1894
April 6.

TORONTO ADMIRALTY DISTRICT.

THE "C. J. MUNRO" AND THE "HOME RULE."

Salvage—Limitation of action against a subsequent bonâ fide purchaser in Ontario—Notice of claim—54-55 Vict. c. 29 sec. 23 subsec. 4.

An action *in rem*, against a tug, was brought claiming $800 for salvage under an alleged agreement made in the Province of Ontario with the master of the tug at the time the salvage services were rendered. Subsequently, but before action was brought, the tug was sold by the Quebec Bank, under a mortgage held by the bank, to a purchaser who it was alleged had notice of the claim. The purchaser paid part cash and gave a mortgage on the vessel to the bank for the balance which remained unpaid.

The action was not begun until after ninety days from the time when the alleged claim accrued.

The purchaser claimed in his defence the benefit of section 14, subsection 5, of *The Maritime Court Act* (R.S.C. c. 137), re-enacted by section 23, subsection 4, of *The Admiralty Act*, 1891 (54-55 Vict. c. 29) as a bar to the plaintiff's claim.

Held, that as against a *bonâ fide* purchaser, the plaintiff's claim (if any) was barred, and the lien on the vessel (if any) destroyed, even though the purchaser had actual notice of the claim at the time of, or before, his purchase.

ACTION for salvage.

This action was brought by the owners of the tug *C. J. Munro* against the tug *Home Rule*, to recover $800 under an alleged agreement for salvage service, entered into at the time of such service with the master of the *Home Rule*.

The *Home Rule* was afterwards sold under a mortgage held by the Quebec Bank to a *bonâ fide* purchaser for value, who, however, it was alleged had actual notice and knowledge of the claim before and at the time of his purchase.

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Statement of Facts.

After the arrest of the vessel, the purchaser intervened and filed a statement of defence which contained the following clause :—

"The defendant further alleges that in any event he is a subsequent *bonâ fide* purchaser of said ship and that the proceedings for the enforcement of the alleged lien or right or remedy *in rem* in respect of the alleged salvage services, were not begun within 90 days from the time the same accrued (if it ever did accrue, which the defendant denies) and the defendant claims the benefit of the statute in that behalf, and the protection afforded to such purchasers."

Subsection 5 of section 14 of *The Maritime Court Act* is as follows :

"No right or remedy *in rem*, given by this Act only, shall be enforced as against any subsequent *bonâ fide* purchaser or mortgagee of a ship, unless the proceedings are begun within ninety days from the time when the same accrued."

The action was tried before His Honour Judge McDougall, Local Judge of the Toronto Admiralty District, at St. Catharines, on 6th April, A. D. 1894.

J. C. Rykert, Q. C., for plaintiffs.

R. Gregory Cox, for the vessel and its owner intervening.

Rykert, Q. C.—The defendant purchased with actual notice and knowledge of the plaintiff's claim. It constituted a maritime lien on the vessel, and as the purchaser executed a mortgage to secure part of the purchase money, which is still unpaid, the lien can be enforced against the mortgage. To the extent of the money still owing on the mortgage, the property has not passed out of the hands of the mortgagees under whose mortgage the property was sold.

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Argument of Counsel.

Moreover the statute protects only purchasers who have no notice of the claim.

Cox, contra—These proceedings were not taken until more than ninety days after the claim, if any, accrued. The statute omits the usual words to be found in a plea of purchase for value without notice, and notice is immaterial. The policy of the law in relation to merchant shipping is to favour the transmutation of property in vessels, as beneficial to commerce. [He cites : *Abbott on Shipping* (1).]

" Of ships which are built to plough the sea and not lie by the walls, commercial nations consider the actual employment as a matter not merely of private advantage to the owners, but of public benefit to the State." (2)

In pursuance of the same policy notice of trusts is not allowed to be registered. (3)

The Quebec Bank are not parties to the action, and no relief can be given against the bank, or the moneys due the bank under their mortgage.

At the conclusion of the case, the learned judge, while holding that on the merits the defendant was entitled to succeed, delivered the following judgment on the statutory defence.

McDOUGALL, L. J.—I think in this case it might be well argued that the services rendered were not properly salvage services, but a contract for towage from one point to another. If that view be correct this action must fail, because towage services do not constitute a maritime lien and therefore do not attach to the vessel. I think the initial difficulty which the plaintiff has to contend with is the barrier established by the clause in the statute which has been preserved

(1) Part 1 c. 1.
(2) Abbott, part 1, c. 3.
(3) *See The Merchant Shipping Act* 1854, sec. 43.

in the new Admiralty Act. I take it the object of that clause is to render vessels more readily marketable, and to compel the people to be prompt in the assertion of their claims, so that would-be purchasers may be in a position to make a purchase without danger of the existence of maritime liens springing up after the date of their purchase, and to set a time limit within which such actions must be brought so far as they affect the vessel itself. That clause does not act as a statute of limitations as against the claim, because it leaves the right *in personam* undisturbed, but it does not affect the question so far as it relates to the remedy *in rem*; and I take it the scope of the statute is such that a would-be purchaser might very properly, with full notice of a dozen maritime liens against a vessel, refrain from making his purchase until ninety days had expired from the date of the last claim that even to his knowledge could be in existence; and then could take a conveyance of the vessel free from all claims, if the parties in possession of such claims had not chosen in the interval to institute proceedings against the vessel. In this case the facts are clearly admitted that the action was not commenced anterior to the ninety days. In my judgment the vessel was not liable to any such claim. I think the clause in the statute is very distinct. When you find a clause of limitation such as this, differently worded from those which are commonly used in other statutes, because it occurs in a maritime Act it does not require any new canon of construction to get at its proper meaning; the usual clause, as we all know, for a limitation of that kind to subsequent *bonâ fide* purchasers and mortgagees, is to say, *provided they have got actual notice*; but the statute leaves those words out expressly, and that must have been done intentionally. I cannot imagine it to have been thought that the legislature by omitting those words

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Reasons for Judgment.

intended to give that clause the same force as if the words had been there. One must construe an Act of Parliament not as you think may have been in the mind of the legislature, but you must construe it according to the language of the legislature. Now, this peculiar clause of limitation is only partial and it is very distinct in terms; it says: "no right or remedy *in rem* given by this Act"—and "given by this Act" means all actions within the jurisdiction of the Admiralty Court—"shall be enforced as against subsequent *bonâ fide* purchasers or mortgagees of a ship unless the proceedings for the enforcement thereof shall begin within ninety days from the time when the same accrued." That does not say no action shall be brought for the claim, but it says no action shall he brought against the vessel.

In this case I am very clear in the view that I have that the vessel is freed from this particular claim which is sought to be established in this action. If the former owner of the vessel had been a party to this action, and a personal judgment sought against him, then I would have to determine the question probably as to the amount and the value of these services, and the question as to whether they were salvage or towage services. But it seems to me to be unnecessary to determine that point if this initial question is vital to the plaintiff's present action.

The action will be dismissed with costs.

Judgment accordingly.

Solicitors for plaintiff: *Rykert & Marquis.*

Solicitors for the ship and owner intervening: *Cox & Yale.*