BRITISH COLUMBIA ADMIRALTY DISTRICT

BETWEEN:

1947

Oct. 11, 18
Dec. 9

HARNEY ET AL

v.

M.V. *TERRY*

Shipping—Wages of Master and crew—Maritime lien—Lex loci contractus —Lex fori—Master's lien for disbursements—Priority of claims.

Defendant ship, enrolled and licensed at Seattle, Washington, United States of America, and owned by a citizen of the United States, was employed in carrying on the coasting trade and mackerel fishery. In the course of a proposed voyage from a port in the United States to Alaska the vessel suffered several mishaps and eventually was abandoned at Vancouver, B.C. The action concerns certain claims made at Vancouver *in rem* against the vessel.

Held: That the Master of the vessel has no maritime lien in Canada for wages since the *lex loci contractus* governs and he would have no such lien under the law of the United States.

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2. That the Master having made certain disbursements and incurred certain liabilities in circumstances of necessity as the only means of saving his ship is entitled to recover the same in the present action, since the matter is governed by the *lex fori* which recognizes a martime lien for such disbursements.

3. That the members of the crew being entitled to the enforcement of a martime lien for their wages under the law of the United States such lien will be recognized in Canada.

4. That the priority of payment of the several claims is determined according to the *lex fori*.

ACTION *in rem* by the Master and Crew, and certain intervenors against the M.V.*Terry*.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver, B.C.

Vernon R. Hill for the Master and crew.

A. Hugo Ray for the intervenor mortgagee, Seattle National Bank.

D. E. McTaggart for the intervenor B.C. Marine Engineers & Shipbuilders Limited.

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

SIDNEY SMITH D. J. A. now (December 9, 1947) delivered the following judgment:

This action concerns certain claims made at Vancouver, B.C. *in rem* against the American M.V. *Terry* enrolled and licensed at Seattle, Washington, U.S.A., Official Number 212,165, length 88·5 feet, breadth 16·1 feet, of 69·48 gross tonnage, with a crew complement of 6 men (including the Master) owned by Leslie H. Grove, a citizen of the U.S.A., and employed in carrying on the "coasting trade and mackerel fishery". The issues involved are claims for Master's wages, disbursements, subsistence and repatriation; crew's wages, subsistence and repatriation; the rights of an intervenor, claiming under a possessory lien for temporary repairs; and the claims of another intervenor

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for sums due under a duly registered mortgage. The appropriate notice of the action was given to the American Consul who intimated that he did not wish to present any submissions to the Court.

In July, 1947, the vessel, in the course of a voyage from Port Townsend, in the State of Washington, U.S.A., to Alaska, suffered many mishaps, and eventually put into the Fraser River in British Columbia in a sinking condition. There she appears to have run against a jetty at the mouth of the River and was unable to get free. The Master incurred liabilities in having her refloated and towed to Vancouver, B.C. There she was found to be so unseaworthy, principally through inherent weakness, that the voyage was ultimately abandoned. The evidence shows that her value in Canada in her then condition was approximately $7,000.00, whereas the claims against her approximate $15,000.00. In this state of affairs the owner would appear to have thrown up his hands and to have left Master and crew to whatever remedies were open to them against the vessel.

The main issue debated before me was whether the Master and crew of the *Terry* had the same right of maritime lien which would have been theirs had this been a Canadian vessel. I had the advantage of hearing evidence from an American attorney, Mr. George T. Nickell of Seattle, who gave expert testimony on the appropriate foreign law. It was clear from what he said that under American law the crew would be entitled to enforce a corresponding maritime lien in an American Court, but that it was otherwise with respect to the Master. The issue then narrowed down to this—was the Master in the circumstances here mentioned entitled to the benefit of the maritime lien given in comparable circumstances to the Master of a Canadian ship, in spite of the fact that he could claim no such benefit under American law.

In deciding this point my task has been much lightened by a consideration of The Ship *Strandhill* and Walter W. Hodder Coy. (1) This was a decision of the Supreme Court of Canada and of course binding upon me. I regard the principle there enunciated as clear guidance in the case before me. That was a claim for necessaries supplied to

(1) (1926) S.C.R. 680.

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an American ship at Boston, U.S.A. For the price of these necessaries the American law gave a maritime lien, but our own law gave only a statutory lien, and so one of much inferior value. It was held that the Court would enforce the maritime lien given by American law. In the course of their judgment their Lordships (Anglin C. J. C., Idington, Duff, Mignault, Newcombe and Rinfret J. J.) referred to and distinguished the well-known and much debated authorities of *Milford* (1); *The Tagus* (2); *The Colorado* (3); and pointed out that the issue under consideration (as is the case here) concerned only the vindication of the right claimed against the ship.

There the Court, distinguishing between the *lex loci contractus* and the *lex fori*, held that the former governed and thus recognized and applied the maritime lien for necessaries given by American law though it was unknown to Canadian law. I have no doubt that the converse must be equally true, viz., that the Court will refuse to enforce a maritime lien not given by American law though valid under Canadian law. In the course of his judgment Mr. Justice Idington said at pp. 691-2:

> It would be, I submit, intolerable to enable owners of American vessels to get advances on faith of such a maritime lien and move up to Canada and sell out.

It would, I think, be equally intolerable to enable the enforcement of maritime liens not recognized by American law in the circumstances here mentioned. That would mean that the contractual rights of Masters and owners of American ships would depend for interpretation upon the accident of a mishap in Canadian waters; or, as has been said, the rights of a party made to depend, so to speak, upon the force of wind and storm. Price on Maritime Liens (1940) p. 207.

That the American Courts give effect to the same principle of law is, I think, sufficiently shown by a passage in vol. 26 Harvard Law Review (February, 1913) at p. 358, quoted with approval by Sir Douglas Hazen, L.J.A. in *Marquis* v. *The Ship Astoria* (4) at p. 199. The passage is as follows:

> 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

(1) (1858) Swabey 362.
(2) (1903) P. 44.
(3) (1923) P. 102.
(4) (1931) Ex. C. R. 195.

rendered (*The Scotia*). Thus if an English vessel is supplied with necessaries 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 seamens' 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 mortagee preferred to an intervening Danish material man. In support of this is cited the case of Constant v. Klompus, 50 Scotch Law Reports 27.

See also as to this the *Hanna Nielsen* (1); the *Oconee* (2); the *Scotia* (3).

My attention was directed to p. 200 of the *Astoria* case, *supra,* where the learned Judge would appear to uphold a maritime lien for wages of the master of an American ship in that he gave priority to such claim over the claim of a mortgagee. But it is clear that this point was not contested before him, no doubt for the reason that it was there purely academic, the wages having already been paid. I therefore hold that the claim of the Master for wages must be disallowed; in the circumstances, without costs.

The Master stands on a different footing with regard to his claim for disbursements or rather for liabilities incurred by him. The mortgagee opposed this claim, but not very pressingly, upon the ground that the Master had neither disbursed the said moneys nor guaranteed payment thereof in writing or otherwise. I am unable to give effect to this view. The Master contracted these liabilities in circumstances of necessity, as the only means of saving his ship, and under conditions in which the power of communicating with his owner was not corresponding with the existing necessity. Upon payment by him of the debts involved he is entitled to recovery in this action. *The City of Windsor* (4). In reaching this conclusion I have not overlooked Sec. 213 of the Canada Shipping Act, 1934, which says that a Master shall have the same lien for disbursements or liabilities as a Master has for the recovery of his wages; and that it may be contended here that as

(1) (1921) 273 Fed. 171.
(2) (1922) 280 Fed. 927.
(3) (1888) 35 Fed. 946.
(4) (1895) 4 Ex. C. R. 362.

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he has no lien for wages (as I have found) neither can he have a lien for his disbursements or liabilities. But in the former case the *lex loci* governs; while the latter, all the incidents of which took place in Canadian waters and involved other parties, is clearly governed by the *lex fori*. And the *lex fori*, as above noted, gives such lien. The Master therefore will have judgment for the amount involved, viz., $440.15, with costs.

I hold that the members of the crew are entitled to the enforcement of a maritime lien for their wages under American law and that this will be given effect to in our Courts. The mortgagee submitted that these wage claims should be calculated to 12th July only (that being the date on which the vessel went upon the ways for survey) or, if not so, then not later than 16th July, on which date the Master received a telegram from his owner directing him to "let the crew go for time being". The first submission is untenable. With respect to the second, apart altogether from the vague nature of this direction, there was no evidence that the Master complied with it in any way. Moreover, it is the benevolent practice of Admiralty Courts to favour seamen in the recovery of their full wages in cases of special, unusual and doubtful circumstances such as are here involved. I hold, therefore, that the crew must have their wages; calculated from the dates they respectively began work on the vessel until 1st August, 1947, at the contractual rates for each member. They will therefore have judgment for the following respective amounts: Edmonds $560.00; Canniff $461.37; Dillon $250.00 and Edmonds Jr. $199.92.

With respect to the claims for subsistence of Master and crew: no proof was offered of any moneys actually expended by them in this way. And I cannot shut my eyes to the testimony that they resorted to various ways for obtaining money for their support. They obtained considerable moneys for this purpose from the mortgagee and others, which they are under no obligation to re-pay; and, less commendably, they pledged part of the vessel's equipment. The mortgagee was obliged to pay $254.40 to redeem the same. No account was given of these moneys,

the total of which would seem to me sufficient for the subsistence of the crew for the period in question. I disallow these claims.

As to the claims for repatriation: I was again left in the dark, no sufficient evidence being adduced. But I find in 10 Federal Code Annotated Title 46, Sec. 678, a reference to certain statutory provisions requiring American Consuls to provide destitute seamen with passage to the United States. The Master and crew were in touch with the American Consul and, perhaps, I may say without presumption, they were no doubt advised as to their rights in this regard. Moreover there was nothing to show that the advances they received were insufficient to cover the small expense involved in returning to Seattle.

The claim of the intervenor, B.C. Marine Engineers & Shipbuilders Limited, which holds possession of the vessel under its possessory lien, was not contested before me. It will therefore have judgment for the sum of $260.09.

The amount due to intervenor Seattle National Bank under its mortgage for principal alone is $12,000.00. I was informed that it would be sufficient for the purposes of this action if judgment were given for this amount. There will be judgment accordingly.

I turn to the question of priority of payment which is clearly governed by the *lex fori* and about which there was no argument. The claims should be paid in the following order: Registrar's and Marshall's fees and expenses: Costs of all parties; Seamen's wages to July 12, 1947; Master's disbursements; Claim of Intervenor, B.C. Marine Engineers & Shipbuilders Ltd.; Seamen's Wages July 12 to August 1; Claim of Intervenor, Seattle First National Bank, under its mortgage.

As to costs, I have already dealt with those of the Master; the seamen will have their costs, except those of the application on 27th September, 1947, and incidental thereto; the two intervenors mentioned above will have their costs; Intervenor Sunde and d'Evers Co. will have their costs based on an unopposed application to the Court for release of their cargo.