

1895
 Feb. 16.

TORONTO ADMIRALTY DISTRICT.

GEORGE SYLVESTER.....PLAINTIFF;

AGAINST

THE SHIP "*GORDON GAUTHIER.*"

*Maritime lien—Seaman's wages—The Maritime Court Act, s. 14 ss. 5—
 Mortgagee in possession—Subsequent purchaser—Rights of lien-holder.*

The mortgagee of a ship who takes possession under his mortgage before the institution of an action *in rem* for the recovery of a claim which constitutes a maritime lien, does not thereby become a 'subsequent purchaser,' within the meaning of subsection 5 of section 14 of *The Maritime Court Act*, as against the lien-holder although the lien may have arisen since the date of the mortgage.

2. In such an action the lien-holder is preferred to the mortgagee.

ACTION *in rem* for the recovery of seaman's wages.

The facts of the case and the arguments of counsel 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 22nd day of January, A.D. 1895..

Messrs. *Caniff & Caniff* for the plaintiff;

Mr. *Fleming* (Windsor) and Mr. *Howell* (Toronto) for the Third National Bank, interveners.

McDOUGALL, L. J. now (February 16, 1895) delivered judgment:

This is an action for seaman's wages. The services were rendered by the plaintiff in the seasons of 1893 and 1894. The action was commenced on the 5th December, 1884, and the ship arrested. There is no doubt that the plaintiff had a maritime lien for these wages.

On the 23rd November, 1886, Charles W. Gauthier, the then owner of the vessel, mortgaged the ship to Milton H. Butler and others to secure the re-payment of the sum of ten thousand dollars. This mortgage was registered on the 2nd of December, 1886, at Windsor, the port of the registry of the ship. On the 16th May, 1890, by an assignment endorsed on the mortgage, Butler *et al*, mortgagees, assigned the above described mortgage to S. T. Reeves. This assignment was recorded at Windsor on the 31st March, 1891. On the 4th October, 1892, S. T. Reeves assigned his interest in the said mortgage for a recited consideration (no amount named) to the Third National Bank of Detroit. This latter assignment was not recorded, however, at the Custom House at Windsor until the 25th January, 1895. On the 19th of June, 1894, Charles W. Gauthier the registered owner of the ship, transferred his title to Stephen J. Reeves by bill of sale of that date recorded 22nd June (no year named in the Registrar's certificate) and there does not appear to have been any declaration of ownership filed pursuant to *The Merchant Shipping Act*, sections 56 and 57.

1895
 SYLVESTER
 v.
 THE SHIP
 GORDON
 GAUTHIER.
 Reasons
 for
 Judgment.

In May, 1894, S. T. Reeves got an extension of time by deed from his creditors conditioned on his agreeing to transfer all his estate to Oscar E. Fleming as trustee for his creditors. The estate enumerated in the extension deed included the ship *Gordon Gauthier*, which was not at that date registered in Reeve's name as owner although it is probable that at the said date he was entitled to a conveyance from Gauthier of the said ship.

On the 4th August, 1894, Stephen J. Reeves, by bill of sale pursuant to the arrangement made with his creditors in the extension deed, transferred the "Gordon Gauthier" to Oscar E. Fleming. This bill of sale was recorded on the 4th September, 1894.

1895
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 SYLVESTER  
 v.  
 THE SHIP  
 GORDON  
 GAUTHIER.  
 ———  
 Reasons  
 for  
 Judgment.  
 ———

There appears to be no declaration of ownership pursuant to sections 56 and 57 in the Act either registered or filed in this case.

On the 27th December, the Third National Bank intervened as defendants in this action, appearing by Oscar E. Fleming, their solicitor. And on the same day, Oscar E. Fleming the trustee of Reeves' estate intervened as a defendant, his appearance being signed by E. S. Wigle, his solicitor.

The defendant Oscar E. Fleming sets up as his defence that he knows nothing of the plaintiff's claim and says that he relies on his bill of sale, 4th August, 1894, and also claims the benefit and protection of subsections 5 and 6 of section 14 of *The Maritime Court Act* as preserved by section 23, subsection 4, of *The Admiralty Act*, 1891.

The defendants, the Third National Bank, set up the defence that they know nothing of the plaintiff's claim, but claim to be entitled to the said ship in priority to the plaintiff by virtue of being assignees of the mortgage dated the 23rd November, 1886, the assignment to them before this action was commenced, and they also claim the benefit of subsections 5 and 6 of section 14 of *The Maritime Court Act*, as preserved by section 23 of *The Admiralty Act*, 1891.

The plaintiff's claim as set out in his statement of claim is that Reeves was either the owner or mortgagee in possession or agent for the owner or mortgagee in 1893, and that he was employed by the said Reeves to act as engineer for the season of 1893, and in his statement of claim he sets out the terms of his hiring. He avers that there was a balance due to him for the year's wages of \$175 and interest. He further claims a balance of \$60 for the season of 1894, when, as he states, he was also engaged by Reeves as engineer for that year upon the said ship.

The defendants admit that the plaintiff has a claim against the owner for two hundred and thirty-five dollars for balance of wages in respect of the seasons of 1893 and 1894, and admit that if he has a maritime lien against the vessel superior to the claims of the intervening defendants, the judgment should be for two hundred and thirty-five dollars; and the plaintiff is willing to take a judgment for this amount if he is entitled to recover.

1895  
 SYLVESTER  
 v.  
 THE SHIP  
 GORDON  
 GAUTHIER.  
 Reasons  
 for  
 Judgment.

The defendant Fleming admits that he is only a trustee for the creditors of Reeves, and that he has no title otherwise than as such trustee to claim to be the owner of the ship. An assignee or a trustee for the benefit of creditors is in the same position as the debtor himself and can only claim such rights as the debtor was legally entitled to at the date of the execution of his deed of trust (1). Reeves, it appears, was the real owner of the vessel in 1893-94, though he only procured his bill of sale from Charles Gauthier in June, 1894. The plaintiff was clearly entitled to his lien against the vessel for his wages as against Reeves or the true owner of the ship at the date of the assignment to Fleming for the benefit of his (Reeve's) creditors. Fleming can only make claim to the ownership of the ship subject to this lien, because he has no higher or better title than Reeves, the debtor, had (2).

The plaintiff further avers that the bill of sale to Fleming was never properly registered pursuant to *The Merchant Shipping Act*, nor was any actual possession of the vessel taken by Fleming. I think beyond all question the defendant Fleming cannot claim the position of a *bonâ fide* purchaser within the meaning of section 14 of *The Maritime Court Act*, subsection 5.

(1) *McMaster v. Clure* 7 Gr. 550. (2) See *Collver v. Shaw*, 19 Grant 599; *Robinson v. Cook*, 6 O. R. 590.

1895  
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 SYLVESTER
 v.
 THE SHIP
 GORDON
 GAUTHIER.

Reasons
 for
 Judgment.

As to the contention of the Third National Bank that they are mortgagees in possession, this, from the evidence, does not appear to be the fact. The mortgagees according to Mr. Petzold, who was examined on their behalf, were not in possession of the "Gordon Gauthier" and had not taken possession of the vessel as such mortgagees before this action was commenced. Something was said on the argument of this case that this was a mistake on the part of Mr. Petzold, and that it could be shown that the mortgagees had taken possession of the vessel some time about the 20th of November, 1894. If that be so, it is necessary to consider whether a mortgagee who has taken possession under his mortgage can be considered as a subsequent purchaser within the meaning of section 14, subsection 5 of *The Maritime Court Act*. When a ship is mortgaged and the mortgage registered according to the requirements of *The Merchant Shipping Act*, by virtue of the mortgage the property in the ship passes *primâ facie* to the mortgagee, and he is thereby the owner of the ship unless his rights as to ownership are restrained by any other part of *The Merchant Shipping Act*. Section 70 of *The Merchant Shipping Act* enacts as follows:—

A mortgagee shall not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner of such mortgaged ship or share except in so far as may be necessary for making such ship or share available as a security for the mortgage debt.

It is said in *Dickinson v. Kitchen* (1), that the true meaning and intention of the earlier part of this section is to protect a mortgagee in doing acts necessary to make the ship available as a security for his debt. To so make the ship available he may take possession of her and collect the freight, and yet by the earlier part of the section he is protected from liabilities such as

(1) 8 El. & Bl. 789.

the debts of the ship which might otherwise be urged against him as the legal owner in possession, receiving a beneficial interest. Coleridge, J. in the same case, says (1) that even a defective registration of a mortgage does not prevent the ordinary incident of a mortgage, that thereby the mortgagee is become the owner of a ship. Crompton, J. (2) in the same case says, speaking the position of the mortgagee of a ship :

1895.
 SYLVESTER
 v.
 THE SHIP
 GORDON
 GAUTHIER.
 Reasons
 for
 Judgment.

By the ordinary incident of the conveyance to him by way of mortgage, he would be owner. The question, therefore, is whether the conveyance by way of mortgage under section 66 of the statute, [*The Merchant Shipping Act*] is an ordinary mortgage. If it is, the mortgagee is thereby, by reason of such mortgage, become the owner of the ship as against a subsequent execution at the suit of a creditor. I am of the opinion that the mortgage under the statute is an ordinary mortgage with ordinary incidents. It seems to me that none of these ordinary incidents are taken away by section 70. That section was intended to protect the mortgagee taking possession of a mortgaged ship in order to make it available as a security from certain liabilities which frequently attach upon an owner of a ship in possession.

The question in this case, (*Dickinson v. Kitchen*) was as to the rights of the mortgagee of a ship against an ordinary execution creditor of the owner of a ship, and the case determined that the mortgagee's rights as owner and right to possession of the ship prevailed against an execution creditor of the registered owner, though such an owner and not the mortgagee was in possession of the ship at the time of the seizure under the writ of execution.

I refer also to the case of *Dean v. M'Ghie* (3), an earlier case under the statute of 6 Geo. IV, c. 110 where it was held that a mortgagee who had taken possession of the ship under his mortgage was liable to pay seamen's wages, and very similar words in the statute of 6 Geo. IV, c. 110, sec. 45, namely, that the mortgagee by virtue of his mortgage should not be

(1) *Ibid.* p. 799.

(2) *Ibid.* p. 800.

(3) 4 Bing. 45.

1895
 SYLVESTER
 v.
 THE SHIP
 GORDON
 GAUTHIER.

Reasons
 for
 Judgment.

deemed to be the owner of the ship were held to not prevent such mortgagee from being considered the legal owner of the ship. The effect of these cases would appear to be that the execution and registration of the mortgage constitutes the mortgagee the legal owner of the ship from the date of his mortgage, and that transferees of such mortgage will occupy the same position from the date of their respective transfers. Sec. 70 of *The Merchant Shipping Act* does not limit his common law rights or vary its incidents, but simply protects him from certain claims only which he might otherwise be liable for if treated as an owner in possession. His taking possession of the ship under his mortgage does not vary or alter his title as legal owner; it only puts him in the position to make a sale for the purpose of realizing upon his security. He can in no sense be treated or considered, in my opinion, as becoming, by the act of taking possession, a subsequent purchaser within the meaning of subsection 5 sec. 14 of *The Maritime Court Act*.

I would refer to the cases of the *Mary Ann* (1), and *The Feronia* (2), as showing that a seaman's lien for wages will rank in priority to the claim of the mortgagee; and, therefore, I find that the plaintiff's claim in this case is not superseded by the claim of the Third National Bank under their mortgage, even if before the commencement of the action they had taken possession of the ship under their mortgage, and they cannot be treated as having by the act of taking possession, become subsequent purchasers. The ninety-day limit, therefore, imposed by section 14 subsection 5 of *The Maritime Court Act*, does not prevent the plaintiff bringing his action to recover against the ship the amount of his wages in this case.

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

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

I direct that judgment be entered for the plaintiff against the said ship for the sum of two hundred and thirty-five dollars (\$235), and costs of suit and that an order for the sale of the said vessel will be made unless the said amount and costs are paid within twenty days from this date, and that the decree do not issue till the expiration of the said twenty days.

1895
SYLVESTER
v.
THE SHIP
GORDON
GAUTHIER.
Reasons
for
Judgment.

Judgment accordingly.

Solicitors for the plaintiff: *Caniff & Caniff.*

Solicitors for interveners: *O. E. Fleming and E. S.
Wigle.*