TORONTO ADMIRALTY DISTR. 1895

Nov. 26.

WILLIAM RANKIN.....PLAINTIFF;

AGAINST

THE SHIP "*ELIZA FISHER*."

Maritime law—Master's lien for wages—Assignment—Rights of assignee—Action in rem.

The holder of a maritime lien cannot transfer the same, and the assignee of a claim for master's wages has no right of action *in rem* against the ship.

2. There is no distinction to be made between the lien existing in favour of common seamen and that in favour of the master of a ship in relation to the power to assign; and it has always been contrary to the policy of maritime law to invest a seaman with any capacity to transfer this remedy against the *res* to a third person.

ACTION *in rem* by an assignee of a maritime lien for wages alleged to be due to the master of the ship.

The facts of the case are set out in the reasons for judgment.

The case was tried at Toronto before the Honourable Joseph E. McDougall, Local Judge of the Toronto Admiralty District, on the 3rd day of October, A.D. 1895.

T. Mulvey for plaintiff: The point to be decided in this case is, whether a maritime lien can be assigned. Is the maritime lien from its nature inalienable? It differs from the common law lien which requires possession. The only express authorities to the contrary are found in *Coote's Admiralty Practice* (1) and *Abbott on Shipping* (2), which state in express terms that a maritime lien can be assigned.

The chapter in *Abbott on Shipping* referred to, was originally written by Mr. Coote. The substance of the

(1) P. 19. (2) 13 ed. p. 883.

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chapter is taken from an article which he wrote and published in volumes 48 and 49 of the *Law Magazine*. The language of the section referred to has been modified in the last edition. The cases referred to, *The New Eagle* (1), *The Louisa* (2), and *The Janet Wilson* (3), were cases of seamen's wages and not of master's wages, and they all refer to payment of wages after the arrest of the ship, while all matters were *sub judice*.

Judge Story, in the case of *The Brig Nestor* (4), gives the following definition of a maritime lien: "Now a lien by the maritime law is not strictly a Roman hypothecation, though it resembles it and is often called a tacit hypothecation. It also somewhat resembles what is called a privilege in that law, that is, a right of priority of satisfaction out of the proceeds of the thing in concurrence of creditors. Emerigon says that this privilege was strictly personal and gave only a preference against simple contract creditors, and had no effect against those who were secured by express hypothecation." This definition is commented upon in *The Sarah J. Weed* (5). Regarding the statement that a maritime lien is a personal privilege, Judge Lowell in this case states that Judge Story "does not mean that it is not transferable: to use his expression in that sense is to make a bad pun, or quibble. What he means is, that it is a personal as distinguished from a real privilege according to the classification of the civil law, which has nothing whatever to do with it being assignable or otherwise." In this case the American authorities down to the year 1877 were reviewed. The case of *The A. D. Patching* (6) which decided that a maritime lien was not assignable, and all the cases following that decision were disapproved.

(1) 4 Not. of Cas. 426.
(2) 6 Not. of Cas. 531.
(3) 1 Swab. 261.
(4) 1 Sumn. 83.
(5) 2 Lowell (U.S.) 559.
(6) 12 Law Reporter 21.

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In the *Hull of a New Ship* (1) the question is considered on authority and principal, and it was held that a maritime lien was assignable. There is no statutory prohibition to the assignment. R.S.C. chapter 74, section 45, does not apply to Ontario; that section is a re-enactment of *The Merchant Shipping Act*, 1854, section 233; that section is not in force in Ontario. The rights of seamen in this province are controlled by *The Inland Water Seamen's Act*, and there is no prohibition of assigning wages or salvage in that Act.

The objections to the assignment of seamen's wages do not apply in the case of a master. Masters are not of such a class as require the paternal care of the court. The history of legislation on the subject shows that they never had such paternal care. It was not until the Act of 1854 that masters had a lien for wages.

It is not the policy of the law that seamen's wages should be inalienable. Section 163 invalidates an assignment or sale which is made before the wages accrue due, and does not relate to wages earned. Section 140 of *The Merchant Shipping Act*, 1894, states that a person "shall not have any right to action, suit or set off against the seaman or his assignment in respect of money so paid," which would clearly indicate that an assignment of wages was contemplated.

This case, however, rests on the assignability of a maritime lien. No English case has been cited nor can be found in support of the statement that a maritime lien cannot be assigned, except in cases of seamen's wages and salvage where there is a statutory prohibition against assignment.

Since the Judicature Acts choses in action are clearly assignable, and unless some authority can be produced showing that from the nature of the lien it is not

(1) Daveis 199.

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assignable, it is submitted that it should be held to be assignable.

J. F. Canniff for mortgagee, intervening: The intervening defendant is a mortgagee of the ship. The lien of the master has been extinguished by the payment to him made by the plaintiff in this action.

The plaintiff has no right of action *in rem*. He is only an assignee of the master's claim for wages.

The court's sanction to payment of wages to seamen is necessary in all cases where the party paying the wages wishes to retain the priority of lien held by the seaman for such wages.

[He cites *Abbott on Shipping* (1); *Coote's Ad. Pr.* (2); *The New Eagle* (3); *The Duna* (4); *The John Fehrman* (5); *The Lyons* (6); *The Fairhaven* (7); *The Bridgwater* (8); *The Janet Wilson* (9); *The Louisa* (10).]

These cases decide that a seaman cannot assign his lien for wages, and the right of the master to a lien for wages is identical with that of the seaman.

(He cites *The Merchant Shipping Act*, 1854, sec. 191.)

The Merchant Shipping Act, 1894, sections 182 and 235, are statutory enactments preventing such assignments, and were held in the *Rosario* (11) to be in aid of the English maritime law and not as a substitute for it.

In the United States an assignee of the wages of a seaman cannot maintain an action in the Admiralty for wages.

[He cites *Pritchard's Digest*, p. 2300, citing the *A. D. Patchin* (12); *Waple's Proceedings In Rem*

(1) 13th ed. p. 883.
(2) P. 19
(3) 4 Not. of Cas. p. 426.
(4) 5 L.T. (N.S.) 217.
(5) 16 Jurist 1122.
(6) 6 Asp. M.C. (N.S.) 199.
(7) L.R. 1 A. & E. 67.
(8) 3 Asp. M.C. 506.
(9) 1 Swab. 262.
(10) 6 Not. of Cas. 532.
(11) 2 P.D. 41.
(12) 12 Law Rep. 21; see also Dunlaps, Ad. Practice 74; 1 Conkling's Ad. Law 107; 2 Parsons on Ad. Law 186.

(American) (1), citing the barge *Geo. Nicholaus* (2); *The Æolian* (3); *The Freestone* (4); *Reppert* v. *Robinson* (5); *Schr. Kensington* (6); *The Tug Champion* (7); *The Gate City* (8); *American Encyclopædia of Law* (9); also, *Carroll* v. *Steamer Leathers* (10).]

Some of the American cases hold that the lien is assignable, but the majority are the other way.

I submit that the English decisions must be preferred to the American, as was decided in *Gaetano* and *Maria* (11).

McDOUGALL, L.J., now (November 26th, 1895) delivered judgment.

This action is brought by William Rankin to recover a claim for master's wages amounting to $126.13, alleged by Robert Rankin to be due him as master of the *Eliza Fisher*, and which claim he assigned to William Rankin, the plaintiff.

The plaintiff claims, by virtue of an assignment, to be entitled to a maritime lien upon the proceeds of the vessel, in priority to a mortgage debt due one Stanley Patterson, under whose mortgage the vessel has been sold and the proceeds brought into court. One R. C. Smith formerly owned the *Eliza Fisher* and executed a mortgage upon the vessel in favour of Stanley Patterson for $2,500; the mortgage is dated September 30th, 1890. On the 6th April, 1893, Smith sold the *Eliza Fisher* to Robert Rankin the elder, father of the plaintiff, subject to the mortgage in respect of which,

(1) P. 560.
(2) 1 Newb. 450.
(3) 1 Bond 267.
(4) 2 Bond 234.
(5) Taney 492.
(6) 8 Am. Law. Reg. 144.
(7) Brown's Adm. p. 520.
(8) 5 Biss. 200.
(9) P. 428.
(10) 1 Newb. 437.
(11) L.R. 7 P.D. 143.

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at the date of the sale, there remained due $1,300, with accrued interest thereon from the 25th March, 1893.

The amount due in respect of the mortgage at the date of the trial of this action was proved and practically admitted, and the proceeds are insufficient to pay the mortgage debt and costs of the mortgage action in full.

On the 15th July, 1895, Robert Rankin assigned his claim to the plaintiff for the arrears of wages sued for in this action. Some question arose as to a portion of the above claim, as to whether it could be properly claimed as master's wages, because the vessel never actually sailed with Robert Rankin, the younger, as master; he having been engaged for the period set out in the statement of claim in fitting up the vessel and awaiting directions from the owner. He avers that the amount of wages coming to him was adjusted with the owner as three months' wages at forty dollars a month, and he says that the engagement was then dissolved by mutual consent. *The Chieftain* (1) decides that a master may recover wages and establish his maritime lien thereto under similar circumstances.

In this case, however, it is not the master who sues, but his assignee, the plaintiff, and the objection taken by counsel for the mortgagees, who dispute the liability of the proceeds to this claim, is that the master cannot assign his claim and by such assignment transfer to the assignee the master's maritime lien against the vessel or the proceeds. The debt is doubtless assignable at common law, but the master having parted with his claim for wages, his lien, which it is contended is personal to the master only, is claimed to be at an end. The following citation from the 13th

(1) B. & Lush. 104.

edition of *Abbott on Shipping* (1) is referred to in support of the contention:

> Bottomry bonds have long been regarded as negotiable, but this character does not extend to maritime liens generally. A person who, with the leave of the court, advances money to pay the wages of the crew has long been allowed the same priority the crew would have had, and in proper cases such orders continue to be made.

Also the following from *Coote's Admiralty Practice* (2)

> A maritime lien is inalienable, and except in the case of bottomry it cannot be assigned or transferred to another person so as to give him a right of action *in rem* as assignee. A lien may be extinguished in various ways. It is extinguished on payment of a debt by or on behalf of the owner of the *res*; where also a payment is made by another person without the direction or privity of the owner, e. g., where a mortgagee has paid seamen their wages in order to save the vessel, upon which he has security, being wasted by their actions, the lien is equally extinguished and cannot be revived in the person of the payer, who accordingly has no right of action in the Court of Admiralty in respect of his advances.

The cases cited in support of the non-assignability of the lien are the *New Eagle* (3), the *Janet Wilson* (4) and the *Louisa* (5).

The *New Eagle* was the case of a derelict vessel arrested in a salvage suit and sold by the court; the proceeds of the sale (£376) were paid into court, of which the salvors got one-half. The mortgagees asked for the balance. One Brambly, who alleged he had advanced £66 for wages, now asked that this amount be paid out to him from the proceeds. Dr. Lushington stated:

> The law of this country has always struggled against such claims being allowed. I must be guided by the case of *The Neptune*, 3 Hagg. 129, and I know of no principle recognized by the common law that allows any person who has made advances on account of a ship, unless it be on bottomry, to come here and make a claim. After the

(1) P. 883.
(2) P. 19.
(3) 4 Not. Cas. 426.
(4) Swab. 262.
(5) 6 Not. of Cas. 532.

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case of *The Neptune*, it is very difficult to make a distinction between the proceeds and the ship itself.

In this case the proceeds were ordered to be paid to the mortgagees.

The *Janet Wilson* was a case of pronouncement for bottomry bond and a subsequent application by the ship owner to be repaid wages advanced. Dr. Lushington (1), says:

> I established in preceding cases the rule that it is not competent to any person without leave of the court to pay wages which might have been incurred and then come to the court and make application to have that money refunded. It is necessary that application should be made to the court prior to the time the money was paid, for leave to make such payment and then the court would judge of the circumstances.

The *Louisa* was a case of advances to salvors; the party advancing asked payment out of the shares. Refused. Dr. Lushington says:

> I think this would be an erroneous principle and one that might be attended with serious consequences by encouraging advances of money which might be exceedingly detrimental to salvors.

In a case in the Court of Admiralty in Ireland, *The Duna* (2), it was held that where the master of a vessel paid off a portion of his crew after his vessel was arrested by the court in a collision case in obedience to orders received from the agent of the owners, he was entitled to get credit for such payments upon settlement of his accounts, but would not in a suit for wages in the names of such seamen be permitted to recover such advances as charges against the ship or proceeds. In this case the claims and the lien of the master and other seamen for wages were postponed in point of priority to the claim for damages, but upon other grounds.

The master for his wages or disbursements was originally without a lien, so that his only remedy was

(1) At p. 262.

(2) 5 L. T. N. S. 217 [1861].

personal either by law or equity. Upon this state of the law supervened the statute giving him the same rights, liens and remedies for his wages as were possessed by ordinary seamen.

The words of the statute are as follows:

> Every master of a ship shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by this Act or by any law or custom any seaman not being a master has for the recovery of his wages. [*The Merchant Shipping Act* (1854) sec. 191.]

What then is a seaman's lien? It is the right of a mariner to take action against the ship itself for the recovery of his claim. It is a right and a remedy for his own exclusive benefit. It arises by implication and is held to exist independently of possession. It is a privilege conferred by maritime law with the object of securing to the seaman his wages, the fruit of useful and oftentimes perilous services. When, therefore, his wages have been paid, it matters not by whom, the design of the privilege is answered, and his maritime lien is at an end.

It has always been contrary to the policy of maritime law to invest him with any capacity to transfer this remedy against the *res*, to a third person. The legislature by several enactments has signified in no uncertain terms their approval of this restriction. Mariners are proverbially an improvident class; they are easily imposed upon, and, returning from a voyage, would readily become the victims of sharpers and usurers, did the right exist to them to readily dispose of their claims for wages earned on the voyage.

Section 182 of *The Merchant Shipping Act* 1854, enacts:

> No seaman shall by any agreement forfeit his lien upon the ship or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Act, and every

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stipulation by which any seaman consents to abandon his right to wages in case of the loss of the ship or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.

Section 233 of *The Merchant Shipping Act*, 1854, enacts:

> No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or any attachment, encumbrance or arrestment thereon; and no assignment or sale of such wages or of salvage made prior to the accruing thereof, shall bind the party making the same; and no power of attorney or authority for the receipt of any such wages or salvage shall be irrevocable.

Section 182, above quoted, has been expressly held in *The Rosario* (1) to be an enactment in aid of the general law, and not as a substitute for it. [See the judgment of Sir Robert Phillimore (2)]. The learned judge held that in that action, which was an action for salvage, it was no defence for the defendants to set up an alleged agreement whereby fourteen of the sixteen plaintiffs had, for valuable consideration, assigned to the defendants all their respective shares of the salvage award; that such an agreement was void under section 182, above cited, and a demurrer to the statement of defence was allowed.

In *The Lyons* (3), in a mortgage action, it was held that a claim by the plaintiff for necessaries, even though it included items of wages paid to the ship's crew at the request of the owner, was not entitled to precedence to the mortgagee's claim. *Semble*, that precedence might have been gained as to the wages if the prior permission of the court had been obtained to make the payment.

The question for decision in this action has been expressly dealt with in *The City of Manitowoc* in the Vice-Admiralty Court of Quebec (4), (1879), a case

(1) L.R. 2, P.D. 41.
(2) Ibid. p. 45.
(3) 6 Asp. M.C. (N.S.) 199.
(4) Cook, 178.

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not cited before me on the argument. There the court expressly held that the lien of the salvors, which also included a claim for seaman's wages, necessaries, pilotage and towage, was personal and inalienable and did not vest in the plaintiffs, who were assignees, by virtue of the assignment. In the judgment (1) the following language is used by the learned judge:

I do not regret that this court is compelled to decline jurisdiction over the assignment of salvage and the other matters for which this suit is brought, not only because its efficiency would be impaired if it had to determine the validity of assignments and disputed accounts, subjects of municipal law and regulation and involving delay, but because in the case of assignments of claims such as those in question, the assignors, the mariner and the salvor may be subject to gross injustice where their wants compel them to accept a tithe of their due for a claim admitting of no question. I express no opinion on the merits of this case; as it is not opposed, I take it for granted that the claims of the promoters are well founded, and if they are, they have their remedy before the ordinary tribunals of the country, to which they can apply for relief.

I have been referred to a number of American decisions in which the question of the assignment of maritime liens is dealt with. These decisions are conflicting, some affirming the principle that all the remedies and securities, including the lien of the assignor, pass to the assignee, who can pursue them in the same manner as the assignor himself could have done; other cases affirm the contrary doctrine and sustain the view that a maritime lien is purely personal and for the exclusive benefit of the original lien holders, and there is no capacity vested in the lien holder to transfer his lien to third persons. I do not find any assistance from these decisions, for I have to determine this case according to the civil and maritime law of the High Court of Admiralty of England.

(1) P. 189.

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No case has been cited to support the view that the High Court of Admiralty has sanctioned a proceeding *in rem* at the instance of an assignee of a claim for a master's or seaman's wages.

In *Gaetano and Maria* (1), Mr. Justice Brett in the Court of Appeal, dealing with the question as to what law is administered in the English Court of Admiralty, expresses himself as follows:

> The first question raised on the argument before us was, what is the law which is administered in an English Court of Admiralty, whether it is English law or whether it is that which is called the Common Maritime Law, which is not the law of England alone, but the law of all maritime countries. About that question I have not the smallest doubt; the law which is administered in the Admiralty Court of England, is the English Maritime Law; it is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by Act of Parliament or by reiterated decisions, traditions and principles has adopted as the English Maritime Law; and about that I cannot conceive that there is any doubt. It seems to me that this is what every judge in the Admiralty Court of England has promulgated (Lord Stowell and those before him and Dr. Lushington after him) and I do not understand that the present learned judge of the Admiralty Court differs in the least from them.

It was urged before me that the lien of a master for his wages as created by the statute was more beneficial in its nature than, and not to be treated as subject to the same restrictions as, the lien existing in favour of common seamen. I cannot perceive that any difference exists or was intended to be created by the statute in the quality or legal incidents to be attached to the master's lien which distinguishes it in any way from the lien in favour of an ordinary seaman.

The master was by the statute placed in the same beneficial position as a seaman; his rights, remedies and privileges were made co-extensive, neither more nor less; his maritime lien for his wages, like that of a seaman, is personal and exclusively for his own

(1) L. R. 7 P. D. 143.

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benefit, and is therefore by the policy of maritime law inalienable.

The plaintiff in this case, therefore, has no right of action *in rem* for the recovery of his claim in the Admiralty side of the Exchequer Court of Canada.

Judgment dismissing action with costs.

Solicitors for plaintiff: *Mulvey & McBrady.*

Solicitors for the mortgagee (intervening): *Canniff & Canniff.*