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suit is to enforce an equitable claim on the part of the plaintiffs to follow the proceeds of their timber, and, finding them in the hands of the defendant, to make him responsible for the amount. That does not fall either within Arts. No. 60 or No. 48; but comes within Art. 118, as "a suit for which no period of limitation is provided elsewhere in this schedule," and for suits of that nature a period of six years is the limitation. Their Lordships think that the plaintiffs had a right at any time within six years from the time when the defendant received the money to hold him responsible to them for the amount so long as it remained in his hands: they might have given him notice not to pay it over, and held him responsible in equity if he had done so.

Their Lordships will, therefore, humbly advise Her Majesty that the decision of the High Court be affirmed and this appeal dismissed. As no appearance has been entered for the respondent, there will be no costs of this appeal.

Their Lordships think it right to add a declaration that any money which may be recovered under this decree shall be treated in part satisfaction of the former decree against Modhoosoodun, or his widow, in the same way as if it had been levied under that decree, and *vice versâ*.

Solicitors for the appellant: Messrs. *Lambert, Petch, and Shakespear.*

Appeal dismissed.

VICE-ADMIRALTY APPELLATE JURISDICTION.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

1884 *June* 23.

In the matter of the British steam ship or vessel "Mary Stuart."

THE "MARY STUART" (IMPUGNANT) *v.* "THE NEVADA" (PROMOVENT).*

Vice-Admiralty—Action in rem—Owner indirectly impleaded—Towage Contract.

The "M. S.," a steam tug, was hired to tow the barque "N." down the Hughli, and in consequence of the negligence of the master of the tug whilst so employed, and of his wilful disobedience to the order of the pilot on board the "N." the latter ran foul of a sailing vessel the "S. F.," considerable damage being done to both sailing vessels.

* Appeal No. 24 of 1883 from a judgment of Mr. Justice Norris, dated the 14th August 1883.

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The "S. F." took proceedings against the "N." for the damage sustained, and an action *in rem* was brought (pending the proceedings taken by the "S. F.") by the "N." against the tug to recover damages, including any damages that the "N." might have to pay to the owners of the "S. F."

The defence set up by the tug was, protection under its towage contract, which was to the effect that the proprietors of the tug should not be responsible under any circumstances for any loss or damage to any vessel whilst in tow of the tug, whether the same should have happened through the default of the master or other sailors, &c., of the tug, or through the incompetence or want of skill of the pilot in charge.

The Court below held, that the accident was due to the wilful disobedience of the master of the tug in not obeying the pilot on board the "N.," and that such misconduct was a "default" within the meaning of the clause in the towage contract; but inasmuch as the action was one *in rem*, and not against the proprietors, the clause was no answer to the suit.

Held on appeal that the clause was a sufficient answer; for that, although in every case of a proceeding *in rem* the suit is directly against the ship itself, still the owner of the ship must always be considered as indirectly impleaded.

APPEAL against the judgment of Mr. JUSTICE NORRIS, dated the 14th August 1883.

This was a proceeding *in rem* brought in the High Court in its vice-admiralty jurisdiction.

The promovent stated that on the 20th September 1882 the British Barque "Nevada," of the Port of Halifax in Nova Scotia, was proceeding down the river Hughli in tow of the tug steamer Mary Stuart," the "Nevada" being in charge of a pilot, and the "Mary Stuart" under command and in charge of her master. That about 7 P.M. on the same evening (it being bright and clear at the time) the "Mary Stuart" with the "Nevada" in tow approached the British ship "Savoir Faire" (having the "Savoir Faire" about two points on their starboard bow), which was at anchor in Diamond Harbour on the southern side of the navigable channel with her head up stream, bearing west, the tide being about half ebb and running from three to four knots an hour.

That when the tug was about 150 yards from the "Savoir Faire," the master of the tug, without any order from the pilot on board the "Nevada," suddenly ported her helm, thereby turning the tug in a direction to cross the bows of the "Savoir Faire," and

that thereupon the pilot shouted out to the tug to put her helm starboard, but the tug continued on her course, and both it and the "Nevada" were consequently taken across the bows of the "Savoir Faire," the tug narrowly escaping collision with her, whilst the "Nevada" fell portside on the bows of the "Savoir Faire," carrying away the latter's jibboom and part of her head gear and doing other damage; whilst the jibboom and head gear of the "Nevada" were also carried away, her bowsprit and foremast started, and she was otherwise considerably injured.

It was further stated that the owners of the "Savoir Faire" had arrested, and preferred a claim for damages for Rs. 15,000 against the "Nevada," which was then pending, and the promovent, therefore, claimed to be entitled to recover in this action, in addition to the damages claimed for the damage done to the "Nevada" in the said collision through the negligence of the tug, any damages and costs that the promovent might have to pay to the owners of the "Savoir Faire."

The impugnant denied that there had been any mismanagement or unskilfulness of navigation on the part of the master of the tug, and stated that the pilot of the "Nevada," being aware, and having approved of the course first taken by the "Mary Stuart" to pass on the portside of the "Savoir Faire," the responsibility of the collision rested entirely with the "Nevada"; it being due to the improper and unskilful conduct of the "Nevada" in putting her helm hard a-starboard when the helm of the "Mary Stuart" was hard a-port; and the amount of damages was disputed.

The contract under which the "Mary Stuart" was engaged by the agents of the "Nevada" to tow out the "Nevada" from Garden Reach to the Eastern Channel Light, contained the following clause: "The proprietors are not to be responsible under any circumstances for any loss or damage which may be sustained or occasioned by any vessel whilst it is in tow of any of their tugs, whether the same shall have happened through the act or default of the master of the tug, or any engineer or other servants or otherwise," and the impugnant claimed shelter under this clause.

The Court sat with two assessors.

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Mr. *Phillips* and Mr. *Bonnerjee* for the promovent.

Mr. *Hill* and Mr. *Sale* for the impugnant.

The assessors were of opinion that the collision was entirely due to the negligence of the master of the tug, and in this opinion the Judge concurred.

Mr. JUSTICE NORRIS (after concurring with the assessors on the questions of negligence), continued.—"The only question remaining for disposal in this case is, whether the impugnant is relieved from all liability in respect of the collision that happened on the 22nd September 1882, by virtue of the 22nd condition contained in the towage contract, (the learned Judge here cited the condition as set out above). Mr. Phillips for the promovent argued that the contract could not operate to relieve the proprietors of the tug from the consequence of an accident caused by the disobedience of the master of the tug to the lawful orders of the pilot in charge of the tow. I am of opinion that the word 'default' is wide enough to cover a case of such disobedience. Mr. Phillips further argued that, this being an action *in rem* and not *in personam*, the condition would not apply. A condition such as this must be construed most strongly against those who rely upon it, and I am of opinion that, if the owners of the 'Mary Stuart' wished to protect herself from the consequences of negligence or default on the part of her captain, they should have said so in express terms. I have already found that the collision was caused by the negligence of the captain of the tug: there must be judgment for the promovent with costs, and the usual reference to the Registrar as to the amount of damages."

The impugnant appealed.

Mr. *Sale* and Mr. *Hill* for the appellant.

Mr. *Sale*.—According to the principle of maritime law, the ship is only responsible when, in the first instance, the master is liable. A person's property is not liable unless the owner is liable. The ship's liability attaches only through the liability of his owners—*The Druid* (1); the action there was one *in rem*, and the facts were

(1) 1 Rob. Adm. Rep. 391.

very strong as against the steam tug. On p. 399, the Court says: "The liability of the ship and the responsibility of the owners (in suits which arise from circumstances occurring during the ownership of the person whose ship is proceeded against) are convertible terms; the ship is not liable if the owners are not responsible, and *vice versâ*. No responsibility can attach upon the owners, if the ship is exempt and not liable to be proceeded against.

[GARTH, C.J.—That case merely says, that neither the ship nor the master could be made answerable for acts which were out of the range of the employment of the master.]

The case of the *United Service* (1) is a case on a towage contract, and the words of the contract are similar to ours; it was there held, that the owners of the tug were protected by notice from liability. It is true that the action was *in personam*, but I submit that this makes no difference; the liability *in rem* can only attach through the liability *in personam* in the first instance, and if the owners contract themselves out of all liability, then no liability attaches to the ship.

As to the nature of maritime liens on ships, they are inchoate at the time the lien attaches, and may be enforced by proceedings *in rem*. The *Bold Buccleugh* (2) decides that in case of damage caused by collision, such damage creates a lien on the ship. I refer to this case to show what is the nature of this lien, and whether it is not competent to the parties to contract themselves out of liability. A maritime lien is defined on p. 284 as "a claim or privilege upon a thing to be carried into effect by legal process, and that process is a proceeding *in rem*. I submit (1) that no lien was created in favor of the owners of the "Nevada" in consequence of the collision, because a lien is a simple privilege given to vessels injured, and the other party may contract themselves out of it; (2) that nothing turns on the fact that the matter comes up before the Court as a proceeding *in rem*, because it is doubtful whether there can be a lien in proceedings *in rem*, because lien depends on whether the owners intended to exclude themselves from all liability.

(1) L.R. 8 P.D 56. (2) 7 Moo. P. C. 267.

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Mr. *Phillips* (with him Mr. *Bonnerjee*) for the respondents.—In the case of *The Druid* the master was not acting as master of the ship in what he did; it would have been the same if a stranger had acted in that way. Moreover, that was not such a case as would make a vessel liable; the suit was against the ship and the ship-owner.

The liability of the ship is not treated apart from the liability of the owners, and it does not attach through the liability of the ship as Mr. Sale has said. Mr. Sale also virtually asks the Court to add the words "proprietor and the tug" to the words of the contract. We have not recovered against the owner personally in the Admiralty Court, and can the Court now insert these words. The case of the *Bold Buccleugh* is not in point; it only establishes the ground of maritime liens.

If the tug had refused to take us down the river at all, the persons who had hired the tug out to us would not be liable if Mr. Sale's argument is correct. The case of the *United Service* was a common law action, and has no bearing therefore on our case.

I say that this being an act of disobedience, it is not one of the matters that the parties meant to guard themselves against. On the question of construction of such contracts as the present, see *Hayn, Roman and Co.* v. *Culliford* (1).

Mr. *Hill* in reply.—Disobedience is a clear default, and we say we are not liable for default. The case of *The Druid* is in point; it was an action brought against the steamer alone; the words used by Dr. Lushington in the judgment in inverted commas against the "ship and ship-owner," are only there adopted for the sake of an argument.

Judgments were delivered by GARTH, C.J., and CUNNINGHAM, J.

GARTH, C.J.—This is an appeal from a judgment of Mr. Justice Norris in a cause depending on the Original Side of this Court in its vice-admiralty jurisdiction.

It was a suit *in rem*, promoted by the master of the British ship "Nevada" against the "Mary Stuart" for damages sustained by the "Nevada" under these circumstances.

(1) L. R. 4 C. P. D. 182.

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The "Mary Stuart" is a steam tug belonging to the Port of Calcutta, of which Captain Thomas was the master.

She was hired on the occasion in question to tow the "Nevada" down the river; and it was alleged by the promovent that in consequence of the negligence of the master of the "Mary Stuart," and of his wilful disobedience of orders, which he was bound to obey, the "Nevada" ran foul of a vessel, called the "Savoir Faire," and considerable damage was caused to both vessels.

The "Savoir Faire" took proceedings against the "Nevada" for the damages which she sustained in the collision; and this suit was brought against the "Mary Stuart" to recover those damages, as well as compensation for the injury which the "Nevada" herself had sustained.

The answer made by Mr. Sutherland, who was the owner of the "Mary Stuart," was twofold:—

1*st*.—That the master of the tug had been guilty of no negligence; and

2*ndly*.—That the tug was protected by clause 22 of the Contract of Towage, which had been entered into by the owners of the tug with the "Nevada's" agents.

That clause was part of a general form of contract, which was used by the proprietors of the "Mary Stuart" in all cases, when their tugs were employed, and it was in these words:—

"The proprietors are not to be responsible under any circumstances, for any loss or damage which may be sustained or occasioned by any vessel whilst it is in tow of any of their tugs, whether the same shall have happened through the act or default of the master of the tug, or any engineer, or other servants, or otherwise, or through the incompetence or want of skill or care of the pilot in charge of the vessel."

The trial took place before the learned Judge and two nautical assessors; and as to the first question they decided that the collision took place through the improper conduct of the master of the tug in wilfully disobeying the orders of the pilot on board the "Nevada," which orders he was bound to obey. And with

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regard to the other question arising upon the 22nd clause of the Contract of Towage the learned Judge decided :—

1*st.*—That the misconduct of the master was a *default* within the meaning of the clause; but

2*ndly.*—That as this was a proceeding *in rem*, and *not against the proprietors*, the clause was no answer to the suit.

The Court therefore pronounced in favor of the "Nevada," and it was referred to the Registrar to ascertain the amount of damages.

From this judgment the impugnant has appealed upon the second point only; and it has been contended by Mr. Sale on his behalf, that, as the proprietors would be the sufferers, if the tug were held responsible, the clause in question was intended to, and did in point of law operate to, protect them.

Having heard this point fully argued, and having taken some time to consider my judgment, I had at first arrived at a conclusion in favor of the respondent.

It seemed to me that the towage contract, which consists of certain regulations, prepared by the owners of several tugs in the Port of Calcutta, is of a very one-sided character.

I think that it should be read most strongly against the owners of the tug; and that, as regards the protective clause, with which we are dealing, its meaning and effect ought not to be extended beyond what its language strictly warrants.

Having regard to the circumstances which occurred in this case, the owners of the "Nevada," in the absence of any agreement to the contrary, would have had three remedies :—

1*st.*—They might have sued the master of the tug;

2*ndly.*—They might have sued the proprietors of the tug; and

3*rdly.*—They might have taken the course which they did, and sued the tug itself in a maritime Court.

That being so, it seemed to me that, according to the strict language of the clause in question, the proprietors were protected against one only of these suits.

The clause would clearly have been no answer to a suit against the master; and I was unable to see why it should afford any answer to a suit against the ship, unless the liability of the proprietors, and the liability of the ship, meant substantially the same thing.

There are undoubtedly many cases of collision, where the ship would be liable, and the owners would not; as, for instance, where a ship is chartered out and out, so that not only the possession of the vessel, but the appointment of the master and crew is vested in the charterers. No action could then be brought against the owners for damage caused through the improper management of the ship, although a suit might be brought against the charterers, or proceedings *in rem* might be taken against the ship. [See *Scott* v. *Scott* (1) and the *Ticonderoga* (2).]

And as a proof that the responsibility of the owners is a different thing from the responsibility of the ship, it has been held that a verdict in a Court of common law is no bar to proceedings against the ship in a maritime Court for the same collision; or, on the other hand, that a judgment *in rem*, and an actual sale of the ship in the Court of Admiralty, is no bar to an action against the owner in a Court of common law. See *Nelson* v. *Couch* (3) and *The Bold Buccleugh* (4).

I had, therefore, as I had come to the conclusion that the view taken by the learned Judge in the Court below was right, and as my learned brother and myself differed in opinion, we considered it would have been necessary that the case should be heard by a third Judge.

Mr. Justice Pigot, however, has been kind enough to refer me to a case lately decided in England, which appears to solve the difficulty, and has satisfied me that my first impression was wrong.

It is a case of *The Parlement Belge* (5) in the Court of Admiralty in England.

The question there was, whether a ship belonging to the Belgian Government, could be proceeded against for a collision in the English Court of Admiralty.

It was admitted that the Belgian Government, who were the owners of the ship, could not be sued in an English Court; but it was concluded that, notwithstanding this, the ship itself was liable to proceedings *in rem*.

(1) 2 Stark, 438.
(2) Swab. 215.
(3) 15 C. B. N. S. 99.
(4) 7 Moo. P. C. 267.
(5) L. R. 5 P. D. 197.

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Sir Robert Phillimore in the Court of Admiralty held that the ship was liable. But on appeal to the Lords Justices his judgment was reversed. Their Lordships were of opinion that although in every case of a proceeding *in rem*, the suit is *directly* against the ship *itself*, still the owner of the ship must always be considered *as indirectly impleaded*. The owner, according to the rules of the Admiralty, has always notice to appear to show cause why the ship should not be liable; and their Lordships observe that, unless the owner were thus impleaded, and had an opportunity of protecting his property from the Court's decree, a judgment *in rem* would be contrary to natural justice.

Lord Justice Brett, who delivered the judgment of the Court, proceeds to say :—

"In a claim made in respect of a collision, the property is not treated as the *delinquent per se*. Though the ship has been in collision, and has caused injury by reason of the negligence or want of skill of those in charge of her, yet she cannot be made the means of compensation, if those in charge of her were not the servants of her then owner, as if she was in charge of a compulsory pilot. This is conclusive to show that the liability to compensate must be fixed, *not merely on the property, but also on the owner through the property*. If so, the owner is at least indirectly impleaded to answer to, that is to say, to be effected by, the judgment of the Court. It is no answer to say, that if the property be sold after the maritime lien has accrued, the property may be seized and sold as against the new owner. This is a severe law, probably arising from the difficulty of otherwise enforcing any remedy in favor of an insured suitor. But the property cannot be sold as against the new owner, if it could not have been sold as against the owner at the time when the lien accrued. This doctrine of the Courts of Admiralty goes only to this extent, that the innocent purchaser takes the property subject to the inchoate maritime lien, which attached to it as against him who was the owner at the time the lien attached. The new owner has the same public notice of the suit, and the same opportunity and right of appearance as the former owner would have had. He is impleaded in the same way as the former owner would have been."

It seems to me that the point thus decided by the Lords Justices is precisely the same as that which we have to determine here. It was admitted in that case, as it is here, that the owners were not personally liable to be sued for the collision, and the question was whether, the owners not being liable, the ship could be made liable. Their Lordships decided that question in the negative, and I am bound to say that, irrespective of the high authority of the Lords Justices, and especially of Lord Justice Brett, who on such a subject is probably the best authority we have, the extract, which I have just read from his Lordship's judgment, appears to me quite unanswerable.

I think therefore that the judgment of the Court below should be reversed, that this suit should be dismissed, and that the "Mary Stuart" should be released from arrest.

Having regard however to the circumstances of the case, and to the question of fact in the Court below having been found entirely in favor of the "Nevada," I think that the owners of the "Mary Stuart" ought not to be allowed any costs.

It is clear that this serious injury, which has been done both to the "Nevada" and the "Savoir Faire" is entirely due to gross disobedience of orders on the part of the master of the "Mary Stuart." It is also clear that if the "Savoir Faire" had sued the "Mary Stuart" instead of the "Nevada," the owners of the "Mary Stuart" would have had no defence to that suit, because the owners of the "Savoir Faire" were no parties to the contract, which alone has protected the "Mary Stuart" as against the "Nevada"; and lastly it is clear that, in consequence of the course which has been taken, the "Nevada" will have to pay for the whole damage to both ships, which has been caused entirely by the fault of the "Mary Stuart."

I consider therefore that each party should pay his own costs on scale 2, and that if any costs have been paid in the Court below, they should be repaid.

CUNNINGHAM, J.—The question raised in this appeal is, whether the 22nd clause in the towage contract, exempting the owners from liability, is a defence in the present action. That clause provided that the owners should "not be responsible under any

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circumstances for any loss or damage which may be sustained or occasioned by any vessel while it is in tow of any of their tugs, whether the same shall have happened through the act or default of the master of the tug or any engineer or other servants or otherwise, or through the incompetence or want of skill or care of the pilot in charge of the vessel."

The present action is brought in respect of injuries sustained and occasioned by the "Nevada" in a collision between her and the "Savoir Faire," which collision is found to have resulted from the misconduct of the master of the "Mary Stuart." The owners of the "Nevada" now seek damages in an action *in rem* against the "Mary Stuart" in respect of the injuries occasioned to the "Nevada" and of the damages which have been recovered from them by the owners of the "Savoir Faire."

I concur in thinking that both the injuries sustained by the "Nevada" and the damages which have been recovered from her owners by the owners of the "Savoir Faire" fall within the *loss or damage* against responsibility, for which the clause protected the owners of the "Mary Stuart;" and that the conduct of the master was *an act or default* within the meaning of the clause. Consequently I think the owners are protected from personal liability. But I am unable to agree in the view of the original Court that, though the clause secured the owners of the "Mary Stuart" against personal liability, it is not a defence in an action brought *in rem* against the "Mary Stuart." The clause is one, no doubt, which ought to be construed strictly, and in case of its meaning being doubtful, rather against, than in favor of, the person whom it relieves of responsibility; but its strict legal effect must be sought. Can it then, by any reasonable rule of construction, be contended that, when the owners of the "Mary Stuart" had put an end to their own liability, as between themselves and the owners of the "Nevada," in respect of damage resulting from the misconduct of the master of the tug, the intention of the parties, or the meaning of the words in which they expressed that intention, was, that the owners of the "Nevada" should still be entitled to proceed against their tug in respect of these same damages? Such a construction seems to me in direct opposition to the clear meaning of the words employed. I think that when

the owners of the tug stipulated that they should not be responsible under any circumstances "for loss, damage, &c.," they must be held to have intended as between themselves and the other parties to the contract, to include not only the damages recoverable in a common law action, but the damages recoverable in an Admiralty suit by sale of their ship. It is true that there is not, since the decision of the *Bold Buccleuch* (1), any question that by the maritime law there attaches upon a wrong doing vessel and her freight, a maritime lien to the full extent of the damage done; and that this lien relates back to the time of the damage and travels with the ship into whosoever hands she may come—1 *M. and P. on Shipping*, 619, *4th edition*. But I do not see that this doctrine conflicts with the view that the parties to a contract may entirely put an end to the ordinary responsibility of the owners of a ship for any damage she may cause, and, by putting an end to that ordinary responsibility, destroy the lien by which that responsibility is enforced.

The language of Dr. Lushington in *The Druid* (2) seems to place beyond doubt the dependence of the right to proceed *in rem*, on the existing personal liability of the owners, and his dictum that the liability of the ship and the responsibility of the owners are convertible terms seems to be applicable to the present case. The observations of the Judges in *Nelson* v. *Couch* (3) seems to me to favor this view. The Judges there treated the right of proceeding *in rem* as a lien with a right of sale, and accordingly held, that if the sale was insufficient to satisfy the lien, the plaintiff might proceed *in personam*, for the residue: Byles, J., comparing it to the case in which a man having a debt secured by a pledge or mortgage necessarily resorts to legal proceedings to make the pledge available, and having failed to realize the whole of his debt by the sale, sues in a common law Court for the balance. In the present case, if we consider that the contract did not operate to exclude the action *in rem*, we must hold that the lien still exists, although, by the terms of the contract between the owners of the tug and the

(1) Moo. P. C. C. 267. (2) Rob. Adm. Rep. 391.
(3) 15 C. B. N. S., 99.

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owners of the "Nevada," no liability could arise to the former on account of any damage done by the tug. The case to which the Chief Justice has just referred (*The Parlement Belge*) seems to show that this view would not be correct.

Appeal allowed.

Attorney for impugnant: *Barrow & Orr.*

Attorney for promovent: *Watkins & Watkins.*

REFERENCE UNDER THE BURMAH COURTS' ACT.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

1884
June 19.

FRITZ OLNER (PLAINTIFF) *v.* LAVEZZO (DEFENDANT.)*

Jurisdiction—Foreign ship—Suit by sailor for wages—Mofussil Small Cause Court Act, XI of 1865, *s.* 8 (*expl. a*)—*Consul to receive notice of suit.*

Civil Courts have, as a general rule, jurisdiction to try all civil suits against all persons of any nationality within the local limits of their jurisdiction.

A captain of a ship, who was at the time loading or unloading his vessel within the local limits of the Small Cause Court of Rangoon, was sued by one of his sailors (who had contracted to serve on a voyage from Bremerhaven to East India), for wages in the Small Cause Court of Rangoon; *held*, that the sailor's cause of action arose within the local limits of the Small Cause Court, where the defendant was residing when the suit was brought, and that, therefore, the Small Cause Court had jurisdiction to hear the suit.

THIS was a reference under s. 54 of the Burmah Courts' Act, 1875.

On the 9th November 1882, one Fritz Olner, a British subject, engaged at Bremerhaven in Germany to serve as an able seaman on board the Italian vessel *Gentili*, whereof the captain was one Lavezzo, for the voyage from Bremerhaven to East India at the pay of £2-8 per month, and at Bremerhaven received an advance of £4-16, from that amount.

* Civil Reference No. 825 of 1884, by C. F. Egerton Allen, Esq., Officiating Recorder of Rangoon, under s. 54 of the Burmah Courts' Act, dated the 6th November 1883.