

a sale before title was proved would do plaintiffs considerable injury. [NORMAN, J., referred to *Best v. Drake* (1).]

*Norman, J.* (after stating the facts).—The case, by arrangement of the parties, stood over till to-day, and the question is now whether the plaintiffs are entitled to an injunction to restrain the sale until the rights of the parties are determined by this suit. The case is one of considerable difficulty. Mr. Kennedy for the plaintiffs could not support his contention by any case bearing directly on the point, and Mr. Woodroffe has argued with great force and ingenuity that the Court has no power or ought not to interfere. It is not without very considerable hesitation that I have come to the conclusion that I ought to stay the sale until the rights of the parties have been determined. I think it would be an abuse of the process of this Court, and would tend to create mischief, if I were to allow the sale to proceed by the Registrar under the decree in the suit upon the mortgage, when it is made plain to me that there is the strongest reason for supposing that the defendants have no title. This is not a case in which the Registrar sells the right, title, and interest of a person only. By the form of the decree he is to sell the mortgaged hereditaments, or a part thereof. On the same principle, that it is the duty of a person, who has rights in property advertized for sale in execution of a decree, to claim the property under Section 246 of Act VIII of 1859, and if his claim is disallowed to bring a suit within one year, from the time of the disallowance, which would be probably before the sale took place, it appears to me that it was the duty of the plaintiffs to set up their title to prevent the public from being defrauded, or themselves from having to litigate with a pauper. It appears to me that I must be guided by the question of convenience, or inconvenience which was the principle in the case of *Bacon v. Jones* (2), and I, therefore, grant the injunction. Great injury might result to the plaintiffs if I did not interfere, and a great fraud may be committed on the purchaser. I think no injury can result to the defendant by my granting this injunction. On these grounds, therefore, though with some hesi-

tation, I grant the injunction until the rights of the parties have been determined. The costs of both parties will be costs in the cause.

*B. L. R. Vol. V, p. 258.*

(Original Civil.)

The 5th May 1870.

Before Mr. Justice Phear.

In the Matter of the SHIP "PORTUGAL."

Bottomry Bond-holder—Ship, Sale of—Master's Lien for Wages—Priority.

The charterer of a ship advanced money to enable her to complete the voyage, and obtained, as security, a "bottomry bond" signed by both the master and owner. On the completion of the voyage, the charterer got the ship arrested and sold, and the money was brought into Court. Before any order had been made for the payment of the proceeds out of Court, the master also had got the ship arrested at his suit for wages due, but no decree had been obtained. Subsequently, the charterer, without notice to the master, obtained an order of Court for the payment of the proceeds of sale to satisfy his bottomry bond. Thereupon, the master applied to restrain the charterer from taking the money out of Court, until the claim for wages had been first satisfied. *Held*, that the master had a lien on the proceeds for wages due to him at the time of the sale of the ship, prior to that of the bottomry bondholder, and that he was entitled to have the proceeds retained in Court until the hearing of his claim.

*Mr. Phillips* had, in this case, obtained a rule *nisi* for an injunction to restrain the holder of a decree obtained in a suit on a bottomry bond on a certain ship, called *The Portugal*, from taking out of Court the proceeds of the sale of the ship, which sale had been made by order of the Court passed in the said suit.

The ship had been chartered by one Mahomed Hossein, for a voyage from Calcutta to Jedda and back, with the option of calling at certain ports, both going to and returning from Jedda. On the voyage to Jedda, the ship put into one of the intermediate ports, where it was found necessary that she should undergo some repairs, for which the necessary funds were supplied by the agent of the charterer at that port. The master had also been compelled to borrow from the passengers during the subsequent voyage to Jedda, in order to

(1) 11 Hare, 369.

(2) 4 M. & Cr., 433.

meet necessary expenses.\* The charterer met the ship at Jeddah, where further supplies were found, necessary for the prosecution of the voyage. Accordingly, the master by advertisement solicited tenders for the loan of a sum of money, and an offer made by the charterer, in competition with others, was accepted. Finally, a bottomry bond was executed by the master, with the consent of the owner, in which were included the sum spent for the repairs of the ship which had been found necessary at the intermediate port, and which had been supplied as above described. The bond was signed both by the owner and the master, and thereby the master purported to bind himself, his executors and administrators, and it contained a proviso that if either of them paid the sum secured by the bond, it should be void. The ship, therefore, proceeded on her voyage back to Calcutta. On her arrival there the charterer proceeded *in pœnam* on his bond, arrested the ship, and obtained an order for sale. The sale, accordingly, took place, and money was ordered to be paid out of Court to the holder of the bottomry bond in satisfaction of his claim. The master had, subsequently to the decree on the bottomry bond, put in his claim for wages, and finding that an order had been made for payment out of Court of the proceeds of sale, of which order he had had no notice, he had applied for and obtained the present rule.

*Mr. Cowell* showed cause against the rule and it was then found necessary to adjourn the hearing for the production of the bond and for allowing affidavits to be filed, but nothing further appeared in the decree material to this report. On the adjourned hearing,

*Mr. Phillips*, in support of the rule, contended that rule that the most diligent creditor is to be first paid did not apply where the debts were of unequal rank. The Court will let creditors come in at any time while the fund is in Court.—Seton on Decrees, 128. *The Saracen* (1). That case was decided before the passing of the Admiralty Court Act, 1861, which made applicable Part 9 of the Merchant Shipping Act, 1854, and thereby extended the equitable jurisdiction. [PHEAR, J.—Does that affect the Vice-Admiralty Jurisdiction?] It is submitted that it does. The claim for wages is preferred to that of a bottomry

bond holder even after decree obtained by the bottomry bond-holder as is clearly shown by *The William Safford* (1). The bond is invalid, no money having been advanced on the credit of the ship—*Abbott on Shipping*, 131; *The Augusta* (2); and the bond-holder being indebted to the owners of the ship—*Abbott on Shipping*, 132; *The Hebe* (3); *The Royal Arch* (4); and the whole of the money not having been really paid—*Abbott on Shipping*, 134; *The Jonathan Goodhue* (5). The latter case is distinguishable, in that the allowing the master's claim would have been inequitable, but it is not so here. The terms of the bond there were much stronger, and the equity therefore against the master. But the Court will consider the equities and may, if it thinks fit, marshal the securities: *The Edward Oliver* (6). The bond is the owner's bond practically: the master signed as a matter of form, and notwithstanding his having signed, he retains his priority. The master's affidavit shown he was deceived and only signed on the representation that he would retain his priority. The learned counsel also referred to the cases of *Dodson v. Lyall* (7); *The Madonna d' Idra* (8); *The Mary Ann* (9); *The Priscilla* (10); *The Constantia* (11).

*Mr. Cowell, contra.*—The bottomry bond is a valid one, and the holder is entitled to priority. The master has made himself liable on the bond, and therefore cannot compete with the bond-holder in asserting a lien; see *The Jonathan Goodhue* (5), where the master made a claim, and was opposed by the bond holder, in whose favor it was ruled by Dr. Lushington, that the master having hypothecated by his own act the ship and freight, and also rendered himself personally liable, could not claim to take the sale proceeds for his benefit and to the injury of the bond-holder: *Abbott on Shipping*, 620. Even if the master ever had a lien, he lost it, when the bond-holder obtained a decree: *Abbott on Shipping*, 619;

(1) 1 Lush. Adm. Rep., 69.

(2) 1 Dodds, 283.

(3) 2 Rob. Adm. Rep., 146.

(4) Swab, 278.

(5) *Ibid.*, 524.

(6) 1 L. R., Ad. & E., 379.

(7) 8 Jur., 969.

(8) 1 Dodds Adm. Rep., 37.

(9) 9 Jur., 94.

(10) 1 Lush. Adm. Rep., 1.

(11) 2 Rob. Adm. Rep., 405.

(1) 2 Rob. Adm. Rep., 451; S. C., on appeal. 6 Moore's P. C., 56.

Cooté's Admiralty Practice, 113; *The Saracen* (1). Diligence in procedure to decree is rewarded in the Admiralty Court with priority of claim against the proceeds—Machlachlan on Shipping 596. There is no marshalling securities here; the bond-holder was not indebted to the owner. The owner had drawn a bill for rupees 3,000 as freight on the bond-holder. A lien is extinguished by the sale of the *res* by a competent Court, and by want of diligence in the suitor: Cooté's Admiralty Practice, 6. In this case only a fraction of the master's claim was for wages earned during the voyage. His services therefore did not operate for the protection of the bond-holder's interests, see Abbott on Shipping, 620.

*Mr. Phillips*, in reply, referred to the cases of the *Gratitudine* (2), *The Veronia* (3).

*Phear, J.*—I think *Mr. Phillips'* client is entitled to the injunction for which he asks, and that the rule *nisi* should be made absolute. Hossein Ibrahim chartered the Ship *Portugal* in December 1868, for a voyage to Jeddah and back, calling at certain ports at the charterer's choice, both on the outward and homeward voyages. The ship started on her voyage in February 1869, with Mahomed Hossein as master, and also with her owner on board. She arrived at Jeddah in April 1869, and there she met the charterer. At that time it seems to have been found by the owner and the master that they had not sufficient funds to enable them to bring back the ship on her return voyage, and after an advertisement, to which I need not further refer now, an agreement was entered into by the charterer to advance the necessary money, and, on July 12th, what is said to be a bottomry bond, was signed both by the master and owner in favor of the charterer. The ship left Jeddah on July in her homeward voyage, and arrived in Calcutta in September. In November the charterer proceeded against the ship in this Court, in its Vice Admiralty jurisdiction, on the bond of the 12th of July. The ship was arrested; the usual appraisement and sale took place, and a decree was made in favor of the charterer. After this and before any order was made for the payment of the proceeds of the sale out of Court, the master also got the ship arrested at his suit, but no decree was made thereon.

(1) 2 Rob. Adm. Rep., 451; S. C., on appeal, 6 Moo. P. C., 56.

(2) Tud. L. C. Mer. & Mar., 50.

(3) 2 L. R. Ad. & E., 76.

After this had taken place, the charterer without notice to the master, obtained an order of Court for the payment to him of the proceeds of the sale of the ship, and the present application is that he be restrained from taking out the money under that order. I think, as I have already said, he must be restrained, because, in my opinion, the effect of the decree in his favor was merely to put him in possession of the ship, which then existed in the shape of money in Court, and that he had that possession subjects to all liens that were prior in rank to his own claim. *Mr. Cowell* referred me to the case of *The Saracen* (1) and one or two other cases in support of the contention that the decree made in favor of the charterer gave him priority over all other claims against the ship. I think that these cases are correctly distinguished from the present one, by *Mr. Phillips*, for in them the priority which the decree was allowed to give was simply priority against claimants of co-ordinate rank. It was simply that priority which all Courts of Common Law give to the most diligent suitor. The decree holder got possession of the ship, and as against all persons with co-ordinate claims which they had been careless of asserting, he was entitled to pay himself in full before they could be considered. But I think this is not so against persons who have claims against the ship of a higher rank and priority to his own. In the case of *The Aline* (2), *Dr. Lushington* points out very clearly that a party who had obtained a decree against a ship for damages, still held the ship under that decree subject to the lien of a bottomry bond-holder, where the bottomry bond had been entered into after the occurrence of the collision. It appears to me that following the reasoning of *Dr. Lushington*, I must hold that the possession which the charterer has obtained, by virtue of the decree of this Court, is subject to all liens which are prior to the lien of the bottomry bond-holder, and there is no doubt that the master's claim for wages, during the time when he was engaged, in the service of bringing the vessel safe to port, is a claim which is prior to that of the bottomry bond-holder. Upon this I think that *Mr. Cowell* has not made any contest. It follows, therefore, that *Mr.*

(1) 2 Rob. Adm. Rep., 451.

(2) 1 Rob. Adm. Rep., 111.

Phillips' client is entitled to have the proceeds kept in Court, until he has made out his claim. No doubt, Mr. Cowell did urge that in this case the master had bound himself personally in the bottomry bond, and had in that way waived his claim for wages as against the bottomry bond-holder, or at any rate given the bottomry bond-holder priority. But I think there is no ground for contending in this document that the master has bound himself personally. I think it is extremely doubtful, if it were matter now before me, whether, under the circumstances, the charterer was a party who could advance money on a bottomry bond. He appears to me to have been, pending this voyage, in the position of a temporary owner, and if it had come to be a contest between the parties, whether or not the so-called bottomry bond was in law a bottomry bond, which entitled the owner to proceed against the ship in the Admiralty Court, would be a matter which would require great consideration. I think it right to add that, on the last affidavit (what may be in those I have not read, I do not know) I abstain from saying that the bond-holder did actually advance the money. Be this as it may, as I have already said, the master is entitled to have his claim for wages first satisfied. The rule must be made absolute, and with costs, because the bond holder ought not to have applied to take the money out of Court without notice to the master. That he had notice of the master's claim Mr. Carapiet's affidavit puts beyond doubt, and as it is a claim which I think is well founded in law, the bond-holder must pay the costs of having caused the master to litigate it. I may throw it out as a doubt, however, whether as against the bond-holder the master is entitled to claim for wages after the time when the ship was first arrested; but I think he is certainly entitled to his wages up to that time.

*Rule absolute.*

Attorney for the master : *Mr. Carapiet.*

Attorneys for the bond-holder : *Messrs. Berners & Co.*

*B. L. R. Vol. V, p. 264.*

*(Full Bench.)*

The 14th June 1870.

*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice E. Jackson and Mr. Justice Markby.*

**RAJKUMAR RAMGOPAL NARAYAN SING** (*Plaintiff*),

*versus*

**RAM DUTT CHOWDHRY and another** (*Defendants*).

*Regular Appeal No. 138 of 1869, from a decree of the Subordinate Judge of Tirhoot, dated the 30th March 1869.*

**Mortgage—Agreement not to alienate.**

By an agreement reciting that A. had executed a bond in favor of B., for a certain sum of money, A., "in order to repay the bond-money in the terms in the bond contained," declared that, "until the repayment of the money covered by the bond, he should not, from the date of the agreement, convey the property mentioned therein to any one, by deed of sale, or deed of conditional sale, or *mokurrari potta*, or deed of mortgage, or *zuripeshgi ticcapotta*. Should he make all these transactions in respect of the said lands, the instrument relating thereto shall be deemed invalid and as executed in favor of nominal parties for evading payment of the money covered by the said lands."

*Held, (Markby, J., doubting), that the instrument operated as a mortgage to A. of the lands comprised therein.*

No precise form is required to create a mortgage.

On the 10th Baisakh 1265, F. S. (8th April 1858), Mussamat Bhagabati Kunwar, guardian of Mussamat Jorowan Dye, minor, lent and advanced to Murlidhar and his co parceners rupees 3,000. In consideration of the loan, Murlidhar and his co parceners executed a bond for the amount, and also an agreement, a translation of which is as follows :

"This is executed by Murlidhar Jha, Haldhar Jha, Lalji Jha, and Mussamat Sachi