

THE ANGLER.

VAN HOESEN v. THE ANGLER.

(District Court, E. D. New York. March 13, 1894.)

MARITIME LIENS—WAIVER—INNOCENT PURCHASERS.

A delay of over two years in attempting to assert a lien for damages for wrongful discharge of a pilot held to be a waiver thereof as against purchasers of the vessel who bought her while the lien claimant was suing the owner personally, without giving notice to the purchasers of an intention to hold the vessel, so that they had no opportunity for taking indemnity against the claim.

This was a libel by Francis Van Hoesen against the steamboat Angler, to enforce a lien for damages.

Alexander & Ash, for libelant.

Goodrich, Dedy & Goodrich, for claimants.

BENEDICT, District Judge. This is an action to enforce a lien on the steamboat Angler for damages arising from the discharge of the libelant from the service of the boat before the expiration of his term of service. The libelant was hired as pilot by the then owner of the boat, one Foster, on February 11, 1889, and on July 11, 1890, he was discharged by Foster. In October, 1890, the libelant sued Foster in the state court to recover the same demand here presented. In January, 1892, the steamboat was transferred to a corporation, who are now her owners. In December, 1892, the libelant obtained judgment against Foster in the state court, and on December 27, 1892, he filed his libel against the steamboat in this action. The proofs in regard to the transfer of the boat to the corporation warrant the conclusion that the claimants were bona fide purchasers for value. They purchased the steamboat with no notice that the libelant claimed to have a lien upon her, but with notice that he had sued the former owner for his demand. When the claimants purchased the boat they paid all outstanding debts presented, and the demand of the libelant would then have been paid if it had been presented. It was not presented, and instead it was prosecuted against Foster. Any sum recovered by the libelant in this action will be so much lost to the present owners, for they are without security. Under these circumstances, I am of the opinion that the libelant should be held to have waived his lien against the boat by allowing it to remain dormant for over two years. The cases cited by the libelant are clearly distinguishable from the present case. Here no excuse is given for the libelant's delay to prosecute his claim for over two years; and this delay is coupled with the fact that in the meantime he put his claim in suit against the owner, and gave no notice of an intention to hold the boat, and coupled with the further fact that by withholding such notice he deprived the claimants of the opportunity of seeing that his claim was paid at the time of the transfer of the boat or taking indemnity against it. In such a case it would be inequitable to cause the claimants to pay the libelant's demand. The libel is accordingly dismissed, with costs.

THE ALEXANDER BARKLEY.
FLANNERY v. THE ALEXANDER BARKLEY.
PENNSYLVANIA R. CO. v. SAME.

(District Court, E. D. New York. February 2, 1894.)

1. TOWAGE—NEGLIGENCE OF TUG—RESPONSIBILITY OF PILOT—CONCLUSIVENESS OF DECREE.

A default decree against a tug for damages caused to her tow by stranding is not conclusive of negligence on the part of the pilot in charge of the tug, so as to preclude him, after obtaining a decree against the tug for his wages, from denying such negligence in a contest between himself and the owner of the tow as to whose decree should be first paid out of the proceeds of the tug.

2. MARITIME LIENS—PRIORITY.

A decree for pilot's wages is entitled to be first paid out of the proceeds of a tug, as against a decree for damages to her tow by stranding, where it appears that the stranding was not caused by the pilot's negligence, but by negligence of the tow's master.

These were libels in rem by John Flannery and by the Pennsylvania Railroad Company, respectively, against the steam tug Alexander Barkley. The cause was heard upon the question of the distribution of the proceeds of the tug.

John A. Anderson, for Flannery.

Robinson, Biddle & Ward, for Pennsylvania R. Co.

BENEDICT, District Judge. John Flannery filed a libel against the tug Alexander Barkley to recover wages due him as pilot. He had a decree in his favor by default. The Pennsylvania Railroad Company, owner of the schooner Gale, also filed a libel against the steam tug Alexander Barkley to recover damages caused by the negligence of the tug to the schooner Gale while in tow of the tug. In this suit, also, a decree was entered in favor of the libelant. The vessel having been sold, and the money in court being insufficient to pay both the decrees, the case comes before the court on the question of priority between the two decrees. On the part of the Pennsylvania Railroad, it is insisted that its claim has a priority over the claim of the pilot, because the accident in question was caused by the negligence of Flannery at the time in charge of the tug as pilot. Reference was ordered to take testimony upon the question whether the accident was caused by the fault of John Flannery. The reference was had, and the commissioner submitted the testimony, with the opinion that the accident was not caused by the negligence of John Flannery. It is now contended before the court that the Pennsylvania Railroad Company having obtained a decree of this court based upon an allegation of fault on the part of the steam tug Alexander Barkley, and it appearing that Flannery was in charge of the tug at the time, it is not open to be denied that the fault was the fault of John Flannery. But the decree obtained by the Pennsylvania Railroad Company by default is not conclusive upon John Flannery, and it was open to him, notwithstanding the