

*Dr. Lushington*: The registrar says, and my own memory goes with him, that the unvarying practice of the Court has been, where the marshal arrests, that he has the security of the ship for his costs; but where the party taking out the warrant executes it himself or by his agent, he is responsible for the detention fees. Perhaps I cannot give any very satisfactory explanation for this difference in our practice in the London district and in the outports. But on mere motion I cannot change the ancient practice of the Court. These detention fees must be paid by the owners of the "Tecla Carmen."

[468] As to the reference. The cross-action should have been better prosecuted. Although no appearance had been given to the libel, I am of opinion that for such non-appearance a decree could have been got against the owners of the "Tecla Carmen." The reference must proceed in the ordinary way.

THE "BENGAL"—(W. H. Henderson, Master). June 9 and July 14, 1859.—Master's wages—Action *in personam* and judgment unsatisfied—Proof in bankruptcy—Lien on ship.—A master having sued for his wages at common law and recovered judgment, which judgment remains unsatisfied in consequence of the defendant's bankruptcy, and having further proved his debt under the defendant's bankruptcy, is entitled to sue the ship in the Admiralty Court, notwithstanding the ship has changed hands.

[Referred to, *The "Mal Ivo,"* 1869, L. R. 2 Ad. & Ecc. 358; *The "Joannis Vatis (No. 2),"* [1922] P. 221.]

This was a suit for wages, brought by William Henry Henderson, late master of the barque "Bengal"; James Akett, formerly of Melbourne, then of New Orleans; Robert M'Swiney, of Melbourne, and John Atteridge, formerly of Melbourne then of Liverpool, her owners, intervening.

The summary petition stated the hiring of Henderson in February 1854, by Alexander Robinson, her then owner, on a voyage from London to Port Philip; the arrival of the barque at Port Philip on 2nd September 1854, where Henderson remained in charge of her as master till 2nd January 1855, for which services he claimed, on balance of account, £74, 4s. That some time in October or November 1854, the barque was sold by Messrs. Tootal & Browne, of Melbourne, under power of attorney from Robinson, to Messrs. White & Co., of Melbourne, of which sale Henderson was not aware till 1st of January 1855, when he was required to deliver up possession of the barque to Messrs. White. This he, at first, refused to do; but being advised that he could not legally retain possession, there being no Admiralty Court at Port Philip, he delivered her up to Messrs. White. That he demanded his wages from Tootal & Browne, as agents of Alexander, who paid £5 on account, and gave him the following letter to Robinson:—

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Melbourne, 19th January 1855.

Dear Sir,

Late owner of the barque "Bengal." This will be presented by Captain W. H. Henderson, late master of the barque "Bengal," and will certify that, in consequence of the balance of funds, the proceeds of sale of the above barque having been attached in our hands to meet a claim for deficient delivery of wooden houses, we have been prevented by the Court paying Captain Henderson the balance of wages due to him, and amounting to £74.

Yours, &c.

TOOTAL & BROWNE.

That Henderson also received from Messrs. White £20 on account. That it was not till June 1856 that he was able to leave for England, and he then made the voyage as mate of a vessel, and arrived in London 20th November 1856, when he handed Messrs. Tootal & Browne's letter to Robinson, who promised to pay when he received remittances on account of the barque. That about 28th May 1857 Robinson was, on his own petition, adjudged a bankrupt; that his estate was insolvent, and the trade assignee had refused to pay Henderson's wages; that from November 1856 till February 1859 Henderson had been unable to discover the said barque.

This petition was answered by an allegation on behalf of Akett, M'Swiney, and Atteridge, stating their purchase of the vessel in the beginning of 1855, from Messrs. White, at Melbourne. That in the early part of 1857 Henderson brought an action

in the Court of Exchequer, for the same wages, against Robinson, and obtained judgment by default on the 1st May 1857, for the sum of £74 and costs. That on 14th September 1857 he filed his claim in bankruptcy against Robinson's estate, setting forth his action and judgment recovered as above. That the "Bengal" arrived at Montrose with a cargo in March 1856, and had since then been employed between England and North America in the timber trade, and had on various occasions been in the ports of London and Shields, where Henderson might easily have arrested her at an earlier period. That the cause of action was the same as in the action and judgment recovered in the Court of Exchequer. That by reason of that action and judgment, and by reason of his *laches* and delay, and of the other premises, it was not competent in law to Henderson to recover the said wages against the "Bengal," her present owners or the bail given, &c.

On the 9th June Wambey moved to oppose the admission of the allegation.

[470] A maritime lien attaches to the ship and follows the ship into a purchaser's hands; *Harmer v. Bell* (7 Moore, P. C. 281). The unsatisfied judgment *in personam* is no bar to a plaintiff suing *in rem*; a personal suit pending has been expressly decided to be no bar; *Harmer v. Bell* (7 Moore, P. C. 286). The master has been guilty of no *laches* so as to forfeit his lien. The Court is always anxious to satisfy just claims of wages, "*Sydney Cove*" (2 Dods. 13); "*Margaret*" (3 Hagg. 240); "*Repulse*" (4 N. of C. 172).

Swabey in support of the owners' allegation.

The judgment in the Court of Exchequer is a bar to proceeding for the same cause *in rem*: the cause is *res judicata*, *King v. Hoare* (13 M & W. 504). Even if it were a case of *lis alibi pendens* only, that would be a bar; "*Lanarkshire*" (2 Spinks, 189). The master has lost his lien by his delay; *Harmer v. Bell* (7 Moore, P. C. 285); "*Royal Arch*" (*ante*, p. 284).

July 19. *Dr. Lushington*: In the allegation it is not pleaded that the purchasers were ignorant of the present demand, or that they made enquiries as to the existence of such a lien. This was a British ship sold in Australia; that fact, and the smallness of the sum, ought to have excited the attention and suspicion of the purchasers. Several facts are quite apparent; 1st, that these wages are a debt justly due to the master; 2ndly, that he is not barred by the Statute of Limitations; 3rdly, that he has obtained a judgment in a Court of Common Law against a bankrupt defendant, which judgment remains unsatisfied. The question, then, is, whether this master, having by law a twofold security for his wages, may avail himself of the second, the first which he tried (the personal action) having practically failed to give relief. I know of no case immediately in point either as regards master or seamen; but I see no reason to doubt but that this suit ought to be allowed to proceed. So, when a mortgage and a collateral security along with it is taken, the creditor may proceed on either, and a Court of Equity will take care that he does not recover more than he is justly entitled to; *Burnell v. Martin* (Doug 417). I must reject this allegation.

Scurlock, proctor for the master.

Jennings & Son for the owners.

[471] THE "JOHN AND MARY" June 9 and July 14, 1859.—Collision—Action *in personam*—Verdict unsatisfied—Ship liable in Court of Admiralty—*Lis alibi pendens*.—A plaintiff, having sued in a cause of collision at common law and recovered a verdict, is entitled, if the defendant proves insolvent, to sue the ship in the Court of Admiralty, even after the ship has been transferred to a third party. *Semble*, a party, having commenced proceedings at common law in respect of a collision, will not be allowed, in the first instance, to sue the ship in the Admiralty Court for the same cause.

[S. C 5 Jur. (N. S.) 1085. Referred to, *The "Mali Ivo,"* L. R. 2 Ad. & Ecc 359; *The "Joannis Vatis (No. 2),"* [1922] P. 221] (1927) — .

In this case the "John and Mary" was arrested on behalf of the owners of the screw steamship "Urania," in a cause of damage. The proctor for the owners of the "John and Mary" prayed to be heard on his act on petition in objection to the arrest, and in bar to any further proceedings.

The act on petition stated that the collision from which the damage arose took