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Mar. 15.

TORONTO ADMIRALTY DISTRICT.

GEORGE ALLAN SYMES.....PLAINTIFF;

AND

THE SHIP *CITY OF WINDSOR*, THE THIRD NATIONAL BANK OF DETROIT, AND THE PENINSULAR SAVINGS BANK OF DETROIT, MORTGAGEES INTERVENING ..... DEFENDANTS.

Maritime law—Master's wages and disbursements—Lien—Statute 56 *Vict., Chap.* 24 *(Can.)—Inland waters—Seamen's Act—Mortgagees—Form of judgment.*

The master of a ship registered at Windsor, Ontario, instituted an action for wages or damages in the nature of wages for alleged wrongful dismissal, for disbursements, and liabilities incurred by him for necessaries supplied, and repairs done to the ship by persons in Ontario.

The owner did not appear but the claim was opposed by mortgagees of the ship who intervened.

During the time these liabilities were incurred by the master his means of communication with the owner were limited.

Held, that the master was entitled to a maritime lien on the ship for his wages, and as the power of communication by the master with the owner was not correspondent with the existing necessity, he was entitled to recover for disbursements properly made by him and for liabilities properly incurred by him on account of the ship.

2. *Held* that the master's claim for his wages and for disbursements were to be preferred to the mortgage.

3. *Held*, that as to liabilities properly incurred but not paid, the master's claim as to these were also to be preferred to the mortgage, but vouchers of their due payment must be filed by the master with the Registrar before the master could receive out of court sums awarded in respect of such claims.

THIS was an action by a ship-master to recover wages, damages, disbursements and liabilities incurred by him for necessaries supplied and repairs done to the

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ship by persons resident in Ontario while he was acting as master of the ship.

The owner made no defence but the mortgagees of the vessel intervened and disputed the claim of the master. The facts of the case and the arguments of counsel are fully set out in the reasons for judgment.

The trial of the case was commenced at St. Catharines on the 23rd day of November, 1894, and concluded at the city of Toronto on the 22nd and 23rd days of January, A.D. 1895.

Messrs. *Caniff & Caniff* for the plaintiffs.

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

McDOUGALL, L. J. now (March 15, 1895) delivered judgment:

This is an action *in rem* against the ship *City of Windsor* brought by the master to recover wages due him upon an alleged hiring for the season of 1894; for damages for wrongful dismissal; and for disbursements properly made by him and liabilities properly incurred by him on account of the ship during the months of April, May, June, July and August, 1894.

The ship was taken possession of by the Third National Bank as mortgagees, on the 27th August, 1894, and they now intervene as defendants. The Peninsular Savings Bank also intervene as defendants, claiming some right or interest in the same mortgage.

The *City of Windsor* is a passenger steamer registered at the port of Windsor. For some years she has been plying at or near that port. In the spring of 1894, her then registered owner, S. T. Reeves, who resided at Windsor, decided after conference with the mortgagees, the Third National Bank, to place her on the passenger route between the cities of St. Catharines and Toronto.

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The plaintiff, George A. Symes, was engaged by Mr. Reeves as master and was placed in charge of the vessel on the 13th day of April, 1894. The first duty assigned to him was to superintend the fitting out of the vessel for the proposed season's work. While the fitting out was in progress, Reeves the owner, and the master visited St. Catharines to arrange for a dock and other business details necessary for placing his passenger boat on a new route. The evidence shows that Capt. Symes was well known in St. Catharines, while Reeves the owner was an entire stranger. Capt. Symes had commanded several other vessels in former seasons, and his credit and reputation at St. Catharines was excellent. When it was known that he was to command the new passenger excursion steamer, no difficulty was experienced in making satisfactory preliminary arrangements at that port and later at Toronto, the other terminus of the route.

On the 11th day of May the *City of Windsor* started for St. Catherines, arriving there on the 13th, and the boat was at once placed on the dry-dock by the owner's orders to have her bottom scraped and several other minor repairs made. The trial trip was made on the 17th May, and the first regular trip on the 22nd May. Several rival steam-boats were running on the same route as competitors for the business. The owner during the whole season supplied little or no money for the running expenses of the boat. He was himself pecuniarily embarrassed and his own time was much occupied in managing a large fishing business carried on in Lake Huron. He stated that he expected and hoped that the *City of Windsor* would earn enough money to pay her own way. One or two small drafts drawn upon him by the master were paid, while others were protested for non-acceptance or non-payment. The owner had no agent either at St. Catharines or

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Toronto. In his letters to the master he was urging him not to draw on him for necessary outlays, but to try and meet his accounts and bills from the boat's earnings.

In the month of May the boat met with several accidents. She unshipped her rudder by striking a sunken log in the canal, necessitating her going into dry-dock. A second accident occurred through the engineer disobeying a signal, resulting in the breaking down of the gates of one of the locks of the canal. In consequence of this injury caused to the canal, the boat was tied up for some weeks by the Government. Great delay ensued in procuring bonds for the security of the Government's claim, and the boat was not released for about three weeks. The business done throughout the season was unsatisfactory. Money enough was not earned to pay running expenses and the charges for the repairs necessitated by the several casualties above alluded to. The master had to purchase coal, provisions and other necessaries for the boat on credit. Money was borrowed to pay wages and various liabilities incurred amounting in the aggregate to about $2,500, outside of the master's present claim for wages.

The master swears that he endeavoured to raise money on the credit of the owner but was unable to do so. Reeves gave the master $100 on leaving Windsor in May; $20 at another time, and paid one draft drawn on him by the master amounting to $50. Beyond this he paid nothing towards the expenditure incurred during the season.

On the 27th August, 1894, the defendants the Third National Bank, mortgagees, sent their agent, Mr. Petzold, to Toronto, and he took possession of the boat in their name. The seamen and master were paid up to that date, and the boat was laid up for the balance of the season.

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On the 31st day of August, the master commenced the present action for his own claim and for the amount of the various debts which he had incurred on account of the ship. Nearly all the creditors were examined and detailed the circumstances under which they supplied the goods to the steamer. A large number swear that they supplied the goods they charge for solely on the credit of the master with whom they were personally acquainted, and state the fact that as they were totally unacquainted with the owner they did not credit him. Others declare that they supplied the goods on the joint credit of the ship and the master, and a few admitted that they did not look to the master but had supplied the goods in the usual course of their business to the ship, charging the account to the *City of Windsor* on their books. The master gave notes of acceptance for some of the accounts and in a few other cases acknowledgements or agreements to be personally responsible for the charges. The *City of Windsor* made two or three excursions trips during the time she was plying on Lake Ontario, to American ports, but with these exceptions made all her trips between Canadian ports.

The Third National Bank and the Peninsular Savings Bank who also intervene as defendants, occupy this position with reference to their mortgages: Reeves the owner of the vessel, on the 1st December, 1891, executed a mortgage to the Third National Bank, for $9,000; in January, 1893, Reeves executed another mortgage to the Third National Bank for $17,500, as security for certain advances made to him, as appears from the evidence, and to cover any outstanding balance of account due by Reeves to the Bank. The Third National Bank is at present in liquidation, but it is alleged, assigned the indebtedness covered by the mortgages to the Peninsular Savings Bank as security for certain advances

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made by them to the Third National Bank. The mortgages themselves were not assigned. It is admitted that there is due and unpaid in respect of all these mortgages as against the *City of Windsor* about $9,700. Beyond this amount Mr. Hudson, the Receiver of the Third National Bank, made an advance of about $600 to Reeves, the owner, to enable him to fit out the *City of Windsor* in the spring of 1894, and was a consenting party as representing the bank, to the placing of the boat on the Toronto and St. Catharines route. The Receiver also advanced further, about $1,700 on the 27th August, 1894, to pay off the crew and certain claims then settled; they contend that these advances should be treated as covered by these mortgages. Mr. Petzold, his agent, took possession of the boat under their mortgage on the latter date.

One question arises in this action which it is necessary to decide before entering upon any consideration of the various liabilities alleged to have been incurred by the master on account of the ship, and before I deal with his own personal claim for wages:—Is the plaintiff entitled to a maritime lien on the said ship for the liabilities alleged to have been incurred by him as master?

By 56 Vict. (Dom.) cap. 24, entitled *An Act to amend the Inland Water Seamen's Act*, assented to on April 1st, 1893, it is provided by sec. 35 (*a*) as follows:—

> 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; and if in any proceeding in any court possessing Admiralty jurisdiction in any of the said provinces touching the claim of a master to wages, any right of set off or counter-claim is set up, such court may enter into and adjudicate all questions and settle all accounts then arising or outstanding and un-

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settled between the parties to the proceeding, and may direct payment of any balance which is found to be due.

The section above quoted is practically a transcript of the Imperial statute 52–53 Vict., cap. 46, sec. 1, and the courts in Canada are aided in construing its provisions by several very recent English decisions upon the section defining its legal effect and meaning. The first is *Morgan* v. *The Castlegate Steamship Co.* (1) and the *Orienta* (2), as qualified by the judgment of the Court of Appeal (3). The Imperial Statute of 1889 was passed immediately after the decision of the House of Lords in the case of the *Sara* (4), and in consequence of such decision. The effect of the decision in the *Sara* was to hold that the provisions of the Admiralty Court Act 1861, did not give a master a maritime lien on the ship for disbursements or liabilities incurred by him. The contrary of this had been held in a long series of cases, commencing with the *Mary Ann* (5), decided in 1865, and ending with the *Sara* in the court below, until the latter case was reviewed in the House of Lords when all the prior decisions were declared unsound and the judgment of the court below in the case of the *Sara* reversed. In the previous cases of the *Chieftain* (6), and the *Edwin* (7), it was held that the maritime lien then thought to exist in favour of a master for disbursements extended only to moneys actually paid, but not to liabilities incurred and not actually paid. But in the case of the *Feronia* (8), this doctrine was infringed upon, for Sir Robert Phillimore confirmed the ruling of the Registrar as to certain items for liabilities for proper necessaries purchased by the master but not actually paid for by him; and the items were allowed to the master conditionally

(1) [1893] A. C. 38.
(2) [1894] Prob. 271.
(3) [1895] Prob. p. 49.
(4) L. R. 14 A. C. 209.
(5) L. R. 1 A. & E. p. 8.
(6) Brown & Lush 104.
(7) Brown & Lush, 281.
(8) L. R. 2 A. & E. p. 65.

upon his producing vouchers showing actual payment of them by him and depositing them in the Registry. See also the *Red Rose* (1). The added words in the Imperial statute of 1889: "And liabilities incurred on account of the ship" now clearly establish a maritime lien for such liabilities even if such liabilities had not been actually paid by the master at the date of his action.

The *Sara* (2), as I have said, reversed all these cases, and Parliament recognizing the confusion that would arise from disturbing a line of decisions which had been followed and acted upon for twenty or twenty-five years, immediately enacted 52–53 Victoria, cap. 46. The effect of this statute is stated by Lord Halsbury in the *Castlegate* (3), "to be to create the lien which it had been supposed existed by virtue of the section which gave jurisdiction to the Court of Admiralty," sec. 10, Admiralty Court Act, 1861. Again he says at page 47:

> When the legislature altered the law laid down in this House in the case of the *Sara* and restored the law which was supposed to exist before, it cannot for a moment be imagined that the legislature was ignorant of the construction which had been consistently put upon the words in the former Admiralty Court Act which was supposed to create a lien. I cannot conceive that if it had been intended to create a wider lien than had been held to exist under the previous words which were supposed to create it, the Legislature would not have used different words to those upon which the construction had been put, so as to make that intention clear and unambiguous.

This being the result of the statutory amendment, and our Act of 1893 being to all intents and purposes identical in language, we are compelled to examine some of the earlier cases which by force of the Act of 1889 in England are re-established, as authorities, to ascertain what are and what are not proper disburse-

(1) L. R. 2 A. & E. 80. (2) 14 App. Cas. 209.
(3) [1893] L. R. App. Cas. 46.

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ments and liabilities incurred on account of the ship by the master in respect of which the maritime lien will arise. It is also necessary to consider under what circumstances such disbursements, even if creating a maritime lien upon the ship, if expended or incurred in a foreign port, would create a similar lien if the expenditure was made and the liability incurred in a home port.

First, what are necessaries for which disbursements may be made or liabilities incurred? *Coals*, [the *West Frieland* (1), the *N. R. Gosfabrick* (2)]; *cables, anchors, rigging, and matters of that description*, [the *Sophie* (3)]; *money advanced for procuring necessaries*, [the *Omni* (4)]; *primary indispensable repairs—anchors, cables, sails and provisions*, [the *Comtesse De Pregeville* (5)]; *insurance for freight, money advanced to pay pilotage, light, tonnage and harbour dues, noting protest travelling expenses of master*, [the *Riga* (6)]; *tobacco and slop supplied seamen; bill of exchange drawn by master of the dishonour of which he had received no notice*, [the *Feronia* (7), the *Fairport* (8)]; *account for painting ship on master's order*, [the *Great Eastern* (9)]; *money advanced to pay a shipwright's bill for repairs where he refused to allow the ship to leave his dock until paid*, [the *Albert Crosby* (10)].

The obligation of the owners upon the contract of the master for repairs and necessaries to the ship depends upon the principles of agency. The owners act through the master, as their agent, and in the absence of any express directions, impliedly hold him out to the world as possessing authority to bind them

(1) Swab. 344; 456.
(2) Swab. 344.
(3) 1 Wm. Robinson, 368.
(4) Lush. 154.
(5) Lush. 329.
(6) L. R. 3 A. & E. 516.
(7) L. R. 2 A. & E. 65.
(8) 8 P. D. 48.
(9) L. R. 2 A. & E. 88.
(10) L. R. 3 A. & E. 38.

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by his contract for the employment or repair of the ship and the supply of necessaries. He is appointed by the owners for the purpose of conducting the navigation of the ship to a favourable termination, and there is vested in him, as incident to that employment, an implied authority to bind the owners for all that is necessary to that end. The master is always personally bound by a contract of this kind made by himself, unless he takes care by express terms to confine the credit to the owners only. But when the contract is made by the owners themselves or under circumstances that show the credit to have been given to them, there is no right of action against the master. Usually, however, the surrounding circumstances attending the making of the contract are such that there is an election for the creditor to proceed against the owners or against the master, but he may not sue both (1). Where the owner or his agent is at the port where the liability is incurred or so near it as to be reasonably expected to interfere personally, the master cannot without special authority for the purpose, pledge the owner's credit or the ship's necessities. Under the foregoing limitation of the implied authority of a master, it has been stated that the rule cannot be described by any geographical radius because it is said that cases arise daily, where, as the necessity is pressing, the delay of communicating with the owner, though comparatively near, would be prejudicial to his (the owner's) interests. Mr. McLachlan formulates the rule as a result of a number of decisions, in the following language (1):

> There is authority to borrow money on the ship or pledge the owner's credit whenever the power of communication is not correspondent with the existing necessity.

In the *Orienta* (2), Lord Esher thus expresses himself as to the circumstances under which the master

(1) *McLachlan on Shipping* [3rd edition] 139, 142.

(2) [1895] Prob. 49.

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incurs a liability which entitles him to a maritime lien:

> He (the master) is only authorized to pledge his owner's credit for what you may call the things necessary for the ship, that is to say, he can pledge his owner's credit if he is in a position where it is necessary for the purposes of his duty that these things should be supplied and he cannot have recourse to his owners before ordering them. * * * The real meaning of the word 'disbursements' in Admiralty practice is disbursements by the master which he makes himself liable for in respect of necessary things for the ship for the purposes of navigation which he as master of the ship, is there to carry out, necessary in the sense that they must be had immediately—and when the owner is not there able to give the order and he is not so near to the master that the master can ask for his authority, and the master is, therefore, obliged necessarily to render himself liable in order to carry out his duty as master.

In the *Riga* (1), Sir Robert Phillimore, in the Admiralty Court, adopted the common law rule laid down by Abbott, C. J. (not Lord Tenterden as stated in the report) in *Webster* v. *Seekamp* (2), and he thus expresses the rule to be applied by a jury in determining what were the circumstances that would justify the master in pledging his owner's credit for necessaries, and in determining what were necessaries:

> If the jury are to enquire only what is necessary, there is no better rule to ascertain that than by ascertaining what a prudent man if present would do under the circumstances in which the agent in his absence is called upon to act. I am of opinion that whatever is fit and proper for the service on which the vessel is engaged, whatever the owner of that vessel as a prudent man would have ordered if present at the time, comes within his meaning of the term 'necessaries,' as applied to those repairs general or things provided for the ship by order of the master for which the owners are liable.

See also *Arthur* v. *Barton* (3), *Webster* v. *Seekamp*, above cited. The *Riga* (4), abolished the distinction between necessaries for the ship and necessaries for the voyage and placed them on the same footing.

(1) L. R. 3 A & E. 516.
(2) 4 B. & Ald. 352.
(3) 6 M. & W. 138.
(4) L. R. 3 A. & E. 516.

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In the *Castlegate* (1), Lord Watson lays down the principle that:

> There can be no lien upon a ship in respect to disbursements for which the master had not authority to bind the owner, or, in other words, that no maritime lien can attach to the *res* for any sum which is not a personal debt of the owner.

And this definition must be taken as the latest judicial decision of the highest court in the empire as determining the test which must be applied in each case where the master sets up a lien for disbursements made by him for liabilities incurred on account of the ship.

Before examining the evidence in the present case, then, it becomes necessary to consider a few of the authorities wherein it has been held that the master had authority to pledge the owner's credit in a home port, and thereby render the owner liable in an action brought by the creditor to recover for an indebtedness contracted by the master. McLachlan, (3rd edition) p. 133, states that even when the ship is at home, if she is to be employed as a general ship, it rarely happens in practice that the owners interfere with the receipt of the cargo. Without doubt, however, they are by law bound by every contract made by the master relative to the usual employment of such ship. At page 138, the same author says:

> The obligation of the owners upon the contracts of the master for repairs and necessaries to the ship is of the same nature and depends upon the same principles as their obligation on his contracts with regard to its employment.

And at page 139, speaking of the implied authority of the master, he says:

> Consequently this authority, subject to certain limits hereafter to be considered, covers all such repairs and the supply of such provisions and other things as are necessary to the due prosecution of the voyage and extends to the borrowing of money when ready money is required

(1) [1893] App. Cas. 51.

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for the purposes of the same employment to which this authority is incident.

In *Webster* v. *Seekamp* (1) Abbott, C. J., and the court, held it was a proper question to submit to the jury to determine whether the coppering of a vessel for an intended voyage to the Mediterranean ordered by the master living at Liverpool, the owner living at Ipswich was necessary, and what a prudent owner if present would have ordered; and the jury having found both questions for the plaintiff, he refused to disturb the verdict and held the owner bound by the master's contract. In *Arthur* v. *Barton* (2), Lord Abinger held that the question as to the owner's liability for money borrowed for necessaries by the master of a coasting vessel from the plaintiff who resided at Swansea, the owner residing at Port Madoc in Merionethshire, was a question for the jury and he laid down the principles as follows:

> Under the general authority which the master of a ship has, he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged, but this does not usually extend to cases where the owner can himself personally interfere in the home port or in a port in which he has beforehand appointed an agent who can personally interfere to do the thing required. Therefore if the owner or his general agent be at the port or so near to it as to be reasonably expected to interfere personally, the master cannot, unless specially authorized or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him or to his agent to do what is necessary. But if the vessel be in a foreign port where the owner has no agent, or if in an English port, but at a distance from the owner's residence, and provisions or things require to be provided promptly, then the occasion authorizes the master to pledge the credit of the owner.

In *Stonehouse* v. *Gent* (3), the owner escaped liability, but largely on the ground that the plaintiff in that case set up in evidence what amounted to a special authority

(1) 4 B. & Ald. 352 (1821). (2) 6 M. & W. 143 (1840).
(3) 2 Q. B. 451 (1841).

from the owner to the master, but the court found that the conditions of the special authorization had not been followed and that there was full opportunity for communicating with the owner. In *Wallace* v. *Fielden* (1), the owner was held not liable because he was in actual communication with the master by telegraph though the ship was in a foreign port and the master signed a bottomry bond for repairs and for discharging and re-loading cargo without his express authority, which could have been asked for. In *Gunn* v. *Roberts* (2), the court cites *Arthur* v. *Barton* and affirms and approves of the judgment in that case as a correct and proper exposition of the law.

In the light of the principles laid down in the foregoing cases, I will endeavour now to consider the evidence given at the trial herein to ascertain the relative position of the parties and the authority, expressed or implied, conferred upon the master by the owner of the *City of Windsor* to make contracts for necessaries and repairs, and to borrow money for the payment of the seamen's wages and other disbursements and liabilities for which the plaintiff now sets up a maritime lien.

The *City of Windsor* was a passenger boat and also carried freight and anything else that might offer; she was therefore a general ship. The route upon which she was plying between St. Catharines and Toronto on Lake Ontario was two hundred and twenty miles from Windsor and the port of registry and the place of residence of her owner Mr. Reeves. Her owner though engaged at a fishing village on Lake Huron, three hundred miles from Toronto, it appears did not leave Windsor for his fishing station until 6th July. He remained at Lake Huron until August 1st, and then came to Toronto, remaining until the 7th August; went away again to Lake Huron until August 18th, returned

(1) 7 Moore's P. C. Cases, 398. (2) L. R. 9 C. P. 331 (1874).

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to Toronto for a day or two, then went to Detroit and Windsor and returned to Toronto again on the 25th August where he remained until 27th August, on which last date the steamer was taken possession of by the mortgagee.

The greater number of the accounts and claims set up by the master as liabilities incurred by him were by him contracted prior to the 6th July. Those incurred by him after that date would amount to four or five hundred dollars out of the aggregate of the claims. The route upon which the boat was placed, as I have before remarked, was a new one. Two and sometimes three other steamers, the *Lakeside*, the *Garden City*, and the *Empress of India* were active competitors for the traffic and freight between St. Catharines and Toronto. The steamer *City of Windsor* was a slow boat and as stated earlier in my judgment, she had the misfortune to carry away the gates of a lock of the canal in the latter part of May, and was tied up by the Government for about three weeks, because the owner between those dates had been unable or neglected to furnish a bond to secure the claim of the canal authorities for the damage caused by the casualty. Mr. Reeves, the owner, acquits the captain of any responsibility for this canal accident. It was due either to a defect in the engine or to negligence on the part of the engineer in not promptly obeying the signals given by the master from the deck. The weather during May had been cold and rainy so that there was little travel. When the boat resumed her trips in June after her release by the Government, it was difficult to secure a share of the passengers. The season altogether was a most unprofitable one for the vessel. The owner himself accepted a few drafts, but allowed most of them to go to protest for non-payment. The master was being urged by the owner to keep the vessel on the route,

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and yet the *City of Windsor* was not earning enough money to nearly pay her running expenses. As to some of the drafts, the owner was writing the master to try and meet them from the earnings of the boat. Such articles as provisions, fuel, and certain of the repairs, were required to be got immediately; and if the owner's orders were to be obeyed to keep the vessel running strictly according to her published time table, there would be no opportunity to communicate with the owner to get express authority except by laying up the boat.

I have, therefore, come to the conclusion that the disbursements by the master for provisions, fuel, and certain of the repairs he only acted as an ordinarily prudent man would have done, and as an ordinarily prudent owner would have acted had he been there dealing with the same difficulty. He procured his daily necessary supplies under various heads on credit, and under all the circumstances of the case, and looking to the nature of the employment of the boat, I am of the opinion that the master must be held to have had implied authority from the owner to incur the liabilities in question.

The master further swears that the owner visited him at various times during May, June and July, and that he advised him from time to time of his difficulties and of the fact of his having to procure many necessaries on credit, and in no instance does it appear that the propriety of his doing so was called in question by the owner Reeves, nor was any objection raised to this method of procuring what was needed for the crew and vessel to enable the *City of Windsor* to continue her daily advertised trips.

[His Lordship here gave a detailed statement of the particulars of the various disbursements and liabilities

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in reference to which the master set up his claim to a maritime lien.]

Many of the foregoing accounts were open accounts with grocers, butchers and bakers, the supplies only being obtained from day to day. In some instances payments were made on account to the creditors by the master, out of the moneys received by him from the vessel's earnings, and as to such claims it is for unpaid balances that the master now sues. In other cases the articles were procured on credit and nothing has been paid on account.

I find the following items and accounts contracted by the master should be allowed:—Items 2, 3, 6, 12, 13, 14, 17, 18, 19, 20, 21, 24, 30, 31, 39, 44 and 45.

As to item 1, this is a claim for $61.77 for groceries purchased from John M. Butler. The master settled part of the claim by directing the purser of the boat Mr. Love, to give Butler a note signed by himself (Love) the purser, at one month, for $53.35, the amount of the account. The circumstances of giving the note as shown by the evidence of the master appear as follows:—Butler said he must have some money; the master said he was unable to give it; he suggested to Butler that if he (Butler) would take a note at a month, he (the master) would be able to meet it out of the earnings of the boat. Butler said he could use a note if it would be paid at maturity. The master said he would instruct the purser, Love, to draw up and sign the note, which was accordingly done on the master's instructions. Love signed the note in this form "John Love, Purser *City of Windsor*." It is clear from the evidence of both Butler and the master that the note was not to be taken in satisfaction, but only to give time to the master to procure the money to meet it. The master was to meet the note, not Love. It is quite manifest that it was not intended by the parties to the

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transaction to make Love responsible personally; I think therefore this claim should also be allowed.

Claim No. 4 included besides an account for groceries, one hundred dollars money borrowed by the master from the claimant to pay seamen's wages and a draft, at thirty days was drawn by the master on the steamer *City of Windsor* for $165.50 being the amount of the grocery claim and the borrowed money. The draft was not used or discounted and was not paid. I think that part of this claim, for $72.97, for groceries, should be allowed. I will deal with the question of borrowed money later.

Claim 5, for $53.89, the creditor accepted a draft on the owner drawn by the purser for the amount of his debt. The owner accepted the draft but did not pay it. Here the creditor elected to look to the owner, and the master is discharged. The master was not a party to the draft.

Claim No. 7 is a claim for repairs by Polson & Miller. The work was building and setting up new davits and repairing the rudder. The amount of the claim is $263.65; protest fees on a draft subsequently given by Capt. Symes, $1.58. In this case the evidence shows that the Inspector of Hulls ordered the steamer to procure an extra boat and have davits fitted up to carry the same; in default she would not be allowed to carry passengers. The claim is made up of $187.56 fitting up and building the davits and $87.09 repairing the rudder which had been broken and had to be welded. I think these are repairs which had to be made promptly, and, as to the rudder, were imperatively necessary. The boat's passenger license would have been withdrawn unless the davits had been put in and the extra boat carried. The owner was notified of the expenditure, and in fact approved and ratified the incurring of the liability. On the 20th June, 1894,

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Polson & Miller forwarded the account in question to the master requesting him to "o. k." the same and send it on to the owner. This to my mind shows an election on the part of the creditor to look to the owner for payment. The account so forwarded is made out to the *City of Windsor*. On the 6th August, Polson & Miller made a draft on the master, owner, and steamer *City of Windsor* for $263.65 at fifteen days which draft was accepted by the master in these words: "Accepted, G. A. Symes, manager of the *City of Windsor*." I do not think this alters the former election by the creditor of the owner as the party liable, nor does it render the plaintiff liable as master, or even if it has this effect, I do not think he had any authority to bind the owner by his later acceptance after he had received the letter of June 20th from the creditor. I therefore cannot allow this claim as a liability properly incurred by the master on account of the ship.

No. 8 is a claim for $60.32 meat and vegetables and $75 borrowed money to pay seamen's wages. I allow the claim for $60.32 for the provisions and defer considering that part of the claim relating to borrowed money.

Claim 9, $10.75, for horse and hack hire, I also allow. Part of it was occasioned by the accident in the canal and the necessity to transport the passengers then on the steamer from Port Dalhousie, the place of the accident, to St. Catharines, their destination. The other items were necessary expenses by the master in St. Catharines for the necessary business of the boat.

Claim 10, Wm. Hutchison, fuel. $353. As to part of this claim, the creditor drew directly upon the owner for $137.25. This draft went to protest and Hutchison accepted a renewal draft for $139.15 on the owner to satisfy the first draft. Prior to the first draft going to

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protest and on the 28th July, Hutchison insisted upon a letter of guarantee from the master. This letter purported to cover the past and future credits. Prior to the 28th July, the creditor evidently had given credit to the owner. On the 28th July, after he insisted on the personal liability of the master, the master assumed the same. I think from the evidence, therefore, that for all fuel supplied prior to the 28th July, the master was not responsible. And upon the authority of the *Orienta*, I must hold that the master cannot come in after the debt has been incurred on the owner's credit and create a maritime lien in his own favour for the liability by voluntarily assuming personal responsibility after the debt has been contracted. I will allow to the master as a liability, the value of the fuel supplied on and after the 28th July. This amounts to $84. As to the cash payments made by the master on account, as they were not appropriated at the time by him, they will apply to the earlier items of the account, and cannot, therefore, be credited to the portion which I have allowed to the master.

Claim 15, $123, is for hardware, coal oil, paint, rope, etc., etc., and I consider that these were all general and proper supplies for the boat, and I therefore allow this claim.

Claims 22, 27, 32, 41, 42, 43, and 46, are all claims for advertising the boat and her trips in Toronto and St. Catharines papers, and for necessary printing, tickets, books, &c., for use on the steamer. Looking to the employment of the ship and the propriety of these expenditures and liabilities contracted, I think that they are clearly within the term necessaries. The only question that could arise would be was the expenditure too large or too lavish. They are as follows: *Toronto News*, contract for season advertising only to date of boat ceasing to run, $54.62; *Toronto Telegram*,

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ditto, $29.50; *Toronto World*, ditto, $23.75; *Toronto Mail* for dodgers and tickets, $10.75; *St. Catharines Journal*, $30.75; *St. Catharines Star*, printing tickets, excursion books, etc., $52.80; advertisements, $23.35; *St. Catharines Standard*, printing, $7.85; advertising $13. I think these amounts are not unreasonable, and and I shall allow Nos. 32, 42, 43 and 46, and disallow claims 22, 27 and 41. In the case of these three last claims, the creditors expressly swore when they were examined that they do not hold the master personally responsible, and they must therefore look for their claims to the owner.

Claim 23, $13.50, rental of cots for an excursion, I allow.

Claim 25 for telegrams, $7.35 I allow. I consider that they were all proper messages to be sent in connection with the business of the boat.

Claim 26, for dry dock and repairs, for $87.19. These were immediate repairs required by reason of the canal accident. As to part of this claim, the master gave the creditor a draft on the owner for $76 for thirty days which was accepted and dishonoured. The acceptance by the owner is an acknowledgment of the claim by him, and of the master's authority to draw on him. I think this claim should be allowed, as both master and owner are on the draft. It is true the draft was not protested, but it was not accepted in payment but only sent forward for collection and as the master well knew the financial position of the owner and had no funds in the hands of the acceptor at the time, and does not himself set up any defence of want of notice of dishonor, upon the authority of the *Feronia* (*supra*), I think the master should be allowed this claim.

Claim 28, lumber for life preservers, I also allow. In this claim as in claim No. 1, the purser's note at a month was given to gain extension of time for the master to

earn the money, but it was not taken in satisfaction of the debt. And the same reasons which guided me in allowing claim No. 1, apply in this claim also.

Claims 29, 36 and 37, for soda water, cigars and whisky for sale on the steamer, I disallow as not being necessaries.

Claims 33, $4.40 for some awnings supplied the ship, I allow.

Claim 36, two dollars, for an advertising card, I disallow as being unnecessary.

Claim 34 by P. Dixon, $52.90, for use of his dry-dock, I disallow because the arrangement was made by the owner in person and the master is not responsible for the indebtedness.

Claim 38, I disallow, it having been included, as I find on the evidence, in the settlement by the mortgagees with the master in August.

Claim 40, dockage at Toronto. This is a claim by Mr. R. A. Dickson, proprietor of the Toronto dock where the steamer landed her passengers during the season. The owner is liable upon the contract of the master for engaging the dock at which to land his passengers. The master was sent by the owner to Toronto to make the arrangements for the dock, and entered into them with Mr. Dickson for the season on behalf of the owner. There is no evidence that the master made any personal promise or assumed any personal responsibility; but stated that he was acting for the owner. He himself declares that he made no promise or engagement nor did he pledge his own credit nor does he consider himself liable for the claim. In view of all the circumstances of this case and in the light of the letter written by Mr. Dickson setting up his claim, I cannot allow it as as a liability incurred by the master on account of the ship.

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Now, turning to claim No. 4, so far as it relates to borrowed money, the facts are as follows:—Capt. Symes swears that on the 14th June, some of his men desired their wages and he had no money to pay them. The boat at the time was tied up by the Government and the owner had been unable to procure a bond which was acceptable to the canal authorities to secure her release. The master swears he could get no communition with the owner who was at Windsor and who did not reply to his requests for money; that he went to Merriman whom he knew, and borrowed the money, telling him he required it for seamen's wages. A draft was then drawn by himself for $165.50 on the steamer *City of Windsor*, a peculiar document, amounting probably to a mere acknowledgment in writing by the master for indebtedness for $165.50. The draft covered the $100 borrowed and the open account for necessaries of $65.50. He did not pay the draft and was therefore liable to Merriman for the money. The money was chiefly disbursed in paying wages. Can this claim be recognized as a liability properly incurred? I do not think the master had any express authority to borrow this money; the boat was not running at the time and there was ample opportunity of communicating with the owner and awaiting his reply. I do not think there was any implied authority to authorize the master to borrow this money, nor was there any pressing necessity. If the boat had been running and her trips likely to be interrupted, there might have been colour for the claim that it was an emergency which had immediately to be provided for; but the facts are all the other way. The bond for the canal authorities was not forwarded until the 18th June and the boat did not resume her trips until after the 23rd or 24th day of June. In view of the foregoing facts I cannot allow this claim.

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Claim No. 8. As to the borrowed money under this claim, Mr. Hare, who claims, says that the master borrowed $75 from him to pay seamen's wages. The owner accepted this draft and admits that by accepting the master's draft, made it his own indebtedness. He also admits that more than $75 was originally borrowed from Hare ($150), and that it was actually disbursed in wages. The draft was duly protested and both the owner and master are liable on it, and I think therefore that the subsequent ratification of the transaction by the owner and his acceptance of the draft is equivalent to a previous express authority, and that I should allow the claim.

Claim 11 is one by Mr. Norris for an advance of $75 to the master for the purpose of retiring an accepted draft by the master for $75 in favour of the claimant (Mr. Hare) under No. 8, being the other half of Hare's original advance of $150. This retired draft had been discounted by Mr. Hare and was maturing at the bank. The master in order to protect the owner's credit, borrowed the $75 from Mr. Norris and took up the draft at maturity. The master having secured the owner's acceptance of the original indebtedness to Hare, was not in my opinion authorized expressly or impliedly to create a new debt and to borrow money to discharge an existing claim already recognized by the owner. I must disallow this claim.

The foregoing findings dispose of all the items except claim 16, which is a claim for board of the master at Windsor while he was overseeing the fitting out of the boat. I think he was hired (taking the owner's own statement of the nature of the engagement) at $100 a month and all found. His services commenced on the 13th April, when he started to superintend the fitting out of the boat, and he was entitled to his board from that date until he went on board the ship, and I therefore allow the claim ($32.17).

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I now have to deal with the question of the master's wages and his claim for damages for wrongful dismissal. The evidence upon the facts is most contradictory. The master swears that he was engaged for the season at the rate of $100 per month, and board and lodging, and that he was given to understand that he would be employed for nine months. Mr. Reeves the owner swears that the engagement was only by the month at $100 per month and board and lodging. He states that the question was fully discussed and that the plaintiff endeavoured to procure a contract for the season, but that he declined positively to make any such arrangement. He says that the plaintiff asked him what had been his arrangement with the master who had sailed the steamer the previous season, and that he told him that he (Reeves) had paid $100 per month and agreed to keep Capt. Moore, the former master, employed for about eight months, but he also told the plaintiff that he would not make any such arrangement for the season of 1894, because he said he was desirous of selling the *City of Windsor*, especially in view of the fact that he had lost $1,400 or $1,500 by her in the season of 1893. He avers that the plaintiff said that he (the plaintiff), would take his chances. That the boat was going to be placed on a good route (speaking of the St. Catharines and Toronto route), and that he (the plaintiff), was satisfied to take the risk, feeling confident that he would make more than eight months' time for the season. In view of this conflict of testimony, I am compelled to adopt the rule that the burden is upon the plaintiff to establish his case by satisfactory evidence. The case of the plaintiff depends simply on his own statement of the facts, without corroboration, and this statement by him is absolutely contradicted by the oath of the owner of the vessel, and there are no attendant circumstances which will

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guide the court to a safe conclusion between these two conflicting statements. The affirmative of the issue is upon the plaintiff. I do not find sufficient evidence in the face of the denial of the owner, to enable me to accept the plaintiff's version of the facts as establishing the contract he sets up. Mr. Reeves' most positive denial is strengthened, as his evidence is, by so many circumstances. His financial difficulties, his losses in the season of 1893, the experimental character of the proposed employment of the *City of Windsor* for the season of 1894—are all good and probable reasons why he should decline to employ a master for the full season if it could be avoided.

I cannot, therefore, pronounce judgment in the plaintiff's favour upon his alleged contract of hiring. It is admitted, however, that the plaintiff was hired by the month; it is also admitted that he was discharged by the mortgagees on the 28th August, and his wages as master paid up to that date. I think upon the monthly hiring, he cannot be discharged so summarily without some notice. He is entitled to reasonable notice, *Creen* v. *Wright* (1). He cannot be discharged without cause in the middle of the month. Reasonable notice would be a month's notice, and therefore I think he is entitled to $100 for a month's wages and an allowance for his board for one month, which I fix at one dollar a day or $30.

Having disposed of the various claims for disbursements, liabilities, and the master's claim for wages and damages, there remains but one question further to be considered. Is the plaintiff to have the amount of such wages, damages and disbursements or liabilities, or any of them, paid out of the proceeds of the vessel in priority to the claim of the mortgagees? The cases of

(1) L. R. 1 C. P. Div. 591.

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the *Chieftain* (1); the *Mary Ann* (2); the *Feronia* (3); and the *Hope* (4), seem to be conclusive upon this point. In the *Mary Ann*, at page 12, Dr. Lushington, says (speaking of the Admiralty Act of 1861):

> I think under this Act a seaman would have a maritime lien for his wages although fixed by special contract. Because before the Act he had such a lien for wages earned not under any special contract. And for a similar reason there would be a maritime lien for damages done by any ship. If this be so, then under the Act the master, claiming for disbursements is to be preferred to the mortgagee because before the Act his claim for his disbursements was entitled to similar preference in the only case where the court could take cognizance of such disbursements, namely in the case of a set-off.

I refer also to the case of the *Marco Polo* (5), where the mortgagee's claim was postponed to the master's claim for disbursements and liabilities incurred by him on account of the ship.

From these decisions, it is clear that a master's lien for his wages and disbursements (including under our statute of 1893, liabilities properly incurred by him on account of the ship), takes priority to the claim of the mortgagees under their mortgage. Of course this means as to disbursements and liabilities incurred by the master before the mortgagees took possession of the ship under their mortgage.

There will, therefore, be judgment for the plaintiff in this action for $1,196.17 in respect of proper disbursements and liabilities properly incurred on account of the ship—and for $130 for wages and his claim for wrongful dismissal, in all $1,326.17 subject to this direction: That as to the liabilities allowed to the master herein he must deposit with the Registrar the vouchers showing payment by him of the several claims outstanding to the various creditors which are

(1) Br. & Lush 212.
(2) L. R. 1 A. & E. 8.
(3) L. R. 2 A. & E. 65.
(4) 28 L. T. N.S. 287.
(5) 24 L. T. R. 804.

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Judgment accordingly.

Solicitors for plaintiff: *Caniff & Caniff.*

Solicitor for interveners: *O. E Fleming.*

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(1) Br. & Lush. 104.
(2) L. R. 1 A. & E. 12.
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*Judgment accordingly.**

Solicitors for plaintiff: *Caniff & Caniff.*

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

*Affirmed on appeal, *see* p. 400.