

THE ASHER W. PARKER.

CURTIN v. THE ASHER W. PARKER.

(Circuit Court of Appeals, Second Circuit. January 7, 1898.)

No. 4.

1. MARITIME LIENS—WAIVER—LACHES.

A furnisher of supplies, who, for about a year and a half after the vessel has been sold, takes no steps to enforce his lien or ascertain her ownership, and then, on learning of the sale, waits about six months longer before filing his libel, though the vessel was continuously within the jurisdiction, thereby loses his lien; the purchaser having in the meantime paid the deferred purchase money notes, in ignorance of the existence of the claim.

2. SAME—STATE STATUTES—DEFENSES.

A lien for supplies given by state statute, when enforced in a court of admiralty, is subject to all defenses recognized by such courts as meritorious, including that of laches.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel in rem by John Curtin against the schooner Asher W. Parker to enforce an alleged lien for supplies. The district court dismissed the libel on the ground that libelant had lost his lien by laches, and the latter has appealed.

J. A. Hyland, for appellant.

Thos. Alexander, Jr., for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the court below that the laches of the libelant were such as should defeat his suit. The supplies were furnished to the schooner August 5, 1893, at which time one Clayton was her owner. In November, 1893, Clayton sold her to Kemp, the present owner, representing that there were no liens upon her. The certificate of enrollment, showing Kemp to be the owner, was duly entered at that time with the collector of the port at which the supplies were furnished. Prior to the spring of 1894, Kemp had paid the full purchase price of the vessel. The libelant had known Clayton for many years; having sold him supplies previously for this vessel and another vessel. He seems to have ascertained in the spring of 1895 that Clayton had divested himself of his property and become irresponsible, and it was not until after this time that he took any active measures to communicate with Kemp and assert his rights. The libel to enforce the lien was filed in December, 1895. The vessel had always been within the jurisdiction since Kemp had become her owner, and could have been arrested at any time. If the libelant had used any real diligence, Kemp would have been apprised of the claim seasonably, and possibly could have indemnified himself from Clayton. The state statute giving a lien upon vessels for supplies furnished within the state, when enforced in a court of equity, must be enforced conformably with the principles of such courts, and subject to all defenses which such courts recognize as meritorious. The decree is affirmed, with costs.

HUGHES v. GREEN et al.

(Circuit Court of Appeals, Eighth Circuit. January 31, 1898.)

No. 914.

1. STATE AND FEDERAL COURTS—DISMISSAL OF STATE-COURT SUIT—SUBSEQUENT SUIT IN FEDERAL COURT.

That a plaintiff first commenced his action in a state court, and procured its dismissal (leaving him free, under the local statute, to institute it anew), is not a bar to a suit, seeking the same relief, subsequently brought by him in the federal court of the same state, involving matter over which that court has primary and original jurisdiction. 75 Fed. 691, reversed.

2. SAME—CONCURRENT SUITS—SUSPENSION OF PROCEEDINGS IN SECOND SUIT.

While, as between two suits for the same relief in the enforcement of a lien on specific property, or similar purposes,—one in the state and the other in the federal court,—the one in which process is first issued and served must be allowed to proceed without interference from the other, the practice is not to dismiss, but to suspend action in the second suit until the first is tried and determined.

Appeal from the Circuit Court of the United States for the District of Colorado.

W. J. Roberts (Felix T. Hughes and H. R. Hughes, on brief), for appellant.

T. A. Green, for appellees.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was a suit brought by Felix T. Hughes, the appellant, against Thomas A. Green, Edward B. Green, Thomas A. Green, Jr., Charles H. Green, and Amos V. Green, the appellees, in the circuit court of the United States for the district of Colorado, for an accounting, and to foreclose a mortgage on certain mining property located in Pitkin county, Colo. It is averred in the bill that the mortgage in controversy was executed by the defendant Thomas A. Green, and given to secure the payment of one certain promissory note for the sum of \$3,925, and three certain assignments of an interest in a contract for attorney's fees, dated as follows: One for \$10,000, dated March 31, 1893; one for \$10,000, dated November 20, 1893; and the other for \$1,500, bearing even date with the mortgage, viz. October 9, 1894. For the purpose of disposing of the question before the court upon this appeal, it is unnecessary to state the averments of the bill more at length. The record shows that on the 12th day of July, 1895, Felix T. Hughes, the plaintiff, brought a suit in the district court of Pitkin county against the defendant Thomas A. Green to foreclose this mortgage; that on August 15, 1895, he brought a suit in the circuit court of the United States for the district of Colorado against the same defendant, and asking the same relief; that on the 16th day of May, 1896, the defendant Green filed a motion in that case to dismiss it for the reason that a suit was then pending in the state court, brought by the same plaintiff against the same defendant, and concerning the same property mentioned and described in the bill therein. The circuit court sustained the motion to dismiss.