

Friday, February 26.

SHEARER v. COOPER.

(Before Lord Chancellor Cairns, Lords Chelmsford, Hatherley, and Selborne.)

(*Ante* vol. x. p. 442.)

*Ship—Repairs—Lien—Right of Retention.*

When a firm, after executing certain repairs upon a ship on their own private slip, launched her into the public dock,—held (*reversing* decision of the Court of Session) that they had not thereby lost their lien on the ship for the cost of the repairs, but had a right to retain her until these expenses were paid.

This was an appeal from a decision of the First Division of the Court of Session. The respondent, Mr Cooper, who was pursuer in the action, was the registered mortgagee of a vessel "Joan Cunllo," of Aberystwith, and he sought to recover possession of it, as he said the ship was illegally detained by Messrs Barr & Shearer at Ardrossan by virtue of an alleged lien for repairs. The vessel was in September 1872 in possession of her owner, Mr Lewis, and had returned from a voyage to the West Indies. On her return Lewis agreed with the appellants to have some repairs executed, and for that purpose took her and left her with the captain and part of her crew at Ardrossan. For a time the vessel lay in the public dock, there waiting her turn to get upon the appellants' patent slip. She got on the appellants' slip, and remained there till 16th November, the captain and mate remaining in charge of her as before. The repairs were mostly completed, and the vessel was again launched into the public dock to make room for another vessel. By order of the harbour master she was ordered to lie for some hours opposite the appellants' slip. In the course of the same day she was brought back to the south side of the dock and moored right across the bottom of the slip. She there remained till 12th December, when she was removed to some distance from the foot of the slip, and separated from it by the graving dock. By this time the whole repairs had been completed at an expense of about £900, with the exception of some carpenter work. All this time the captain and mate were on board, the appellants' workmen going and coming during the day. This state of things continued till 18th December, when the appellants, becoming doubtful of the owner's credit, took possession of the ship during the temporary absence of the captain and crew, and drew her up again into their own yard. The respondent thereupon claimed to take possession of the ship by virtue of his mortgage, alleging that he was entitled, and that the appellants had lost their lien on the ship, and he raised the present action,—which the appellants resisted on the ground that they had a lien for £900 repairs. The Lord Ordinary (Gifford) by his interlocutor held that the appellants had a lien on the vessel for the cost of the repairs; that they had never lost such lien by ceasing to have possession; that they had a right to retain the ship till these expenses were paid; and that the respondent had no right to demand or obtain possession without such payment. On reclaiming note, the First Division recalled this interlocutor, and ordered the appellants to deliver up the vessel to the respondent, without payment of their expenses.

The appellants appealed to the House of Lords.

At delivering judgment—

The LORD CHANCELLOR said that the question was not whether the shipbuilders had a lien, but whether in the circumstances they had abandoned it. The facts lay in a small compass—The ship had been on a voyage to the West Indies, and the owner resolved on its return to have certain repairs done, and he put it into the hands of the appellants. The ship was taken by its owner and left at Ardrossan, where it lay waiting its turn to be taken into the appellants' patent slip. The condescendence very properly described this act as putting the ship into the appellants' hands, for the ship was literally handed over, and it was in consequence of that that the ship lay in the dock, The captain, the mate, and a care-taker were left on board. The ship was clearly in the appellants' hands all the time; the owner's servants were in it, and their presence there did not at all exclude the appellants' possession. The ship having been nearly completed, was moved out of the patent slip; but this was not at the owner's request, for he wanted her to remain two days longer, but it was moved out to make room for other ships, and because the rest of the repairs could be done quite as easily in the wet dock. This was not in any sense a giving-up of the possession, and there was nothing to indicate any change of the possession. The harbour master, and he alone, directed where the ship was to lie, and the works went on exactly as before; and, indeed, it appeared to be the custom of the appellants' business to finish all their repairs in this way. It was a question of fact as to the circumstances under which the ship was moved. She was originally handed over to the appellants, and when for a special purpose—namely, in order to complete the repairs more conveniently in the dock—the ship was moved, this was not an abandonment of possession. The interlocutor of the Lord Ordinary ought therefore to be restored, and that of the Inner House reversed.

LORD CHELMSFORD said the question was entirely one of fact, and if the Court of Session had dealt with it as such they could scarcely have arrived at the conclusion they did. They thought that there was some rule of law which compelled them to go against equity and hold that the possession of the ship had ceased when it left the patent slip. All depended on the purpose for which the removal took place, and that was to make room for another ship. It was obvious, therefore, that there had been no relinquishment of the possession.

LORD HATHERLEY was of the same opinion.

LORD SELBORNE said the possession was at first in the shipbuilder, and the launch was the act of the appellants, and not of the owner. It was for the appellants' convenience, and was objected to by the owner as interfering with the repairs. The control while the ship was in the wet dock came entirely from the harbour-master, and not from the owner, and all was done in the usual way of conducting the appellants' business. This is a very clear case, for possession being once legitimately obtained, it required to be misplaced by some acts which were unequivocal. The acts here were unequivocal; but they were so entirely in the view contended for by the appellant.

Judgment reversed.

Counsel for Appellants—Cotton, Q.C., and Williams, Q.C.

Counsel for Respondents—Pearson, Q.C., and Mackintosh.