

5. That a mortgagee of a vessel cannot prevent the seizure and sale thereof by a judgment creditor, but such sale will not purge his mortgage, and will only convey to the purchaser the rights of the judgment debtor in the vessel, the mortgagee retaining his rights under his mortgage against the vessel in the hands of the purchaser.

The judgment of the majority of the Court of Review, which reversed that rendered by the Superior Court, Mackay, J., was pronounced by Dorion, J., as follows :

In August, 1874, Norris and others sold to McDonald an inland registered vessel called the "America" for a price said to have been paid cash, and this sale was duly registered. This vessel had been registered previous to the repeal of the chap. 41 of the Consolidated Statutes of Canada.

In September, 1874, McDonald mortgaged the "America" to Norris for \$6,000 payable in three yearly instalments of \$2,000 each. The mortgage is in the form prescribed by the Statute above referred to.

The plaintiff, who is a judgment creditor of McDonald, has caused the "America" to be seized in satisfaction of his judgment, and Norris has filed an opposition *afin de distraire* claiming the vessel as his own under his mortgage.

The plaintiff has contested this opposition under three grounds :—

1st. That the mortgage is worthless, not being in the form given by the Merchants' Shipping Act of 1854, which was the only law in force in the time of the making of said mortgage, the ch. 41 of the Consolidated Statutes having been repealed. (37-38 Vict. c. 128, s. 3.)

2nd. That plaintiff's claim was a privileged one which had precedence over that of the opposant.

3rd. That the opposant could not prevent the sale of the vessel, and could only come in either by opposition *afin de charge* or *afin de conserver*.

First, upon the first two grounds I am against the plaintiff. The sec. 14 of the above Act repealing ch. 41 of Consolidated Statutes expressly declares that vessels already registered need not be registered except in one particular case. And the sec. 66 of the Act of 1854 says that the mortgages shall be made in form given, or as near to it as circumstances will permit. The vessel having been registered under ch. 41 of the Consolidated Statutes, the mortgage

could only be made according to the description contained in the original registration; and as to the rest of the document the forms in both Statutes are materially similar, so that the mortgage is perfectly good in my opinion.

As to the question of privilege, it is impossible to apply Art. 2383 C. C. to this case. This article applies only to the last voyage. That does not mean a master of a vessel hired by the season to navigate within the limits of our rivers or lakes, and who makes trips, *not voyages*, every day or two days, and sometimes many trips in one day. This has been decided in many cases.

But I do not consider that the question of privilege or no privilege can affect this case.

The question is whether the defendant has any interest in this vessel, and, if he has, can that interest be seized and sold by sheriff, notwithstanding the mortgages that may affect her? The only case in point decided in Lower Canada is that of *Kelly v. Hamilton*, 16 L. C. J., p. 320. In that case the vessel had been sold by sheriff's sale without opposition from the mortgagee. The mortgagee took a *saisie-revendication*, alleging that his mortgage was then due and payable, and claiming that the vessel be delivered to him in order that it might be sold for the payment of his mortgage, and demanding an order of the Court that such sale should take place. This *saisie-revendication* was dismissed by the Superior Court, which maintained that the sheriff's sale had purged the mortgage. The Court of Review reversed this judgment, and gave for reasons not that the sheriff's sale was invalid, but that it could not have transferred to the purchaser more rights than the mortgagor himself had in the vessel, and that the sale did not interfere with the mortgage. The Court of Appeals, three Judges against two, maintained this view of the case. But nowhere in that case is it contended that the sheriff's sale was a nullity.

Here we are asked to say that a registered vessel can never be sold by sheriff or otherwise because there is a mortgage upon her! The first question that suggests itself to one's mind is who is the proprietor? Is it the mortgagor or mortgagee? This is answered by Art. 2371 of our Code: "And the person to whom such transfer is made (mortgagee) is not deemed to be the owner of such vessel or share, except in