

1935

BRITISH COLUMBIA ADMIRALTY DISTRICT

Jan. 3, 17.
Feb. 18-20.

HIS MAJESTY THE KING.....PLAINTIFF;

May 23.

AND

THE SHIP *EMMA K*.....DEFENDANT.

Shipping—Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, s. 67 (2), s. 69 and s. 76—False declaration touching owner's qualification to own ship—Unlawfully cause the ship to fly the British flag and assume a British character—Matters occurring "on board a ship"—Bona fide mortgage of ship—Transfer of mortgage—Right of transferee to intervene—Disposition of proceeds of sale of ship to protect interest of mortgagee and transferee.

The ship *Emma K*, having been seized by the Collector of Customs for infringement of the Merchant Shipping Act and on the same day arrested by the marshal at the instance of certain seamen for wages, was sold on the 25th April, 1934, by order of the Court, and after the wage claims were satisfied, the balance of the proceeds of the sale, deposited in Court, was claimed by the Crown as forfeited because the owner had made a false declaration touching his qualification to own the said ship contrary to s. 67, ss. 2, of the Merchant Shipping Act, 1894, 57 & 58 Vict., c. 60, and further because the owner "did unlawfully cause the ship to fly the British flag and assume a British character contrary to s. 69" of the said Act.

One Barrett was given leave to come in as a defendant as being a "person interested" as the unregistered transferee on December 10, 1934, of a registered mortgage to secure \$5,000, given on the 23rd March, 1933, by the owner to one Allender, Barrett being given leave, as transferee and agent representing in British Columbia the interest of Allender of San Francisco in the ship, to be heard in support of his principal's alleged interest.

The Court found that the owner had wilfully made a false declaration of ownership contrary to s. 67 (2) but that the mortgage of which Barrett was the transferee was a *bona fide* transaction entered into without knowledge of the offence.

Held: That the mortgagee and transferee are, as regards this forfeiture, in as favourable a position under ss. 2 which states that the "ship or share shall be subject to forfeiture under this Act to the extent of the interest therein of the declarant," as though they were in possession of the ship and therefore that interest should be protected in the order that should be made under s. 76, and the balance of the proceeds of the sale of the ship should be paid to the intervener to be applied in reduction of the mortgage.

2. That the owner procuring registration of himself as a British owner by fraudulent means under ss. 2 of s. 67 is not sufficient to establish a use and assumption of flag and character for the prohibited purpose since ss. 2 is obviously directed to matters occurring "on board a ship" and of such a kind as to "make the ship appear to be a British ship" as the result of something done "on board" of her in the course of her use as a ship and not something done in a registry in relation to the "Procedure for Registration" of her and the claim for forfeiture under s. 69 must be dismissed.

ACTION under section 76 of the Merchant Shipping Act for the forfeiture of the ship *Emma K* for alleged infractions of s. 67 (2) and s. 69 of the Merchant Shipping Act.

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The action was tried before the Honourable Mr. Justice Martin, District Judge in Admiralty, at Victoria, B.C.

W. C. Thomson for the intervener John Barrett.

H. W. R. Moore for the Crown.

The facts and questions of law raised are stated in the reasons for judgment.

MARTIN D.J.A., now (May 23, 1935) delivered the following judgment:

This action, raising a new and very important question, is brought under section 76 of the Merchant Shipping Act, 1894, for the forfeiture of the defendant ship on the ground that the owner thereof, Manuel Purdy, did wilfully make a false declaration touching his qualification to own the said ship, being a British one, contrary to section 67 (2) of the said Act, viz.:—

If any person wilfully makes a false declaration touching the qualification of himself or of any other person or of any corporation to own a British ship or any share therein, he shall for each offence be guilty of a misdemeanor, and that ship or share shall be subject to forfeiture under this Act, to the extent of the interest therein of the declarant, and also, unless it is proved that the declaration was made without authority, of any person or corporation on behalf of whom the declaration is made.

The ship was originally seized by the Collector of Customs at Vancouver on the 19th of April, 1934, and later in the same day was arrested by the Marshal at the instance of certain seamen, for wages, and on the 25th of that month the Collector, who had remained in possession under his seizure, handed her over to the Marshal to be sold by order of this Court (12th June) to satisfy the said wage claims, and, after satisfying, with the Crown's consent, those claims from the proceeds of that sale duly paid into Court, there remains a balance of about \$2,500, which the Crown claims as being forfeitable, in lieu of the ship, for the reason aforesaid, and for the further reason, pursuant to amendment granted, that "the said Manuel Purdy did unlawfully cause the (said) ship to fly the

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British flag and assume a British character contrary to section 69" of said Act, which added ground will be considered later.

Upon the case coming on for hearing a motion was made, under Rule 30, on behalf of John Barrett, for leave to "come in * * * as a defendant" as being a "person interested" as the unregistered transferee, on December 10, 1934, of a registered mortgage to secure \$5,000 and interest, given on the 23rd of March, 1933, by the said Manuel Purdy, as owner, to Percy J. Allender, and after a lengthy hearing and strong opposition the motion was granted and leave given to Barrett as transferee and agent representing in this Province the interest of Allender (of San Francisco) in the ship to be heard in support of his principal's alleged interest: *The Two Ellens* (1); *The St. George* (2); *The Cathcart* (3); McLachlan on Merchant Shipping (7th ed.) 33, 37, 39; sec. 57 Merchant Shipping Act, 1894, and sec. 37-*cf.*, Temperley's Merchant Shipping Acts (4th ed.), 33.

Apart from Barrett's claim the case presents no real difficulty because the evidence adduced for the Crown clearly establishes the said charge against Purdy of making a false declaration of British ownership under said section 67 (2) and therefore the usual judgment of forfeiture of the entire ship (or the proceeds of its sale in lieu thereof) would follow, he being the sole owner. But it is submitted on behalf of Barrett that, as the transferee of said mortgagee and standing in his shoes, he is entitled to retain and protect his individual "interest" in the ship as mortgagee and that said interest is not subject to forfeiture because ss. (2) declares that the ship or share shall be subject "to forfeiture under this Act to the extent of the interest therein of the declarant," and that such interest does not "extend" to include that portion of it which he has parted with under said mortgage, and consequently that no judgment can be pronounced which does not recognize and protect that interest.

The question that falls to be determined, therefore, is, what is the meaning of the expression "subject to for-

(1) (1871) L.R. 3 Ad. & E. 345,
 354-5.

(2) (1926) P. 217, 221, 230.

(3) (1867) L.R. 1 Ad. & E. 314.

feiture * * * to the extent of the interest therein of the declarant"? as used in the section, and its history, and that of cognate sections, is of assistance in answering it. In the Merchant Shipping Act of 1854, cap. 104, the 4th subsection of section 103 corresponds in general to the present subsection (2) the main difference being in its conclusion, as follows:—

* * * and the ship or share in respect of which such declaration is made * * * shall to the extent of the interest therein of the person making the declaration, unless it is shown he had no authority to make the same * * * be forfeited to Her Majesty.

So the only change, effected by subsection (2), is that the ship or share shall be "subject to forfeiture" instead of being absolutely "forfeited," and the procedure to secure that forfeiture is provided by said section 76 under which this ship is "brought for adjudication."

It was submitted that this change conferred a discretionary power upon the Court to protect innocent purchasers and mortgagees and the effect of the decision of the Court of Appeal in the *Annandale* case (1) was relied upon, wherein it was decided, not on said subsection (4) of section 100 of the Act of 1854, but on a distinct offence under subsection (2) of that Act (*viz*: concealment of the British character of the ship or assumption of a false character, etc., now in part section 70) that the forfeiture of the ship became complete and immediate upon the commission of the prescribed offence because the said subsection declared that "such ship shall be forfeited to Her Majesty" and therefore it was immediately divested from its former owner and vested in the Crown, and the result was that the claim to the ship of a *bona fide* purchaser thereof for valuable consideration on the 6th of July, 1876, and without knowledge of the commission of the prior offence on the 18th of July, 1874, was rejected, James L.J., saying, p. 220:—

According to the view of the law which has been taken upon the cases I have referred to, the property of the rightful owner may be divested the moment a person has committed the offence for which it is to be forfeited, and being divested he cannot vest it in anybody unless there be a statutory provision to that effect, a provision like our law with regard to the sale of stolen goods in market overt, where a person who has no title does give a title to a purchaser. Without such a provision

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the person whose title is divested cannot give a title to any other person, however innocent that person may be. However, if there is any case of hardship, no doubt the Crown will always take that into its merciful consideration.

And Baggally L.J., said, p. 220:—

It appears to me that the opposite construction of the second subsection of the 103rd section of the Act would substantially render that section a dead letter; for the claim for protection is based upon this, that there is no actual forfeiture until adjudication, or at any rate until seizure; and if that were the true construction of the Act no distinction could be drawn in the case of a purchaser for value with or without notice. If that be the case, as in almost every instance where any act is done, which is made punishable under the second subsection, it is done in secret, it would not be impossible to make a sale of the ship before the time when any seizure could be made, or before the time when an adjudication could be brought about.

And he went on to say, p. 221:—

Reliance has been placed on the provision in the latter part of the section in which directions are given as to the process by which the ship is seized, and by which adjudication is obtained, but it appears to me those provisions are for the benefit of the shipowner, in order to afford him the opportunity to shew that the seizure was improper. If he can shew that the vessel was not liable to forfeiture at the time, then it could not be treated as a forfeiture, and in that case if the officer of the customs had not good ground for making the seizure, the officer is to be subjected to make amends as the Court may think fit to direct.

And Cotton L.J., said, p. 221:—

That second subsection is to the effect that if a master shall so offend the ship shall be forfeited, and not as has been contended, that it shall on adjudication be forfeited. The forfeiture results immediately on the offence being committed, and if there is any argument raised as to the construction of the words, "the ship which has become subject to forfeiture," then I say those words are not sufficient to alter what in my opinion is the true construction of the second subsection of the 103rd clause, which is that the forfeiture takes place when the act is committed.

These reasons affirmed the view of Phillimore J. very clearly expressed at p. 185:—

* * * the demurrer must be sustained on the ground that the forfeiture accrued at the time when the illegal act was done, and that the seizure of the *Annandale* related back to the time of the wrongful act committed by the then owners.

Now while this decision is, as already noted, on a different section of the old Act of 1854, yet it is of much assistance on the present one because its *ratio decidendi* is that the absolute forfeiture brought about an immediate divesting of ownership and vesting in the Crown which necessarily excluded the consideration of all subsequent transactions, and it is to my mind fairly clear that if the forfeiture had not occurred "until adjudication, or at any rate until seizure" (pp. 185, 220) then, the claim of the

innocent purchaser would have been allowed, and this is important because the said subsection 2 has been altered by said section 70 of 1894 to declare that "the ship shall be subject to forfeiture under this Act" instead of "shall be forfeited" as theretofore, and the following opinion on the effect of that change was expressed by the Supreme Court of China and Corea at Shanghai (per Sir Haviland de Sausmarez) in *The ss. Maori King* (1) viz:—

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For the defendants it is urged that the change of the words in the Act from "shall be forfeited" to "shall be subject to forfeiture" must indicate an intention of the Legislature that the Court should exercise its discretion as to whether it would give weight to questions of hardship which under the Act of 1854 could, as James L.J. points out in *The Annandale* (*supra*), be taken into the merciful consideration of the Crown. I am bound to say that this consideration weighed heavily with me, but on mature consideration I have come to the conclusion that the object of the change in the Act is to defer the forfeiture until judgment so that a possibly unwitting breach of the law may not imperil valuable property in a ship, or that an innocent *bona fide* purchaser may not lose his property, because the ownership has been divested by operation of law. *The Annandale* was decided on the words of the statute of 1854; this case must be decided on the words of the statute of 1894. There have been no cases under section 76, but a consideration of the words of that section has led me to the conclusion that I must make the order prayed for by the Crown.

It appears from this citation, and from the pages above cited in *Aspinall* and *The Law Times* (i.e., 250 and 789) that the learned Judge decided that he had no discretion to relieve from hardship, but that the statute itself operated to protect "innocent *bona fide* purchasers" and this opinion stands because the Privy Council did not upset his judgment on that opinion or give it consideration because it held that his court had no jurisdiction to entertain a suit for forfeiture for breach of section 76 of the said Act of 1894.

It is passing strange that apart from this judgment there is no other judicial decision (that I, at least, have been able to find after a long and diligent search) on a question of such great and far-reaching importance, but that some change at least in the law has been effected by said change in the language is recognized by all the leading text books on the subject, *e.g.*, Mayers Admiralty Law and Practice (1916) 197; Williams & Bruce Admiralty Practice (3rd

(1) (1909) A.C. 562 at 565; 11 Asp. 249, 250; 100 L.T. 787, 789.

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ed.) 223-4; I Hals. (2nd ed.) 105; Maclachlan on Merchant Shipping (7th ed.) 55; Temperley's Merchant Shipping Acts (4th ed.) 51; and Abbott on Shipping (14th ed.) 112-3; in which last and high authority it is said, note (o):

The wording of the corresponding section 70 in the Act of 1894 may be construed to mean that the forfeiture will not operate until condemnation and that the offence would therefore impose no such disability on a purchaser taking before condemnation.

That it was the settled intention of Parliament in the new consolidated Act of 1894 to depart in general from the peremptory and absolute forfeitures imposed by the old Act of 1854 is further shown by the use of the new expression "subject to forfeiture" in sections 16, 28 (4), 67 (2), 69 and 71 as well as in said section 70, in substitution for the imperative expressions in the old corresponding sections 52, 64, and subsections (3) and (4) of 103 of 1854, as well as in subsection (2) thereof, and after a very long and careful consideration of all the relevant sections of the Act, I am impelled to the opinion that if the *Annandale* case were now being decided the said change in the Act would compel the Court to come to the same conclusion as that of the Supreme Court of China in the *Maori King* case, i.e., that the right of the innocent purchaser would be upheld because "there is no actual forfeiture until adjudication, or at any rate until seizure."

That the principle embodied in such a decision under present section 70, in favour of a *bona fide* purchaser without notice, should extend to such a purchaser under subsection (2) of 67, now in question, there seems no good reason to doubt, and so if the present intervening claimant were such a purchaser he would be entitled to judgment in his favour because he had acquired "the interest of the declarant" in the ship to the full "extent" thereof. I can see no good reason why such a purchaser is not just as fully entitled to protection where he buys from an owner (who derives title from a lawful registered owner) who has got on the register by deception under section 67 as where he buys from one who after getting on the register rightfully has resorted wrongfully to deceptions concerning the "National character and Flag" under section 70: the offences to my mind are *pari passu*, though it might ponderably be argued that the latter is the more serious.

This intervener, however, is not a purchaser but the transferee of a mortgage, covering the sole owner's entire interest, and upon the evidence I find that the objections taken to said mortgage as being a sham proceeding were not sustained, and it must be regarded as a *bona fide* transaction entered into without knowledge of any offence against section 67 and overdue both as to principal and interest, and that the intervener stands in the said mortgagee's shoes and is entitled to assert his interest. Such being the case, the second difficult question arises as to whether or no he is entitled to the same protection as an innocent purchaser?

The former position of a mortgagee is well explained in Abbott on Shipping, (*supra*) pp. 41, 85 and 101 *et seq*:

It seems proper in this place to take notice of what was formerly an important question, and on which persons of eminent talents differed in opinion, viz., whether the mortgagee of a ship was to be deemed in law the owner of it, entitled to the benefits and liable to the burthens, which belong to that character before he took possession of the ship. It will, however, be sufficient briefly to refer to the cases in which decisions have taken place on the subject, as by recent Acts of Parliament, when a transfer is made only as a security for the payment of debts by way of mortgage, or of assignment to trustees for sale, on a statement being made in the book of registry, and in the indorsement on the certificate of registry to that effect, the person to whom the transfer is made, or any other claiming under him, *is not to be deemed the owner* nor is the person making such transfer to be deemed to have ceased to be an owner, except so far as may be necessary for the purpose of rendering the ship transferred available, by sale or otherwise, for the payment of those debts, to secure the payment of which the transfer was made.

This refers to section 34, viz:—

Except as far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share nor shall the mortgagor be deemed to have ceased to be owner thereof.

Abbott then proceeds at p. 42:—

When the fifth edition of this work was published there was no provision for registering mortgages as such, and as no rights in a ship could then be acquired except on registration, mortgages were usually effected by means of an absolute transfer of the ship or shares mortgaged, with the indorsement above mentioned. The Act of 1894 now provides for the registration of mortgages of ships and shares in ships, and a mortgagee is still protected as he is not by reason of his mortgage to be deemed owner, nor is the mortgagor to be deemed to have ceased to be owner. Nevertheless, as a mortgagee may by the act of taking possession, whether of a ship or shares as will be seen hereafter, put himself into the position of the legal owner, it becomes necessary to deal more fully with the relative positions of mortgagor and mortgagee.

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And at p. 102:—

The effect of this provision, coupled with other provisions of the Act, is, shortly, that whilst a registered mortgagee has rights in priority to all other persons not registered before him, unregistered mortgages may be enforced as between their holders and a mortgagor.

It flows from this that, in my opinion, if an innocent mortgagee has taken possession of his security then he is in just as strong a position, whatever his exact status may be (whether he is regarded as a “beneficial title” under section 5 (iii) or “beneficial interest” under section 57, or otherwise) to resist a forfeiture as if he were an innocent purchaser and therefore it is “necessary” to “deem” him to be the owner *ad hoc* in order to “make (the) mortgaged ship or share available as a security for the mortgage debt.”

And in *Liverpool Marine Credit Co. v. Wilson* (1) James L.J., in delivering the judgment of the Court said, p. 512, respecting the right of “a legal first mortgagee in possession” of a ship:—

He has the paramount legal title, there is nothing to affect his conscience, and we are unable to find either on principle or authority any sound distinction between his case and that of the legal mortgagee of any other kind of property who has made farther advances on the property itself, or on the timber of growing crops, without notice of intervening equitable charges or interests.

Then why is a mortgagee not in possession in a worse position as regards forfeiture of this kind? Having regard to the language and operation of the section I find it very difficult to hold that he is, because the section does not require him to take any step in order to become entitled to its benefits, but simply says, in effect, that when it is necessary to make the mortgaged ship “available as a security” then he is to be deemed to be the owner thereof, and it is in practice more necessary for that purpose to “deem” him to be an owner when out of possession than in it.

This view is supported in an instructive case on the section in *Kitchen v. Irvine* (2) wherein it was held by the Court of Appeal that a creditor who has got judgment against the registered owner of a mortgaged ship could not take the ship into execution because that would defeat the right of the mortgagee to make the ship available as

(1) (1872) 7 Ch. App. 507.

(2) (1858) 28 L.J.Q.B. 46.

a security under the section, even though the mortgagee had not taken possession, Lord Campbell C.J., saying, p. 47:—

I am of opinion that the ship, under those circumstances, cannot be taken in execution as against the mortgagee. It is his property *prima facie*, unless his rights are restrained by the act of parliament. Now, by section 70 of the Merchant Shipping Act the mortgagee is not to be deemed owner of the ship, nor is the mortgagor deemed to have ceased to be owner of the mortgaged ship, "except in so far as may be necessary for making such ship available as a security for the mortgage debt." It cannot be said to be consistent with that provision that the ship should be taken in execution at the suit of a creditor of the mortgagor. Section 70 protects the mortgagee in everything necessary to make the mortgage available.

And Crompton J. said:—

I think the word "mortgagee" passes the legal property. That does not appear to me to be affected by the provision that he shall not be deemed owner, for that means, I take it, that he shall not be affected by the debts of the ship. We cannot alter the position of the parties and make the creditor a trustee for the mortgagee against his will. The mortgagee has the property in the ship for all the purposes of rendering it available as a security for his debt.

This clear reasoning is specially applicable to the present case, and there is nothing in it which conflicts with the decision in *The St. George* (1) that the same section does not

* * * extinguish the powers of a ship's master to bottomry a distressed ship in case of need, or to subject a damaged ship to a possessory lien in order that she might be repaired. The language used is not apt for the purpose if it was meant to deprive masters of ships of powers which they notoriously had. Acts in the exercise of those powers seem to me not to be dealings by the mortgagor. Nor is it obvious that they impair, or are calculated to impair, the security of the mortgagee. They are perhaps rather calculated to preserve it.

In *The Blanche* (2), also on this section, Butt J. said at p. 273:—

I am prepared to hold that the mortgagee was not entitled to take possession before the money secured by the mortgage is due. True the property in the ship is his, but the equities interfere and prevent his taking possession. If, however, I saw any attempt to impair the security, so that it would not be available, I should say he was justified in doing what he has done.

In support of the forfeiture the Crown cited the decision of this Court in *The King v. The Sunrise* (3) and of the Supreme Court of Canada in *The King v. Krakowec* (4); but they are on different statutes, the latter being one wherein the expression is "shall be forfeited to the Crown"

(1) (1926) P. 217 at 231.

(2) (1887) 6 Asp. 272.

(3) (1930) 43 B.C. 494.

(4) (1932) S.C.R. 134.

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(p. 141) and therefore on all fours with *The Annandale* case (*supra*); and as to *The Marie Glaeser* (1), that is a Prize case: *The Polzeath* (2) is on section 51 of the Shipping Act of 1906, and throws no light upon the present question because it did not arise therein, nor was *The Annandale* case considered (p. 254), and Bankes L.J. said (p. 255) that the only question that arose for decision was one of fact, *viz.*, what was the principal place of business of the company that owned the ship?

It was submitted that since the ship had got upon the register unlawfully by the fraud of her then owner the original taint of that registration is carried into all subsequent transactions, but the consequences of that fraud are only those which are prescribed by the statute imposing specific penalties of forfeiture and for personal misdemeanour, which brings the question back to the effect of the change in the law since the *Annandale* case. There might, possibly, be more to be said in favour of this submission if the ship had been unlawfully put upon the register the first time, under section 10, but as that is not the case here I refrain from expressing any opinion upon it.

It is worthy of note that a similar submission of a taint of piracy was, under circumstances largely involving the same principle, rejected by the Privy Council in the instructive case of *The Queen v. McCleverty—The Telegrafo or Restauracion* (3) at p. 688, *viz.*:—

There is no authority, their Lordships think, to be derived either from principle or from precedent for the position that a ship duly sold, before any proceedings have been taken on the part of the Crown against her, by public auction to a *bona fide* and innocent purchaser can be afterwards arrested and condemned, on account of former piratical acts, to the Crown. The consequences flowing from an opposite doctrine are very alarming. In this case, six months have elapsed between the sale and the arrest; but, upon the principle contended for, six or any number of years and any number of *bona fide* sales and purchases, would leave the vessel liable to condemnation on account of her original sin. Their Lordships are of opinion that the taint of piracy does not, in the absence of conviction or condemnation, continue, like a maritime lien, to travel with the ship through her transfers to various owners.

And after assuming that the ship had been “piratically navigated” previous to her transfer the report proceeds:—
 * * * their Lordships have arrived at the conclusion, that the Court ought not to have arrested the ship, which for many months had been in

(1) (1914) P. 218.

(2) (1916) P. 241, 243, 254.

(3) (1871) L.R. 3 P.C. 673.

the undisputed possession of a *bona fide* purchaser by public auction, on account of piratical acts alleged to have been committed from on board of her before the sale took place.

The "taint of piracy" is one requiring a thorough purge, it might well be thought, because, as Blackstone says, Vol. 4, Lewis's ed., 71:—

The crime of *piracy*, or robbery and depredation upon the high seas, is an offence against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.

It is significant that there is still one offence against the "National Character and Flag" for which Parliament has departed from its general intention above noted and continued unchanged the penalty of immediate and absolute forfeiture imposed by the Act of 1854, section 106, the present corresponding section in the Act of 1894 being 73 (3), which declares that certain specified officers may board any ship or boat on which any colours or pendant are hoisted contrary to this Act, and seize and take away the colours or pendant, and the colours or pendant shall be forfeited to Her Majesty.

And the same absolute penalty is also imposed upon emigrant ships for violation of section 319, which preserves the original provision of the Passengers Act Amendment Act 1863, cap. 51, sec. 13, and it is to be observed that a mitigating power is by subsection (2) conferred upon the Board of Trade to "release, if they think fit, any such forfeited ship on payment to the use of the Crown" of a sum not exceeding £2,000.

After giving very careful and prolonged consideration to this exceptionally difficult question in all its aspects and having special regard to the principles laid down in *Kitchen's case* (*supra*), I find myself unable to reach any other conclusion than that the present mortgagee and transferee are, as regards this forfeiture, in just as favourable a position under said subsection (2) as though they were in possession of the ship and therefore that interest should be protected in the order that should be made under section 76.

If the ship were before the Court that order would, under present circumstances, take the form that she should be

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“adjudged with her tackle, apparel, and furniture to be forfeited to His Majesty” to the extent of the interest therein of said Manuel Purdy, but with the necessary addition (in pursuance of the subsequent and further power to “make such order in the case as to the Court seems just”) of a declaratory order that the forfeited interest of said Manuel Purdy does not extend to include the interest that he as mortgagor has transferred to said Allender as mortgagee, and which is now lawfully asserted by the intervener on Allender’s behalf, to the amount and extent of the principal and interest now due under the mortgage.

Though the result of such an adjudication in the present case would be that the declaration of forfeiture would be an empty formality, yet if this ship had sold for a larger sum, or the mortgage been for a less one, the result would have been of substantial difference.

As the matter now stands, the only order that can appropriately be made is that the balance of the proceeds of the sale of the ship, now in Court in lieu of her, be paid out to the intervener to be applied in reduction of said mortgage.

There only remains for consideration the said claim for forfeiture under section 69 because Purdy “used the British flag and assumed the British national character on board a ship owned” by him “for the purpose of making the ship appear to be a British ship,” though he was “not qualified to own” her. No evidence was given in support of this charge other than the bare fact that Purdy had got himself registered as a British owner by fraudulent means under said subsection (2), but it was submitted that this is sufficient to establish a constructive use and assumption of flag and character for the prohibited purpose.

These submissions extend the section to great, and, I think, in the absence of any authority, unwarranted length, because it is directed obviously, to my mind, to matters occurring “on board a ship” and of such a kind as to “make the ship appear to be a British ship” as the result of something done “on board” of her in the course of her use as a ship, and not something done in a registry in relation to the “Procedure for Registration” for her—section 4 *et seq.*—and confirmation for this practical view is

to be found in the section itself, in the proviso justifying the use for another "purpose" viz:—

unless the assumption has been made for the purpose of escaping capture by an enemy or by a foreign ship of war in the exercise of some belligerent right.

The only case I have found of a forfeiture on this section is *The Queen v. Schooner S. G. Marshall* (1) but no exposition of the section was there attempted because it was unnecessary to do so since the ship was seized at sea after she had "hoisted the British ensign"—(p. 318).

It follows that this charge must be dismissed.

With respect to costs, leave is given to speak to them, and also to the exact form in which this judgment should be entered.

Judgment accordingly.

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 THE KING
 v.
 Emma K.
 Martin
 D.J.A.