

NEW BRUNSWICK ADMIRALTY DISTRICT

WALTER H. MARQUIS.....PLAINTIFF;

vs.

THE SHIP ASTORIA.....DEFENDANT.

1930
Dec. 17.
Nov. 29.

Shipping—Claim for necessaries—Mortgagee—Priority of Mortgagee

The vessel *Astoria* was an American vessel on which H. and E. Holding Company Inc., of New York held a mortgage. Messrs Baker, Carver & Morrell, Inc., of Connecticut had furnished certain necessaries to the vessel, for which the laws of the United States gave a maritime lien. The vessel was subsequently libelled and sold in New Brunswick, Canada, and the proceeds of the sale were deposited in Court for subsequent distribution. The mortgagee appeared and claimed that his mortgage should be preferred to the claim of materialmen.

Held, that, though by English law a maritime lien created by a foreign law, under circumstances which do not give rise to a maritime lien according to English law, is recognized; the priority which it will be given in the distribution of proceeds is treated as relating only to the remedy determined by the law of the form at which the vessel is libelled and sold, the mortgage should be preferred to the claims of the materialman.

APPLICATION of plaintiff for an order for payment out of Court of the proceeds of the sale the defendant ship, and for the purpose of establishing the order of priority in which claims against the ship should be paid.

(1) (1893) 2 Q.B.D. 212.

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The application was heard before the Honourable Sir Douglas Hazen, Local Judge in Admiralty for the New Brunswick Admiralty District, at Saint John.

W. H. Harrison, K.C., for the Mortgagee (H. & E. Holding Company).

J. H. A. L. Fairweather, for the material men (Baker, Carver & Morrell, Inc.).

Harrison, K.C., argued that claimants for necessities in the ordinary way are postponed to the mortgagee. Mayers Admiralty, 87; *The Two Ellens* (1); *The Henrich Bjorn* (2).

All questions as to priority of claims are determined by the *lex fori*, nor is this affected by a foreign statute purporting to give a materialman a maritime lien. *The Union* (3); *The Colorado* (4); *The Tagus* (5).

The only remedy for a materialman is an action under the Act of 1840, or the act of 1861, which gives a lien dated from the institution of the action.

The Strandhill v. Walter H. Hodder Co. (6); Newcombe J. at p 809; *The Henrich Bjorn* (7). That *Baker, Carver & Morrell, Inc. v. The Astoria*, and *The Strandhill* made no decision on the priorities. Newcombe J. in *The Strandhill* at p. 808:

The case, as now presented, does not involve a question of priorities as between competing creditors to be determined by the *lex fori* as in cases like *The Tagus* (5); *Clark v. Bowring* (8); *The Colorado* (4).

Nor is it claimed by way of real privilege or lien that a chose in action, depending on the law for recovery of the latter, as in the much debated decision of Dr. Lushington in *The Milford* (9). The case is concerned only with the vindication of the right claimed against the ship.

and again at P. 809:

If it should appear at the trial that subsequent interests have intervened and that conflicting priorities are to be adjudged, other considerations may arise, which have not been debated, and as to which I am careful to say that it is not my purpose at present to express any opinion.

(1) L.R. 4 P.C. 161.

(2) 11 A.C. 270.

(3) 167 E.R. 60.

(4) (1923) P. 102, at 106 and 109.

(5) (1903) P. 44.

(6) (1926) 4 D.L.R. 801.

(7) 11 A.C. 270, at p. 278.

(8) (1908) Sess. Cas. 1168.

(9) (1858) Swab. Ad. R. 362; 166 E.R. 1167.

See also vol. 25 *Harvard Law Review*, 358, citing *The Constant v. Klompus* (1), for the proposition that though international comity requires that the creation of a lien by a foreign law be recognized, the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libeled and sold. He cited *American Express Co. v. U.S.* (2). Also *Harvard Law Review*, Vol. 37, 1135; *The Oconee* (3); Horton, *Conflict of Laws*, 3rd Ed., vol. 324.

J. H. A. L. Fairweather, argued that under the Ship Mortgage Act, 1920, as enacted by Congress Statutes of the United States, vol. 41, part 1, any person furnishing necessaries shall have a maritime lien upon the vessel which may be enforced by suit in rem. In *Baker, Carver & Morrell, Inc. v. The Astoria* (4), it was decided that this court had jurisdiction to enforce the maritime lien granted by the said statute.

The question here is whether this maritime lien takes priority over the American Mortgage of H. & E. Holding Co. Inc. The mortgage was recorded four days after the last of the goods was supplied, and under American law the maritime lien for necessaries takes precedence of the mortgage. This maritime lien is something which adheres to the ship from the time the facts happened, and it must take precedence to the mortgage. He cited:

The Strandhill v. Walter H. Hodder Co. (5); *The Bold Buccleugh* (6); *The Two Ellens* (7); *The Ripon City* (8). Storey, *Conflict of Laws*, 4th Ed. 322; Roscoe's Admiralty Practice, 4th Ed. 67; Mayers Admiralty Law and Practice, 55; *Minna Craig Steamship Company v. Chartered Mercantile Bank of India* (9).

Accordingly maritime liens have precedence over statutory liens.

The Colorado (10); *City of Windsor* (11); *The Gordon Gauthier* (12); *The Mary Ann* (13); *The Feronia* (14); *The Hope* (15); *The Traders Bank and Lockwood* (16).

(1) 50 Scot. L. Rep. 27.

(2) 297 Fed. 189.

(3) 280 Fed. 927.

(4) (1927) 4 D.L.R. 1022.

(5) (1926) 4 D.L.R. 801.

(6) (1851) 7 Moo. P.C. 267.

(7) (1872) L.R. 4 P.C. 161.

(8) (1897) P.D. 226.

(9) (1897) 1 Q.B. 460.

(10) (1923) L.R. P. 102.

(11) (1895) 4 Ex. C.R. 400.

(12) (1895) 4 Ex. C.R. 354.

(13) L.R. 1 A. & E. 8.

(14) L.R. 2 A. & E. 65.

(15) (1873) 28 L.T. 287.

(16) 48 S.C.R. 593.

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The facts and questions of law raised are stated above and in the Reasons for Judgment.

Sir DOUGLAS HAZEN, L.J.A., now (December 13, 1930) delivered the following judgment.

In answer to a summons dated the 16th day of December, A.D. 1926, the parties concerned attended before me on November 29 last at my chambers, on the hearing of an application of the plaintiff for an order for the payment out of court of the proceeds of the ship *Astoria*. The application was for the purpose of establishing the order of priority in which claims against the ship should be paid.

The fund in court remaining of the proceeds of the sale of the ship amounts to less than \$5,000, and the claims against the ship amount to over \$19,000, and the main question involved is as to whether or not the maritime lien of Baker, Carver & Morrell takes priority over the American mortgage of H. & E. Holding Company, Incorporated. The mortgage was recorded in July, 1926. It was claimed by counsel on behalf of the mortgagee that the mortgage ranks ahead of necessities supplied anywhere, and Mr. Fairweather, of counsel for those supplying the necessities, admitted that mortgages come ahead of necessities under the English practice, but that a mortgage has no priority over a maritime lien for necessities, and it was claimed that there was no such a thing in this jurisdiction as a maritime lien for necessities. However the evidence is to the effect that the vessel left an American port with an American lien attaching to it, and came to Canada where the lien continued, and where the vessel was sold. It was claimed that the only authority in a British Admiralty Court to deal with a claim for necessities is to be found in the Acts of 1840 and 1861, and that the only remedy given a necessities man by British law is the remedy to be found in those Acts, viz., a right to sue in rem, or as it is called, a statutory lien dating from the institution of the action. In the case of *Baker, Carver & Morrell* (1), it was held that the Admiralty Court has jurisdiction under the Act of 1861, and the decision in that case was to the effect that the Exchequer Court of Canada had jurisdiction to enforce a maritime lien properly granted by a foreign statute.

(1) (1927) 4 D.L.R. 1022.

In Myers' Admiralty (1916), p. 87, I find it stated in regard to priority—

As no maritime lien is conferred by these sections the dates at which the rights of the material men are ascertained with regard to competing claims is the date of the institution of the suit. All liens, therefore, whether maritime or possessory, which have attached prior to that date and are still in force, are entitled to preference over the claims of the material man; and not only liens but all other valid charges on the ship existing at that date. Therefore a registered mortgagee takes precedence of claims for necessities for equipment, under these sections, in cases where the registration of the mortgage is prior to the institution of the suit in which the claim is made, although it may be subsequent to the supplying of the necessities. And in support of this a number of cases are cited.

It was open to the parties supplying the necessities and who have established claims in reference thereto, to have ascertained previous to doing so that a mortgage existed against the ship, and had they taken the necessary steps to so ascertain they could, by refusing to give credit, have saved themselves any loss which has been incurred, and it would seem an act of injustice if they should be given preference over the mortgagee who had lent his money on the strength of the security afforded by the ship.

In an article in No. 4, Vol. 26 of the Harvard Law Review, of February, 1913, at p. 358, under the heading of *What Governs Maritime Liens* I find the following—

It seems clear that the creation of the lien must be governed by the law of the place where the vessel is situated when the services are rendered (*The Scotia*). Thus if an English vessel is supplied with necessities in an American or French port and libelled in the United States, the material man's lien is upheld. Conversely, it is submitted that for supplies furnished an English vessel in an English port no lien should be recognized even though the vessel were libelled in the United States. The creation of liens for service on the high seas, as for seamen's wages, is on the same theory, governed by the law of the ship's flag. But though international comity requires that the creation of a lien by a foreign flag be recognized, the priority which it will be given in the distribution of proceeds is adjusted by the law of the forum at which the vessel is libelled and sold. Thus in the recent case where a Russian ship mortgaged in England was libelled and sold in Scotland, the law of the forum was applied and the English mortgagee preferred to an intervening Danish material man. In support of this is cited the case of *Constant v. Klompus* (1).

From a note to the article at p. 358 I quote—

It might be contended that the essential right of a maritime lien is that it gives a vested right superior to all prior and non-maritime interests and that to postpone it to a mortgage is to refuse to recognize its existence. The foreign Sovereign, though he may pass a valid title to a ship

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even in assignment proceedings, as in *Castrique v. Imbrie* (1), has not jurisdiction to give a qualified interest which will forbid the sale of a ship in another forum later acquiring jurisdiction, or specify how the proceeds arising in that forum shall be distributed. Elsewhere the lien need only be regarded as giving such rights as the creating Sovereign had jurisdiction to grant, viz., a claim against the vessel for which the Sovereign of the forum may furnish such a remedy as he sees fit. It is submitted, however, that the only relief given a material man in the English Admiralty Act is grossly inadequate.

I concur in the conclusions come to by the author of the article in question, and can see no reason why the claim of the mortgagee should be postponed to that of the necessaries man, in view of the practice that has hitherto prevailed. It is laid down that the question of priority of liens is treated as relating only to the remedy determined by the law of the forum. See Wharton's *Conflict of Laws*, 3rd Ed., p. 324.

So far as the main question in the present application is involved, I am of opinion that the mortgagee takes preference over those who have claims for necessaries, and the order of preference will therefore be as follows:

1. Registrar and marshal's fees and expenses.
2. Costs of Walter H. Marquis of arrest and bringing fund into court.
3. Costs of Alexander McLennahan for the first arrest.
4. Wages of seamen.
5. Wages of Captain.
6. Mortgage as to 60/64 H. & E. Holding Company, Incorporated.
7. Necessaries.

I understand that the costs of Marquis and McLennahan, the seamen's wages and the wages of the mate and Captain have already been paid, so that the balance of the funds remaining will have to be applied to the payment of the mortgage claim, after payment of the Registrar and marshal's fees.

Judgment accordingly.

(1) 4th H.L. Cases, 414.