1896

Aug. 26.

TORONTO ADMIRALTY DISTRICT.

JOHN SIDLEY ....PLAINTIFF;

AGAINST

THE SHIP "*DOMINION*."

JOHN SIDLEY ....PLAINTIFF;

AGAINST

THE SHIP "*ARCTIC*."

Master's wages and disbursements—Account between co-owners—Proportion of costs to be paid by co-owners—Mortgagee—Priority of lien-holder.

In actions for account between co-owners the rule as to the incidence of costs followed by the courts of law in partnership actions may be adopted in a Court of Admiralty.

2. In an action of account where there is a deficiency of assets the court may order the costs of the proceedings to be borne equally by the co-owners.

3. Where the *res* is not of sufficient value to pay the claims of a lien-holder and a mortgagee in full, the lien-holder is entitled to apply all the proceeds in payment of his claim.

ACTION *in rem* for the recovery of a master's wages and for account between co-owners.

The two cases were tried together. John Sidley was the plaintiff in both cases,—the first action being on a claim by him for master's wages and also for an account, he being the owner of 32 shares in the ship *Dominion*. The other owner was Elizabeth J. Peters, who was made a defendant, as well as one Magann who was the mortgagee of the 32 shares owned by the defendant Peters.

The action against the *Arctic* was brought by the said Sidley for an account by his co-owner Elizabeth J. Peters.

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Argument of Counsel.

Both vessels were sold by the marshal and the proceeds remaining in court after the payment of the marshal's fees and costs were not sufficient to pay the amount found due to the plaintiff on the taking of the account, which was done by the judge at the trial as shown by his judgment herein.

The case was tried at Toronto before the Honourable Joseph E. McDougall, Local Judge of the Toronto Admiralty District, on the 13th and 22nd days of April and the 3rd and 12th days of June, A.D. 1896, and judgment was reserved.

T. Mulvey, for the plaintiff:

The master is entitled to a lien for wages and disbursements, although he is also co-owner. (The *Feronia* (1).) A mortgagor cannot give a mortgage higher rights against part owners than he, the mortgagor, himself had (2).

In an action *in rem* the court has jurisdiction to give judgment for costs against the defendant personally. The *Hope* (3); The *Volant* (4). Both co-owners must pay all the liabilities owing by them jointly before any of their costs will be paid out of the proceeds of assets, and all costs must be borne equally. *Ross* v. *White* (5) and cases therein referred to.

J. Kyles, for defendant Peters:—The plaintiff is not entitled to costs. Accounts were not furnished before bringing action. (The *Fleur de Lis* (6).) The claim of the plaintiff was greatly reduced. For these reasons he is not entitled to costs (7).

A. C. McDonell, for the defendant Magann:—The mortgagee is entitled to priority over the plaintiff (8).

(1) L. R. 2 A. & E. 65.
(2) *Alexander* v. *Sims*, 18 Beav. 81; *Catto* v. *Irving*, 5 DeG. & S. 210; The *Chieftain*, Br. & L. 104.
(3) 1 Wm. Rob. 154.
(4) 1 Notes of Cases 503.
(5) L. R. 3 Chy. Div. 326.
(6) 1 Asp. 149.
(7) The *William*, Lush. 200; The *Ellen Dubh*, 5 Asp. M.C. 154; The *Leumella*, Lush. 147; The *Englishman*, 38 L. T. 756.
(8) The *Orchis*, L.R. 15 P.D. 38.

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Reasons for Judgment.

The defendant is entitled to his costs of intervening (1). The court has jurisdiction to make a personal order against defendant, Peters, for amount of claim (2).

McDOUGALL, L.J. now (August 26th, 1896) delivered judgment.

As a result of the trial of these two actions, tried together by consent, and both being actions *in rem*, between co-owners, one of them including a claim of the plaintiff (though part owner) for wages and disbursements as master of the *Dominion*, I have found upon the taking of the accounts a balance in favour of the plaintiff for nine hundred and fifty-six dollars and ninety-three cents ($956.93).

Both vessels have been sold under the directions of the court and the gross proceeds of both vessels was the sum of one thousand four hundred dollars ($1,400) only. Deducting the costs of sale there will not be sufficient balance of the proceeds in court to satisfy the plaintiff's claim apart from any question of costs.

There is no reason why the incidence of costs in partnership actions adopted by the courts of law should not apply to actions between co-owners in the Admiralty Court. That rule appears to be, where there are assets to direct the payment of the costs of taking the partnership accounts out of the partnership assets.

Where there is a deficiency of assets the aggregate costs of the plaintiff and defendant ought to be paid equally by the plaintiff and defendant. The Court of Admiralty has power to make an order that the costs of a proceeding shall be paid personally by the owners, at least, that is the rule in damage actions (3).

(1) The *Sherbro*, 5 Asp. N.S. 88. The *John Dunn*, 1 Wm. Rob. 159;
(2) 56 Vict. c. 24, sec. 35. The *Volant*, 1 Wm. Rob. 390;
(3) The *Dundee*, 1 Hagg. 109; *Ex parte* Rayne 1 Q. B. 982.

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Reasons for Judgment.

I cannot see any reason for not following this practice in actions for an account between co-owners.

I make the following order as to the disposition of the proceeds of the sale of these two vessels:

1. The costs of the sale of the *Arctic* will be paid out of the proceeds of that vessel, so far as the proceeds will allow. I understand that in the case of that ship the sale did not produce sufficient funds to pay these costs in full.

2. In the case of the *Dominion* the costs of the sale shall be first paid out of the proceeds.

3. The claim of the plaintiff, as far as the proceeds will allow, he producing a voucher of payment to Magann of the sum of $363.79, which sum forms part of his claim as awarded him. In this case, too, I believe after paying the costs of the sale there will not remain sufficient funds to pay the plaintiff's claim in full.

4. The total amount of the party and party costs of both the co-owners (there are only two) parties in each action shall be taxed, and the plaintiff Sidley, or Peters, the other co-owner, as the case may be, must pay to the said Peters or the plaintiff Sidley the difference between one moiety of the total amount of the party and party costs and his own party and party costs. (*Austin* v. *Jackson* (1); *Namer* v. *Giles* (1); *Re Potter* (2).)

The only remaining question is as to the costs of the intervening mortgagee, Magann. As the claim of the plaintiff for wages and disbursements absorbs the whole fund, Magann's mortgage only covering thirty-two shares, the plaintiff is entitled to be paid in priority to the mortgagee.

I dismiss the claim of the mortgagee intervening against the *res* or proceeds, without costs.

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(1) 11 Ch. Div. 942.

(2) 13 Ch. Div. 845.