

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Chasteauneuf v. Capeyron and another, from the Supreme Court of the Island of Mauritius, delivered 21st January 1882.*

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Present :

SIR BARNES PEACOCK.

SIR MONTAGUE SMITH.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

This is an appeal from a rule made by the Supreme Court of Mauritius, whereby it was ordered that the Collector of Customs at Port Louis in Mauritius do register in his books the British barque "Barentin" under the name of Messrs. Capeyron and Delange of Port Louis, and whereby it was further ordered that the said Collector of Customs do erase from his books the inscriptions which appear therein against the said ship, the creditors having accepted to exercise their rights upon the sale price deposited with the Master of the Court. That rule was obtained upon the application of Messrs. Capeyron and Delange, the Respondents, who claimed as purchasers of the barque at a sale by licitation.

The Appellant was the Collector of Customs at Port Louis, and in that capacity was Registrar of British Ships at that port. The barque was a

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British ship, and was registered at Port Louis in the name of Aimé Docinthe, a British subject, as the sole proprietor thereof, and in the names of Henry Capeyron, Emile Coiffe, and John Ferguson, as joint mortgagees, for 8,000 dollars, with interest at 9 per cent.

The sale by licitation was ordered by the Supreme Court in a suit in which Marie Léonie Lilia François, as one of the heiresses of the late Jean Eliacin François deceased, was Plaintiff, and Aimé Docinthe, the registered owner of the barque, and the guardian and sub-guardian respectively of certain minors, heirs of the said Jean Eliacin François, were Defendants.

In the order for the sale made in that suit it was directed to take place before the Master of the Court according to law, and in the conditions under which the sale was directed by the Court to take place, the sale was described as a judicial sale as regards the heirs François, and by licitation as regards Aimé Docinthe, of the barque "Barentin," therein described as belonging for one half to the estate and succession of the late Jean Eliacin François, and the other half to Aimé Docinthe. Neither the judgment of the Supreme Court by which the sale was ordered nor the grounds upon which it was based are before their Lordships. The Registrar was ordered to register the barque under the names of the Respondents upon the production of the memorandum of conditions under which the sale by licitation took place before the Master, together with the award of that officer, and upon the making and signing by the Respondents of the declaration and statements required by Section 58 of the Merchant Shipping Act, 1854, and by form marked H in the schedule thereto.

It would be unnecessary, even if their Lordships had the means for so doing, to inquire into the validity of the order for sale; that order was

binding upon the parties to the suit, and the substantial question to be determined in this appeal is, whether the Registrar of British Ships was bound to register as owners of the barque the purchasers under the award of the Master made upon the sale by licitation. Their Lordships have had the benefit of the arguments of the learned Attorney General and Mr. Smith on behalf of the Appellant, but the Respondents did not appear. Their Lordships have carefully considered the case, and have arrived at the conclusion that the Registrar was right in refusing to register the Respondents as owners of the barque, and to erase from his books the inscriptions contained in the register against the barque in the names of the mortgagees.

The determination of the question, so far as it relates to the obligation on the part of the Registrar to register the Respondents as owners, depends principally upon the proper construction of the 55th and 58th sections of the Merchant Shipping Act, 1854 (17 & 18 Vict., c. 104).

The 55th section enacts that a registered ship or any share therein, when disposed of to persons qualified to be owners of British ships, shall be transferred by bill of sale, and such bill of sale shall contain such description of the ship as is contained in the certificate of the surveyor, or such other description as may be sufficient to identify it to the satisfaction of the Registrar, and shall be according to the form marked E in the schedule to the Act, or as near thereto as circumstances permit, and shall be executed by the transferrer in the presence of, and be attested by, one or more witnesses. By Section 57 it is enacted that every bill of sale for the transfer of any registered ship, or of any share therein, when duly executed, shall be produced to the Registrar of the port at which the ship is registered, together with the declaration required by

Section 56 to be made by a transferee, and that the Registrar shall thereupon enter in the register book the name of the transferee as owner of the ship or share comprised in such bill of sale. By the 58th section it is enacted that if the property in any ship, or in any share therein, becomes transmitted in consequence of the death or bankruptcy or insolvency of any registered owner, or in consequence of the marriage of any female registered owner, *or by any lawful means other than by a transfer according to the provisions of the Act*, such transmission shall be authenticated by a declaration of the person to whom such property has been transmitted, made in the form marked H in the schedule to the Act, and containing the statements therein-before required to be contained in the declaration of a transferee, or as near thereto as circumstances permit, and in addition a statement describing the manner in which and the party to whom such property has been transmitted.

The form marked H contains forms applicable to the cases of bankruptcy, insolvency, death, and marriage respectively, but no form applicable to any other means of transmission. In each of these cases, the marriage, the bankruptcy or insolvency, or the death of the registered owner has to be declared, and by Section 59 the declaration has to be accompanied with the proof required by that section of the transmission by such means of the property in the ship or in the share thereof *from the registered owner* to the person entitled by such transmission; and then by Section 60 it is enacted that the Registrar, upon the receipt of such declaration so accompanied as aforesaid, shall enter the name or names of the person or persons entitled under such transmission in the register book as the owner or owners of the ship or share therein in respect of which such transmission has taken

place, and such persons, if more than one, shall, however numerous, be considered as one person only as regards the rule therein-before contained relating to the number of persons entitled to be registered as owners. The latter portion of the section refers to the enactment in Section 37 that, subject to the provisions with respect to joint owners or owners by transmission, not more than 32 individuals shall be entitled to be registered at the same time as owners of any one ship.

So strictly were the provisions of the earlier statutes relating to the transfer of British ships interpreted, that it was held by Lord Eldon that the doctrine of implied trust in a Court of Equity could not be extended to the case of a British registered ship where the title accrued *by an act of the parties* other than a transfer made in accordance with the provisions of the Merchant Shipping Acts.—*See* Expte. Yallop, 15 Ves. 66, and *Curtis v. Perry*, 6 Ves. 739. His Lordship, however, drew a clear distinction between such a case and a trust implied by law not arising out of an act in which the parties claiming the beneficial interest had joined.

In the case of *Curtis v. Perry*, 6 Ves., his Lordship, at p. 746, said, “I desire it to be distinctly understood that I give no opinion upon the effect of these two Acts of Parliament in cases of trusts implied by law and not arising out of an act in which the contracting parties join.” And again, in Expte. Yallop, 15 Ves., at p. 70, “The case of *Curtis v. Perry*, though it does not rule this case, furnishes a strong intimation of my opinion that the distinction between trusts by operation of law *unconnected with acts of the persons claiming interests*, and trusts, in a sense perhaps by operation of law, *but arising out of acts of the parties not regu-*

“ *lated by the Act of Parliament, is founded on principle.*”

The decision in *Expte. Yallop* was followed in the case of *The Liverpool Borough Bank v. Turner*, decided by Lord Hatherley, then Vice Chancellor Wood, in 1 Johnson and Hemming's Reports, p. 150, upheld on appeal by Lord Campbell in 1 Maritime Law Cases, p. 21. In that case the Vice Chancellor pointed out a distinction between the Merchant Shipping Act, 1854, and the former statutes, viz., that in the former statutes the Legislature declared that an unregistered contract should have no effect at law or in equity, and that those words were left out in the Act of 1854, and this after they had been the subject of express decision (p. 171). But, notwithstanding that distinction, it was held that an unregistered contract to assign an interest in a ship, when required as a security for past and future advances, was inoperative even in equity. In his judgment in that case Vice Chancellor Wood referred to Section 58 with reference to the contention that the Legislature, in the Act of 1854, intended to depart from its general policy of requiring all transfers to be effected by the specified methods; he said, “The phrase which strikes me as the strongest in favour of such a contention is that which is found in the 58th section, which speaks of the transmission of the property in a ship by death, bankruptcy, marriage, or by any lawful means other than by a transfer according to the provisions of this Act. That is certainly a very strong expression, but the phrase must be looked at in connection with the context, because the transmission is directed to be authenticated by a declaration in the form marked H. in the schedule which contains forms of statement that the owner is a natural born subject, and also certain forms applicable to the

“ transmission by death, marriage, bankruptcy, and insolvency.” Then, after referring to Sections 59 and 60, his Honor proceeded,—“ It is clear that these provisions cannot possibly apply to a contract for the sale of a ship, and, whatever may have been pointed at by the words ‘ transmission by any lawful means other than by a transfer according to the provisions of the Act,’ it could not have been intended that any person should be at liberty to go to the Registrar with a contract for sale in his possession, and insist upon having it registered.”

The above decisions are referred to not for the purpose of showing that a beneficial interest cannot now be created by implication or by a contract neither registered nor made according to the provisions of the Merchant Shipping Act, 1854, but for the dicta of and the principles laid down by the learned Judges in construing the earlier statutes. The law has been altered by the 25 & 26 Vict., cap. 3, sect. 63, passed since those cases were decided. By that section it is enacted that the expression “ beneficial interest,” whenever used in the second part of the principal Act (*i.e.*, the Act of 1854), includes interests arising under contract and other equitable interests, and the intention of the said Act is that without prejudice to the provisions contained therein for preventing notice of trusts from being entered in the register book, or received by the Registrar, and without prejudice to the powers of disposition and of giving receipts conferred by the said Act on registered owners and mortgagees, and without prejudice to the provisions contained in the said Act relating to the exclusion of unqualified persons from the ownership of British ships, equities may be enforced against owners and mortgagees of ships in respect of their interests therein in the same

manner as equities may be enforced against them in respect of any other personal property.

It may be assumed, for the purpose of argument, that as regards ordinary moveables the award of the Master to a purchaser on a sale by licitation vests the property in him without any deed or other conveyance, and that according to the law of Mauritius there is no distinction between legal and equitable estates. But the transfer of a British ship is not governed by the rules applicable to moveables in general, but by the express provisions of the Merchant Shipping Acts, which make a clear distinction between the legal estate and mere beneficial interests in a British ship.

It must be borne in mind that, by Section 43 of the Merchant Shipping Act, 1854, it is enacted that no notice of a trust, express, implied, or constructive, shall be entered in the register book, or receivable by the Registrar. It may be admitted that the sale by licitation without a conveyance by bill of sale created a beneficial interest in the purchasers; but the question is not whether the sale by licitation created a trust for or a beneficial interest in the purchasers, but whether it created such an interest in them as rendered it compulsory upon the Registrar to register them as owners. That still depends upon the proper construction of the 58th section of the Act of 1854.

Their Lordships are of opinion that the words "or by any lawful means other than by a transfer according to the provisions of this Act" in that section must be restricted, and construed as comprehending only transmissions of the same nature as those previously enumerated in the section. If this were not so, they would include any assignment by a registered owner



not made according to the provisions of Sec. 55 of the Act of 1854, and would in effect nullify the provisions of that section.

It must be observed that there is a clear distinction made in Sections 55 and 58 between a "transfer" and a "transmission," the same distinction is also made in Sections 73 and 74, and the Form L in the schedule as regards the transfer and transmission of mortgages.

In their Lordships' opinion, a transmission, in order to be of the same nature as a transmission by bankruptcy, insolvency, death, or marriage, must be a transmission by operation of law, unconnected with any direct act of the party to whom the property is transmitted, and that a transmission to a purchaser at a sale by licitation is not such a transmission, inasmuch as it is connected with and is the direct consequence of an act of the person who applies for the order, and another act of the person who purchases, and to whom the property is transmitted. This view of the case is supported by Sec. 103, Clause 3, when read in conjunction with Sec. 55, for if a transfer by a judicial sale to a purchaser not qualified to be the owner of a British ship were a transmission, there would be no reason for placing him in a different position from a purchaser under Sec. 55. In the present case the purchasing and paying the purchase money for the ship by the purchasers was the act upon which the Master's award was based, and, admitting that the adjudication and award of the Master passed a beneficial interest to the purchasers without any further conveyance, the interest was not such as to entitle them to be registered as owners.

Further, it may be remarked that, so long as Docinthe was registered as sole owner, the interest of the heirs François could not have been such as would have entitled a purchaser of it under

a judicial sale to be registered as the owner of it.

In the case of "The Sisters," heard before the High Court of Admiralty in 1804 (*vide* Robinson's Admiralty Reports, Vol. 5, p. 159), Lord Stowell observed, "According to the ideas which I have always entertained on this question, a bill of sale is the proper title to which the maritime courts of all countries would look. It is the universal instrument of transfer of ships in the usage of all maritime countries, and in no degree a peculiar title deed or conveyance known only to the law of England. It is what the maritime law expects, what the Court of Admiralty would, in its ordinary practice, always require, and what the Legislature of this country has now made absolutely necessary, with regard to *British* subjects, by the regulations of the statute law." This, no doubt, was before the introduction of the transmission section, but the remark is applicable to all cases in which ships are transferred by purchase and sale, by whomsoever the sale is effected.

It may be stated, in corroboration of the view of the case taken by their Lordships, that upon a sale of a ship in execution of a judgment the sheriff passes the property by bill of sale, and their Lordships understand that, although upon the sale of a ship by order of the High Court of Admiralty in a judgment *in rem*. the vessel becomes the property of the purchaser, it is the practice for the purchaser to procure a bill of sale from the Marshal or Commissioner, in order to entitle him to be registered in accordance with the Merchant Shipping Act, 1854.

The above view of their Lordships renders it almost unnecessary to say a word as to the order to erase the names of the mortgagees from the register, except that it is clearly invalid; but

it may be pointed out that the mortgagees were no parties to the proceedings for sale by licitation; that that proceeding was not a judgment *in rem.*; that the mortgagees were not called upon by the rule *Nisi* to show cause against it; and that the only consent on the part of the mortgagees to forego their rights against the ship, and to exercise their rights upon the sale price, was upon the hearing of the rule *Nisi*. Such a consent was not an act which would have justified the Registrar in making an entry on the register under Sec. 68 of the Act of 1854, that the mortgage had been discharged; still less did it render it obligatory upon him, or even authorize him, to erase the mortgages from the register. Such a proceeding, even if the mortgages had been discharged in the manner pointed out by the Act, would have been wholly unwarranted. There is no provision in the Acts which authorizes the Registrar to erase entries of mortgages upon their being discharged, and it would be in violation of the principle of the Registration Acts to erase any entries which appear on the face of the register.

For the above reasons their Lordships will humbly advise Her Majesty to rescind the order above mentioned, and to order that the rule to show cause of the 13th of March 1879 be discharged, with costs.

The Respondents must pay the costs of this appeal.

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