the immediately preceding words 'at the time of institution of the cause,' and the interpretation to be placed on the section is that irrespective of the ownership of the ship at the time the necessaries are purchased, that if any owner is resident within the jurisdiction at the time the action is commenced the court has no jurisdiction.

On the other hand the plaintiff contends that the words 'any owner or part owner of the ship' refer to the owner at the time the necessaries were purchased and if no owner or part owner was resident within jurisdiction at the time the action was instituted, then the court has jurisdiction.

(1) 10 Bing. 345.
(2) 2 B. & P. (N. R.) 182.
(3) 1 C. & P. 602.
(4) 4 Campb. 254.
(5) 2 P. D. 189.
(6) 4 Bing. 729.
(7) Br. & Lush 243.
(8) L. R. 4 P. C. 161.
(9) 1 Wm. Rob. 391.

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Argument of Counsel.

It is not contended by the plaintiff here that they have a maritime lien upon the vessel. They claim merely a right *in rem* under sec. 35 of the Act of 1861.

First: In support of the plaintiff's contention that the words 'owner or part owner of the ship' relate to the ownership at the time the necessaries were supplied, it is submitted that this interpretation must be placed upon the section, otherwise one of the most important objects of the section would be frustrated. At common law no action can be maintained except under contract or one made through their agents authorized for that purpose. The master is, of course, such an agent, and if the master orders, the owners are liable. If the vessel should be sold there would be no claim against the purchaser because it is assumed that the master who made the purchase was not the master employed by the owner at the time the necessaries were supplied. In this case there can be no claim against Nihan, because under the charterparty it is expressly provided that the master was not his servant but the servant of the charterer. The object of the section is to give a right *in rem* where on account of the bankruptcy or absence from the jurisdiction of the owner no effective remedy can be given at common law. In support of this contention the following cases are submitted: *The Ella A. Clark* (1); *The Pacific* (2).

In the case last cited, Dr. Lushington, in short (considering 25 Vict. c. 10, s. 5) says that the remedy against the ship is given only when a personal action against the owner would be fruitless, and not even then where the supply is to be assumed to have been made on his personal credit.

The next point for consideration is the meaning of the phrase 'owner or part owner' where it appears in

(1) B. & Lush 32. (2) B. & Lush. 243.

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Argument of Counsel.

the section. It is submitted that this is a case of *locatio navis*. It is true that the owner under the charterparty had the right to select and appoint the captain and chief engineer. See clause 2 of charterparty. But by clause 5 it was provided that notwithstanding the right of the owner to appoint the captain and chief engineer, they, with the crew, were to be under the order and control solely of the charterer and not deemed the employees or servants of the owner. Lord Tenterden in the 5th ed. of *Abbott on Shipping*, laid down the following rules for ascertaining in whose possession a vessel may properly be said to be. They are:

"1. That although by the language of the charterparty it may be expressed that the owner or master lets the ship to freight, this phrase does not necessarily import that the possession of the ship is given up to and taken by the charterer.

"2. That it must depend on the terms of the instrument taken altogether, and

"3. Upon the purpose and objects of it. (1)

These rules are laid down in considering claims of the owner for a lien for freight. There is no lien where the possession of the ship passed to the charterer. *Hutton* v. *Bragg* (2) was decided upon consideration of the nature of a lien, as being a right to detain something of which the party claiming the right has already the possession; and as the entire ship was left to freight, the merchant charterer (who became bankrupt) was considered to be the owner *pro tempore* and the goods on board to be in his possession, not in the possession of the owner who had let out the ship.

This case was considered in *Dean* v. *Hogg* (3), and the above rules 2 and 3 are the proper means of ascertain-

(1) See *Abbott on Shipping*, 13th ed. p. 246.

(2) 7 Taunt. 14.

(3) 10 Bing. 345.

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Argument of Counsel.

ing the law. (See also *Belcher* v. *Capper* (1); *Trinity House* v. *Clark* (2); *Saville* v. *Campion* (3).

The charterparty in the latter case expressly gives the full control of the vessel to the charterer, and it is submitted that this case so far as the possession is concerned is on all fours. *Baumwoll Manufactur* v. *Furness* (4); *The Tasmania* (5).

Referring to the case, cited on behalf of the defendant, of *Dean* v. *Hogg* (6), it is submitted that this case is not in point. The owner's captain was not the owner's servant here. The captain was expressly declared to be the servant of the charterer. *Fletcher* v. *Braddick* (7).

The Tasmania (8) is a more recent and more satisfactory authority upon the questions raised in this case. *Cox* v. *Reid* (9); and *Harder* v. *Brotherstone* (10) raises questions of contract which are not raised in this motion, and add no light whatever to the discussion of the subject in hand.

The Aneroid (11). It is not contended that the plaintiff has a maritime lien. They have a right *in rem* under sec. 35 of the Act of 1861. As to *Lucas* v. *Nockells* (12), this case creates no difficulty.

In *Baumwoll Manufactur* v. *Furness* (13), Lord Herschell, says as follows: "The person who has the absolute right of the ship, who is the registered owner, the owner, (to borrow an expression from real property law) in fee simple, may properly be spoken of, no doubt, as the owner, but, at the same time, he may have so dealt with the vessel as to have given all

(1) 11 L. J. C. P. (N. S.) 274.
(2) 4 M. & S. 288.
(3) 2 B. & Ald. 503.
(4) [1893] A. C. 8.
(5) 13 P. D. 110.
(6) 10 Bing. 345.
(7) 2 B. & P. (N.R.) 182.
(8) 13 P. D. 110.
(9) 1 C. & P. 602.
(10) 4 Camp. 254.
(11) 2 P. D. 189.
(12) 4 Bing. 729.
(13) [1893] A. C. at p. 17.

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Argument of Counsel.

right of ownership for a limited time to some other person who may equally be spoken of as the owner. Similarly under real property law, the lessee as well as the lessor has the right to maintain an action for trespass.

As to *The Pacific* (1) and *The Two Ellens* (2), these cases merely decide that a claim for necessaries does not give a maritime lien, and it is not contended here that they do. *Reeve* v. *Davis* (3). The charterer in this case was also the master.

Littledale, J. said: "The rule is that upon a general order for repairs given by the captain, the party executing them has the security of the ship, of the captain and of the owners; but in an action against parties as owners, the question is who are so for this purpose? The persons registered are not necessarily so; the Register Acts were not passed for this purpose, and the question of ownership, as it regards the liability for repairs, must be considered as it would have been before those Acts passed."

This case is considered in *Abbott on Shipping* (4) as a case of *locatio navis*.

As to *The Druid* (5) this case does not give a complete statement of the law as decided in subsequent cases. It is considered, and this point is developed, in *The Tasmania* (6). See also *Colvin* v. *Newberry* (7).

H. J. Wright, in reply:

The words of the statute 24 Vict. chap. 10, (Imp.) sec. 5, (on which the defendant relies) are so explicit that no room whatever is left for argument as to their meaning. My learned friend has failed to cite any cases bearing on that section, while he tries to dismiss

(1) B. & Lush. 243.
(2) L. R. 4 P. C. 161.
(3) 1 A. & E. at p. 315.
(4) P. 59, 13 ed
(5) 1. Wm. Rob. 391.
(6) 13 P. D. 110.
(7) 7 Bing. 190; 33 Rev. Reports 437.

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Argument of Counsel.

the cases cited on behalf of the defendant by the broad contention that they do not apply, giving no sufficient reason for such contention. I submit that the point resolves itself into the meaning of the word 'owner,' and my learned friend is seeking to give it a meaning which it cannot possibly bear within the contemplation of the statute, otherwise the words of the statute would have been extended. The word 'owner' means either the 'registered owner' or the 'real owner.' Thomas Nihan, owner of *The Garden City* is both. The charterer, who, it is contended on behalf of the plaintiffs, was some sort of an owner, is not and never was either registered or beneficial owner, and it would, I submit, be extending the meaning beyond all precedence to hold that the charterer was included in the word 'owner' within the meaning of the statute. Apart altogether from this it is expressly contrary to the terms of the charterparty agreement for the charterer to render the boat in any way liable for the coal supplied; and I ask that the plaintiffs' action be dismissed with costs as being without the jurisdiction of this court.

McDOUGALL, L. J. now (January 23rd, 1901) delivered judgment:

This is an action *in rem* brought by the plaintiffs to recover the price of certain coal supplied to *The Garden City*, at Buffalo, in June and August, 1896.

The Garden City is a British ship, and during the summer of 1896 was chartered to one William P. Goodenough, of Buffalo, to ply between Buffalo and Crystal Beach, or Victoria, in Canada; the charterer to pay $5,000 for the season, and also to pay all expenses or outlay of every kind, including the wages of the crew, master and engineer, during the period of the charter. The charterer was to appoint and employ

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Reasons for Judgment

the crew, except the master and engineer, who were to be appointed by the owner but paid by the charterer, in other words the vessel, with all her appointments, was handed over at the beginning of the season to the charterer, and was to be re-delivered by him to the owner, at Port Dalhousie, at its conclusion, free from any liens, charges, or claims whatsoever incurred during the period unless the same had been incurred by the owner. It was also expressly stipulated that the master and engineer, though appointed by the owner of the ship, were not to be deemed in any sense the servants of the owner.

During the season, and to enable the steamer to make her trips, the coal in question was supplied by the plaintiffs upon either the charterer's or the master's orders. The charterer did not pay; and the plaintiffs now seek to make the ship liable for the same, claiming the right to an action *in rem* under 24 Vict. chap. 10 (Imp.) sec. 5 (*Admiralty Act of* 1861) which enacts, "that the High Court of Admiralty shall have "jurisdiction over any claim for necessaries supplied "to any ship elsewhere than in the port to which the "ship belongs, unless it is shown to the satisfaction of "the court that at the time of the institution of the "cause any owner or part owner of the ship is domi-"ciled in England or Wales."

The owner of *The Garden City* is domiciled at St. Catharines, in Ontario, within the Dominion of Canada, and was so domiciled at the institution of the present action, the 8th June, 1900. A great number of cases were cited upon the argument of this motion to set aside the writ of summons and service with a view to indicate the application of this section of the statute to the facts of this case and also as to the meaning of the word 'owner.' It was admitted for the plaintiffs that they did not possess a maritime lien; and that

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Reasons for Judgment.

any right they did possess which would enable them to bring the present action must depend upon the construction to be placed on the above-cited section of the Act of 1861. It was not seriously contended that the registered owner, Mr. Nihan, was in any sense personally liable for the claim sued for.

I find that the latest decision which deals with the whole matter, the judgment referring to nearly every case theretofore decided, is *The Ripon City* (1).

That case determined that the master of the vessel appointed by persons who were not the real owners of the ship, but who had been allowed by the real owners to remain in possession and to have control of the vessel for the purpose of using her in an ordinary way, in the particular case, had a maritime lien on the ship for his disbursements and for liabilities properly incurred by him on account of the ship, although the owners of the ship may not have been personally liable for the disbursements or the matters in respect to which the liabilities had been incurred. The master was held entitled to recover against the ship the amount of certain bills which he had drawn upon the persons who had the control of the ship in favour of certain foreign coal merchants who had supplied the ship with coal to enable her to pursue her voyages. By force of this determination the coal merchants recovered their claims, for the master, obtaining judgment against the ship for the amount of the drafts drawn by him upon his employers—which drafts had been dishonoured by them, they having become bankrupt—was enabled to pay the coal merchants and thus discharge himself from his personal liability to them on the drafts.

The court held that the master had acquired a maritime lien upon the ship for these liabilities, notwith-

(1) [1897] P. 226.

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Reasons for Judgment.

standing the fact that the real owners were free from any personal liability whatever in respect of the claims. In other words the court held that wherever a maritime lien was created in favour of any one against the property—the ship—it was not necessary to further establish personal liability against the real owner. The doctrine that there must, in conjunction with the maritime lien be established the personal liability of the owner though apparently suggested in several earlier cases the learned judge after careful consideration of those cases held that the liability against the ship might be created without establishing the personal liability of the owner. *The Ripon City* was not a chartered vessel, but a vessel in the possession of persons to whom the owners had made a provisional sale. The owners had not been paid the purchase money, and had not consequently transferred the legal title to the purchasers, but had chosen to hand the possession of the vessel over to them to be employed by the purchasers as they might see fit in the meanwhile. Gorell Barnes, J., in his very able and elaborate judgment, points out this important limitation of a master to create a maritime lien for disbursements in the case of a charterparty, and, citing *The Castlegate* (1), and *The Turgot* (2), says: (3) "A master who with knowledge of a charterparty under which the charterers are to provide and pay for coals, orders coals on their credit, and draws on them for the value, and had, and knew he had, no authority, expressed or implied, to pledge the owner's credit for the coals, has not a maritime lien for the amount of his liability on the bills drawn for the price of the coals," and cites from Lord Watson's judgment in the House of Lords in *The Castlegate* the following passage: "I can find no reasons, either of equity or policy, for enabling the

(1) [1893] A. C. 38. (2) 11 P. D. 21.
(3) [1897] P. at p. 238.

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Reasons for Judgment.

master of a vessel who is not bound to incur liability to relieve himself when he does choose to incur it out of the property of his owners, although they may derive no benefit from it, and by the terms of his employment he is debarred from incurring it on their personal account." So that in this case if the master had drawn bills on the charterers for their coal bills, and the same had not been paid, he could not, as such master, with a knowledge of the terms of his charter-party, have created a maritime lien against *The Garden City* for the value of this coal, although he had rendered himself personally liable therefor by drawing bills.

The word 'owner' used in the statutes of 1861, in my opinion, means 'registered owner,' or a person entitled to be registered as owner, not a *pro hâc vice* owner; and the word 'domicile' must be understood in its ordinary legal sense. Now, the statute expressly gives the court jurisdiction to entertain an action *in rem* for necessaries supplied a ship in any port other than her home port, but that jurisdiction is liable to be displaced if it be shown that at the time the writ issued an owner or port owner was domiciled in Canada.

In collision cases, where the collision occurs between a chartered vessel and another, the maritime lien which the injured vessel may have against the chartered vessel arises only because, as Gorell Barnes, J. says in *The Ripon City*, "It is a right acquired by one over a thing belonging to another, *a jus in re alienâ*. It is, so to speak, a subtraction from the absolute property of the owner in the thing. This right must, therefore, in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. The person

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Reasons for Judgment.

who has acquired the right cannot be deprived of it by alienation of the thing by the owner." (1)

The result of his very able review of the authorities is to point out that it is only maritime liens that a ship may become liable for when in the possession and control of charterers, because the lien-holder is entitled to treat the vessel as owned by the person in possession. But other claims which may arise, such as are illustrated in *The Druid* (2); *The Orient* (3), and *The Ida* (4), cannot be enforced against the vessel because they arise out of unlawful acts done without any authority and beyond anything which ought to be contemplated in the ordinary use of the vessel.

In cases like *The Turgot* (5), and *The Castlegate* (6), persons dealing with the charterers have been held not to be entitled to treat the vessel as owned by the charterers, but have dealt with them on their credit and not upon the faith of having the security of the vessel. In the present case, there being no maritime lien, no act of the master in purchasing supplies for the ship, with a full knowledge of the terms of the charterparty, could bind either the vessel, or the owners, or any person except the charterers or himself personally. The question as to whether an action *in rem* may be instituted against a vessel for necessaries supplied to her in any port other than her home port depends solely upon the fact at the time of the institution of the action. Was an owner or part owner domiciled in Canada? If any such owner was domiciled in Canada, or in other words, within the jurisdiction of the Admiralty Court, then no action *in rem* for necessaries will lie. I am of opinion, therefore,

(1) [1897] P. D. 242.
(2) 1 Wm. Rob. 391.
(3) L. R. 3 P. C. 696.
(4) Lush. 6.
(5) 11 P. D. 21.
(6) [1893] A. C. 38.

1901

THE ROCHESTER & PITTSBURG COAL AND IRON CO. v. THE SHIP THE GARDEN CITY.

Reasons for Judgment.

that the plaintiffs' writ and the service thereof must be set aside with costs.

*Judgment accordingly.**

Solicitors for plaintiff: *Thom, German & Pettit.*

Solicitor for the ship: *M. J. McCarron.*

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* REPORTER'S NOTE: An appeal was taken by the plaintiffs to the JUDGE OF THE EXCHEQUER COURT, who affirmed this judgment. See the report of the case on appeal, *post.*