

Case No. 7,246.

[11 N. Y. Leg. Obs. 137.]

THE J. B. LUNT.

District Court, S. D. New York.

1853.

POSSESSORY ACTION IN ADMIRALTY—MORTGAGOR AND
MORTGAGEE—THIRD PARTY—PURCHASER AT SHERIFF'S
SALE—ADJUSTMENT OF ACCOUNTS—COSTS.

1. The legal title and right to immediate possession to a vessel mortgaged is vested in the mortgagee.
2. After condition broken, the mortgagee may take immediate possession of the vessel.
3. A suit in admiralty will lie to reclaim the possession from any third party who may have acquired it
4. A purchaser of the vessel at a sheriff's sale, under a judgment against the mortgagor, cannot maintain his possession against the mortgagee.
5. A court of admiralty will not adjust the accounts between mortgagor and mortgagee in a possessory action to recover the vessel.
6. Whether the mortgagee shall be entitled to costs in such action will depend upon the fairness and equity of his proceedings in getting the vessel into his possession.

The libellants and claimants are residents of this state. The brig was built in the state of Maine, and was owned by Silas Hardy, a citizen of that state, and had been registered in his name in this port. On the 4th of February, 1851, the owner gave the libellants a bond for twelve thousand dollars, conditioned to pay them on demand five thousand nine hundred and seventy-five dollars with interest; and the same day executed to them an absolute bill of sale of the brig, to which was subjoined the condition that on payment of the sum of money secured by the said bond, pursuant to its condition, the bill of sale was to be void, and otherwise to remain in full force. The mortgage was registered at the custom-house in this port on the day of its date. The debt for which the bond was given, was created by credits given by the libellants to Hardy, as master and owner of the brig, for supplies and repairs to her, and sums of money advanced

him by the libellants for her purchase. The owner being negotiating a sale of the brig, the libellants on acquiring knowledge of it, on the 1st day of March, 1851, demanded of him immediate payment of the said sum of money. This was the afternoon of Saturday. Hardy requested time until the Monday following to make payment, and said he would then obtain the money from his purchaser and pay off the mortgage. The libellants refused to give the delay, and directed a person to go to the vessel and take possession of her in their name. The same day Hardy complained to the libellants that they had taken the brig into their possession. The present claimant was the person negotiating with Hardy for the purchase of the brig. On the 4th of March, 1851, the brig was attached by process issued the same day out of a state court, in favor of Jones and Johnson against Hardy, as a non-resident debtor. The debt on which the attachment was founded, was a promissory note, dated February 20th, 1851, for three thousand seven hundred and seventy-one dollars and sixty-six cents, payable on demand, to the claimant, and by him endorsed to his firm, Jones and Johnson. On the 4th of March, a summons in the action was served on Hardy, and on the 6th he gave his written consent that judgment be entered against him forthwith for the amount claimed with interest. Judgment was perfected and docketed the same day against Hardy for three thousand two hundred and eighteen dollars and eighty-three cents, and execution thereon issued the same day. On the 13th of March the sheriff sold, under the execution, the interest of Hardy in the vessel at public auction to the claimant, he being the highest bidder, and gave him a bill of sale and possession of the vessel. The bill of sale was recorded at the custom-house on the 15th of March. On the 15th of May, 1851, the above judgment was assigned by the plaintiffs therein to the claimant.

G. F. Betts, for libellants.

C. Van Santvord, for claimant.

BETTS, District Judge. 1. As between Hardy and the libellants, the latter, by force of the mortgage, are entitled at law to have possession of the brig against him, and hold it until satisfaction of the debt secured by it (*Fuller v. Acker*, 1 Hill, 473), and the right of possession is not interrupted by a seizure and sale under execution against the mortgagor while the possession remains with him (*Id.*). The conveyance of the vessel by way of mortgage, vested the legal title in the libellants, and would be sufficient to carry even the proceeds to them had she been disposed of. *De Wolf v. Harris* [Case No. 4,221]; 2 Denio, 172; *Id.* 344; 3 Denio, 33.

2. The legal title vested in the libellants by the bill of sale entitled them to take possession of the vessel against the mortgagor without suit. Every outside equitable interest with which the legal title is opposed, must be left to the cognizance of other courts than the admiralty. *The Sisters*, 5 C. Rob. Adm. 138; 3 C. Rob. Adm. 176; 4 C. Rob. Adm. 225; *Patchin v. Pierce*, 12 Wend. 61. The court of admiralty has jurisdiction of actions

to reclaim possession of vessels in behalf of the party holding the legal title. Abb. Shipp. 131, note 1. Judge Woodbury, in running over all the cases, admits it to be so when the consideration is of a maritime character. *Leland v. The Medora* [Case No. 8,237].

3. The claimant proves no tender of the debt on demand of it when the mortgage became forfeited, nor previous suit brought. The assertion of a willingness to pay, not accompanied by proof of ability to perform, would raise no equity in behalf of the mortgagor, even if the court is permitted to take into consideration a bona fide attempt to satisfy the mortgage debt at such time. 3 Denio, 33; 12 Wend. 61. Although on the question of costs, such attempt would justly have great weight in behalf of the mortgagor or his assignee.

4. This mortgage being given by a foreign owner of, the vessel for a maritime consideration, its lien is complete on compliance with the act of congress, and the mortgagee is not compelled to register it also tunder the state law. But the claimant is not in a position to raise the question of registry, because the sheriff sold him no more than the right and interest of the mortgagor in the vessel, and because he had actual notice of the existence of the mortgage and the consideration for which it was given.

5. The action is not to enforce payment of the money secured by the mortgage, and the court is not therefore required to meet the question which seemed to weigh with Judge Woodbury,—*Dean v. Bates* [Case No. 3,704]; *Leland v. The Medora* [supra]; *Packard v. The Louisa* [Case No. 10,652],—whether a mortgagee can resort to admiralty to foreclose his mortgage. This suit seeks to carry into effect the legal title of the libellants to the possession of the vessel, as against the right of the mortgagor alone, and when the possession is secured, the holders would be subject to the control of the proper judicatory in the exercise of their rights as mortgagees, and the allowance of all equitable interests of the claimant standing in the place of the mortgagor. The possession in point of fact was in the libellants, by admission of the mortgagor, when it was divested by the sheriff under the direction of the claimant.

6. In my opinion, the libellants are entitled to a decree for restoration of possession of the vessel to them. Independent of the legal title to possession, they had it in fact through their agent, Daggett, and, in relation to a vessel, the possession of the master and mortgagor, continuing after it

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is demanded by the mortgagees, becomes, as against him and a third party taking his interest with full notice, the possession of the mortgagees. It was not necessary to the protection of their rights against the claimant that they should have displaced the mortgagor from the vessel.

7. The question of costs will be reserved to enable the claimant to satisfy the court that the mortgagor made bona fide effort to satisfy the mortgage debt, and had means to do so before this suit was instituted, or that the libellants were guilty of oppression and inequitable measures in enforcing their legal right.

[NOTE. Subsequently a motion was made before Judge BETTS that the decree of possession of the vessel to the libelants be varied, and the libel dismissed, upon the execution of a bond with sufficient sureties, approved by the district court; the bond to be conditioned to pay the libelants the amount due them. The court held that the proceeding contemplated would contravene the established practice of the court in respect to rectifying a decree, and that, furthermore, it would be changing an act of possession into a proceeding in foreclosure of the mortgage, which last the learned judge held was not within the province of courts of admiralty. Case No. 7,247.]