

Mar. Ct.]

ONTARIO REPORTS.

[Mar. Ct.]

burnt. That during the following winter she was repaired, and in the season of 1881, about the 1st of July, he took charge of her again and so continued for 2½ or 3 months, when the respondent took possession of her by virtue of an overdue mortgage, held by him on the tug. On cross-examination the petitioner said, that when his wife and sons bought the tug from the respondent Moore, he helped them a little, but it was his wife's own money that "went into it;" that when he was hired in 1880, nothing was said about the length of time he was hired for; that he could come or go when he liked; that he had always made a bargain *every year* with other boats and for, perhaps, different wages; that every spring they hire their captains and crew, who, when paid off, can go where they like.

The respondent took possession of the vessel under the power in his mortgage, and after giving the necessary security, sold her, so that this proceeding *in rem* may now be said to be changed into a proceeding *in personam*.

The objection was taken by the respondent that in no case could the petitioner recover wages for 1880, inasmuch as the hiring ended that year, not later than the 1st September, at which date the wages must be said to have accrued. And that, as this petition was not filed till the month of November, 1881, more than the ninety days prescribed by the M. C. Act, 40 Vict. c. 21, s. 2, sub-s. 4, have expired, and that the petitioner cannot enforce this claim against respondent, a *bona fide* mortgagee.

This contention must, I think, be allowed. I should find as a fact that the hiring for 1880 was a separate and independent one from that of 1881, and terminated by the 1st of September in that year; no custom of any sort is proved by which such a hiring could, in these inland waters, where navigation is altogether closed for at least five months of the year, be construed to be a continuous hiring for any longer period than the close of navigation in that year. Indeed, the evidence of the petitioner himself shows the contrary to be the case.

The respondent also filed two mortgages upon the vessel to him. The first dated 18th April, 1881, for the sum of \$300, made by Jane McNabb, James McNabb and John McNabb. The second is for the sum of \$500, dated the 5th July, 1881, made by Alexander McNabb (this peti-

tioner), and the said James and John McNabb. Both the mortgages contain a covenant in the words following: "We covenant with the said D. Moore, to indemnify and save harmless the said D. Moore, and the said ship, from any lien which might attach to the said ship by reason of overdue wages, or otherwise." The respondent contends that these words "overdue wages," must refer to wages to be earned in the future, and therefore cover the claim of the petitioner for the year 1881's wages, but that if not they must refer to the wages of 1880.

It seems to me that this last is the proper construction to be given to them; and that therefore the petitioner, having given this covenant of indemnity, knowing he had such a claim for 1880 as he now puts forward, should not be heard in support of that claim. Supposing he had as master a right to recover these wages for 1880, the respondent would have the right to fall back on this covenant and recover back from the petitioner the very sum he had just recovered from the respondent—such a proceeding as would not be sanctioned by this Court.

To put the opposite construction upon this covenant, and make it applicable to future wages would clash with the well known principle that "no seaman can by agreement forfeit the legal right he has to his wages, and that whether the same be due under special agreement or otherwise." *The Juliana*, 2 Dods, 504.

It has been objected that the petitioner is not a "seaman," within the meaning of the Act. This point has already been raised in the case of *The Tug Robb*, 17 C.L.J., 66. McKenzie, J., in that case, says: "It is not necessary to decide here whether the contract specified in the petition should be in writing or not under the Dom. Statutes."

I do not see myself that it is necessary to show that this contract was in writing, or to show anything more than that the petitioner was engaged to do the work he did as master. The Merchants' Shipping Act, 1854, requires the master in hiring seamen, to enter into a written agreement with them. But even if he neglected to do so, would a seaman who went the voyage be thereby debarred from recovering his wages. I see nothing about the mode of hiring the *master* in that Act, but section 191 enacts, that every master of a ship shall have, so far as the case permits, the same rights, rem-