THE H. N. EMILIE.

REDMEYER et al. v. THE H. N. EMILIE (LA CHANCE, Intervener).

(District Court, D. Minnesota, Fifth Division. November 20, 1895.)

1. ADMIRALTY PRACTICE—LIBELS IN REM—INTERVENTION BY MORTGAGEE.
A mortgagee of a vessel may intervene in a suit in rem, for the purpose of resisting liens sought to be established by libelants.

2. MARITIME LIENS—STATE STATUTES—SUPPLIES IN HOME PORT.
Liens given by state statutes for supplies furnished in the home port may be enforced in the federal courts, and are entitled to priority over a previously recorded mortgage; but they are subject to the conditions imposed by the state statute, and must be enforced within the statutory limit of time.

3. SAME—LACHES.
Liens for wages accruing subsequently to a recorded mortgage have priority; and, where the mortgagor has control of the vessel, the rule of laches will not be as rigidly enforced as when subsequent rights have intervened. No fixed period of time will be established as an inflexible rule for the determination of laches, but every case must depend upon its peculiar equitable circumstances.

John Jenswold, Jr., for libelants.
Spencer & Hollembaek, for intervener.

NELSON, District Judge. On March 29, 1895, Hedley E. Redmeyer filed a libel against the schooner H. N. Emilie for work done and performed on that boat between August 1, 1891, and June 3, 1892, in a home port, and for wages on different occasions, as mate and seaman thereon, from June 4, 1892, to November, 1894. On April 30, 1895, Erick Erickson filed a libel against the same boat for wages earned thereon in August, 1892, and June, 1893. Whereupon Eugene La Chance intervenes, resisting the libels, and asks that a judgment obtained by him, duly docketed in St. Louis county, Minn., April 11, 1895, for $496.77, on a mortgage given to him by Henry J. Redmeyer, the owner of the boat, March 11, 1892, and duly recorded in the office of the collector of customs of the port of Duluth, Minn., be declared a lien and charge upon said schooner superior to the libels, and asks a decree accordingly.

There can be no question as to the right of La Chance to intervene as a claimant in this manner. Schuchardt v. Babbidge, 19 How. 239. He seeks to defeat these libels on the grounds that the sums claimed for work done and performed on the boat cannot now be recovered, because the action was not commenced within a year after it accrued; and, also, that the amounts claimed for wages are stale claims, and, not having been enforced within a reasonable time, the liens are thereby lost. The rule is well settled that a lien for supplies furnished in a home port, given by a state statute, can be enforced in rem in the United States district court (The Menominie, 36 Fed. 197), and that it has priority over a previously recorded mortgage on the vessel (Clyde v. Transportation Co., 36

Fed. 501; The Madrid, 40 Fed. 678); but it is also true that, where a lien is sought to be established by virtue of a state statute, it is subject to the conditions imposed by that statute (The Edith, 94 U. S. 518; The Menominie, supra). Section 23, c. 83, Rev. St. Minn. 1878 (section 6107, Rev. St. 1894), reads as follows: "All actions against a boat or vessel, under the provisions of this chapter, shall be commenced within one year after the cause of action accrues." It appears that more than that time has elapsed since the last work was done on the boat, and therefore this claim cannot now be enforced.

The claims of Redmeyer for wages are $70 from June 4 to August 4, 1892, $140 from July 25 to November 25, 1893, and $35 from November —— to December ——, 1894; while those of Erickson are for a month's wages, at $30, from August 1, 1892, and a like amount from June 1, 1893. In the cases cited by counsel for La Chance, rights of purchasers or others had intervened. In The Key City, 14 Wall. 660, the court says:

"Where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued."

See, also, The Harriet Ann, 6 Biss. 13, Fed. Cas. No. 6,101.

Here no rights have intervened, and, when the liens for seamen's wages attached, the vessel was under the management and control of the mortgagor.

The claims of Redmeyer for work and labor performed in 1891 and 1892 cannot be sustained, but the amounts for wages claimed by him and Erickson are prior liens to the mortgage of La Chance, and a decree will be entered accordingly, and for a sale of the boat, under proper notice.

MAHONEY v. NEW SOUTH BUILDING & LOAN ASS'N.

(Circuit Court, W. D. Virginia. November 7, 1895.)

REMOVAL OF CAUSES—TIME OF APPLICATION.

Under the practice in Virginia, a summons against a defendant is made returnable at a rule day of the court following its issue. Upon that day, if the defendant fail to appear and plead, an order is entered that judgment go against him, unless he appear and plead at the next rule day; and at such next rule day the defendant may plead to the merits, but any dilatory plea must be filed on the rule day to which the summons is returnable. *Held*, that a petition and bond for removal of a cause to a federal court, filed on the second rule day, at which a plea to the merits is due, is filed in time. Martin's Adm'r v. Railroad Co., 14 Sup. Ct. 533, 151 U. S. 673, distinguished.

Harrison & Long, for plaintiff.
McHugh & Baker, for defendant.

SIMONTON, Circuit Judge. This is a motion to remand a cause removed into this court from the circuit court of the city of Roanoke, Va. The defendant is a corporation of the state of Louisiana; the plaintiff a citizen of the state of Virginia, resident in said city of Roanoke. The defendant filed its petition for removal with bond in the said circuit court for the city of Roanoke, and obtained the order of the court for the removal. The record coming into this court, this motion to remand is made. There is but a single question in the case,—was the petition for removal filed within the proper time? The summons in this case was originally issued on 11th March, 1895, returnable to the rules to be holden on third Monday of March thereafter. An attempt at service was made on 15th March. On second March rules, 1895, this indorsement was made: "Decn. filed and C. O.,"—that is, declaration filed and common order entered. On first April rules, the common order was confirmed, and writ of inquiry granted. But on 17th April, 1895, the court made an order setting aside the service as defective, and on motion of plaintiff the cause was remanded to the rules. A new summons was issued 6th August, 1895, returnable to the rules to be holden on third Monday of August then next ensuing, which summons was served on 7th August, 1895. At the second August rules, this indorsement was made: "Cause remanded to rules at April term. Declaration filed and common order." And at first September rules this entry was made: "Defendant filed petition and bond for removal of cause to U. S. court, and W. E." (writ of inquiry). The practice in Virginia is this: The defendant is brought into court by a summons requiring him to appear on a certain day, when a declaration will be or has been filed. If he fail to appear and plead, the clerk enters what is called the "common order." "This rule is called the 'common order' because it is the usual order; or the 'conditional judgment,' because it threatens the defendant with a judgment unless he appear and plead according to its terms. Those terms, it may be proper to say, are as follows: The defendant having been summoned (or being arrested), and not