

BRITISH COLUMBIA ADMIRALTY DISTRICT

1922
Dec. 28.

RUMELY PLAINTIFF;

AGAINST

THE SHIP *VERA M.*

AND

THE WESTERN MACHINE WORKS, LTD., CLAIMANT.

Shipping and seamen—Possessory lien for repairs to vessel—Loss thereof to claimant by arrest of vessel.

Where a shipwright, having repaired a vessel, takes action to recover the cost of such work and has the vessel arrested by the marshal at his suit, he will be deemed to have relinquished his possession of the vessel to the marshal, and his lien for said services is thereby destroyed.

ACTION by the Western Machine Works, Limited, claiming possessory lien at common law for repairs done to the *Vera M.*

December 12th and 13th, 1922.

Case now heard before the Honourable Mr. Justice Martin at Vancouver.

Roy W. Ginn for plaintiff.

E. A. Dickie for claimant.

John A. Sutherland for the Ship.

The facts and points of law at issue are stated in the reasons for judgment.

MARTIN, L.J.A., now (December 28th, 1922) delivered judgment.

This is a contest between the plaintiff who asserts a maritime lien for seaman's wages and the Western Machine Works, Ltd., which claims a possessory lien at common law for repairs done on the vessel. Several questions of nicety arose at the trial and have caused me to give the matter

much consideration but in the conclusion I have reached it will be necessary to consider only the most important one of them, viz.: that relating to the consequences of the arrest of the vessel by the company. It appears that after the vessel was arrested at the suit of the plaintiff, and while the cause was pending, the defendant company began an action for the value of its repairs and caused the ship to be arrested in that action, the result of which is that the vessel is in the custody of the marshal under two independent warrants of arrest each of which requires him

1922
RUMBLY
v.
THE
Vera M.
AND
WESTERN
MACHINE
WORKS.
—
Martin
L.J.A.
—

to arrest the ship * * * and keep the same under safe arrest until you shall receive further orders from us. (Form 15).

It is submitted by plaintiff's counsel that by voluntarily giving up its right to possession the company has destroyed its lien, assuming it to be a valid one upon the facts in proof, and the case of *Jacobs v. Latour* (1) is relied upon as establishing that principle. There it was held that a trainer of horses had lost his lien (if he had one) because he sued the owner for his charges and eventually issued a *fi. fa. de bonis* against him under which the horses, which had remained in the trainer's possession, were sold. The principle involved was thus laid down by the Court of Common Pleas, in Term:—

A lien is destroyed if the party entitled to it gives up his right to the possession of the goods. If another person had sued out execution, the defendant might have insisted on his lien. But Messer himself called on the sheriff to sell; he set up no lien against the sale; on the contrary, he thought his best title was by virtue of that sale. Now, in order to sell, the sheriff must have had possession; but after he had possession from Messer, and with his assent, Messer's subsequent possession must have been acquired under the sale, and not by virtue of his lien.

As between debtor and creditor the doctrine of lien is so equitable that it cannot be favoured too much; but as between one class of creditors and another there is not the same reason for favour.

After a careful consideration of the question I can only reach the conclusion that this principle applies to the case at bar. Indeed, in one way it is stronger here, because in the common law courts the execution (*fi. fa.*) is directed against the goods in general and so might be satisfied otherwise than out of the goods in possession, whereas in this Court the initial arrest was directed against the *res* in par-

(1) [1828] 5 Bing. 130.

1922
 RUMELY
 v.
 THE
 Vera M.
 AND
 WESTERN
 MACHINE
 WORKS.
 —
 Martin
 L.J.A.
 —

ticular which was looked to for prime satisfaction at least, and therefore the intention must inevitably have been that the possession of the *res* should pass to the marshal, and with its passing came the destruction of the lien upon it which exists only by possession. See also *Mulliner v. Florence* (2), and *Gurr v. Cuthbert* (3).

It is unfortunate that this second action should have been begun by the claimant contrary to the practice, because its interests would have been protected by the Court in the ordinary way in the first action wherein the first arrest was made—*Mayers Adm. Law*, 57; *Williams & Bruce Adm. Prac* (1902) 319 (n); because a lien cannot be asserted against the authority of the court, and even though that course was taken in excess of caution, yet it nevertheless involved the transfer of the claimant's right of possession to the marshal whose assistance was invoked: a shipwright cannot obtain the assistance of a court to enforce his lien by sale—*Thames Iron Works Co. v. Patent Derrick Co.* (4).

The result is that the claim of the company for a possessory lien fails, and is dismissed with costs, and the plaintiff's maritime lien is established for the amount for which he has obtained judgment, with costs. Pending further information as to the state of the cause of the company's action, I withhold any present direction concerning it and the action for necessaries in which one Yates obtained judgment by confession in open court on the 13th instant.

Judgment accordingly.

(2) [1878] 3 Q.B.D. 484.

(3) [1843] 12 L.J.Ex. 309.

(4) [1860] 1 J. & H. 93.
