

QUEBEC ADMIRALTY DISTRICT

1923
 March 2.

GEORGE McCULLOUGH ET AL. PLAINTIFFS,
 AND
 SS. SAMUEL MARSHALL AND OWNERS. DEFENDANTS,
 AND
 HYMAN I. ELIASOPH. CLAIMANT,
 AND
 THE STEEL COMPANY OF CANADA. CONTESTANT.

Shipping and seamen—Duties of purser and ship's husband distinguished—Admiralty Court Act 1861, section 10—Canada Shipping Act, section 326—Lien for services of ship's husband—Non-assignability of seaman's claim for wages.

E. had not signed the ship's articles, and was not a member of the crew and the services performed by him were not performed on board the ship. He acted as the shore agent for the owners, collecting freights, ordering supplies, signing contracts for the owners, receiving and disbursing their monies.

Held, that E. was not a seaman within the meaning of the Admiralty Court Act, 1861, s. 10 and the Canada Shipping Act, s. 326, and consequently had no right to proceed in rem.

- (2) That the services rendered by him were in the nature of those usually performed by a managing owner or ship's husband which does not carry maritime lien. That calling himself purser employed by the owners did not give him the status of a seaman.
- (3) That, even if E. had paid off any members of the crew with his own funds, and not as agent for the owners, and took assignments of their rights, such transfers and assignments to him are of no avail as maritime liens, other than liens for bottomry, which are not assignable.

CONTESTATION of the claim made by the agent of the owners for salary and for monies advanced to pay seamen, etc.

December 16th and 29th, 1922, and March 2nd, 1923.

Case now heard before the Honourable Mr. Justice MacLennan, at Montreal.

T. M. Tansey for Claimant

W. R. L. Shanks, K.C. for Contestant.

The facts are stated in the reasons for judgment.

MACLENNAN, L.J.A., now (March 2, 1923) delivered judgment.

The SS. *Samuel Marshall* was sold by order of the Court on 31st January, 1921, and the proceeds of the sale were paid into the office of the Deputy District Registrar for distribution among creditors and claimants according to their respective ranks. On 31st May, 1921, the claimant

filed an affidavit stating that the ship and her owners were indebted to him in the sum of \$4,855.75 made up of: (a) \$1,600 wages and \$200 bonus as purser under written contract for the season of 1919; (b) \$1,800 wages and \$240 bonus under a verbal renewal of the same engagement at an increase of wages and bonus for the same duties during the season of 1920, and (c) \$1,015.75 for monies advanced by him to Captain Ludger Marchand during November, 1920, to pay wages then due to the seamen, which money was used for that purpose, and he claims the right to be collocated by preference and privilege and that he had a lien on the proceeds of the sale of the ship in the hands of the Deputy District Registrar. At the hearing claimant made an additional claim of \$447 consisting of two payments alleged to have been made by him on September 30, 1920, and three on October 15, 1920, for wages due to members of the crew and from whom he claims to have obtained receipts transferring and subrogating him in their respective rights. All these claims are contested by the Steel Company of Canada, a mortgagee judgment creditor of the ship for an amount considerably in excess of the balance of the money in the hands of the Registrar. In support of his claim the claimant has filed a letter dated Montreal, May 1, 1919, addressed to himself and signed by S. D. Miller on behalf of the owners of the ship agreeing to engage claimant as a purser for the steamer for the navigation season 1919 at a salary of \$200 per month payable monthly and a bonus of \$200 at the end of the season. There was no written engagement for the season 1920, but claimant claims that his engagement was verbally renewed for that season at \$225 per month with a bonus of \$240. The ship, during the seasons of 1919 and 1920, was operated under a season's charter for the carriage of coal from lake ports to Montreal. Claimant had not signed the ship's articles. Captain Ludger Marchand was her master during both seasons and he has testified that he had no purser either season and claimant was not a member of the crew. Captain Grey, master mariner, and for the past five years Shipping Master for the port of Montreal, with thirty-eight years' experience in marine matters, seventeen of which were in Montreal, testified that he never heard of

1923
 McCULLOUGH
 v.
 SS. Samuel
 Marshall
 AND
 ELIASOPH
 AND
 STEEL CO. OF
 CANADA.
 —
 MacLennan
 L.J.A.
 —

1923
 McCUL-
 LOUGH
 v.
 SS. *Samuel
 Marshall*
 AND
 ELIASOPH
 AND
 STEEL CO. OF
 CANADA.
 —
 MacLennan
 L.J.A.
 —

any ship of the *Samuel Marshall's* class carrying a purser. It was not necessary and there was no work on her for a purser. John Waller, marine superintendent, who has had twenty-three years' experience, the last twelve being with the Keystone Company, has testified that he is familiar with the coal transportation business and never heard of a coal boat having a purser when under charter for the season. Claimant during two seasons acted as the shore agent for the owners of the ship collecting freights, ordering supplies, signing contracts for the owners, receiving and disbursing their monies and performing the usual duties which are performed by a managing owner or ship's husband. The duties of a managing owner or ship's husband are set forth as follows in Abbott on Shipping, 14th ed., p. 130:—

He is to see that the ship is properly repaired, equipped, and manned; to procure freights or charter parties; to preserve the ship's papers; to make the necessary entries; adjust freights and averages; disburse and receive monies; and keep and make up the accounts between all the parties interested. His acts for these purposes are considered to be the acts of the part owners appointing him, who are liable on all contracts entered into by him for the conduct of their common concern—the employment of the ship.

See also Bell's Principles of the Law of Scotland, 10th ed., p. 205, par. 449, and *Darby v. Baines* (1).

The result of the evidence is that the services performed by the claimant during the seasons of 1919 and 1920 were not performed on board the ship. He was not employed or engaged in any capacity on board the SS. *Samuel Marshall*. His own testimony, to say nothing of witnesses called on behalf of the Steel Company and the evidence of the master, is sufficient to defeat his pretensions in that respect. Consequently he has no right to proceed in rem not being a seaman within the meaning of the Admiralty Court Act, 1861, s. 10, and Canada Shipping Act, s. 326. The claimant does not pretend that he had been engaged by the master of the ship one of whose duties is to enter into an agreement with every seaman whom he carries as one of his crew; "Canada Shipping Act," s. 328. Calling himself purser employed by the owners does not give him the status of a seaman.

The portion of the claim for \$1,015.75 for monies advanced to the master in November, 1920, to pay wages of

the crew is not established. The claimant pretends that these monies had been borrowed by him from his father-in-law, one Frank, and that he handed it over to the master but got no receipt. Frank was not called to confirm claimant's statement as to the alleged borrowing. At the time claimant was the recognized agent of the owners. During the season of 1920 the ship was under charter for the carriage of coal to Montreal for the Steel Company of Canada, Limited. This company, from May to November 15, 1920, paid over \$18,000 for freight by its cheques to the order of S. D. Miller, one of the owners, which cheques in nearly every instance were endorsed by claimant under his power of attorney and deposited in the Union Bank of Canada in Montreal in an account kept for the ship. That bank account was subject to cheques drawn upon it by claimant. He has not shown in this case what he did with the proceeds of the freight received by him and deposited in that account. From time to time he paid monies over to the master to be used in paying wages of the crew and other disbursements. He has no vouchers for payments making up this sum of \$1,015.75. His additional claim for \$447 is based upon the allegation that he paid that sum to members of the crew and holds assignments of their rights. At the date when these alleged assignments were obtained by claimant, he was the recognized agent of the owner's and the ship's husband. Every one having any business with the ship knew him in that capacity. If he paid off any members of the crew, as he pretends to have done, in his personal capacity and not as agents of the owners, the transfers and assignments to him are of no avail as maritime liens other than liens for bottomry which are not assignable: *The Janet Wilson* (1); *Rankin v. The S.S. Eliza Fisher* (2); *A. J. Bjerre v. The SS. J. L. Card* (3); *The Petone* (4); *Bonham v. The SS. Sarnor* (5).

To entitle claimant to be collocated by preference and privilege against the money in the Registrar's possession as is attempted here, he must be entitled to enforce a maritime lien. If his claim is not founded upon a maritime

(1) [1857] Swabey 261.

(3) [1899] 6 Ex. C.R. 274.

(2) [1895] 4 Ex. C.R. 461.

(4) [1917] P. 198; 86 L.J. Adm.

164.

(5) [1918] 21 Ex. C.R. 183, at p. 187.

1923
 McCULLOUGH
 v.
 SS. Samuel
 Marshall
 AND
 ELIASOPH
 AND
 STEEL CO. OF
 CANADA.
 —
 MacLennan
 L.J.A.
 —

1923
 McCULL-
 LOUGH
 v.
 SS. *Samuel
 Marshall*
 AND
 ELIASOPH
 AND
 STEEL CO. OF
 CANADA.
 —
 MacLennan
 L.J.A.
 —

lien, it must fail. There is no maritime lien for the salary or wages of a managing owner or ship's husband and the weight of authority is strongly against the doctrine that the man who has paid off a privileged creditor stands in the shoes of the privileged creditor, has his lien and is entitled to the rights and remedies of the person whom he has paid. The claimant has no right *in rem* independent of a maritime lien and, in my opinion, the claimant has not acquired any maritime lien and his claim to rank by preference and privilege must be rejected.

Apart from the legal objections to this claim, it is surrounded by circumstances of grave suspicion. I have serious doubts as to the contract between S. D. Miller and claimant for the season 1919. These men are brothers-in-law and on their own admissions at the trial had no occupation. The claimant swore that he received no pay for his services in 1919 and 1920, although very considerable sums of money passed through his hands. He had no other occupation except a connection with a defunct company known as Baines, Limited, of which Miller was president and from which he occasionally got something. Since 1920 he claims that he, his wife and three children have been supported by his father-in-law, one Frank. This Mr. Frank did not appear at the trial. Miller swore the claim before the Court has been checked over and found correct. There is evidence to show that claimant had some interest in the SS. *Samuel Marshall*. From the manner in which claimant and Miller gave their evidence and having regard to claimant's record in the Criminal Court, it was quite evident the truth could not be obtained from them. They were acting in collusion. The claim was put forward as an after thought for the purpose of reducing the amount which the Steel Company of Canada would receive from the proceeds of the sale of the ship after payment of prior claims. In my opinion, the claim is wholly fraudulent and fictitious and there will be judgment rejecting it with costs.

Judgment accordingly.

Solicitor for claimant: *S. Eliasoph.*

Solicitors for contestant: *Brown, Montgomery &
 McMichael.*
