THE TRADERS BANK OF CANADA..APPELLANT; 1913

AND *Oct. 29. *Nov. 3.

HERBERT LOCKWOOD, LIQUIDATOR, AND JAMES MCINNES, APPOINTED TO REPRESENT WAGE-EARNERS..... } RESPONDENTS.

In re THE FORT GEORGE LUMBER AND NAVIGATION COMPANY (IN LIQUIDATION).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Winding-up proceedings—Company in liquidation—Sale of assets—Consent to sale of mortgaged ship—Sale by order of court—Mariners' liens—Sale free from incumbrances—Special fund—Privileged charge—Priority—Valuation of security—Release of mortgage—Marshalling securities—Subrogation.

A ship which belonged to a company in liquidation was mortgaged to a bank and was also subject to maritime liens for seamen's wages due at the time of the winding-up order. The bank consented to the sale of the ship, by the liquidator, free from incumbrances at the same time as he sold the other assets of the company by direction of the court. He sold the ship separately and free from incumbrances for $5,000, which was credited, as a special fund, in his accounts. The bank subsequently filed its claim, valuing its security on the ship at $5,000. The purchasers took the ship to sea and it became a total loss. The bank then made claim to the whole of the fund realized on the sale of the ship and their claim was opposed on behalf of the wage lien-holders claiming the right to be paid by priority out of this fund.

Held, affirming the judgment appealed from (4 West. W.R. 1271; 25 West. L.R. 92; 12 D.L.R. 807) that by its consent to the sale of the ship under direction of the court, free from incumbrances,

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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the bank had assented to the conversion thereof released from its mortgage and that the proceeds of the sale of the ship should be apportioned amongst the creditors in the order and according to the priorities provided by law; consequently it was not entitled to any special charge on the fund realized upon its sale. *Held*, further, that the rights of the wage-earners holding maritime liens were not affected by the loss of the ship after it had been sold by the liquidator under the order of the court and that they were entitled to recover their claims out of the fund realized upon the sale of the ship in priority to the mortgagee.

[MEMO.—The court ordered that the rights of the bank, if any, to relief, by way of subrogation or marshalling of securities, should be reserved to be dealt with on further proceedings in the winding-up of the company.]

APPEAL from the judgment of the Court of Appeal for British Columbia (1), dismissing an appeal, by the present appellant, from certain orders by Clement J., in the matter of the winding-up of the Fort George Lumber and Navigation Company made, respectively, on the 15th, 22nd and 27th of January, 1913.

A statement of the case is given in the head-note. The orders in respect of which the appeal is asserted are recited in the judgment of Mr. Justice Duff, at page 600 of this report.

W. B. A. Ritchie K.C. for the appellant. The right and title of the bank in the "Chilco" was never divested. No "assignment and delivery" of the mortgage was required or made pursuant to section 77 of the "Winding-up Act," or at all. The vessel being valued at $5,000, and that being all that could be got for her, the liquidator had no interest in her, but for convenience she was sold with the other assets of the company, the liquidator in selling her acting on behalf of the bank. The $5,000 paid by the purchaser was the money of the bank, and no question of indemnity

(1) 4 West. W.R. 1271; 25 West. L.R. 92; 12 D.L.R. 807.

arose as no claim was made by the seamen under their liens before the loss of the ship, and by her loss the liens ceased to exist.

The liquidator has no power to make a sale which would divest the liens of the seamen; he represented the company, not its creditors. See *In re Clinton Thresher Co.*(1), *per* Boyd C., and *In re Longdendale Cotton Spinning Co.*(2), *per* Jessel M.R., speaking of the rights of a person having a charge by virtue of mortgage against property of a company in liquidation; also 2 Palmer's Company Precedents (10 ed.), p. 385, and *Keighly, Maxsted & Co.* v. *Durant*(3).

At all events, the seamen could not hold, as they did, their liens upon the ship till she goes down, and then contend that, the security having gone, they would elect to treat the sale as made on their behalf and ask for payment of their liens out of the purchase price. Assuming that they might, before the loss of the ship, have elected to treat the purchase price as representing the ship and enforce their liens then, they cannot do so after the loss of the ship because at the time when they came forward to so enforce their liens they had no liens.

The seamen were entitled, to the extent of $3,152.15, to rank as preferred creditors by virtue of section 70 of the "Winding-up Act" and the effect of taking the security held by the bank to pay the seamen is that the bank is forced, by reason of the liens, to pay off the preferred creditors, and upon no equitable principle can this enure to the benefit of the general creditors. If the order charging the seamen's wages upon the $5,000 which, but for such wages,

(1) 1 Ont. W.N. 445. (2) 8 Ch. D. 150.
(3) [1901] A.C. 240.

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would have been paid over to the bank, was correct then the order should have worked out the equitable rights of the bank by subrogating it to the rights of the seamen as preferred creditors.

Assuming that it is regarded that there was an assignment and delivery of the security to the liquidator within the meaning of section 77 of the "Winding-Up Act," and that the liquidator realized such security, the order charging the liens upon the proceeds of the sale and thereby diverting the money which would otherwise have gone to the bank should provide for payment of the $5,000 to the bank out of the general assets.

Travers Lewis K.C. for the liquidator, respondent. The liquidator has, throughout the proceedings, considered himself as custodian and trustee of the $5,000, proceeds of the sale of the "Chilco," and has been and is prepared to pay it, or any part of it, to whomsoever the court decides to be entitled thereto. The liquidator objects to being joined as a respondent in this appeal; and he is improperly referred to as a respondent, the matter in dispute being a question between the appellant and the class represented by the respondent McInnes; no order has been made joining the liquidator as a party.

The ship was sold, with the consent of the court, without incumbrances, the liquidator at that time having no knowledge of the existence of the maritime liens; the claims on that account were presented after the sale and before the loss of the ship. The sale was free from incumbrances as to the purchasers, but the court has held that this did not relieve the proceeds of the sale from being charged with any lien attaching to the ship.

With reference to the costs incurred by the proceedings taken by way of appeal in this court and in the lower courts, the liquidator submits that, as the dispute is one between the appellant and the wage-earners over a separate fund, these costs should not be borne by the general estate, but out of the separate fund affected; the moneys realized from the sale of the general assets should not be liable for these costs; it would be inequitable to permit these costs to be chargeable against the preferred creditors who are not parties to the dispute, and they have not had an opportunity of appearing in these appeal proceedings.

Chrysler K.C. for the wage-earners, respondents. In the Court of Appeal it was admitted that the wage-earners were entitled to a maritime lien on the ship at the time of her sale. The only question now involved is as to priority of the claims of the lien-holders or mortgagees to the $5,000 received from her sale, the price being insufficient to satisfy both claims.

If there had been no winding-up order made, and the mortgagees had proceeded under their mortgage, the seamen's lien would have attached to the moneys secured by the sale of the vessel. *The "Hope"*(1). How can the position of the parties be reversed and the mortgagee secure a priority over the lien of the seamen by electing to participate in the winding-up ?

When a company is being wound-up the proper procedure for the master and seamen is to place their claims in the hands of the liquidator, and participate in the winding-up, instead of proceeding *in rem. In re Australian Direct Steam Navigation Co.*(2), *per* Jessel M.R., at page 327; *In re Rio Grande do Sul Steamship Company*(3), *per* Brett J., at page 285.

(1) 28 L.T. (N.S.) 287. (2) L.R. 20 Eq. 325.
(3) 5 Ch. D. 282.

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In an action for winding-up the seamen are entitled to priority over the mortgagees for the proceeds of the sale of a vessel of the company being wound-up. *In re The Great Eastern Steamship Co.*(1).

The lien for wages was not lost by any slight delay there may have been in setting forth the claims and there is no evidence before the court that there was any such delay. *Munsen et al.* v. *The "Comrade"*(2). The money realized from the sale of the "Chilco" is still in the hands of the liquidator, who is an officer of the court. *The "Chieftain"*(3).

As to the contention that the seamen's lien followed the vessel and became extinct when it was wrecked and became a total loss, see *Re "Dawson"* (4).

The relationship which the liquidator bears the creditor is that of a trustee. He, without the knowledge or consent of the wage-earners, disposed of the ship, on which they had a maritime lien, for the sum of $5,000, and he is governed by the legal principles controlling a trustee. *In re Oriental Inland Steam Company*(5), *per* James L.J., at page 559, and Mellish L.J., at page 560; Lewin on Trusts (12 ed.), 1150, sec. 2; *Taylor* v. *Plumer*(6), *per* Lord Ellenborough, at pages 574 and 575.

Since the liquidator disposed of the ship, without the knowledge or consent of the wage-earners, and the money received has been kept by him in a separate account, that money is to be considered as the ship itself, and the seamen are entitled to be paid out of that fund in priority to all other claims. Moreover,

(1) 53 L.T. 594.
(2) 7 Ex. C.R. 330.
(3) Bro. & Lush. 212.
(4) Fonb. 229; 17 L.T. (O.S.) 100.
(5) 9 Ch. App. 557.
(6) 3 Maule & Sel. 562, at p. 574.

the ship was sold under an order of the court and, therefore, was free from incumbrance so that no lien could follow the vessel into the hands of the new purchasers.

THE CHIEF JUSTICE and DAVIES J. agreed with Duff J.

IDINGTON J.—Upon the application of the respondent, assented to by the appellant, in a winding-up proceeding, a vessel was sold free from incumbrances under an order of the court and, as a result thereof, it was taken from where, but for this sale, it should have remained and was totally wrecked.

The contention that thereby the rights of those having a lien on that so absolutely sold by order of the court and so dealt with are not only extinguished, but that the benefit of such extinction is to enure entirely to one of the prime movers in such a proceeding involves some strange conception of what law and courts of justice are for.

Yet to give effect to such a contention seems to be the chief if not the sole aim of this appeal.

If the appellant had sold by virtue of its mortgage, or by order of a court enforcing it, the absolute property in the vessel, these prior liens would have come out of the purchase money; or if it had been sold subject to such liens it would only have realized so much less.

But why need I labour with such a question ? The appeal should be dismissed with costs for the reasons (so far as necessary for his decision) assigned by the learned Chief Justice of the Court of Appeal, speaking for the majority of the court.

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The time has not arrived for dealing with any equities the appellant may have as against others (who are not before us) than the lien-holders classed as wage-earners now before us.

DUFF J.—This is an appeal brought by the Traders Bank of Canada against the judgment of the Court of Appeal for the Province of British Columbia dismissing its appeal from three orders of the Honourable Mr. Justice Clement, dated, respectively, the 15th day of January, 1913, the 22nd of January, 1913, and the 27th day of January, 1913.

The Fort George Lumber and Navigation Company, Limited, was incorporated under the laws of the Province of British Columbia and empowered, *inter alia,* to carry on a general logging, lumbering and transportation business and, in connection with its business, owned and operated a number of river steamships on the inland waters of the province.

Upon the application of certain creditors the company was, by order of the Supreme Court of British Columbia, bearing date the 4th day of January, 1911, ordered to be wound up under the provisions of the "Winding-Up Act," R.S.C. ch. 144.

By a further order, dated the 23rd of January, 1911, the respondent, Herbert Lockwood, was appointed official liquidator and was directed to call for tenders for the purchase of the assets of the company in liquidation.

The assets comprised mill and camp equipment, machinery of various kinds, and certain river steamships, and these were at the time of the winding-up in various places in the neighbourhood of Fort George and Ashcroft.

Included in them was the steamship "Chilco," upon which the appellant, the Traders Bank, held a mortgage to secure the sum of $10,000.

At the time of the winding-up order the "Chilco" was imbedded in the ice in the Upper Fraser River and there was grave danger of her becoming a total loss when the ice broke up in the Spring of the year.

Pursuant to the order directing the sale of the assets, the liquidator advertised for tenders for the purchase of them, which advertisement included the steamship "Chilco" and equipment.

Pursuant to the said advertisement the two material tenders received were:—

1. A tender for the whole of the assets of the company, at a price of $65,100.

2. A tender, at the price of $37,500 plus $25,000 and interest (the sum alleged to be due the purchasers on certain mortgages held by them on the assets of the company), making in all $62,500 and interest.

After consultation with the committee of creditors of the company, and on behalf of the liquidator, it was arranged with the agents of the purchasers, John K. McLennan and Allan J. Adamson, that they should offer to purchase separately the steamship "Chilco" and equipment, which offer was made by the purchasers, and the liquidator accepted their offer to purchase the steamship for $5,000; thus bringing the total price the purchasers were to pay for the assets of the company, exclusive of book debts, to about the sum of $67,500. The appellant, the Traders Bank, was consulted and approved of the sale of the steamship for the price of $5,000, it being set out in the liquidator's acceptance of the offer of purchase that the

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liquidator made no guarantee as to the present existence of the steamship "Chilco."

The appellant, when asked by the respondent liquidator if it would consent to a sale of the steamer "Chilco" for the sum mentioned, gave its consent.

By order of the Chief Justice, dated 5th March, 1911, the liquidator was directed to sell the said assets upon the terms of the said offer and acceptance, which sale was carried out as directed, and the separate sum of $5,000 was agreed to be paid over by the purchasers to the liquidator for the steamship "Chilco," which sum of $5,000 was duly credited to the company in liquidation.

As directed by the court, and in the usual course of the winding-up proceedings, the respondent liquidator advertised for creditors of the company, and the appellant (by its manager in the City of Vancouver, Arthur Romaine Heiter) filed with the liquidator an affidavit, dated 1st April, 1911, whereby the appellant claimed to be a creditor of the company (among other claims) on a demand note for $10,000 and interest, and, further, stated that the appellant held as security for payment of the said note a mortgage on the steamship "Chilco," which the said appellant, the Traders Bank, valued at $5,000.

The purchasers took possession of the steamship and, in attempting to take the ship to Quesnel, it was wrecked, on or about the 27th April, 1911, and became a total loss.

Maritime liens were then advanced by the respondent McInnes and the class of creditors he represents and they claimed preference on the proceeds of the sale of the steamship. The appellant, the Traders Bank, claimed to be entitled absolutely to this $5,000.

By order, dated the 26th April, 1911, an inquiry before the district registrar at Vancouver was directed to ascertain, *inter alia,* what persons had earned wages upon the steamship "Chilco" and were still unpaid, the amount of such wages, and how much thereof was earned three months prior to the winding-up of the company.

By order, dated the 16th January, 1912, the said inquiry was extended to ascertain, *inter alia,* what maritime liens there were, if any, affecting the steamship "Chilco" at the date of its sale, and whether any and, if so, which of said liens were then and are now chargeable "upon the proceeds of the sale of the steamship 'Chilco'."

Pursuant to these orders the said inquiries were held and the report of the district registrar, dated 9th January, 1913, sets out his findings.

His report contained a finding that certain claimants, therein set out, were entitled to maritime liens on the steamship "Chilco" at the date of said sale in the amounts set opposite their respective names.

The report further contained a finding by the district registrar that "none of" the said liens were chargeable upon the proceeds of the sale of the "Chilco."

The respondent McInnes moved to vary the said reports and, by an order, dated 15th January, 1913, Mr. Justice Clement varied the said report by striking out the words "none of," and held that the said liens were chargeable upon the proceeds of the sale of the "Chilco," and further directed that the wage-earners be paid the total amount set after their respective names in the report out of the proceeds of the sale of the "Chilco" in priority to all other claims.

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A further order, dated the 22nd January, 1913, to the same effect, included the steamship "Chilco," and, by a further order, dated the 27th January, 1913, the reports were approved, subject to the said orders so varying the reports in part.

The appellant appealed to the Court of Appeal for British Columbia from the order of the 15th January, 1913, the order of the 22nd January, 1913, and the order of the 27th January, 1913, and, by judgment, dated the 22nd July, 1913, the Court of Appeal dismissed said appeal. The present appeal is brought from this judgment of the Court of Appeal, by special leave granted in this court, in Chambers, by order dated 16th September, 1913, on the appellant's undertaking to abide by any order as to costs, including costs as between solicitor and client and all other costs which this court may see fit to make.

I think the appeal fails. The liquidator undoubtedly intended to sell and the purchasers intended to buy the ship free from all incumbrances. The sale must be taken to have been authorized with a view to attain the object for which the winding-up proceedings were initiated, namely, to convert the assets of the company and to apply the proceeds in payment of the creditors according to the order and priority ordained by law. It is upon this hypothesis that any claim of the appellant itself against the proceeds of the sale in specie must rest; and, in consenting to the sale, the appellant must be taken to have assented to the fund being dealt with on this principle; and, on this principle, the superiority of the respondents' claim is indisputable.

It is true that the respondents did not, as the bank did, consent to the sale before it took place.

It may be assumed that, in the absence of circumstances giving rise to an estoppel, the sale itself would not, *ex proprio vigore,* pass to the purchaser a title to the ship free from their liens. On the other hand, if immediately after the sale they had attempted to enforce their rights by proceeding against the ship *in rem,* the court would, unquestionably, on the application of the purchaser, have directed the liquidator to apply the proceeds of the sale in his hands in satisfaction of the liens; and these proceeds being sufficient for the purpose would have restrained the proceedings of the lien-holders.

The lien-holders, moreover, might have elected, *mero motû,* to affirm the sale as passing to the purchaser a title free from incumbrances and to proceed themselves against the fund in the liquidator's hands.

Such having been the rights of the parties immediately after the conclusion of the sale, there appears to be no ground for holding that the subsequent loss of the ship in any way prejudiced these rights.

That circumstance does not appear to have altered the position of the parties in the least. The bank could not have withdrawn its assent to a sale free from its own mortgage on discovery, after the sale, of the existence of the liens. There is no suggestion that if the existence of the liens had been known prior to the sale any other course would have been taken. It seems impossible, therefore, to support the view that the lien-holders have, through the destruction of the ship, lost their right to elect to proceed against the fund. The rights of the bank, if any, to subrogation, or in respect to the marshalling of securities, do not appear to have been affected by the judgment appealed from; but it is better that this should be formally stated in the order dismissing the appeal.

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The appeal should be dismissed with costs, and the liquidator should have his costs, as between solicitor and client.

ANGLIN J.—Although counsel for the appellant argued on behalf of his client that the case at bar should be regarded as one of the taking over of a security by the liquidator at a valuation, under section 77 of the "Winding-Up Act," in answer to a question from the bench, he frankly admitted that he did not himself consider that to be the proper view of it. He was, I think, well advised in making this statement.

That being so, I cannot understand how the appellant can successfully maintain that it is entitled to the whole sum of $5,000, received as proceeds of the sale of the "Chilco" without any provision being made for the satisfaction of the claims of the wage lien-holders, which, admittedly, constituted a charge upon the vessel itself in priority to the appellant's mortgage.

The correspondence between the solicitors for the purchasers and the solicitors for the liquidator seems to make it clear that, at least to the extent of $3,500, there was an agreement that this fund should be held subject to the claims of these lien-holders.

But, apart from any effect which should be given to that correspondence, it is obvious that the liquidator and the appellant mortgagee would, as vendors, be obliged to indemnify the purchasers against these liens, if they remained unaffected by the sale. If they were extinguished by the sale as charges on the vessel, or became unenforceable by proceedings against it, they attached upon the proceeds of the sale which

stood in its stead. In either case, as between the liquidator, representing the estate, and the appellant, the proceeds of the sale of the ship which were in the hands of the liquidator as an officer of the court and subject to equitable administration in the winding-up proceedings, were available to satisfy the claims of the lien-holders as against and in priority to the rights upon them of the appellant. The rights of the parties in regard to this fund were not affected by the subsequent destruction of the "Chilco."

But, in default of obtaining the whole sum of $5,000 to the exclusion of the lien-holders, the appellant asked at bar that it should be subrogated to the rights against the general estate of such of the wage lien-holders as should be paid out of this fund, which represents the appellant's security, or that there should be a marshalling of assets and securities in such manner that, to the extent to which it has two securities — one a lien on the vessel or its proceeds, in which the appellant is interested; and the other a preferential right to payment out of the general assets of the estate, in which the appellant is not interested — the lien-holders should be required to resort to and exhaust the latter security before availing themselves of the former. As against unsecured and unpreferred creditors, represented here by the liquidator, it may well be that this is the appellant's equitable right. But other secured and preferred creditors were not represented before us and, at all events in the apparent uncertainty which exists as to whether the assets will be sufficient to satisfy claims of this class, we could not determine anything here as against such creditors or which would affect their rights. The appellant did not raise this question in the courts of

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British Columbia so far as the record shews. The notice of appeal to the Court of Appeal contains no allusion to this aspect of the case. The only matter dealt with in the judgments delivered in that court is the claim of the appellant to entirely exclude the lien-holders from any interest in the fund of $5,000. In rejecting that claim of the appellant the courts below were, I think, clearly right. Counsel for the respondents maintains that this is the only matter which was presented or adjudicated upon and that any right which the appellant may have to marshalling or subrogation will arise at a later stage of the liquidation proceedings and will not be affected by the disposition of this appeal. Accepting this view of the matter and on this basis I concur in the dismissal of the appeal.

BRODEUR J.—I concur in the opinion of Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Bowser, Reid & Wallbridge.*

Solicitors for the liquidator, respondent: *Wilson & Whealler.*

Solicitor for the wage-earners, respondents: *B. P. Wintermute.*