

by the stipendiary magistrate. In order to end the matter I will make an order altering the decision of the Court below from an order dismissing the summons into one imposing a fine of £20, upon defendant, and, in default of payment, three month's imprisonment; such fine to be reduced to 10s. if possession of the premises be given up to the appellant by the respondent within fourteen days after the service of the order upon him.

GARRICK AND OTHERS *v.* OWNERS OF THE *EXCELSIOR.*

[Admiralty Jurisdiction (Berkeley, C.J.) December 16, 1896.]

Seamen's action for wages—Maritime lien—Statutory lien—Priority—Customs Regulation Ordinance 1881—1895, s. 49.¹

The seamen of a ship having obtained an order for its sale in an action against the owners for wages, and the vessel having been sold and the proceeds paid into court, the priority of various claimants was in issue.

HELD.—That, after payment of certain costs and charges, the Statutory lien of the Collector of Customs for expenses incurred under s. 49 of the Customs Regulation Ordinance 1881—1895¹ takes precedence over the maritime lien of the seamen for unpaid wages; and the maritime lien, again takes precedence of a claim for necessaries supplied on the order of the master of the ship.

Cases referred to :—

(1) *The Gustaf* [1862] 31 L.J.P.M. & A. 207; 6 L.T. 660; 41 Dig. 932.

(2) *The Immacolata Concezione* [1883] L.R. 9—P.D. 37; 52 L.J.P. 19; 50 L.T. 539; 41 Dig. 935.

ACTION by the crew of the barque, *Excelsior*, of Sydney, for wages. The facts are fully set out in the judgment.

H. Shaw for the plaintiffs and also for Messrs. Corbett & Hunt.

The Attorney-General, *J. S. Udal*, for the Collector of Customs. The defendants were unrepresented.

H. S. BERKELEY, C.J.—In this case the plaintiffs, the seamen of the ship *Excelsior*, have obtained an order for the sale of the ship in an action for their wages. The ship has been sold and the proceeds have been paid into court. In addition to the claim by the plaintiffs, claims against the proceeds are made by the Collector of Customs for moneys expended by him under the provisions of s. 49 of the Customs Regulation Ordinance 1895,¹ and by Messrs. Corbett & Hunt for meat supplied. The facts on which the question now to be determined arises are (so far as they are material) as follows :—The chartered sailing vessel, the ship, *Excelsior*; arrived in cargo at Suva on the 16th May last. On

¹ *Now Customs Ordinance (Cap. 147) s. 139 (Revised Edition, p. 1538).*

the same day the master proceeded to the Customs House and entered the ship in the ordinary course and a Customs officer was placed on board. On the 20th May the ship commenced to discharge cargo and a portion thereof was landed. A dispute then arose between the master and the agents of the charterer as to who was to bear the cost of putting in ballast to replace cargo discharged, and the master ceased discharging on the 23rd of the month. By the Customs Regulation Ordinance 1895, s. 49,¹ whenever imported goods shall remain on board the importing vessel after the expiration of seven clear days from the date of the entry of the vessel, being a sailing vessel, or such further period as the Collector may direct, such Collector may, in his discretion, cause such goods to be landed at the expense of the master of such vessel, and every such vessel shall be detained by the Collector until the officer's salary for any term for which an officer may have been necessary after the said seven days or such further period as aforesaid, and the reasonable expenses of moving the goods, be paid. The master having ceased to discharge cargo, and the seven days' limit fixed by the statute having expired, the Collector of Customs communicated with him in order to ascertain his intentions with respect to the discharge of the goods imported in his ship. On the 27th May the master wrote to the Collector as follows:—"I beg to inform you I will not allow any more cargo to be landed from *Excelsior* at present. By so doing I would render the ship unsafe and danger [*sic*] the lives of all on board." Legal proceedings between the consignees of the goods and the master followed, and an order for payment under a judgment debtor's summons having been made against him he was, on the 21st September, committed to prison. On the 8th October last the Collector of Customs commenced to remove the goods from the ship. On the 27th October the expenses of such removal were fixed by a judgment recovered by him against the master, and the ship was detained under the provisions of the Customs Regulation Ordinance 1895, s. 49.¹ On the 14th October the articles of agreement with the seamen had expired, and on the same day the seamen commenced an action in this court for their wages. On the same day also the marshal seized the ship, and on the 11th November the Collector of Customs entered an appearance in the action for the purpose of putting forward the claim which is now under consideration. On the 5th December the ship was sold under the order of the Court, the proceeds being directed to be paid into court, the question of the priority between the claims of the seamen and those of other claimants to be thereafter determined. On the 14th December the proceeds of the sale were paid into court. The proceeds are insufficient to satisfy all the claims and the question now is, which is to have the preference?

The seamen claim to be paid in priority, on the ground that they possess a maritime lien on the ship for their wages, in precedence to all liens other than a lien for damages for collision, or a lien for subsequent salvage. The Collector of Customs claims priority to the seamen on the ground that the 49th section of the Customs Ordinance¹ expressly gives him the right to detain the ship until the expenses of watching, guarding, and removing the cargo are paid, contending that the effect of the section is to create in his favour a paramount statutory lien on the ship, which must be discharged before she can be made available for

¹ Now Customs Ordinance (Cap. 147) s. 139 (Revised Edition, p. 1538).

payment of wages or any other claim. The claim of Messrs. Corbett & Hunt is the ordinary one for necessaries in the shape of meat supplied, presumably, on the order of the master. With respect to this last claim it is sufficient to say that it obviously takes rank after the two former, and as the fund in court will not be sufficient to discharge them, it is not necessary to consider it any further. If the meat has been properly supplied as necessaries, Messrs Corbett & Hunt have their personal remedy elsewhere. The question for determination is, which is to take priority, the maritime lien of the seamen, or the statutory lien of the Collector created by the 49th section of the Customs Regulation Ordinance 1895.¹ No case at all analogous to this has been quoted to me at the Bar, and, so far as I know, none exists. In the cases in which conflict as to priority has arisen between mariners and persons claiming a right of detainer under a lien, such claim has arisen *ex contractu*, and the lien has been the common law possessory lien. In such cases mariners have priority for their wages earned up to the time of the commencement of the possessory lien. The case of *The Gustaf* and the more modern case of the *Immacolata Concezione* establish the mariners' right in that respect beyond all question. These cases are relied upon by the plaintiffs to establish their right of priority here. It will be seen, however, that neither of these cases is analogous to the present case, differing in this respect, that here the statutory lien claimed by the Collector of Customs arises *ex delicto* and in the two cases referred to the lien claimed arose *ex contractu*. Now there is an essential difference between the cases quoted and the present case, and the essential difference lies in the fact that the statutory right to detain the lien on the ship, arises by operation of law through the wrongful act of the master. Whereas, in the cases quoted at the Bar, the possessory common law lien, the right of detainer, arose from the voluntary act of the claimant. In the case of *The Gustaf* Dr. Lushington, referring to the shipwright who claimed a lien in priority to the lien of the mariners for their wages, said, "I think it may not unreasonably be presumed that when he received the ship into his yard he took her with all the existing obligations." In other words, in that case the Court thought it reasonable to import into the shipwright's contract an implied term that his claim for repairs to the ship was to be postponed to certain liens existing at the time of the contract for repair. Can I in this case follow the line of reasoning in *The Gustaf*, and say that it may not unreasonably be presumed that, when the Collector of Customs incurred the expenses which now appear from his claim, he did so subject to the obligation of the ship to satisfy the maritime lien of the mariners? It will be seen at once that a great difference exists between the case of *The Gustaf* and the present case; in the former, there was no obligation on the part of the shipwright to undertake the repairs. The act on his part was a voluntary one. There was no compulsion on him. He might had he pleased have refused to undertake the repairs. He, however, thought it in his interest to do them. Whereas in the present case the law laid upon the Collector the obligation to act as he did in the circumstances. He had no option but to act as he did. He acted under compulsion of law in the performance of his duty in doing what he did. Now a presumption which might reasonably be drawn from a

¹ *New Customs Ordinance (Cap. 147) s. 139 (Revised Edition, p. 1538).*

voluntary act may become an altogether unreasonable presumption when the act from which it is to be drawn is an involuntary one, when the act done is done under compulsion of law and in the execution of a duty imposed by statute. In such a case it seems to me that the Court must look rather to the intention of the Legislature when it imposed the obligation than to anything else. It does not seem to me that any such presumption as that drawn by Dr. Lushington in the case of *The Gustaf* can in the circumstances of this case be properly drawn as against the Collector of Customs. The intention of the Legislature in authorizing, and indeed requiring, the Collector in certain circumstances to take possession of a ship and unload her was, it may be, to prevent smuggling. It was certainly to protect the public revenue. Would it be reasonable to presume, then, that the Legislature intended that the expenses of the Collector, incurred in putting into force the provisions of a statute intended to protect the general public revenue, should be postponed to the claims of mariners of an offending ship, to the loss possibly of the public treasury? The Ordinance expressly declares that until the expenses it authorizes shall be paid, the Collector of Customs shall detain the ship. That constitutes a statutory possessory lien. There is no exception in the statute in favour of any other lien. Unless, therefore, I can reasonably import such a presumption as was done in the case of *The Gustaf*, the statutory possessory lien must override all others whatever. It was not without hesitation that Dr. Lushington postponed the common law possessory lien of the shipwright to the maritime lien of the seamen, and in the *Immacolata Concezione*, Butt J., referring to the claims of the holder of a possessory lien to have priority over the claims of mariners for their wages, said "But for *The Gustaf* I should not feel quite clear that this claim had not priority over a maritime lien." The words of the Customs Regulation Ordinance, 1895, s. 49¹ are explicit. The ship "shall be detained" until the expenses are paid. The effect of such language is to give a right to detain against all and sundry, no matter what the nature of the claim. If, for the benefit of all concerned, the Court of Admiralty deprives the Collector of Customs of the possession of the ship, which is his statutory security for the payment of his claim, the Court must see that he is placed in no worse position than he was in before he was dispossessed. For these reasons it seems to me that priority must be given to the claim of the Collector of Customs.

It has been urged that the Collector should at all events not have priority for that portion of his claim which consists of the salary of the officer placed on board to watch the cargo, such, it is contended, having been unnecessarily incurred through the delay of the Collector in proceeding to unload under the powers conferred upon him by the Ordinance. I do not, however, concur in that view. In the letter of the 17th May the master, while informing the Collector that he does not intend to unload adds the words "at present." I think the Collector acted prudently in refraining from the exercise of his full power until it became obvious that it was essential in the public interest that it should be exercised. The power conferred on the Collector is an extraordinary one, intended to be exercised only in extraordinary circumstances, and always with great caution.

¹ Now Customs Ordinance (Cap. 147) s. 139 (Revised Edition, p. 1538).

It is also urged that the Collector should be regarded as having elected to pursue his personal remedy against the master and that thereby he had lost his remedy against the *res*—the ship. The proceedings by the Collector against the master before the Chief Police Magistrate were relied upon as supporting that contention. It seems to me, however, that it has no force. The Collector by proceeding in the court of the Chief Police Magistrate followed the mode prescribed by the Customs Ordinance, and what he did amounted really to nothing more than ascertaining the amount due for expenses. It really is not more than equivalent to a reference which might have been made by order of this Court to some person, say to the Chief Magistrate himself, to find what was due and report to the Court.

In marshalling the fund in court I think priority in payment out, after the charges of the marshal are satisfied, should be given to the costs of the plaintiffs, the seamen, for this reason that the fund now being distributed has been placed in court by their action against the ship. This was the view taken by Butt J., in the *Immacolata Concezione*, and I will act on that view. The costs of the Collector will rank next. There then will come the expenses of the Collector incurred under the authority of the Customs Regulations Ordinance, 1895, s. 49, and thereafter the amount found due to the seamen for wages, to which will be added a proper sum for subsistence. No allowance can be made to them for return passage to their homes. I think the principle of such allowance extends only to foreign seamen. In the case of British seamen, if they cannot find re-engagement they are entitled to be returned to their homes as distressed British seamen.

REG. v. MARTELL.

[Criminal Jurisdiction (Berkeley, C.J.) October 25, 1897.]

Procedure for criminal offences under Pacific Order in Council, 1893 : Arts. 15, 66—Indictable Offences Ordinance 1876, s. 4—Criminal Procedure Ordinance 1875, s. 5.

The accused Martell was arrested in the New Hebrides and, after an investigation by a Deputy Commissioner was committed for trial to the Supreme Court of Fiji under Art. 66 of the Pacific Order in Council, 1893, on a charge of manslaughter and was brought to Suva in custody. The Attorney-General entered a *nolle prosequi* in respect of this charge and the accused was released. He was immediately re-arrested by the police and brought before the Chief Police Magistrate at Suva on a charge of murder upon which he was committed for trial to the Supreme Court.

HELD.—(1) The Supreme Court of Fiji has under Art. 15 of the Pacific Order in Council, 1893, original jurisdiction to hear and determine any civil or criminal matter arising at any place within the limits of the Order, and may do so according to the procedure usual in Fiji or according to the procedure under the Order.

(2) A British subject, may if found in Fiji, be committed for trial by a stipendiary magistrate there for an offence wherever committed, if such offence be one cognizable by the Supreme Court.