

1893

[IN ADMIRALTY.

Jan. 9. JONAS BERGMAN..... PLAINTIFF.

AGAINST

THE SHIP *AURORA*.

*Maritime law—Master's lien—Inland waters—R.S.C. cc. 74 and 75—
The Colonial Courts of Admiralty Act, 1890—The Admiralty Act,
1891—Construction.*

The master of a vessel registered at the Port of Winnipeg and trading upon Lake Winnipeg had, in the years 1888, 1889 and 1890, no lien upon the vessel for wages earned by him as such master.

2. Even if such a lien were held to exist, there was in the years mentioned no court in the Province of Manitoba in which it could have been enforced; and it could not now be enforced under *The Colonial Courts of Admiralty Act, 1890*, (53-54 Vic. (U. K.) c. 27) or *The Admiralty Act, 1891*, (54-55 Vic. (D.C.) c. 29) because to give those statutes a retroactive effect in such a case as this would be an interference with the rights of the parties.

ACTION to enforce a maritime lien for wages earned by the master of a ship plying on certain inland waters of Canada.

The case was heard at Winnipeg on the 14th and 16th September, 1892.

The facts of the case are stated in the reasons for judgment.

Wade, (with whom was *Wheeler*) for the plaintiff cited: *The Merchant Shipping Act, 1854* (1); *The Eagle* (2); *Jackson v. The Magnolia* (3); *Nelson v. Leland* (4); *Reg. v. Sharp* (5); *Rajah of Cochin* (6); *The Tug Royal* (7); *The Tug Maytham* (8); *The Colonial Courts of Admiralty Act, (U. K.) 1890*; *The Admiralty Act, 1891*,

(1) Secs. 61, 109, 191, 547.

(2) 8 Wall. 15.

(3) 20 How. 296.

(4) 22 How. 48.

(5) 5 Pr. R. (Ont.) 135.

(6) Swab. 473.

(7) 19 C. L. J. 165.

(8) 18 C. L. J. 287.

(1); 48 Vic. (Man.) c. 15 (2); *The B. N. A. Act* (3); *In re Australian Direct Steam Navigation Company* (4); *The Ironsides* (5); *Reg. v. Birwistle* (6); *Endlich on Statutes* (7); *The Alexander Larsen* (8); and 51 Vic. c. 33.

Darby, for the creditors of the insolvent owners, cited *Williams & Bruce's Adm. Prac.* (9); *The Freedom* (10); *The Nellie Schneider* (11).

Mather, for the liquidators, cites *The Feronia* (12); *The Kate Moffat* (13); *Reg. v. Taylor* (14); *Scott v. Carveth* (15); *The Aura* (16); *Tarring's Law of the Colonies* (17); *re Lake Winnipeg Transportation Co. (Ltd.)* (18); *The Sara* (19); *The Rio Tinto* (20); R.S.C. c. 129, s. 66.

Wade, in reply, cites *re Lake Winnipeg Transportation Co. (Ltd.)* (21); *The Lord Bishop of Natal*. (22); *Brown's Admiralty Practice* (23); *Pritchard's Ad. Dig.* (24); *The Bilbao* (25); *The Louisa* (26); *The W. B. Hall* (27).

BURBIDGE, J. now (January 9th, 1893) delivered judgment.

The plaintiff is seeking to enforce a master's lien for wages which he thinks he has against the steamship *Aurora*, registered at the Port of Winnipeg. The

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| (1) Sec. 6. | (14) 1 Can. S.C.R. 65. |
| (2) Secs. 6 & 92. | (15) 20 U.C. Q.B. 430. |
| (3) Sec. 146. | (16) Young's A.D. 54. |
| (4) L.R. 20 Eq. 325. | (17) P. 81. |
| (5) 31 L.J. Pr. M. & Ad. 129. | (18) 2 W.L.T. 155. |
| (6) 58 L. J. Mag. C. 158. | (19) 14 App. Cas. 209. |
| (7) P. 286. | (20) 9 App. Cas. 356. |
| (8) 1 Wm. Rob. 295. | (21) 3 W.L.T. 108. |
| (9) P. 304. | (22) 3 Moo. P. C., N.S. 115. |
| (10) 4 L.R. Ad. & Ecc. 495. | (23) P. 80. |
| (11) L.R. 3 P. D. 155. | (24) P. 521. |
| (12) 17 L. T. N. S. 621. | (25) 3 L. T. N. S. 338. |
| (13) 15 C. L. J. 284. | (26) 9 Jur. N.S. 676. |
| | (27) 8 C. L. T. 169. |

1893 - *Aurora* was owned by the Lake Winnipeg Transportation, Lumber and Trading Company, and was, in the years 1888, 1889 and 1890, engaged in carrying passengers and freight between the Town of Selkirk on the Red River in the Province of Manitoba and Bad Throat River on Lake Winnipeg in the said Province, and has also carried freight and passengers to Old Norway House in the District of Keewatin and to the Hudson's Bay Company's post at Grand Rapids in the District of Saskatchewan, in the North West Territories, and has not been employed otherwise or elsewhere. The plaintiff was, during the period of navigation of Lake Winnipeg in the years 1888, 1889 and 1890, employed as master of the *Aurora*, and there is due to him for wages earned, as such master, the sum of five hundred and six dollars and interest. The steamer is subject to a mortgage for six thousand dollars, and the company is being wound up under an order made on the 2nd February, 1891, pursuant to the provisions of *The Winding Up Act* (1) and amendments. There is a large number of unsecured creditors of the company, and the assets are not sufficient to pay them in full. The plaintiff sought in the winding-up proceedings to set up a lien against the ship for his wages, and the learned Chief Justice of the Court of Queen's Bench for the Province of Manitoba, although by no means satisfied that such a lien existed, gave him leave to proceed in this court against the steamer. On the 30th day of April, 1892, he sued out of this court a writ of summons against "the owners and all others interested in the ship or vessel *Aurora* of the Port of Winnipeg, in the Province of Manitoba." The company appeared and they and the plaintiff have filed a statement of facts upon which, and some evidence taken at the hearing, the case has been argued by counsel for the

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(1) R.S.C. c. 129.

plaintiff, for the liquidators of the company and, by direction of the Chief Justice, for the creditors of the company. The mortgagees were not represented, and no warrant has been issued against the steamship, which at the time of the hearing was lying at the Town of Selkirk, on the Red River in the said Province.

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The principal question to be determined is as to whether or not the master of a vessel, registered at the Port of Winnipeg, and trading upon Lake Winnipeg, had, in the years 1888, 1889 and 1890, any lien upon the vessel for wages earned by him as such master. It is well settled that apart from statute the master of a British ship has no lien thereon for wages earned on board of the ship. The lien was first given by the Act of the Parliament of the United Kingdom 7-8 Victoria, chapter 112, by the 16th section of which it was provided that all rights, liens, privileges and remedies (save such remedies as were against the master himself) which by that Act or by any law statute custom, or usage, belonged to any seaman or mariner, not being a master-mariner, in respect of the recovery of his wages, should, in the case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to masters of ships or master-mariners in respect of the recovery of wages due to them from the owner of any ship belonging to any of her Majesty's subjects. The Act 7-8 Victoria, chapter 112, was repealed by 17-18 Vic. c. 120. By the 191st section of *The Merchant Shipping Act, 1854* (1), passed in the same session as the repealing Act referred to, it was in general terms provided that every master of a ship should, so far as the case permitted, have the same rights, liens and remedies for the recovery of his wages, which by that Act or by any law or custom any sea-

(1) 17-18 Vic. c. 104.

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man, not being a master, had for the recovery of his wages. *The Merchant Shipping Act, 1854*, is divided into several parts, for which different rules of application are prescribed. For instance *Part II*, relating to the ownership, measurement and registry of British ships, applies to the whole of Her Majesty's dominions, while *Part V*, relating to pilotage, applies to the United Kingdom only.

By the 109th section of the Act it is among other things provided that the third part of the Act, in which section 191 occurs, shall, with certain exceptions that are not material, apply 1st. to all sea-going ships registered in the United Kingdom, and 2ndly. to all ships registered in any British possessions and employed in trading or going between any place in the United Kingdom and any place or places not situate in the Possession in which such ships are registered and to the owners, masters and crews of such ships respectively wherever the same may be. It is also provided by the same section that so much of the third part of the Act as relates to wages and remedies for the recovery thereof shall apply to all ships registered in any of Her Majesty's dominions abroad when such ships are out of the jurisdiction of their respective Governments. By *The Admiralty Act, 1861* (1) the High Court of Admiralty, and by *The Vice-Admiralty Courts Act, 1863*, (2) repealed by 53-54 Vic. c. 27, the courts of Vice-Admiralty were given jurisdiction for claims for a master's wages and for his disbursements on account of the ship. But while these statutes gave jurisdiction they did not create or give maritime liens (3). The law as to a master's lien for

(1) 24 Vic. c. 10 s. 10.

App. Cas. 270. *The Sara* L. R. 14

(2) 26 Vic. c. 24 s. 10 (2.)

App. Cas. 209. See also as to disbursements 52 & 53 Vic. (U.K.) c.

(3) *The Rio Tinto* (L. R. 9 App. Cas. 356). *The Heinrich Björn* L.

46 s. 1.

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wages is, in Canada, supplemented by the 59th section of *The Seamen's Act* (1) by which it is provided that every master of a ship registered in any of the Provinces of Quebec, Nova Scotia, New Brunswick, Prince Edward Island and British Columbia shall, so far as the case permits, have the same rights, liens and remedies for the recovery of his wages which by that Act or by any law or custom any seaman, not being a master, has for the recovery of his wages. There is no such provision in *The Inland Waters Seamen's Act* (2) by which the shipping of seamen in the inland waters of Canada and the remedies for wages are regulated.

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Now, for the plaintiff it was contended that the 91st section of *The Merchant Shipping Act*, 1854, was in force in the Province of Manitoba. It was said that it was so in force by virtue of its own provisions, or failing that, by reason of the Act of the Parliament of Canada, 51 Victoria, chapter 33, by which it is enacted that the laws of England relating to matters within the jurisdiction of the Parliament of Canada, as the same existed on the 15th day of July, 1870, were from the said day and are in force in the Province of Manitoba in so far as the same are applicable to the said province and have not been affected by any Act of the Parliament of the United Kingdom or of Canada. It was also contended that the 191st section of the Act should be read without the limitations to be found in the 109th section; to which reference has been made. And it is obvious that unless the plaintiff can make good both contentions his case fails. For admitting that the provisions of the Act relating to the rights to wages and remedies for the recovery of the same were, in the years 1888, 1889 and 1890, in force in Manitoba, it is clear that the plaintiff's case is not within the statute if the application of the 191st section is to be limited

(1) R. S. C. c. 74.

(2) R. S. C. c. 75.

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by the 109th section. The *Aurora* was registered at Winnipeg and was never out of the jurisdiction of its Government. Mr. Wade's contention that the 191st section of the Act is to be given a wider and more general construction than one would at first suppose from reading it with the 109th section is supported by the opinion of Dr. Lushington in the cases of *The Milford* (1), and *The Jonathan Goodhue* (2), that the section extended to the masters of foreign ships and gave them a remedy against ship and freight for their wages. Speaking, in the case of *The Milford* (1), of the contention that the 109th section of the Act restrained the application of section 191 to certain classes of vessels therein named, he said :

The language there used, however, is affirmative, stating the cases to which the third part of the Act shall extend ; there are no negative words which tend to show that the court should not apply section 191 to foreign masters and seamen. As there are no such words is it consistent with justice that the court should hold its hand in all these matters, and say that as to foreign masters it will impose a restriction not found in the statute ?

Now I cannot but think that Dr. Lushington made too little of the 109th section of the Act. The master's lien for wages was the creation of the statute. Affirmative words were necessary to create it. Negative words were not necessary to limit its application. It is for the legislature to say in what cases it should exist, and I should have thought that it was consistent with justice for a court enforcing such a lien to hold its hand when it had gone as far as the legislature had seen fit to go. I am speaking now only of the maritime lien, not of the jurisdiction of the courts of Admiralty over claims for master's wages, which is a different matter and exists as we have seen by virtue of other statutes. So far as *The Merchant Shipping Act*, 1854, is concerned I do not find in its provisions any

(1) Swab. 367.

(2) Swab. 526.

warrant for the proposition that the master of a ship registered in the Province of Manitoba and trading on Lake Winnipeg had a lien for his wages earned on such ship.

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Assuming, however, that section 191 should be construed without reference to the 109th section of the Act, and that in 1870 the master of any ship had by the law of England a lien on the ship for his wages, was that law introduced into the Province of Manitoba by the Act 51 Victoria, chapter 33? As to that it is clear that the subject of a master's lien for wages is within the legislative authority of the Parliament of Canada, and it must, I think, be conceded that such a law would be applicable to the general circumstances and conditions of the people of that province and to the navigation of Lake Winnipeg and the Red River. In respect to that aspect of the case I have no hesitation in agreeing with Mr. Wade, whose argument is supported by the case of *The Genesee Chief* (1), and other authorities to which he referred. The question is, it seems to me, concluded in this court by the Act of Parliament conferring upon it Admiralty jurisdiction throughout all navigable waters of Canada, whether tidal or non-tidal, or naturally navigable or artificially made so (54-55 Vic. c. 29 s. 4). There were, however, in 1888, two difficulties in the way of applying such a law to Manitoba. In the first place the Parliament of Canada had within a few years dealt with the subject of the shipping of seamen on the inland waters of the Dominion, their engagement and remedies for wages, and had given no lien to the master for his wages, although such a lien existed in respect to vessels registered in the provinces adjacent to the sea (2). And I should hesitate to hold that by the general language of the Act of 1888, 51

(1) 12 How. 443.

(2) R.S.C. cc. 74-75.

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Vic. c. 33, Parliament had intended to make a change in the law of the Province of Manitoba relating to a master's remedies for his wages, which a few years before when dealing with the subject, it had refrained from making.

In the second place, there was at the time no court capable of exercising Admiralty jurisdiction in the Province, and of enforcing a maritime lien against the ship. In that sense the law of the master's lien for wages was not at the time applicable to the Province. To borrow an illustration from the criminal law, there was no reason why incest or adultery should not, in Canada, have been punishable as offences against the law of England applicable thereto except that there were in Canada no courts in which the offender could be punished, the ecclesiastical law of England not being in force in the colonies. (*In re The Lord Bishop of Natal*) (1).

As there were in the colonies no courts to enforce the law against the offences mentioned, the law was held not to be applicable to the colonies, so, I take it, that as in 1888 there was in Manitoba no court having Admiralty jurisdiction, the law of England respecting maritime liens was not applicable to that Province and was not introduced by the Act 51st Vic. chapter 33. For these reasons I am of opinion that the plaintiff had no lien upon the *Aurora* for the wages earned by him as master of that vessel.

I do not understand the plaintiff to desire the judgment of the court against the owners for the amount admitted to be due to him. There is no question as to that, and he has proved his claim in the winding-proceedings.

The object of this suit was to determine the question of his lien against the ship. And the view I have

(1) 3 Moo. P. C. N. S. 115.

taken of that subject makes it unnecessary to discuss the question of the Admiralty jurisdiction of the court, or the limits within which it might be exercised, in respect to a cause of action arising in the Province of Manitoba before the first of July or the second of October, 1891, when *The Colonial Courts of Admiralty Act*, 1890, and *The Admiralty Act*, 1891, respectively, came into force. I may add, however, that in giving a retrospective effect to statutes relating to procedure, which constitute an exception to the general rule that statutes are to be construed prospectively, care must be taken not to interfere with substantial rights; and it is, I think, tolerably certain that to enforce a lien, not enforceable at the time the cause of action arose, would, in such a case as this, be an interference with the rights of parties.

I am also relieved of the necessity of considering whether or not the facts that the *Aurora* is in the possession of the liquidator of the company, and that the mortgagees are not before the court, would have stood in the way of enforcing the master's lien if it had been found to exist. Under all the circumstances of the case I am not inclined to give costs to either party, but that matter, and the question of the plaintiff's right to a judgment against the owners of the vessel for the amount due to him, may, if either party desires it, be reserved.

Judgment accordingly.

Solicitors for plaintiff: *Wade & Wheeler.*

Solicitor for owners: *G. H. West.*

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