1895
Sept. 7.

THE THIRD NATIONAL BANK OF DETROIT AND THE PENINSULAR SAVINGS BANK OF DETROIT..... } APPELLANTS;

AND

GEORGE ALLAN SYMES..... RESPONDENT.

(*THE CITY OF WINDSOR.*)

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

Maritime law—Inland Waters—Master's lien for disbursements and liabilities on account of the ship—56 Vict. c. 24—Priority of lien over mortgage—Master's authority to pledge the ship.

The object of the Act of the Parliament of Canada 56 Vict. c. 24, entitled *An Act to amend "The Inland Waters Seamen's Act,"* is to give the master of a ship navigating the inland waters of Canada above the harbour of Quebec a lien for disbursements made and liabilities incurred by him on account of the ship in all matters in which, prior to the case of *The Sara* (14 App. Cas. 209), it had been held by the courts in England that a master of a ship had such a lien for his disbursements.

2. The master's lien for disbursements and liabilities of this character is preferred to the claim of a mortgagee taking possession after such disbursements had been made and such liabilities incurred.

3. The rule that the master has authority to borrow money on the ship and to pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity, applies as well to a case where a vessel, subject to *The Inland Waters Seamen's Act*, is in a home port as where she is in a foreign one.

APPEAL AND CROSS-APPEAL from a judgment of the Local Judge for the Toronto Admiralty District (1).

The facts of the case are stated in the judgment.

The case on appeal was argued on the 14th day of May, 1895.

O. E. Fleming for the appellants:

(1) Reported *ante*, p. 362.

I submit that there is no maritime lien in Ontario for necessaries and disbursements of themselves; and the captain cannot go and make a debt and so create a maritime lien against the ship. That being the case the only way a maritime lien can be created is by statute, and this is the first case in Ontario where it has been sought to create a maritime lien by the master for necessaries and disbursements. Under the Imperial Act of 1861, section 10, it was supposed, until the decision in the *The Sara* (1), that he could create a maritime lien in his favour for his disbursements and liabilities. That doctrine was overruled in the case of *The Sara*. This caused the Imperial Act of 1889 to be passed. That and our own Act of 1893 are in substance the same. Other cases prior to the Imperial Act of 1889, which the learned judge has referred to in the court below, assumed that disbursements would create a lien. They are the cases of *Morgan* v. *Castlegate* (2). The earlier cases assumed that the lien existed under the Act of 1861, but it must be remembered that the Act of 1889 did not create a greater lien or higher lien than was thought to have been created by the Act of 1861.

There was a distinction drawn under the Act of 1861 between liabilities and disbursements,—it was held by Dr. Lushington that the master had a lien for disbursements and not for liabilities generally.

Where I find fault with the judgment in this case is that while the learned judge of the court below cites authorities to show the authority of the master to incur liabilities on behalf of the owner, as his agent, the cases are really only those where parties have brought ordinary actions against the owner for goods supplied to the master. It is not shown that they created a maritime lien against the vessel.

(1) 14 App. Cas. 209. (2) [1893] A. C. 38.

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I say the *Orienta* case goes to show that he had no right to do this when the owner resided in Canada. That case was decided in November, 1894, in the Divisional Court and on appeal in February, 1895. We are mortgagees here and in a better position than the owner would be in the *Orienta* case.

The test appears to be, under the decisions, could the master here have made a bottomry bond so as to create a maritime lien?

[By the Court: Would you have to go as far as that?]

I submit almost as far. The decisions are that a master could not make a bottomry bond so as to bar a mortgagee where he could have communicated with the owner. Now the Imperial Acts have almost done away with the necessity of bonds in any case, on account of the easy means of communication now existing between the various countries. [He cites *The Lizzie* (1)]. That was a contest as to the validity of a bond because the master did not communicate with the owner. Held, as a fact, that under the circumstances there he could not have communicated with the owners.

Supposing the owner could have been communicated with and the master did not, but acted in collusion with the creditors, could the creditors secure a lien against the ship? I submit not.

The owner was not supplying the goods himself. The facts are that the owner said to the master: "Do as well as you can with her." [He cites *The Karnak* (2).] This is a judgment of Sir Robert Phillimore. I call your lordship's attention to pp. 299, 300, 301, 303, 305, 306. See also the cases of *The Panama* (3) and *The Great Eastern* (4). There are some cases where it is discussed whether the master had a maritime lien in England on

(1) L.R. 2 Ad. & E. 254.
(2) L.R. 2 Ad. & E. 289.
(3) L.R. 2 Ad. & E. 390.
(4) L.R. 2 Ad. & E. 88.

a vessel for liabilities incurred in a foreign port because in such foreign port he would have had a maritime lien.

There are also cases going to show that if the owner has an agent at a foreign port the master could not make a bond so as to create a maritime lien, because the agent of the owner at that port is the proper person to create a lien or liability.

I submit that under the cases from 1861 down to the present time the master has not been allowed under circumstances that exist in this case, where the master is in a home port and the owner could have been communicated with, to create a maritime lien as against the ship.

Mr. *Caniff* for the respondent: The Imperial statute of 1889 was passed in consequence of the decision in the case of *The Sara* (*ubi sup.*) It was supposed until the time of that decision in the House of Lords that a maritime lien existed for master's wages and disbursements. In *The Sara* it was held that he had a right *in rem* against the ship, but that right would be subject to any mortgages on the register. This Act of 1889 gives a lien for wages and disbursements for the master although your lordship, I think, makes some distinction in the case of *Bergman* v. *The Aurora* (1) as to vessels running between home and foreign ports and those confined altogether to home ports. But as to that it appears in evidence in this case that this boat did also run to foreign ports.

But however that might be it has been decided in Canada in the case of *Reide* v. *Queen of the Isles* (2), that the master has a maritime lien for his wages as well as for disbursements and liabilities. By the Canadian Admiralty Act of 1891 it is enacted (section 4) that all persons shall have all rights and remedies

(1) 3 Ex. C. R. 228.

(2) 3 Ex. C. R. 258.

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in all matters arising out of or connected with navigation, shipping, trade or commerce which may be had or enforced in any colonial Court of Admiralty under *The Colonial Courts of Admiralty Act*, 1890. That Act of 1890 gives all the rights and remedies which could be enforced in England. I submit that the Act of 1889 did apply and does apply under the Canadian Admiralty Act of 1891; and that we have a binding judgment of a judge of this court, in the case last cited, deciding that the master has a maritime lien in Canada. That being so, I submit that using the same words in the Act of 1893 amending *The Inland Waters Seamen's Act* as the Parliament of Canada has done that we must apply the rule that where a judicial interpretation of a statute is made and an Act is passed in the terms of the judicial interpretation it must be taken as a legislative sanction of such interpretation.

If it had not been for the decision in *The Orienta* case, it would not have been so clear that a maritime lien could not have been acted upon. But I submit that the decision in that case is not an authority in the present one because in that case there was a fraud upon the mortgagee. It was said there that it was an ingenious device to create a maritime lien to get ahead of a mortgage. That is a very different case from this one. I say that the test applied by Sir Francis Jeune is an artificial one. He admits that the master would have a right *in rem* if there were no mortagees intervening. His test of a lien arising under the Act of 1889 is whether the disbursements or liabilities of the master are such as would, without express authority, have pledged the owner's credit. Now in this case of ours there are letters from the owner to the master to the effect that the latter must try and make the vessel pay her own way.

My learned friend has said there are no cases which show that the master has a maritime lien in a home port. I call your lordship's attention to the arguments of counsel in the *Orienta* appeal. I refer your lordship to the cases there mentioned, as by so doing it will obviate any more detailed reference to them. They are the *Glentanner* (1); *The Chieftain* (2); *The Mary Ann* (3); *The Feronia* (4).

It becomes necessary for us to apply the test referred to by Mr. Justice Jeune. What is the implied authority? Now in the first place your lordship must remember that this steamer was a ship carrying freight where it could be got. She was a general ship, advertised to run two trips daily. The master had to have provisions, had to have coal and to get it from day to day in order to keep faith with the public if she was to be kept on that route.

I refer your lordship to *Maclachlan on Shipping*, 3rd ed., at pp. 133 and 142. The rule laid down by Maclachlan, and adopted by the learned judge of the court below, is that the master has an implied authority to borrow money on the ship and to pledge the ship, whether the owner is communicated with or not, for necessaries. (He cites *Johns* v. *Simons* (5); *Arthur* v. *Barton* (6). My learned friend has said that the cases cited do not bear on this point. Now Mr. Justice Macdougall shows in his judgment that the master could not have got goods on the owner's credit. Then he had to get them on his own credit, and he has a lien therefor. (He cites *Webster* v. *Seakamp* (7); *Gunn* v. *Roberts* (8); *The Red Rose* (9).

(1) Swab. 415.
(2) Br. & Lush. 104.
(3) L. R. 1 Ad. & E. 8.
(4) L. R. 2 Ad. & E. 65.
(5) 2 Q. B. 425.
(6) 6 M. & W. 138.
(7) 4 B. & Ald. 354.
(8) L. R. 9 C. P. 331.
(9) L. R. 2 Ad. & E. 80.

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The position the plaintiff holds is this: he comes to court and says, I am liable for these necessaries although I have not paid for them, but I am entitled to be indemnified out of the boat. There is no difference whether they are disbursements or liabilities, that is clearly laid down in the *Orienta* case.

The rule of law laid down as a test is this: is the power of communicating with the owner correspondent with the necessity? [(He cites *Maclachlan on Shipping* (1).] Your lordship will not find any reason to reverse the finding of fact on this point.

Mr. *Fleming*, in reply, cites the *Fleur de Lis* (2). He maintains that the case of *Reide* v. *Queen of the Isles* (*ubi sup*). is entirely overruled by the *Orienta* case.

Mr. *Caniff*, in reply on cross-appeal, cites *Kay on Shipping* (3); *Smith on Mercantile Law* (4).

THE JUDGE OF THE EXCHEQUER COURT now (September 7th, 1895,) delivered judgment:

This is an appeal by the defendants, The Third National Bank of Detroit and The Peninsular Savings Bank of Detroit, from a decree of the Judge of the Toronto Admiralty District whereby he pronounced in favour of the respondent, the master of the ship *The City of Windsor*, for part of his claim for disbursements made and liabilities incurred for necessaries on account of the ship, and for damages for wrongful dismissal. There is also a cross-appeal by the respondent in respect of the part of his claim that was disallowed.

The City of Windsor was a steamer registered at the port of Windsor, in the Province of Ontario. In 1894, during the time that the respondent was master of her, she was employed as a passenger and freight boat between the cities of St. Catharines and Toronto, and

(1) 3rd. edition, pp. 131, 139.
(2) 1 Ad. & E. 49.
(3) 2nd ed. p. 47.
(4) 10th ed. 338.

was subject to the provisions of *The Inland Waters Seamen's Act* (1). By an amendment of that Act made on the 1st of April, 1893, it is provided that "the master of any ship subject to the provisions of this Act shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages, and for the recovery of disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, as by this Act or by any law or custom any seaman not being a master has for the recovery of his wages." (2).

The appellants, who were mortgagees of the ship, and who in August, 1894, took possession of her and dismissed the master, contend that under the circumstances of this case the master has no maritime lien in respect of any liability incurred by him on account of the ship; that she was registered and employed in the Province of Ontario, and that the owner was at the time domiciled there; that recourse could have been had to him, and that the master had no authority to incur liabilities for necessaries for the ship, or if he had such authority that he could not by incurring them create a maritime lien for such necessaries. The owner could not himself so contract for necessaries for the ship as to create any such lien; and it was argued that his agent in a home port was in this respect not in any better position. It is clear of course that there is no maritime lien for necessaries supplied to a ship, and that the owner has no power to create any such lien. The High Court of Admiralty in England has jurisdiction over any claim for necessaries supplied to any ship elsewhere than at 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 Eng-

(1) R. S. C. c. 75 s. 2 (f). (2) 56 Vict. c. 24.

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land or Wales (1). This court has in a like case a like jurisdiction where there is no owner or part owner domiciled in Canada (2). But the person supplying such necessaries has no maritime lien on the ship, whether they are ordered by the owner or master.

That, however, is not the question at issue in this case. The question is: Has the master by virtue of the amendment of *The Inland Waters Seamen's Act* (3), a lien for disbursements properly made by him and for liabilities properly incurred by him on account of the ship, and is his claim to be preferred to that of the mortgagee? The language of the statute is that so far as the case permits he is to have the same rights, liens and remedies for such disbursements and liabilities as a seaman has for the recovery of his wages. In the case of seamen's wages there is such a lien and it has priority of any claim by the mortgagee. That is not disputed; and there can be no doubt, I think, that the object of the amendment to which I have referred was to give the master of a ship navigating the inland waters of Canada above the harbour of Quebec a lien for disbursements made and liabilities incurred by him on account of the ship in the cases in which, prior to the case of *The Sara* (4), it had been thought that a master of a ship had such a lien for his disbursements. The amendment is founded upon and follows closely in that respect the first section of *The Merchant Shipping Act*, 1889 (5). It was passed after a construction had been put upon the latter statute in the case of *The Castlegate* (6), and should be construed in the same way as that statute. The Act and the cases in the light of which it is to be

(1) 24 Vict. U. K. c. 10 s. 5.
(2) *The Colonial Courts of Admiralty Act* 1891, s. 2 ss. 3 *(a)*.; *Admiralty Rules* No. 37 *(b)*.
(3) 56 Vict. c. 24.
(4) 14 Ap. Cas. 209.
(5) 52 & 53 Vict. (U. K.) c. 46.
(6) [1892] A. C. 38.

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construed have been very fully and ably discussed by the learned Judge of the Toronto Admiralty District; and I content myself with saying that I agree with him in the construction that he has put upon it. It cannot be doubted, I think, that in such a case as this the master has a maritime lien not only for his wages, but also for disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship, that is for disbursements necessarily made, and for liabilities necessarily incurred by him on account of the ship while acting within the scope of his authority as master. What that authority may be in a particular case will depend upon the facts and circumstances of the case. The general rule as stated in *Maclachlan on Shipping* (1), is that the master has authority to borrow money on the ship and to pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity. With reference to sea-going ships the means of communication between the master and the owner, and the latter's opportunities for personal interference and direction are ordinarily greater in a home port than in a foreign port, and in that way the master's authority is usually larger, and more readily conceded where the ship is in a foreign port. But while it may require stronger circumstances to establish the fact of its being necessary to make the disbursement or incur the liability where the ship is in a home port, the principle in both cases is the same. [*Arthur* v. *Barton* (2).] In fact with reference to vessels navigating the inland waters there is little room for any distinction, and it is not at all clear that any should be made. If *The City of Windsor* had been at Detroit in the United States, the means of communication between the master and owner would have been the

(1) 4th Ed. p. 146. (2) 6 M. & W. 138.

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same practically as if she had been at Windsor where she was registered and where the owner resided, and much greater than when she was at St. Catharines or Toronto.

That disposes of the principal question of law raised on the appeal. The other questions discussed have reference to the findings of the learned judge with respect to the particular items of the claim that should be allowed or disallowed. Of the amount of $1,326.17 for which the respondent had judgment, the sum of $130 was allowed for wages and board in lieu of a month's notice of dismissal, and the sum of $7.50 for a disbursement actually made for coal for the use of the vessel. To these two items the appellants do not object. Their objection is to the sums allowed for liabilities incurred by the master. These liabilities were incurred for the most part for repairs and for fuel and provisions for the ship. The fuel and provisions had to be procured from day to day to enable the vessel to make her daily trips between St. Catharines and Toronto. The owner had no agent and little or no credit at either city. He had not provided funds to meet the necessary expenditure for such necessaries and the earnings of the vessel were not sufficient to enable the master to provide them without incurring a personal liability. In the master's incurring the liability there was no attempt to give, and no thought of giving, the persons supplying the goods any priority or advantage over the mortgagees. On the contrary the owner appears to have been ready to do what he could to assist or protect the latter, as was right enough, and equally willing apparently to let the master and the tradesmen look out for themselves as best they could. The case is not in respect of any part of the claim that was allowed analogous to the case of *The*

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Orienta (1). Of the items allowed I have had more doubt about those for advertising than I have had about the others. But these questions, both as to the items allowed and those disallowed are questions of fact, as to which the findings of the learned judge are not to be lightly disturbed.

Appeal, and cross-appeal, dismissed with costs.

Solicitor for appellants: *O. E. Fleming.*

Solicitors for respondent: *Caniff & Caniff.*

(1) [1894] P. D. 271; [1895] P. D. 5.