

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Donald Johnson and others v. John Alexander Black ("The Two Ellens") from the High Court of Admiralty, delivered 1st February 1872.

Present :

SIR J. W. COLVILLE.

SIR JOSEPH NAPIER.

LORD JUSTICE MELLISH.

SIR MONTAGUE E. SMITH.

THIS is a suit by a Plaintiff who performed necessary repairs to a ship to obtain payment by the sale of the ship, under the 5th section of the Admiralty Court Act, 1861. The question to be determined is whether his right to be paid out of the proceeds of the ship takes precedence of a previous mortgage. The mortgage had been assigned to the Defendant in the suit, but it is admitted that that makes no difference in the rights of the parties.

There have been several cases in the Court of Admiralty on this point, and the decisions are to a certain extent conflicting. Dr. Lushington appears in the first instance to have determined the question in accordance with the decisions which had been come to under the previous Act respecting necessaries supplied to foreign ships, viz., that a maritime lien was created from the time that the supplies were furnished, and that therefore, having such maritime lien, the man who supplied the necessaries took precedence of the mortgage. But in the case of the "Pacific," after giving full attention to the case, and re-considering his former decision, Dr. Lushington came to a contrary opinion, and determined that no lien was created until the suit was

commenced, and that accordingly the mortgage took precedence. Dr. Lushington again affirmed, in the case of the "Troubadour," the decision he had arrived at in the "Pacific."

In the present case the learned Judge of the Court of Admiralty thought he was bound by the previous decisions of Dr. Lushington; but in his judgment he acknowledged that if the matter had been *res nova*, and he had not been bound by the previous decisions, he should himself have come to a contrary conclusion. Therefore the question has to be determined by their Lordships, and it may be said, perhaps, that as far as authority is concerned the authorities are very equally balanced.

It is clear that previous to the passing of the 3rd and 4th Victoria the Court of Admiralty had no jurisdiction in the case of necessaries supplied to a ship, and that the supply of such necessaries did not give any maritime lien upon a ship. It is perfectly true that for many years prior to the time of Charles the Second the Court of Admiralty had claimed, and to a considerable extent exercised, such a jurisdiction; but the courts of common law in the time of Charles the Second and subsequently had prohibited them from exercising that jurisdiction on the ground that they never possessed it. Subsequently, in the case of the "Neptune," it was decided by the Privy Council that there was no such jurisdiction. Therefore, notwithstanding this jurisdiction was practically exercised for years, it must be taken now to be conclusively the law that the Court of Admiralty, by the law of England, never had jurisdiction over necessaries supplied to a ship, and that necessaries supplied to a ship do not give any maritime lien upon a ship.

The first Act which altered this state of the law was the 3rd and 4th Victoria, chapter 65. The 6th section of that Act is in these terms:—

"Be it enacted that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage

“ for services rendered to or damage received by
 “ any ship or sea-going vessel, or in the nature of
 “ towage or for necessaries supplied to any foreign
 “ ship or sea-going vessel, and to enforce payment
 “ thereof, whether such ship or vessel may have
 “ been within the body of a county or upon the
 “ high seas at the time when the services were
 “ rendered or damage received or necessaries fur-
 “ nished in respect of which such claim is made.”

In the construction of this section it has been held in several cases in the Court of Admiralty that there is a maritime lien in the case of supplies and necessaries furnished to a foreign ship; and their Lordships do not mean to intimate any doubts as to the validity of those decisions. But they are of opinion that those decisions may be supported upon the ground that, though it is perfectly true that the only words used in the section are “that the High Court of Admiralty shall have jurisdiction,”—which words seem hardly sufficient in themselves to create a maritime lien,—yet, looking at the subject matter to which that section relates, it appears designed to enlarge the jurisdiction which the Court of Admiralty already had in matters forming the subject of a maritime lien. These are strong grounds for holding that as respects salvage and as respects collision, which already gave a maritime lien when they occurred on the high seas, it was intended that they should also, when they occurred in the body of a county, equally give a maritime lien, and that being so as to salvage and as to collision, it might be well said that, necessaries immediately following, it was intended that the same rule should apply in the case of necessaries.

That being so, the case then comes to the decision of the statute in question; and it may be observed that the mortgage of ships is a security which is well known and which has existed in this country for many years. It is quite clear that, according to the decisions of the courts of common law and according to the

express provisions of the Merchant Shipping Act, which say that a mortgagee is not to be deemed an owner except for the purpose of enforcing his security, a mortgagee was never liable at common law for supplies furnished to the mortgagor while the mortgagor continued in possession of the ship.

Then the question is, did the Legislature intend to alter that rule, and to say that, in certain cases specified in this section, instead of the mortgagee having precedence over the material man who had furnished supplies to the ship on the credit of the mortgagor remaining in possession, that rule should be altered, and that the material man should take precedence?

Now, in order that the rights of different classes, the subjects of the Queen, should be altered, one certainly would expect that such an alteration should be expressed in tolerably clear terms. The 4th section, which begins this subject, says this:—

“The High Court of Admiralty shall have jurisdiction over any claim for building, equipping, or repairing of any ship if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the Court.”

Now, it is admitted by Dr. Deane, and their Lordships think it is quite clear, that that 4th section does not give any maritime lien, because it only gives jurisdiction in respect of “any claim for building, equipping, or repairing of a ship if at the time of the institution of the cause the ship is under arrest of the Court, or the proceeds thereof.” Now, it certainly would be absurd to say that the question whether the mortgagee is or is not to take precedence over a person who had either built or repaired or equipped a ship should depend upon the accidental circumstance whether some third person had happened to commence a suit in the Court of Admiralty and arrest the ship. That would certainly be a most irrational

construction, and therefore it seems clear that that section at any rate does not give any maritime lien, but merely entitles the person who has done the repairs or built the ship to be paid out of the proceeds, in preference at any rate to the owner, to whom the proceeds would otherwise be given up.

The 5th section, which immediately follows, is:—"The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

The question is, does that give a maritime lien? Dr. Lushington, in the case of the "Pacific" and in the case of the "Troubadour," has decided that it does not, for a reason which appears to their Lordships by itself to be amply sufficient, namely, that the jurisdiction of the Court of Admiralty is not made by this section to depend upon what is the state of things at the time when the supply is furnished, but is made to depend upon what is the state of things at the time when the suit is instituted; namely, whether there is at that time an owner of the ship domiciled in England. It is contended on the part of the Appellants that the maritime lien attaches directly the supplies are furnished. But suppose that there is an owner at the time domiciled in England, then it is clear that the Court of Admiralty has no jurisdiction; and how can the maritime lien attach if things had not happened which gave the Court of Admiralty any jurisdiction over the matter at all? How can it be said that there is something inherent in the ship which constitutes a charge on the ship when there is actually no mode of enforcing it at all, and the ship is perfectly free from it? Therefore in that case it does not attach.

Suppose either the owner leaves England and becomes domiciled elsewhere, does it then attach? And suppose he comes back again, does it cease to attach? It appears to their Lordships that it is altogether inconsistent that a maritime lien should exist on Monday and should not exist on Tuesday, and should then come back again on Wednesday. A maritime lien must be something which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged, either by being satisfied or from the laches of the owner, or in any other way by which by law it may be discharged. It commences and there it continues binding on the ship until it comes to an end. It would involve this absurdity, that the rights of all other parties would be shifted according as this maritime lien existed or not, as in the instance which has been put during the argument, if goods were sold to a shipowner who was an Englishman, and domiciled and resident in England, then of course the man who so repaired or furnished supplies for the ship has no remedy at all by law except a personal action against the owner. Suppose that man becomes bankrupt, then he has no remedy except to prove against his estate. The trustee sells his ship, as he must do under the bankruptcy. If he sells it to a man who is also an Englishman living in England, then no right accrues, and he is left solely to his remedy against the bankrupt. But if at any time, within six years I presume, when it may be barred by the Statute of Limitations, and I do not know whether that would make any difference, yet if at any future time that ship becomes the property of a man who happens to be domiciled in the colonies, then it is said the right is to attach to it, and it may be seized against anybody, and all the interests of the real owners of the ship at that time may be sacrificed for the purpose of paying the man who had simply furnished his supplies on the credit of an owner who became bankrupt.

Therefore their Lordships think it is quite sufficient to say that, according to the true construction of this section, the *res*, the ship, does not become chargeable with the debt for necessaries until the suit is actually instituted, and that all valid charges on the ship to which any person other than the owner of the ship who is liable for the necessaries is entitled must take precedence.

Their Lordships, therefore, will humbly recommend Her Majesty that this Appeal be dismissed with costs.

