1924

A Selection of Cases and Other Authorities on the Law of Admiralty, Pt.2: The Maritime Law

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A Selection of Cases and Other Authorities

on

THE LAW OF ADMIRALTY

By

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PREFACE

The following collection of cases and other authorities on the Law of Admiralty requires prefatory comment in at least two particulars.

In the first place, the collection is incomplete. It has been necessary to keep within rather definite limits of space. Within those limits it has seemed better to develop selected topics somewhat fully, leaving out others altogether, rather than to spread the collection out over as much of the field as one would like to include. In the result, the subjects of jurisdiction, the maritime lien, and the reception and modification of the maritime law have been treated at length. Average, salvage, insurance, collision, affreightment contracts, limited liability, the Harter Act, and other interesting and important topics have not been treated at all. It is planned to publish cases on additional topics in the substantive maritime law if the undertaking seems warranted after experience with the present collection.

In the second place, the collection is tentative. There are no footnotes and such materials as are usually thus included must be supplied by the instructor. The cases are so arranged that the order may be changed, new cases inserted, or old cases omitted without preparing new stencils for the rest of the book. It is planned to make revisions frequently. There is a special significance, therefore, in the somewhat platitudinous remark that criticisms and suggestions will be greatly appreciated.

E. D. D.

Ann Arbor
June 21, 1924.

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Part II.

The Maritime Law.

Chapter IV.

The Maritime Lien.

Section 1.

The Nature of the Maritime Lien.

Benedict, The American Admiralty.

Fourth Edition, 1910, Sec. 132.

A ship is, of necessity, a wanderer. She visits places where her owners are not known, or are inaccessible. The master is not usually of sufficient pecuniary ability to respond to the demands of the voyage, and he is the fully authorized agent of the owners. These and other kindred characteristics of maritime commerce have established the necessity of making the ship herself security, in many cases, to those who have demands against the master or owners. The contracts and the torts of the master and owners give, therefore, in numerous cases, a lien upon the vessel herself. All these are maritime liens, whether created by actual hypothecation, by implication, or by operation of law.

The Bold Buccleugh.

Judicial Committee of the Privy Council of Great Britain, 1851.

7 Moore's Privy Council Cases 267.

This appeal originated in a cause of damage, civil and maritime, promoted by the Respondents, the owners of the barque "William", against the steam-ship, the "Bold Buccleugh", by reason of a collision between these vessels.

The "Bold Buccleugh" belonged to the Edinburgh and Dundee Steam Packet Company, trading between Leith and Kingston-upon-Hull, in Yorkshire, the partners of which Company were all resident in Scotland. The collision took place in the river Humber, on the 14th of December, 1848, when the barque "William" was run down by the "Bold Buccleugh", and totally lost.

On the 19th of the same month, an action for damage was entered in the High Court of Admiralty in England, on behalf of the Respondents (who were domiciled and resided in England), the owners of the barque "William", against the "Bold Buccleugh" and the partners of the Edinburgh and Dundee Steam Company, and a warrant of arrest was extracted and forwarded to Hull to be executed; but the "Bold Buccleugh" had left that port for Leith, before the arrival of the warrant, and consequently could not be arrested. The owners of the "William" then applied to the owners of the "Bold Buccleugh" to give bail to the action, which they declined to do, and the "Bold Buccleugh", still continuing out of the jurisdiction of the Admiralty Court, and within the jurisdiction of the Scotch Courts, the owners of the "William", on the 30th of January, 1849, commenced a suit against the owners of the "Bold Buccleugh", in the Court of Session in Scotland, and the steamer was forthwith arrested in Leith harbour; but on bail being given to answer the action in that Court, she was released. By a bill of sale, dated the 26th of June, 1849, the owners of the "Bold Buccleugh" sold her absolutely to the Appellant for £4,800, without notice to him of any unsatisfied claim arising out of the damage done to the "William", or any suit pending in regard thereto, in the Court of Session in Scotland; but in August following, the vessel having returned to Hull, was again arrested by virtue of a warrant, under seal of the High Court of Admiralty, and a fresh action commenced in that Court, instructions being sent to Scotland for the immediate abandonment of the suit in the Court of Session. An appearance under protest was entered by the Appellant, and an Act on Petition, brought in on his behalf, disclaiming the jurisdiction of the Court of Admiralty to entertain the second suit. . . .

Part of the statement of the case and the arguments of counsel are omitted.

Sir John Jervis: There were two questions in this case: First, the effect of the pendency of another proceeding in Scotland for the same cause of action. Secondly, the liability of the vessel by a proceeding in rem after a bona fide sale, without notice.

It is manifest that these two defences are of a totally different nature; the first being a declinatory plea properly the subject of a protest; and the second, an absolute bar. Generally, it is inconvenient to depart from the settled rules of procedure, and to raise such questions differing in degree by the same defence; but as the Court below did not object to this course, we merely notice it to observe, that we do not approve of such a proceeding, and pass on to deliver our opinion upon the two points raised.

Upon the first point we have not, from the commencement of the discussion, entertained any doubt; but we desired the second question to be re-argued, because it was of great general importance, and because we were unable to find any authorities bearing directly upon it; and some of the cases to which we were referred, were apparently conflicting with each other.

The course which was taken upon the second argument, makes it convenient to dispose of the second question in the first instance.

It is admitted that the Court of Admiralty has jurisdiction in a case of collision by a proceeding in rem against the ship itself; but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners; that the damage confers no lien upon the ship, and that the owners having appeared, the question is to be determined according to the interests of the party litigant, without reference to the original liability of the vessel causing the wrong. For these propositions, dicta have been referred to, which are entitled to great respect, but which, upon consideration, will be found not to support the propositions for which they were cited. In The Johann Friederich (1 W. Rob. 37), Dr. Lushington is reported to have said that proceedings in rem in the Court of Admiralty were analogous to those by foreign attachment in the Courts of the City of London. For the purpose for which that allusion was made, viz., the liability of the property of foreigners to be arrested by process out of the Court of Admiralty and the Courts of the City of London, the two proceedings may be analogous but in other respects they are altogether different. The foreign attachment is founded upon a plaint against the principal debtor, and must be returned nihil before any step can be taken against the garnishee; the proceeding in rem, whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance. In the former case, the proceedings are in personam, in the latter, they are in rem. The attachment, like a Common Law distringas, is merely for the purpose of compelling an appearance; and if the Defendant appears within a year and a day, even after judgment and execution against the garnishee, and puts in bail, the

attachment is at an end. If the owners do not appear to the warran arresting the ship, the proceedings go on without reference to thei default, and the decree is confined exclusively to the vessel. Many other distinctions will be found upon reference to the notes to Turbill's case (1 Wms. Saund. 67, m. 1). It is not correct, therefore, to say, that the proceeding in rem is in all respects analogous to the proceeding by foreign attachment, and that the former is merely to compel an appearance, because the latter is undoubtedly for that purpose only.

In all proceedings in rem, whatever be the foundation of the jurisdiction, the warrant is the same, and the proceedings are conducted in the same form, and there is no reason for saying that a different rule is to prevail, where the foundation of the jurisdiction is a collision, from that which is admitted to be the practice. when the suit is instituted for salvage, or the recovery of wages against the ship.

But it is further said, that the damage confers no lien upon the ship, and a dictum of Dr. Lushington, in the case of The Volant (1 W. Rob. 387), is cited as an authority for this proposition. By reference to a contemporaneous report of the same case (1 Notes of Cases, 508), it seems doubtful whether the learned Judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a dictum merely, not necessary for the decision of that case, cannot be taken as a binding authority.

A maritime lien does not include or require possession. The word is used in Maritime Law not in the strict legal sense in which we understand it in Courts of Common Law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the Civil Law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the Civil Law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privile upon a thing to be carried into effect by legal process; and Mr. Justice Story (1 Sumner, 78) explains that process to be a proceeding in rem, and adds, that wherever a lien or claim is given upon the thing, then the Admiralty enforces it by a proceeding in rem, and indeed is the only Court competent to enforce it. A maritime lien is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists, a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or

privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached. This simple rule, which, in our opinion, must govern this case and which is deduced from the Civil Law, cannot be better illustrated than by reference to the circumstances of The Aline, referred to in the argument, and decided in conformity with this rule, though apparently upon other grounds. In that case, there was a bottomry bond before and after the collision, and the Court held, that the claim for damage in a proceeding in rem, must be preferred to the first bond-holder, but was not entitled against the second bond-holder to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bond-holder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction.

This rule, which is simple and intelligible, is, in our opinion applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosescever possession the thing may come.

The remaining point may be disposed of in a few words. The pleadings show that the proceedings in Scotland were commenced by process against the persons of the Defendants, and that the seizure of the vessel was collateral to that proceeding, for the mere purpose of securing the debt. We have already explained that, in our judgment, a proceeding in rem differs from one in personam, and it follows, that the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other.

For these reasons, we are of opinion, that the judgment of the Court below must be affirmed, with costs.

The Gazelle.

District Court of the United States, District of Massachusetts, 1858.

Sprague 378.

Sprague, J. This is a libel for wages, by two seamen, against a small British vessel, belonging to Cornwallis, in the Province of Nova Scotia. The suit is prosecuted with the approbation of the British consul at Boston, and is resisted by the claimants, purchasers under a sheriff's sale. On the sixth day of November, 1857, these libellants shipped at Cornwallis, for a voyage from that place to Boston, and back; one of them, Clark, as mate, for $19 per month, and the other, Murphy, as seaman, for $15 per month. Under this contract the vessel arrived at Boston, on the seventh day of December last; and on the eighth of the same month, she was arrested by a sheriff, by virtue of a process from a State court, sued out by a creditor of the owners of the vessel. This proceeding is called an attachment on mesne process. Those not conversant with the local law of Massachusetts, are often misled by the use of the word "attachment". The object is not to compel an appearance by the defendant; but the property of the debtor is taken by the sheriff, and held by him, as security for the payment of any judgment which the plaintiff may recover. A judgment was recovered by the creditor in the State court, and execution issued thereon; and on the 30th day of January last, the sheriff sold the vessel at auction, by virtue of that execution, and she was immediately afterwards delivered to the purchasers. This libel was filed on the 23d of December, 1857, and on the same day, a warrant was issued for the arrest of the vessel. The marshal attempted to execute this process, but found the sheriff in possession, claiming to hold her under the writ of attachment from the State court; and as he refused to permit the marshal to enter upon the vessel, or to take her into his custody, the latter desisted from the attempt. In that state of the case, I refused to proceed to exercise jurisdiction over her. Whether the sheriff could rightfully refuse to permit the marshal to take possession, in order to enforce a paramount lien, and whether the marshal could properly have proceeded to execute his precept, by force, in the same manner as against uhlawful resistance by a private individual, are grave questions, which I do not now decide. Whatever may have been the respective rights and duties of the two executive officers, the fact was, that the marshal had never had possession, and returned his precept unexecuted, and this debarred the court from proceeding futher. I could not exercise jurisdiction over a vessel which was not, and had never been, in the custody of any officer of the court.

On the 27th day of January, 1858, on motion of the proctor for the libellant, another warrant to arrest the vessel was issued, which was duly executed on the 5th of February, before which time

the custody of the sheriff had ceased, he having delivered the vessel to the purchasers under the sheriff's sale.

Although the sheriff was permitted to hold possession of this vessel, until he had sold her on execution, and had terminated his custody by a delivery to the purchaser, such sale and delivery did not divest or impair the lien of the libellants. The purchaser took the vessel cum onere. The sale by the sheriff was by the common-law writ of fieri facias only. The prior attachment on mesne process had only the effect of bringing the property within the reach of the writ of execution, but gave no efficacy to the sale, which derived all its force from the execution. In such a suit, no notice is given except to the debtor, and his rights alone are affected. It is a suit in personam merely. It is in no respect a suit in rem. Neither the writ of attachment, nor of execution, directed the officer to take this vessel, or even named her, but they both ran against the debtor, and all his goods and chattels. Such a sale has none of the characteristics of an admiralty sale, upon process in rem, after notice to all the world, to intervene for their rights or interests. As soon, therefore, as the sheriff had delivered this vessel to the purchaser, the marshal arrested her, to enforce the lien of these libellants; and the purchaser being well advised by counsel, has not contested the paramount right of the libellants to proceed against the vessel, and to have her sold under a decree of this court, for the payment of their claim. The only question now made is, as to the amount which should be decreed to the respective libellants. The voyage has been broken up by the fault of the owner, as he permitted the vessel to be sold for his debt. This was a violation of his contract with the libellants, for which they have a right to recover a full indemnity. To constitute this indemnity, they are entitled to their wages, so long as they were properly attached to the vessel, and thereafter, up to the time when, with reasonable diligence, they may return to Cornwallis, and their necessary expenses while remaining here, and in so returning. . . .

Decree for the libellant, Clark, for the sum of $102.18; and for Murphy, the sum of $71.50, and costs. . . .

The vessel was sold by order of the court, and from the proceeds the amount of the decree was paid to the libellants, and the residue was paid over to the purchaser at the sheriff's sale, who intervened as claimant.

The Cerro Gordo.

District Court of the United States, District of Connecticut, 1893.

54 Federal Reporter 391.

Townsend, District Judge. Libel in rem. There is no dispute as to the facts in this case. The libelants, with three other seamen, originally brought actions at law in the state court against one Henry G. Chapman, then master of the schooner Cerro Gordo, and owner of three eighths thereof, for wages as seamen on board said schooner. In said actions said schooner was attached, judgment was rendered in favor of plaintiffs, and the said interest of said Chapman was sold, under the execution, to the present claimant. The sale was made subject to certain claims, the only one among them which is of any importance in the consideration of this case being a mortgage for $1,200, which was afterwards bought by this claimant. He is now the sole owner of the schooner. The amount received by libelants under the execution sale being insufficent to satisfy their claims for wages, they now seek to recover the balance thereof by a libel in rem against the schooner.

The claimant contends that the libelants, by the sale under the execution, waived the right to again proceed against the vessel for the same cause of action. Counsel for libelants claims that the favor shown by courts of admiralty to the lien of seamen for wages gives them a peculiar right to enforce such lien in this court, and illustrates his claim by the distinction between their lien and the implied lien of the material man.

It is true that seamen are treated as a privileged class, and that, as their services are presumably necessary for the preservation of the res, their liens for wages are of the highest rank; and the remedies allowed them for the enforcement of their claims "ought not to be abridged, except in cases of a clear, common understanding to that effect." Judge Brown, in Russell v. Rackett, 46 Fed. Rep. 201. But I do not see how these facts can give them any greater rights in the proceedings for the enforcement of their lien. A lien is a jus in re. Once acquired, whether by a seaman, or by a material man, under a state statute, the admiralty will recognize and enforce it, subject only to the rules of priority adopted in its courts. Henry, Adm. Jur. & Proc. pp. 197, 198; The Lottawanna, 21 Wall. 558; The Guiding Star, 18 Fed. Rep. 263; The William T. Graves, 14 Blatchf. 189. The favor shown to the lien of the seaman does not affect the question of the nature or extent of his remedy, but only that of priority of satisfaction.

But the effect of the prior attachment, judgment, and sale on execution presents a novel and difficult question. It seems to be settled that the mere fact that libelants had already brought suit

in the state court for the same claim is no bar to this proceeding in admiralty. The Highlander, 1 Spr. 510; The Brothers Apap, 34 Fed. Rep. 352; The Kalorama, 10 Wall. 218. If the two suits were pending at the same time, that might be ground for a stay of proceedings. The Edith, 34 Fed. Rep. 927; The John and Mary, Swab. 473. It would seem from some of the cases that a sale by libelants under the former execution might have operated as a waiver of their lien, provided they had thereby assumed to sell the entire vessel, and all rights and interests therein. The Kalorama, supra; The Mary Morgan, 28 Fed. Rep. 202. And it makes no difference whether such conduct would operate as an estoppel. Under the doctrine of admiralty, applicable to the enforcement of liens, the vendor at the execution sale in such a case would be held to have lost his lien by laches. The Seminole, 42 Fed. Rep. 924; The Scow Bolivar, Olcott, 478.

But the attachments and sale under the execution affected only the part interest of the defendant therein. The attachments could not interfere with the interest of the mortgagee, for they were subsequent to it. Furthermore, the execution sale was made expressly subject to this mortgage. The present claimant is not only the purchaser of the execution debtor's interest, but he is also the assignee of the mortgagee. Prior to his purchase of the mortgage, the liens of these libelants had already become vested. He therefore acquired the title of said mortgagee, subject to said liens (The Guiding Star, 18 Fed. Rep. 263;) and of course the purchase under the execution did not impair said liens in the absence of laches, (The Gazelle, 1 Spr. 378; The Julia Ann, Id. 382; Crosby v. The Lillie, 40 Fed. Rep. 368.) It does not appear that the claimant has been in any way prejudiced by the action of libelants. It does not appear that there have been any laches on their part. The claim accrued between March 9 and April 7, 1892. The attachment was made on said April 7, the execution sale was on May 10, and the libel was filed on June 15, 1892. Nor does it appear that they made any misrepresentations, or failed to make any representations which it was their duty to make. Crosby v. The Lillie, 42 Fed. Rep. 238. They were not called upon to speak at the execution sale, for they assumed to sell only the interest of Chapman in the vessel. Their present claim is not inconsistent with a waiver, by such sale, of all rights to said interest. Crosby v. The Lillie, 40 Fed. Rep. 368.

Furthermore, the purchaser of a mortgage on a vessel, or of an interest in a vessel, on an execution issuing out of a state court, is presumed to know that such purchases are subject to all existing liens. These libelants, by their execution sale, waived only their right again to proceed against such portion of the vessel, or interest therein, as had been sold by them. It would seem, therefore, that they might thereafter enforce their lien in admiralty against the vessel, to the extent of the mortgage interest

therein, just as they might have done against the entire vessel in the first instance. In the latter case they would have been entitled, as against the mortgage, to the whole of the fund arising from a sale, by virtue of the priority of their lien. . . .

In an omitted part of the opinion the court examined the contention that the lien had been waived and the cause of action merged by the suit in the state court.

Let a decree enter for the amount of libelants' claims.

The Amelie.

Supreme Court of the United States, 1867.

6 Wallace 18.

Appeal from the Circuit Court for the District of Massachusetts.

Fitz, of Boston, was owner of goods to the value of $8300, shipped at Surinam on board the Amelie, a Dutch vessel owned in Amsterdam, and to be delivered to him in Boston. The vessel when she left her port was apparently seaworthy and well provided, but having been struck with lightning in the course of her voyage, and encountering perils of the sea, was compelled to seek some harbor, and with difficutly she made Port au Prince. She was here surveyed by two masters of vessels appointed by the Dutch consul there. These examined the outside of the vessel and found damage upon it, which they reported. In an attempt to repair this, and after the outlay of $800 or $1000, further damage, on removing part of the cargo, was discovered. On this, a second survey was held. Upon this new survey there were two masters of vessels, the head of the shipyard at Port au Prince, the agent of the New York underwriters, and Lloyd's agent. They reported the outside of the vessel injured in the same manner that the first survey had reported, and reported other considerable injuries besides (which they specified), and recommended that new knees and planks should be put in, with other repairs, which they estimated would cost 10,000 Haytien dollars, and take from twenty-five to thirty days. They said that permanent repairs could not be made at Port au Prince, but that the repairs recommended would be sufficient to take the vessel to Boston.

In making these temporary repairs, one of the sides of the vessel was uncovered, and the timbers of the vessel, which were then first made visible, were found to be broken on the larboard side. The damage was of so serious a character that a third survey was ordered by the Dutch consul. This third survey had upon it the agent of the New York underwriters, Lloyd's agent, who were also on the second survey, and three masters of vessels. These last-appointed surveyors made a report, stating at length the damage which they were able to find; their belief that additional damage would be found when the vessel was further uncovered; what the vessel would require; that there were no docks, nor competent ship-carpenters, nor requisite timber or materials at Port au Prince; and consequently that they were compelled to come to the conclusion that it would not be possible to make the necessary repairs in that port in a proper manner. They further reported that if materials could be obtained, the time taken would be not less than four months, and would cost more than the vessel would be worth after the repairs were made. The surveyors, for this reason, advised that the voyage should be broken up, the vessel sold for the interest of all concerned, and the cargo transshipped to Boston.

The vessel was accordingly put up at public auction, and, after full notice, knocked down for $407 in gold, to one Riviere, who took possession.

The surveys seemed to have been carefully made, the second one having occupied two hours in the examination, and the third, or last, half a day. The reports were full and particular.

After the purchase of the vessel by Riviere, he repaired her, at a cost in gold of $1695.31, and sent her to Boston,

At the time that the master sold the vessel at Port au Prince, he sold also a part of the cargo, the property, as already mentioned, of Fitz, for the proceeds of which ($2441) he never accounted.

On the arrival of the vessel at Boston, Fitz libelled her; asserting a lien and claiming damages for the non-delivery of the cargo. The vessel having been sold by order of court, the purchaser made repairs to the extent of about $143, took off her copper, which he sold for $1157, and sent her to England with a full cargo. She was forty days on the passage; had a good deal of bad weather; showed no symptoms of weakness, and appeared stanch and strong.

On a claim made by Fitz to the proceeds of the vessel in the Registry, $2138, the District Court dismissed the claim; and this decree was affirmed in the Circuit Court. The matter was now here for review. . . .

[The arguments of counsel are omitted.]

Mr. Justice Davis delivered the opinion of the court.

The principle of maritime law which governs this controversy is too well settled for dispute. Although the power of the master to sell his ship in any case, without the express authority of the owner, was formerly denied, yet it is now the received doctrine of the courts in this country as well as in England, that the master has the right to sell in case of actual necessity.

We are not called upon to discuss the reasons for the rule, nor to cite authorities in its support, because it has repeatedly received the sanction of this court. The Patapsco Ins. Co. v. Southgate, 5 Peters, 620; The Sarah Ann, 13 Id. 400; Post et al. v. Jones et al., 19 Howard, 157.

From the very nature of the case (the court say), there must be this implied authority of the master to sell. The injury to the vessel may be so great and the necessity so urgent as to justify a sale, and under such circumstances, the master becomes the agent of all concerned, and is required to act for their benefit. The sale of a ship becomes a necessity within the meaning of the commercial law, when nothing better can be done for the owner, or those concerned in the adventure. If the master, on his part, has an

honest purpose to serve those who are interested in ship and cargo, and can clearly prove that the condition of his vessel required him to sell, then he is justified. As the power is liable to abuse, it must be exercised in the most perfect good faith, and it is the duty of courts and juries to watch with great care the conduct of the master. In order to justify the sale, good faith in making it and the necessity for it must both concur, and the purchaser, to protect his title, must be able to show their concurrence. The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a legal necessity to do it. If this can be shown, the master is justified; otherwise not. And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed, and the perils to which the property is exposed.

If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether in their judgment a sale is necessary. And he should never sell, when in port with a disabled ship, without first calling to his aid disinterested persons of skill and experience, who are competent to advise, after a full survey of the vessel and her injuries, whether she had better be repaired or sold. And although his authority to sell does not depend on their recommendation, yet, if they advise a sale, and he acts on their advice, he is in a condition to furnish the court or jury reviewing the proceedings, strong evidence in justification of his conduct.

The facts of this case bring it within these well-settled principles of maritime law, and clearly show that the master was justified in terminating his voyage and selling his ship. . . .

It is insisted, even if the circumstances were such as to justify the sale and pass a valid title to the vendee, he, nevertheless, took the title subject to all existing liens. If this position were sound, it would materially affect the interests of commerce; for, as exigencies are constantly arising, requiring the master to terminate the voyage as hopeless, and sell the property in his charge for the highest price he can get, would any man of common prudence buy a ship sold under such circumstances, if he took the title encumbered with secret liens, about which, in the great majority of cases, he could not have the opportunity of learning anything? The ground on which the right to sell rests is, that in case of disaster, the master, from necessity, becomes the agent of all the parties in interest, and is bound to do the best for them that he can, in the condition in which he is placed, and, therefore, has the power to dispose of the property for their benefit. When nothing better can be done for the interest of those concerned in the property than to sell, it is a case of necessity, and as the master acts for all, and is the agent of all, he sells as well for the lien-holder as the owner. The very object of the sale, according to the uniform current of the decisions, is to save

something for the benefit of all concerned, and if this is so, the proceeds of the ship, necessarily, by operation of law, stand in place of the ship. If the ship can only be sold in case of necessity, where the good faith of the master is unquestioned, and if it be the purpose of the sale to save something for the parties in interest, does not sound policy require a clean title to be given the purchaser in order that the property may bring its full value? If the sale is impeached, the law imposes on the purchaser the burden of showing the necessity for it, and this he is in a position to do, because the facts which constitute the legal necessity are within his reach; but he cannot know, nor be expected to know, in the exercise of reasonable diligence, the nature and extent of the liens that have attached to the vessel. Without pursuing the subject further, we are clearly of the opinion, when the ship is lawfully sold, the purchaser takes an absolute title devested of all liens, and that the liens are transferred to the proceeds of the ship, which, in the sense of the admiralty law, becomes the substitute for the ship. . . .

Decree affirmed.

Peter Harmony and Others, Claimants of the Brig Malek Adhel,
v. The United States.

Supreme Court of the United States, 1844.

2 Howard 210.

[The statement of the case and the arguments of counsel are omitted. The facts are sufficiently stated in the opinion.]

Mr. Justice Story delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the district of Maryland, sitting in admiralty, and affirming a decree of the District Court rendered upon an information in rem, upon a seizure brought for a supposed violation of the act of the 3d of March, 1819, ch. 75, (ch. 200,) to protect the commerce of the United States, and to punish the crime of piracy. The information originally contained five counts, each asserting a piratical aggression and restraint on the high seas upon a different vessel: one, the Madras, belonging to British subjects; another, the Sullivan, belonging to American citizens; another, the Emily Wilder, belonging to American citizens; another, the Albert, belonging to British subjects; and another upon a vessel whose name was unknown, belonging to Portuguese subjects; and this last count contained also an allegation of a piratical depredation. The Malek Adhel and cargo were claimed by the firm of Peter Harmony and Co., of New York, as their property, and the answer denied the whole gravamen of the information. At the hearing in the District Court, the vessel was condemned and the cargo acquitted, and the costs were directed to be a charge upon the property condemned. An appeal was taken by both parties to the Circuit Court; and upon leave obtained, two additional counts were there filed, one alleging a piratical aggression, restraint, and depredation upon a vessel belonging to Portuguese subjects, whose name was unknown, in a hostile manner and with intent to destroy and plunder the vessel, in violation of the law of nations; and another alleging an aggression by discharge of cannon and restraint upon a British vessel called the Alert, or the Albert, in a hostile manner, and with intent to sink and destroy the same vessel, in violation of the law of nations. Upon the hearing of the cause in the Circuit Court, the decree of the District Court was affirmed; and from that decree an appeal has been taken by both parties to this court.

It was fully admitted in the court below, that the owners of the brig and cargo never contemplated or authorized the acts complained of; that the brig was bound on an innocent commercial voyage from New York to Guayamas, in California; and that the equipments on board were the usual equipments for such a voyage. It appears from the evidence that the brig sailed from the port of New York on the 30th of June, 1840, under the command of one Joseph

Nunez, armed with a cannon and ammunition, and with pistols and daggers on board. The acts of aggression complained of, were committed at different times under false pretences, and wantonly and wilfully without provocation or justification, between the 6th of July, 1840, and the 20th of August, 1840, when the brig arrived at Bahia; where, in consequence of the information given to the American consul by the crew, the brig was seized by the United States ship Enterprize, then at that port, and carried to Rio Janeiro, and from thence brought to the United States. . . .

Now upon this posture of the case, it has been contended, 1st. That the brig was not an armed vessel in the sense of the act of Congress of 1819, ch. 75,(ch. 200) 2. That the aggressions, restraints, and depredations disclosed in the evidence were not piratical within the sense of the act. 3. That if the case in both respects is brought within the scope of the act, still neither the brig nor the cargo are liable to condemnation, because the owners neither participated in nor authorized the piratical acts, but are entirely innocent thereof. 4. That if the brig is so liable to condemnation, the cargo is not, either under the act of Congress or by the law of nations. . . .

[Only so much of the opinion is given as deals with the third contention.]

The . . . question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation under the act of Congress. Here, again, it may be remarked that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners. The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner. The vessel or boat (says the act of Congress) from which such piratical aggression, &c., shall have been first attempted or made shall be condemned. Nor is there any thing new in a provision of this sort. It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which, or by which, or by the master or,crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party. The doctrine also is familiarly applied to cases of smuggling and other misconduct under our revenue laws; and has been applied to other kindred cases, such as cases arising on embargo and non-intercourse acts. In short, the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs. In the case of the United States v. The Schooner Little Charles, 1

Brock. Rep. 347, 354, a case arising under the embargo laws, the same argument which has been addressed to us, was upon that occasion addressed to Mr. Chief Justice Marshall. The learned judge, in reply, said: "This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel; which is not the less an offence, and does not the less subject her to forfeiture because it was committed without the authority and against the will of the owner. It is true that inanimate matter can commit no offence. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is therefore not unreasonable that the vessel should be affected by this report." The same doctrine was held by this court in the case of the Palmyra, 12 Wheat. R. 1, 14, where referring to seizures in revenue causes, it was said: "The thing is here primarily considered as the offender, or rather the offence is primarily attached to the thing; and this whether the offence be malum prohibitum or malum in re. The same thing applies to proceeding in rem or seizures in the Admiralty." The same doctrine has been fully recognised in the High Court of Admiralty in England, as is sufficiently apparent from the Vrow Judith, 1 Rob. R. 150; the Adonis, 5 Rob. R. 256; the Mars, 6 Rob. R. 87, and indeed in many other cases, where the owner of the ship has been held bound by the acts of the master, whether he was ignorant thereof or not.

The ship is also by the general maritime law held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as for example, in cases of collision and other wrongs done upon the nigh seas or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party.

The act of Congress has therefore done nothing more on this point than to affirm and enforce the general principles of the maritime law and of the law of nations. . . .

Upon the whole, we are all of opinion that the decree of the Circuit Court ought to be, and it is affirmed, with costs.

The Schooner Freeman, Her Tackle, &c., Charles Hickox, Claimant and Appellant, v. Alvah Buckingham, Philo Buckingham, Benjamin H. Buckingham, and James W. McCullok, Libellants.

Supreme Court of the United States, 1855.

18 Howard 182.

[The arguments of counsel are omitted.]

Mr. Justice Curtis delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the northern district of New York.

The appellees filed their libel in the district court, alleging that they are the consignees named in two bills of lading, signed by the master of the Schooner Freeman, which certify that certain quantities of flour had been shipped on board the schooner by S. Holmes and Company, at Cleveland, in the State of Ohio, to be carried to Buffalo, in the State of New York, and there safely delivered - dangers of navigation excepted - to an agent named in the bills of lading, to be by him forwarded to the libellants, in the city of New York. That though this merchandise was thus consigned to the libellants for account of the shipper, yet, on receipt of the bills of lading, and on the faith thereof, the libellants made advances to the shippers. That thirteen hundred and sixty barrels of the flour mentioned in the bills of lading were not delivered at Buffalo, though the delivery was not prevented by any danger of navigation.

In accordance with the prayer of the libel, the schooner was arrested, and the appellant intervened as claimant.

It appeared that, a short time before these bills of lading were signed, the claimant, being the sole owner of the schooner, contracted with John Holmes to sell it to him for the sum of $4,000, payable by instalments of $500, at different dates; that, by the contract, John Holmes was to take possession of the vessel, and if he should make all the agreed payments, the claimant was to convey to him; that only one instalment had become payable, and had been paid, when the vessel was arrested; that the vessel was delivered to John Holmes, under this contract, and he allowed his son, Sylvanus Holmes, to have the entire control and management of the schooner, which was in his employment, and victualled and manned by him, and commanded by a master whom he appointed, at the time the bills of lading in question were signed.

It further appeared that Sylvanus Holmes transacted business under the style of S. Holmes and Company; that the flour mentioned in these bills of lading as having been shipped by him, and which the master failed to deliver, never was in fact shipped - nor, so

far as appeared, had Sylvanus Holmes any such flour; and that he induced the master to sign the bills of lading by fraud and imposition, intending to use them - as he did use them - as instruments to impose on the libellants, and obtain advances on the faith thereof.

To state succinctly the legal relations of these parties, it may be said, that the claimant was the general owner of the vessel; that Sylvanus Holmes was owner pro hac vice; that the libellants are holders of the bills of lading, for a valuable consideration parted with, in good faith, on the credit of the bills of lading; but that the bills of lading themselves are not real contracts of affreightment, but only false pretences of such contracts; and the question is, whether they can operate, under the maritime law, to create a lien, binding the interest of the claimant in the vessel.

Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it.

In this case there was no cargo to which the ship could be bound, and there was no contract made, for the performance of which the ship could stand a security.

But the real question is, whether, in favor of a bona fide holder of such bills of lading procured from the master by the fraud of an owner pro hac vice, the general owner is estopped to show the truth, as undoubtedly the special owner would be. This question does not appear to have been made in the court below, the distinction between the special and general owner not having been insisted on. So large a part of the carrying trade of this country is carried on in vessels of which the masters, or other persons, are owners pro hac vice, and the practice of taking security by way of mortgage of vessels has become so common, while, at the same time, the confidence placed in bills of lading as the representatives of property is so great and so important to commerce, that the relative rights of the holders of such documents, and of the general owners and mortgagees of vessels, which are involved in this case, are subjects of magnitude; and the case has received the attentive consideration of the court.

The first and most obvious view which presents itself is, that the claimant in this case is not personally liable on these bills of lading. The master who signed them was not his agent, and they created no contract between him and the consignor or consignee, or any third person who might become their holder. Abbot on Shipping, 42 and note, 57 and note. . . .

We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner.

In the case of The Phebe, Ware's R. 263, Judge Ware has traced the power of the master to bind the vessel by contracts of affreightment to the maritime usages of the middle ages. So far as respects such contracts made by the master in the usual course of the employment of the vessel, and entered into with a party who has no notice of any restriction upon that apparent authority, those maritime usages may safely be considered to make part of our law; though we should hesitate to declare that their effect has not been modified by our own commercial law, which has recognized interests and rights unknown to the commercial world when those usages obtained. And we desire to be understood as not intending to say that all contracts made by a master within the usual scope of his employment, which, by the ancient maritime law, would have created liens on the vessel, will now do so, in such manner as to bind the interests in the vessel of parties whom he does not represent as agent. For the ground on which we rest the authority of a master, who is either special owner or agent of the special owner, is, that when the general owner intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel. The general owner must be taken to know that the purpose for which the vessel is hired, when not employed to carry cargo belonging to the hirer, is to carry cargo of third persons; and that bills of lading, or charter-parties, must, in the invariable regular course of that business, be made, for the performance of which the law confers a lien on the vessel.

He should be considered as contemplating and consenting that what is uniformly done may be done effectually; and he should not be allowed to say that he did not expect, or agree, that third persons, who have shipped merchandise and taken bills of lading therefor, would thereby acquire a lien on the vessel which he has placed under the control of another, for the very purpose of enabling him to make such contracts to which the law attaches the lien. See The Cassius, 2 Story, 93; Webb v. Pierce, 1 Curtis, 107.

But if this be the ground upon which the interest of the general owner is subjected to liens, by the act of those who are not so his agents as to bind him personally, this ground wholly fails in the case at bar.

There can be no implication that the general owner consented that false pretences of contracts, having the semblance of bills of lading, should be created as instruments of fraud; or that, if so created, they should in any manner affect him or his property, They do not grow out of any employment of the vessel; and there is as little privity or connection between him, or his vessel, and such simulated bills of lading, as there would be between him and any other fraud or forgery which the master or special owner might commit.

Nor can the general owner be estopped from showing the real character of the transaction, by the fact that the libellants advanced money on the faith of the bills of lading; because this change in the libellant's condition was not induced by the act of the claimant, or of any one acting within the scope of an authority which the claimant had conferred. Even if the master had been appointed by the claimant, a wilful fraud committed by him on a third person, by signing false bills of lading, would not be within his agency. If the signer of a bill of lading was not the master of the vessel, no one would suppose the vessel bound; and the reason is, because the bill is signed by one not in privity with the owner. but the same reason applies to a signature made by a master out of the course of his employment. The taker assumes the risk, not only of the genuineness of the signature, and of the fact that the signer was master of the vessel, but also of the apparent authority of the master to issue the bill of lading. We say the apparent authority, because any secret instructions by the owner, inconsistent with the authority with which the master appears to be clothed, would not affect third persons. But the master of a vessel has no more an apparent unlimited authority to sign bills of lading, than he has to sign bills of sale of the ship. He has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped; and he has also authority to sign a bill of sale of the ship, when, in case of disaster, his power of sale arises. But the authority in each case, arises out of, and depends upon, a particular state of facts. It is not an unlimited authority in the one case more than in the other; and his act, in either case, does not bind the owner, even in favor of an innocent purchaser, if the facts upon which his power depended did not exist; and it is incumbent upon those who are about to change their condition, upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends.

Though the law on this point seems to have been considered in Westminster Hall not to have been settled, when the eighth edition of Abbot on Shipping was published, in 1849, (Ab. on Sh. 325,) we take it to be now settled, by the cases of Grant v. Norway, 2 Eng. Law and Eq. 337; Hubbersty v. Ward, 18 ibid. 551; and Coleman v. Riches, 29 ibid. 323.

The same law was much earlier laid down in Walter v. Brewer, 11 Mass. 99.

But the case at bar is much stronger in favor of the claimant, because the master was not appointed by him, and the signature of the bills of lading was obtained by the fraud of the special owner.

In Gracie v. Palmer, 8 Wheat. 605, the question came before this court, whether the charterer and the master could, by a contract made with a shipper who acted in good faith, destroy the lien of the owner on the goods shipped, for the freight due under the charter-party. It was held they could not; and the decision is placed upon the ground of want of authority to do the act. It was admitted by the court that the charterer and master might impose on a shipper in a foreign port, by making him believe the charterer was owner, and the master his agent. But it was considered that so far as respected the owner, the risk of loss from such imposition lay on the shipper. So, in this case, even if the special owner and the master had combined to issue these simulated bills of lading, they could not create a lien on the interest of the general owner of the vessel. Upon the actual posture of the facts, the master having been defrauded by the special owner into signing the bills of lading, it would be difficult to distinguish them, so far as respects the rights of the claimant, from bills forged by the special owner. On these grounds, we are of opinion that, upon the facts as they appear from the evidence in the record, the maritime law gives no lien on the schooner; that the claimant is not estopped from alleging and proving those facts; and, consequently, that the decree of the court below must be reversed, and the cause remanded, with directions to dismiss the libel, with costs.

The China.

Supreme Court of the United States, 1868.

7 Wallace 53.

The statement of the case and the arguments of counsel are omitted. The facts are sufficiently stated in the opinion.

Mr. Justice Swayne delivered the opinion of the court.

This is a case arising out of a collision between the steamship China, a British vessel, then leaving the port of New York for Liverpool, and the brig Kentucky, then on a voyage from Cardenas to New York. The facts are few and undisputed. The collision occurred on the 15th of July, 1863, a short distance outside of Sandy Hook. The brig was sunk. The steamship was wholly in fault. It was not alleged, in the argument here for the appellants, that there was either fault or error on the part of the brig. The case turns upon the effect to be given to the statute of New York, of the 3d of April, 1857. At the time of the collision the steamship was within the pilot waters of the port of New York, and was in charge of a pilot, licensed under this act, and taken by the master pursuant to its provisions. The pilot's orders were obeyed, and the catastrophe was entirely the result of his gross and culpable mismanagement. No question was made in the argument, upon the subject; the evidence is too clear to admit of any. These are all the facts material to be considered. . . .

In an omitted part of the opinion the court examined the New York statute and concluded that its provisions made the taking of a pilot compulsory.

This brings us to the examination of the second proposition. Does the fact that the law compelled the master to take the pilot, exonerate the vessel from liability? . . .

In an omitted part of the opinion the court reviewed the following English cases: The Neptune the Second, 1 Dods. 467; The Attorney-General v. Case, 3 Price 302; Caruthers v. Sidebotham, 4 M. &. S. 77; The Girolamo, 3 Hagg. Adm. 169; The Baron Holberg, 3 Hagg. Adm. 244; The Gladiator, 3 Hagg. Adm. 340; The Eolides, 3 Hagg. Adm. 367; The Protector, 1 W. Rob. 45; The Maria, 1 W. Rob. 95; and The Halley, L. R. (1868) 2 Ad. &. Ecc. 3.

The question is not a new one in this country. It arose as early as the year 1800, in Bussy v. Donaldson. 4 Dall. 206./ In that case the court said:

"The legislative regulations were not intended to alter or obliterate the principles of law, by which the owner of a vessel was

previously responsible for the conduct of the pilot, but to secure in favor of every person - strangers as well as residents - trading to our port, a class of experienced, skilful, and honest mariners, to navigate their vessels safely up the bay and the river Delaware. The mere right of choice is, indeed, one, but not the only reason why the law in general makes the master responsible for the acts of his servant - and, in many cases where the responsibility is allowed to exist, the servant may not in fact be the choice of the master."

Williamson v. Pierce, 4 Martin N. S. 399, Yates v. Brown, 8 Pick. 23, and Denison v. Seymour, 9 Wend. 1, involved the same principle, and were decided in the same way.

In the case of The Creole, decided by Mr. Justice Grier, on the circuit, in the year 1853, 2 Wall. Jr. 485, the subject underwent a learned and thorough examination, both by counsel and the court. The result was the same as in Bussy v. Donaldson. It appears by that case, that Mr. Justice Wayne had ruled the point in the same way in his circuit. No American adjudication to the contrary has been brought to our attention.

The question is now, for the first time, presented in this court.

The New York statute creates a system of pilotage regulations. It does not attempt, in terms, to give immunity to a wrongdoing vessel. Such a provision in a State law would present an important question, which, in this case, it is not necessary to consider.

The argument for the appellants proceeds upon the general legal principle that one shall not be liable for the tort of another imposed upon him by the law, and who is, therefore, not his servant or agent. Mulligan v. Wedge, 12 A. &. E. 737; Redie v. Railway Co., 2 Ex. 244.

The reasoning by which the application of this principle to the case before us is attempted to be maintained, is specious rather than solid. It is necessary that both outward and inward bound vessels, of the classes designated in the statute, should have pilots possessing full knowledge of the pilot grounds over which they are to be conducted. The statute seeks to supply this want, and to prevent, as far as possible, the evils likely to follow from ignorance or mistake as to the qualifications of those to be employed by providing a body of trained and skilful seamen, at all times ready for the service, holding out to them sufficient inducements to prepare themselves for the discharge of their duties, and to pursue a business attended with so much of peril and hardship. The services of the pilot are as much for the benefit of the vessel and cargo as those of the captain and crew. His compensation comes from the same source as theirs. Like them he serves the owner and is paid by the owner. If there be any default on his part, the owner

has the same remedies against him as against other delinquents on board. The difference between his relations and those of the master is one rather of form than substance. It is the duty of the master to interfere in cases of the pilot's intoxication or manifest incapacity, in cases of danger which he does not foresee, and in all cases of great necessity. The Argo, 1 Swab. 464; The Christiana, 7 Moo. P. C. 192. The master has the same power to displace the pilot that he has to remove any subordinate officer of the vessel. He may exercise it or not, according to his discretion.

The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors. The Phoebe, Ware 273; The Creole, 2 Wall. Jr. 519.

The maxim of the civil law - sic utere tuo ut non laedas alienum - may, however, be fitly applied in such cases as the one before us. The remedy of the damaged vessel, if confined to the culpable pilot, would frequently be a mere delusion. He would often be unable to respond by payment - especially if the amount recovered were large. Thus, where the injury was the greatest, there would be the greatest danger of a failure of justice. According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosesoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings. Unlike a common-law lien, possession is not necessary to its validity. It is rather in the nature of the hypothecation of the civil law. It is not indelible, but may be lost by laches or other circumstances. The Bold Buccleugh, 7 Moo. P. C. 284; Edwards v. The Steamer R. F. Stockton, Crabbe 580; The American, 16 Law Reports 264; The Lion, L. R. (1868) 2 Ad. &. Ecc. 102.

The proposition of the appellants would blot out this important feature of the maritime code, and greatly impair the efficacy of the system. The appellees are seeking the fruit of their lien.

All port regulations are compulsory. The provisions of the statute of New York are a part of the series within that category. A damaging vessel is no more excused because she was compelled to obey one than another. The only question in all such cases is, was she in fault? The appellants were bound to know the law. They cannot plead ignorance. The law of the place makes them liable. This ship was brought voluntarily within the sphere of its operation,

and they cannot complain because it throws the loss upon them rather than upon the owners of the innocent vessel. We think the rule which works this result is a wise and salutary one, and we feel no disposition to disturb it.

The steamship is a foreign vessel. We have, therefore, considered the learned and able argument of the counsel for the appellants with more care than we should otherwise have deemed necessary. Maritime jurisprudence is a part of the law of nations. We have been impressed with the importance of its right administration in this case.

[The opinion of Mr. Justice Clifford, in which Mr. Justice Field concurred, is omitted.]

The Siren.

Supreme Court of the United States, 1868.

7 Wallace 152.

Appeal from the District Court for Massachusetts.

The steamer Siren was captured in the harbor of Charleston in attempting to violate the blockade of that port, in February, 1865, by the steamer Gladiolus, belonging to the navy of the United States. She was placed in charge of a prize master and crew, and ordered to the port of Boston for adjudication. On her way she was obliged to put into the port of New York for coal, and, in proceeding thence through the narrow passage which leads to Long Island Sound, known as Hurlgate, she ran into and sank the sloop Harper, loaded with iron, and bound from Newv York to Providence Rhode Island. The collision was regarded by this court, on the evidence, as the fault of the Siren.

On the arrival of the steamer at Boston, a libel in prize was filed against her, and no claim having been presented, she was, in April following, condemned as lawful prize, and sold. The proceeds of the sale were deposited with the assistant treasurer of the United States, in compliance with the act of Congress, where they now remain, subject to the order of the court.

In these proceedings the owners of the sloop Harper, and the owners of her cargo, intervened by petition, asserting a claim upon the vessel and her proceeds, for the damages sustained by the collision, and praying that their claim might be allowed and paid out of the proceeds.

The District Court held that the intervention could not be allowed, and dismissed the petitions; and hence the present appeals. . . .

[The arguments of counsel are omitted.]

Mr. Justice Field delivered the opinion of the court.

It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered if the suprme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable

to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress. Such is the language of this court in United States v. Clarke. 8 Peters, 444.

The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property.

But although direct suits cannot be maintained against the United States, or against their property, yet, when the United States institute a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal and equitable, to the extent of the demand made or property claimed, and when they proceed in rem, they open to consideration all claims and equities in regard to the property libelled. They then stand in such proceedings, with reference to the rights of defendants or claimants, precisely as private suitors, except that they are exempt from costs and from affirmative relief against them, beyond the demand or property in controversy. . . .

For the damages occasioned by collision of vessels at sea a claim is created against the vessel in fault, in favor of the injured party. This claim may be enforced in the admiralty by a proceeding in rem, except where the vessel is the property of the United States. In such case the claim exists equally as if the vessel belonged to a private citizen, but for reasons of public policy, already stated, cannot be enforced by direct proceedings against the vessel. It stands, in that respect, like a claim against the government, incapable of enforcement without its consent, and unavailable for any purpose.

In England, when the damage is inflicted by a vessel belonging to the crown, it was formerly held that the remedy must be sought against the officer in command of the offending ship. But the present practice is to file a libel in rem, upon which the court directs the registrar to write to the lords of the admiralty requesting an appearance on behalf of the crown - which is generally given - when the subsequent proceedings to decree are conducted as in other cases. Coote's New Admiralty Practice, 31. In the case of The Athol, 1 W. Robinson 382, the court refused to issue a monition to the lords of the admiralty to appear in a suit for damage by collision, occasioned to a vessel by a ship of the crown; but the lords having subsequently directed an appearance to be entered, the court proceeded with the case, and awarded damages. As no warrant issues in these cases for the arrest of the vessels of the crown, and no bail is given on the appearance, it is insisted that

they are brought simply to ascertain the extent of the damages, and that the decrees are little more than awards, so far as the government is concerned. This may be the only result of the suits, but they are instituted and conducted on the hypothesis that claims against the offending vessels are created by the collision. The Clara, 1 Swabey, 3; and the Swallow, Ib. 3a. The vessels are not arrested and taken into custody by the marshal, for the reasons of public policy already stated, and for the further reason that it is to be presumed that the government will at once satisfy a decree rendered by its own tribunals in a case in which it has voluntarily appeared. . . .

The inability to enforce the claim against the vessel is not inconsistent with its existence.

Seamen's wages constitute preferred claims, under the maritime law, upon all vessels; yet they cannot be enforced against a vessel of the nation, or a vessel employed in its service. In a case before the Admiralty Court of Pennsylvania, in 1781, it was adjudged, on a plea to the jurisdiction, that mariners enlisting on board a ship of war belonging to a sovereign independent State could not libel the ship for their wages.

In a case in the English Admiralty Court, a libel having been filed to enforce a claim for seamen's wages against a packet ship employed in the service of the General Post Office, Sir William Scott declined to take jurisdiction until notice was given to the Post Office Department, and he was informed that no objection was taken to the proceeding. The Lord Hobart, 2 Dodson, 103. The fact that the court took jurisdiction when the exemption, upon which the government could insist, was waived, shows that a claim against the vessel existed, as only upon its existence could the libel in any event be sustained.

Even where claims are made liens upon property by statute, they cannot be enforced by direct suit, if the property subsequently vest in the government. Thus in Massachusetts the statutes provide that any person to whom money is due for labor and materials furnished in the construction of a vessel in that commonwealth, shall have a lien upon her, which shall be preferred to all other liens except mariners' wages, and shall continue until the debt is paid, unless lost by a failure to comply with certain specified conditions; and in a recent case, where a vessel subject to a lien of this character was transferred to the United States, it was held that the lien could not be enforced in the courts of that State. The decision was placed upon the general exemption of the government and its property from legal process. Briggs and another v. Light Boats, 11 Allen, 157.

The decree must be reversed, and the cause remanded to the court below, with directions to assess the damages and pay them out of the proceeds of the vessel before distribution to the captors.

Ordered accordingly.

[The dissenting opinion of Mr. Justice Nelson is omitted.]

Ex parte in the Matter of the United States, Owner of the American Steamship "Western Maid", Petitioner.

Supreme Court of the United States, 1922.

257 United States 419.

[The arguments of counsel are omitted.]

Mr. Justice Holmes delivered the opinion of the court.

These are petitions for prohibition to prevent District Courts of the United States from exercising jurisdiction of proceedings in rem for collisions that occurred while the vessels libeled were owned, absolutely or pro hac vice, by the United States, and employed in the public service. The questions arising in the three cases are so nearly the same that they can be dealt with together.

The Western Maid was and is the property of the United States. On January 10, 1919, she was allocated by the United States Shipping Board to the War Department for service as a transport. She had been loaded with foodstuffs for the relief of the civilian population of Europe, to be delivered on arrival at Falmouth, England, to the order of the Food Administration Grain Corporation, the consignor, American Embassy, London, care of the Chief Quartermaster, American Expeditionary Forces, France; subject to the direction of Mr. Hoover. If it should prove impracticable to reship or redirect to the territories lately held by the Central Empires, Mr. Hoover was to resell to the Allied Governments or to the Belgian Relief; the foodstuffs to be paid for by the buyer. The vessel was manned by a navy crew. Later on the same day, January 10, 1919, in New York harbor, the collision occurred. On March 20, 1919, the vessel was delivered to the United States Shipping Board. The libel was filed on November 8, 1919. Act of September 7, 1916, c. 451, § 9, 39 Stat. 728, 730.[1] The Lake Monroe, 250 U. S. 246. On February 20,

1. "§ 9. That any vessel purchased, chartered, or leased from the (United States Shipping) board may be registered or enrolled and licensed, or both registered and enrolled and licensed, as a vessel of the United States and entitled to the benefits and privileges appertaining thereto. . . .

"Every vessel purchased, chartered, or leased from the board shall, unless otherwise authorized by the board, be operated only under such registry or enrollment and license. Such vessels while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein. No such vessel, without the approval of the board, shall be transferred to a foreign registry or flag, or sold; nor, except under regulations prescribed by the board, be chartered or leased. . . ." 39 Stat. L. 738, 730.

1920, the Government moved that it be dismissed for want of jurisdiction. The District Court overruled the motion. On April 11, 1921, the Attorney General moved for leave to file the present petition in this Court. Leave was granted and the case has been heard.

The Liberty was a pilot boat let to the United States on the bare-boat basis at a nominal rate of hire. She had been manned by a crew from the United States Navy and commissioned as a naval dispatch boat, and was employed to serve military needs in war service. The collision took place on December 24, 1917, while she was so employed, in Boston Harbor. Afterwards the vessel was redelivered to the owners and still later, February 5, 1921, the suit now in question was brought against her. On February 14, under the Act of March 9, 1920, c. 95, § 4, 41 Stat. 525,[2] the United States filed a suggestion of its interest, and also set up the above facts. The District Court held that they constituted no defence and this petition was brought by the Attorney General along with that last mentioned.

The Steamship Carolinian had been chartered to the United States upon a bare-boat charter and had been assigned to the War Department, by which she was employed as an army transport and furnished with an army crew. While she was so employed the collision took place in the harbor of Brest, France, on February 15, 1918. Afterwards the Carolinian was returned to the owners, and she was employed solely as a merchant vessel on July 9, 1920, when the suit in question was begun, under which the vessel was seized. In the same month the United States filed a suggestion of interest, and on January 6, 1921, set up the foregoing facts and prayed that the libel be dismissed. The District Court maintained its jurisdiction and this petition was brought by the Attorney General along with the other two. 270 Fed. 1011.

It may be assumed that each of these vessels might have been libeled for maritime torts committed after the redelivery that we have mentioned. But the Act of September 7, 1916, c. 451, § 9, does not create a liability on the part of the United States, retrospectively, where one did not exist before. Neither, in our opinion,

2. "¶ 4. That if a privately owned vessel not in the possession of the United States or of such (United States Shipping Board Emergency Fleet) corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act." 41 Stat. L. 525, 526.

is such a liability created by the Act of March 9, 1920, c. 95, § 4, authorizing the United States to assume the defence in suits like these. It is not required to abandon any defence that otherwise would be good. It appears to us plain that before the passage of these acts neither the United States nor the vessels in the hands of the United States were liable to be sued for these alleged maritime torts. The Liberty and the Carolinian were employed for public and government purposes, and were owned pro hac vice by the United States. It is suggested that the Western Maid was a merchant vessel at the time of the collision, but the fact that the food was to be paid for and the other details adverted to in argument cannot disguise the obvious truth, that she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and that had no more to do with ordinary merchandizing than if she had carried a regiment of troops. The only question really open to debate is whether a liability attached to the ships which although dormant while the United States was in possession became enforcible as soon as the vessels came into hands that could be sued.

In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules. The Lottawanna, 21 Wall. 558, 571, 572. Dalrymple v. Dalrymple, 2 Hagg. Cons. 54, 58, 59. Dicey, Conflict of Laws, 2d ed., 6,7. Also we must realize that the authority that makes the law is itself superior to it, and that if it consents to apply to itself the rules that it applies to others the consent is free and may be withheld. The sovereign does not create justice in an ethical sense, to be sure, and there may be cases in which it would not dare to deny that justice for fear of war or revolution. Sovereignty is a question of power, and no human power is unlimited. Carino v. Insular Government of the Philippine Islands, 212 U. S. 449, 458. But from the necessary point of view of the sovereign and its organs whatever is enforced by it as law is enforced as the expression of its will. Kawananakoa v. Polyblank, 205 U. S. 349, 353.

The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so. If then we imagine the sovereign power announcing the system of its laws in a single voice it is hard to conceive it as declaring that while it does not recognize the possibility of its acts being a legal wrong and while its immunity from such an imputation of course extends to its property,

at least when employed in carrying on the operations of the Government, - specifically appropriated to national objects, in the language of Buchanan v. Alexander, 4 How. 20, - yet if that property passes into other hands, perhaps of an innocent purchaser, it may be seized upon a claim that had no existence before. It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person. But that is a fiction not a fact and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force. See Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal, 251 U.S. 48, 53. The personality of a public vessel is merged in that of the sovereign. The Fidelity, 16 Blatchf. 569, 573. Ex parte State of New York, No. 2, 256 U.S. 503.

But it is said that the decisions have recognized that an obligation is created in the case before us. Legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp. The leading authority relied upon is The Siren, 7 Wall. 152. The ground of that decision was that when the United States came into court to enforce a claim it would be assumed to submit to just claims of third persons in respect of the same subject-matter. 7 Wall. 154. Carr v. United States, 98 U.S. 433, 438. In reaching its result the Court spoke of such claims as unenforcible liens, but that was little more than a mode of expressing the consent of the sovereign power to see full justice done in such circumstances. It would have been just as effective and more accurate to speak of the claims as ethical only, but recognized in the interest of justice when the sovereign came into court. They were treated in this way by Dr. Lushington in The Athol, 1 Wm. Rob. 374, 382. Further distinctions have been taken that need not be adverted to here. There was nothing decided in Workman v. New York City, 179 U.S. 552, that is contrary to our conclusion, which, on the other hand, is favored by The Fidelity, 16 Blatchf. 569, 573, and Ex parte State of New York, No. 1, 256 U.S. 490, and Ex parte State of New York, No. 2, 256 U.S. 503. The last cited decisions also show that a prohibition may be granted in a case like this. See The Ira M. Hedges, 218 U.S. 264, 270.

Rule absolute for writs of prohibition.

Mr. Justice McReynolds did not hear the argument in this case and took no part in the decision. . . .

[The dissenting opinion of Mr. Justice McKenna, in which Mr. Justice Day and Mr. Justice Clarke concurred, is omitted.]

The Rock Island Bridge.

Supreme Court of the United States, 1867.

6 Wallace 213.

This was a libel filed in the District Court for the Northern District of Illinois, against that part of the Rock Island Railroad Bridge which is situated in the Northern District of Illinois, for alleged damages done by that part of the bridge to two steamboats, the property of the libellant, employed in the navigation of the Mississippi River. It alleged that, by law and the public treaties of the United States, the Mississippi River is, for the distance of two thousand miles, a public navigable stream and common highway, free and open to all the citizens of the United States, who are entitled to navigate the same by sailing and steam vessels, and otherwise, without impediment or obstruction; that the Rock Island Bridge obstructed the free navigation of the stream; and that by collision with this obstruction the steam vessels of the libellant had been injured, and that he had in consequence been damaged to an extent exceeding seventy thousand dollars.

In accordance with the prayer of the libel, process was issued and the property attached. The Mississippi and Missouri Railroad Company and others then intervened as claimants, and filed an exception to the jurisdiction of the court to proceed against the property in question in the manner "in which the same is sought to be proceeded against by the libel." In other words, they objected to the jurisdiction of the court to take a proceeding in rem against the property. The exception was sustained by the District and Circuit Courts, and the libel dismissed. The correctness of this ruling was the sole question presented for the determination of this court. . . .

[The arguments of counsel are omitted.]

Mr. Justice Field, after stating the case, delivered the opinion of the court, as follows:

There is no doubt, as stated by the counsel for the appellant, that the jurisdiction of the admiralty extends to all cases of tort committed on the high seas, and in this country on navigable waters. For the redress of these torts, the courts of admiralty may proceed in personam, and when the cause of the injury is the subject of a maritime lien, may also proceed in rem. The latter proceeding is the remedy afforded for the enforcement of liens of that character.

A maritime lien, unlike a lien at common law, may, in many cases, exist without possession of the thing, upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim or damages; and when the

lien arises from torts committed at sea, it travels with the thing, wherever that goes, and into whosesoever hands it may pass. The only object of the proceeding in rem, is to make this right, where it exists, available - to carry it into effect. It subserves no other purpose.

The lien and the proceeding in rem are, therefore, correlative - where one exists, the other can be taken, and not otherwise. Such is the language of the Privy Council in the decision of the case of The Bold Buccleugh. 7 Moore, 284. "A maritime lien," says that court, "is the foundation of the proceeding in rem, a process to make perfect a right inchoate from the moment tne lien attaches; and whilst it must be admitted that where such lien exists a proceeding in rem may be had, it will be found to be equally true, that in all cases where a proceeding in rem is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing to be carried into effect by legal process."

There is an expression in the case of The Volant, 1 W. Robinson, 388, attributed to Dr. Lushington, which militates against this view. He is reported to have said, that the damage committed on the high seas confers no lien upon the ship, and this is cited by the counsel of the appellant to show that a maritime lien is not the foundation of a proceeding in rem. But the expression is a mere dictum, and the Privy Council in the case cited allude to it, and observe that it is doubtful, from a contemporaneous report of the same case, 1 Notes of Cases, 508, whether the learned judge made use of it, and add, that if he did, the expression is certainly inaccurate, and not being necessary for the decision of the case cannot be taken as authority.

A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It may arise with reference to vessels, steamers, and rafts, and upon goods and merchandise carried by them. But it cannot arise upon anything which is fixed and immovable, like a wharf, a bridge, or real estate of any kind. Though bridges and wharves may aid commerce by facilitating intercourse on land, or the discharge of cargoes, they are not in any sense the subjects of maritime lien.

Decree Affirmed.

Section 2.

The Creation of the Maritime Lien.

The Florence.

District Court of the United States, Eastern District of Michigan, 1877.

2 Flippin 56.

Libellant, being the owner of a lighter, averred that the master of the scow had, without authority, seized and used his lighter and neglected to return her, though requested so to do . . . Exceptions were taken to the jurisdiction on the ground that the facts did not constitute a lien upon the scow by the admiralty law . . . . The facts were that while the vessel was in a sunken condition the claimant applied to a brother of libellant for permission to use the lighter in carrying off wood to the scow. This the brother, Wallace Lemaire, granted without authority. The claimant used her two or three days only; left her lying near the lake shore where she pounded and became leaky. It was agreed, on demand made by libellant for the lighter, that she should be left at a ship carpenter's to be repaired. After this was finished the carpenter refused to deliver her to libellant, who filed this libel to recover her value.

Brown, J. The principal question discussed upon the argument related to the jurisdiction of the court. The libel sounds in tort, and it was strenuously insisted by claimant's advocate that no lien attached to the scow for the conversion of the lighter, both parties conceding that claimant took possession of her without authority from the owner. Cases of spoliation and damage are of admiralty and maritime jurisdiction. These include illegal seizures or depredations upon vessels or goods afloat. Every violent dispossession of property on the ocean is, prima facie, a maritime tort, and as such belongs to the admiralty jurisdiction. Benedict §§ 310, 311. And the owners of a vessel are liable for torts committed by the master in the course of his employment.

There can be no doubt that if this were a case of contract--that is, if the agent of whom the claimant hired the ~~scow~~ lighter, and whom claimant in good faith believed to have authority to loan it, had in fact possessed that authority, a libel in rem could have been sustained for the use of the lighter. A person furnishing a small boat or a lighter for the use of a vessel has as valid a lien upon her as though he had furnished an anchor, a compass, a chronometer, or any other of the articles usually denominated materials. In the case of The Dick Keys, 1 Bissel, 408, Mr. Justice McLean held that, where the master of a steamboat, on her behalf, agreed to pay $20 per day for the use of a barge, a libel might be maintained against the steamboat for the amount. Mr. Parsons says, (2 Parsons on Shipping, 148:) " If a barge is necessary to a steamboat, its hire to it will be regarded as material furnished for its equipment;" citing Amis v. Steamboat Louisa, 9 Mo. 621; Gleim v. Steamboat Belmont, 11 Mo. 112; Steamboat Kentucky v. Brooks, 1 Greene, (Ia.) 398 -- cases which fully sustain the text of the learned commentator.

Now, upon principle, it is difficult to say why, if an action in rem will lie for the use or value of property lawfully obtained, a similar action will not lie for the use or value of property unlawfully obtained; in other words, where the wrong is greater, the remedy should not be less. The general rule with regard to torts seems to be, that the owners and the vessel are liable for all the acts of the master done in the execution of the business in which he may be employed, by which third persons are injured, whether the injury was occasioned by the unlawful acts or by the negligence or want of skill of the master. Dias v. The Revenge, 3 Wash. 262; Dean v. Angus, Bee's Admiralty, 369; The Martha Ann, Olcott, 18. The principle underlying these decisions is that for torts committed in the business of the master as such, or in which the ship is the active, the injuring or the benefited party, the injured party has his remedy as well against the vessel as against her owner and master. The mere fact that the person committing a tort is master of a vessel, of course, does not make her liable; but, if it be an act done in pursuance of his business as master, or is beneficial to the vessel, she becomes liable in rem. The English cases hold that the vessel is not liable for a willful collision. This doctrine however, is denied in the case of Ralston v. The State Rights, Crabbe, 22, where a libel was sustained for running down the libellant's vessel, done by the express direction of the master of the colliding vessel.

(It is further insisted in this case that, locality being the test of jurisdiction in cases of tort, the injury was not done upon navigable waters, but that the lighter was seized within a fish-pound staked off from the river. I do not regard this fact as material.) In the case of Plummer v. Webb, 4 Mason, 380, a libel was sustained for the abduction of a minor son upon a voyage upon the high seas. Mr. Justice Story observed: "Here it is true that the tortious act, or cause of damage, might be properly deemed to arise in port; but it was a continuing act and cause of damage during the whole voyage; it was in no just sense a complete and perfected wrong until the departure of the vessel from port, and it traveled along with the parties as a continuing injury through the whole voyage, and terminated only with the death of the son at sea." See, also, Sherwood v. Hall, 3 Sumner, 128. In the case of The Bark Yankee v. Gallagher, (McAllister, 467) the court held that, "if the tortious act originates in port, and is not a perfected wrong until the vessel leaves the port, it is a continuous act, and travels with the tort-feasor and the injured party during the whole voyage, and comes within the jurisdiction of the admiralty upon the principle that, if the thing be done on the high seas and brought to land, it is appropriate to a court of admiralty to decide the question as a maritime tort." In this case the libellant had been seized in the city of San Francisco by a vigilance committee, and carried on board the bark and landed in the Sandwich Islands. In the case at bar, admitting that the fish-pound was a not navigable water, the lighter was taken to the scow then lying in navigable waters, and was used by her there, and I think the case falls within the authorities above cited.

No willful misconduct or wrongful purpose on the part of the claimant need be shown; for the gist of the action is the use of the lighter by the vessel, and I hold that it makes no difference whether the claimant became possessed of her by a contract, or by an act which was technically a conversion. The exception to the jurisdiction must therefore be overruled.

Ouillette, the owner of the scow, took possession of the lighter without authority from the libellant. After he had her for some time, and she had been injured either by Ouillette's negligence in allowing her to pound upon the bottom, or by becoming leaky, libellant went to Ouillette and demanded that the lighter should be returned to him in good order. Ouillette then put her into the hands of a carpenter, who repaired the damages done her, and also made some alterations and repairs on her at the request of the libellant. When libellant went to the carpenter to demand her, he refused to give her up, either until the repairs put upon her by Ouillette's directions were paid, as libellant says, or until libellant would release Ouillette from all liability, or would clear Ouillette of the law, as the carpenter says. As it is clear that libellant offered to pay for the repairs which he had ordered, and the carpenter did not detain her upon that ground, his further detention of her must be attributed to Ouillette, notwithstanding his statement that the carpenter detained her without authority from him. It was the duty of Ouillette to see that the lighter was returned, and no excuse for the non-performance of that duty, not attributable to the libellant, can be accepted.

There is considerable conflict with regard to the value of the lighter; but, upon all the testimony, I think that $45 is as much as she is worth. There must be a decree for the libellant for this amount, with interest.

Currie, Appellant, v. M'Knight, Respondent.

House of Lords of Great Britain, 1896.

Law Reports (1897) Appeal Cases 97.

[The statement of the case, the arguments of counsel, and the opinions of Lord Halsbury, Lord Herschell, Lord Morris, and Lord Shand are omitted. The facts are sufficiently stated in Lord Watson's opinion.]

Lord Watson: My Lords, the steamship Dunlossit was sold under a warrant issuing from the Sheriff Court of Lanarkshire, at the instance of Samuel M'Knight, a mortgagee, now deceased, whose executors have been made respondents in this appeal. The price of the vessel having been paid into Court, a competition arose between the mortgagee and the present appellant, who holds a decree for damages against the registered owners of the Dunlossit in respect of which he claims a preferable lien attaching to the proceeds of her judicial sale as a surrogatum for the ship.

The findings of the decree upon which the appellant's claim is founded shew that during a night in November, 1893, three vessels were moored alongside of an open quay at Port Askaig, in the Sound of Islay, where there is no harbour. The Dunlossit was in the centre of the tier, the steamship Easdale, belonging to the appellant, being outside of her, and moored to the quay by cables passing over the deck of the Dunlossit. There was a gale of exceptional violence during the night, which made the position of the vessels very insecure. In the morning the crew of the Dunlossit, which was in serious peril of damage from contact with the vessels between which she lay, and the possibility of another vessel moored in front of her coming into collision with her, got up steam, and, after notice of their intention, cut the mooring ropes of the Easdale, and stood out to sea. The Easdale was short-handed owing to the defection of two of her crew, and, being unable to get up steam, was driven ashore and damaged. The master of the Dunlossit acted solely for the protection of his ship against present and possible damage. The First Division of the Court, reversing the decision of the Sheriff-Substitute, held that the cutting of the Easdale's ropes by the crew of the Dunlossit was a wrongful act, for which her owners were responsible. That decree is final, and I have no right to express, and am not to be understood as expressing, any opinion with regard to its merits.

The Sheriff-Substitute in the present suit sustained the appellant's claim, being of opinion that, in the sense of law, the proceedings of the Dunlossit crew constituted an act of the ship which was sufficient to create a maritime lien for the damage thereby occasioned to the Easdale. His decision was reversed, on appeal, by the Second Division of the Court of Session, who dismissed the claim. Three of the learned judges held that,

according to the law of Scotland, no lien attaches to a ship for damage wrongfully done by her to another vessel whether by collision or otherwise. Lord Rutherfurd-Clark abstained from expressing any opinion upon that point, which did not appear to him to arise for decision. All of the learned judges held that, assuming the same right of lien to exist in Scotland as in England, the injuries suffered by the Easdale were not due to the fault of the Dunlossit as a ship. . . . . .

[Part of the opinion dealing with the first point is omitted.]

The other point as to which the learned judges of the Second Division were unanimous relates to the limits of the shipping rule which was followed in the case of The Bold Buccleugh, 7 Moo. P. C. 267. I think it is the other point as to which the learned judges of the Second Division were unanimous relates to the limits of the shipping rule which was followed in the case of The Bold Buccleugh. (1) I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manoeuvre of the ship to which it attaches. Such an act or manoeuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage. In the present case, according to the findings of fact contained in the decree of the First Division, the injuries sustained by the Easdale were not owing to any movement of the Dunlossit; they were wholly occasioned by an act of the Dunlossit's crew, not done in the course of her navigation, but for the purpose of removing an obstacle which prevented her from starting on her voyage.

I am, therefore, of opinion that upon the second of these grounds the interlocutor appealed from ought to be affirmed.

Ordered that the appeal be dismissed with costs.

Obrecht v. United States Shipping Board.

District Court of the United States, District of Maryland, 1922.

281 Federal Reporter 352.

Rose, District Judge. This is a libel intended to be filed under the Suits in Admiralty Act. The respondent is named in the libel as the United States Shipping Board, and not as the United States. This could be cured by amendment, if such an amendment were permissible upon which no opinion is intended to be expressed. In any event, as the period of limitation has not yet run out, a new libel could be filed.

However, the testimony for the libelant has been offered, and, from it, it conclusively appears that, apart from all technical objections, the claim cannot be sustained. The ship was a new one, and had made one voyage. Then it was discovered that certain parts of its engines had not been in the first instance properly constructed. The libelant was employed, as he knew, by the builder of the ship, to get the ship into the condition in which the builder should have originally put it. This the libelant at the time clearly understood. As the builder would have had no maritime lien upon the ship for such work, it is clear that the libelant acquired none.

In re Petition of Insurance Company of the State of Pennsylvania for the Proceeds of the Barge Waubaushene.

District Court of the United States, Northern District of New York, 1884.

22 Federal Reporter 109.

Coxe, J. The petitioner is a marine insurance company of the state of Pennsylvania, doing business at Buffalo, in this state, where Crosby and Dimick are its general agents. They are also agents, either individually or as a firm, of three other marine insurance companies. The companies represented by them are known as the "Big Four." The barge Waubaushene is a Canadian vessel, registered at Toronto, Ontario. . . .

The questions which the court must examine are these: First, was the contract made in the state of New York or in Canada? In other words, is the controversy to be determined by the law of this country or Canada? Second, has the law of New York, creating a lien in favor of underwriters for unpaid premiums, any application to this case? Third, is a general lien created by the maritime law of this country? The commissioner to whom the cause was referred decided -- First, that the contract of insurance was made in New York; second, that New York law has no application to a Canadian vessel; third, that a maritime lien for unpaid premiums does exist in favor of the insurer. That the commissioner was correct as to the second proposition I have little doubt, but am constrained to disagree with him as to the other two. . . .

[Only so much of the opinion is given as deals with the third question.]

I am clearly of the opinion that the insurers cannot succeed, for the reasons that the contract was made in Canada, and having no privilege there there can be none anywhere. I am aware, however, that there is not entire unanimity among the authorities upon the last question considered. Namely, whether the law of the contract or the law of the forum should be controlling? See The Maggie Hammond, 9 Wall. 435, 451, 452; Scudder v. Union Nat. Bank, 91 U.S. 406, 412, 413; Harrison v. Sterry, 5 Cranch, 289; The Union, 1 Lush. 137; Ogden v. Saunders, 12 Wheat. 213, 361.

But the case will be relieved of all perplexity on this score should the conclusion be reached that by the lex fori, also, no maritime lien exists. Although a determination of this question may not be necessary after the finding that the contract was made in Canada, yet, it is thought proper to decide it in view of the possible doubt above referred to; and for the further reason that a matter of such importance to insurer and insured may not longer be left open to conjecture in this district. Inasmuch as there is a clause

in the policy making the premium a lien in case of misfortune and loss only, and a provision in the note rendering the policy void in case of non-payment; it is by no means certain that a privilege would be sustained in any tribunal. For it may, with plausibility, be argued that no benefit could possibly accrue to the ship after the policy was forfeited; that the underwriters preferred the penalty to the lien. But these considerations are, perhaps, subordinate to the main question, which is: Does our law recognize a maritime lien for unpaid premiums in favor of underwriters? The affirmative of this proposition is held by the following authorities, where the lien is relegated to the lowest class of maritime privileges. The Dolphin, 1 Flippin, 580; affirmed in a qualified way, Id. 592; The Illinois, decided on the authority of The Dolphin, 2 Flippin, 383; The Guiding Star, 9 Fed. Rep. 521; affirmed, 18 Fed. Rep. 263. In this case the lien was sustained because given by a state statute upon vessels navigating the waters of the state, or bordering thereon.

The following cases decide against the lien: The Jenney B. Gilkey, 19 Fed. Rep. 127; The John T. Moore, 3 Woods, C.C. 61; The Robert L. Lane, 1 Low. 388, where the question is referred to, but not decided. See, also, the note to The Dolphin, in which the reporter has collected numerous authorities bearing upon the subject. The argument against the lien seems to me to have the most weight. That the contract of insurance upon a ship is in its nature maritime, is no longer an open question. Insurance Co. v. Dunham, 11 Wall. 1. It is, however, a contract for the personal indemnity of the insured. The credit is given to him, not to the ship. The principle upon which the law recognizes a lien for necessaries is that the ship may thus be enabled to engage in the competitions of commerce. Security is given the material-man, it is true, but the chief benefit is to the ship. It enables her to sail. A contract of insurance in no way aids the ship. She sails no better and no faster because of the insurance. It puts no steam in her boilers, and no wind in her sails. Insured and uninsured vessels are tossed alike by the tempest, and are alike liable to "the peril of waters, winds, and rocks." Indeed, there are those uncharitable enough to assert that a liberal insurance on a vessel does not tend to make her master and crew more diligent in guarding against danger, or more obstinate in refusing to abandon her to her fate. It is argued with considerable force that the contract is frequently one for an indemnity against partial as well as total loss, and contains numerous provisions for repairs, salvage, etc. But these provisions are incidental to the main agreement, are often optional with the underwriters, and are inserted for their benefit rather than for that of the insured. The advantage to the vessel is in the future and depends upon many remote contingencies. It is in this respect different from every other service to which a privilege attaches. If insurance were regarded by the admiralty as essential for the proper equipment of the ship, would not the ship's husband and master have been permitted to contract for it? Yet neither can do this, though both have the right, generally, to bind the ship for necessaries.

If, in case of loss, the liens were transferred to the insurance money there would be great cogency in the argument that the ship is benefited. An insured ship would then be able to offer additional security to those furnishing her with necessaries. But such is not the case. As is said in The John T. Moore, supra: "In case of loss the maritime liens upon the vessel are displaced and do not follow the insurance money. The money goes to the owner and not to the lien holder, who may insure his own interest." Again, unless distinguishable in some way from maritime privileges in general, the lien, if established, must cover the entire ship and not alone the insurer's interest. It must proceed upon the theory that the credit of the ship is pledged. It must be a lien enabling its holder to seize and sell the ship wherever found. It must follow the proceeds wherever they may be. But all who have an interest in the ship may insure; part owners, lienholders, and mortgagees. Upon what principle of law should the owner of a twentieth part be permitted to create a lien upon the other nineteen-twentieths, because he is in default to the underwriters for the risk they have run on his behalf? A case might easily be imagined where the insurers could seize a ship and sell her, or cause great loss, upon a claim for premiums on a policy issued to a lienholder or mortgagee. Parties having interests of this character ought not to be permitted to protect themselves at the expense of the ship. And yet, if the principle is once admitted, upon what theory can they be excluded? Unless the ship is benefited the ship should not pay.

Another objection is the almost absolute impossibility of ascertaining the existence of the incumbrance. The courts do not and ought not to favor secret liens. They should not be extended. And yet the most diligent inquiry might fail to discover liens of this character. This is not true to the same extent of other maritime privileges. An examination of the ship or inquiries addressed to her master and crew will in almost every instance reveal her liabilities. But what method of investigation would enable a proposed purchaser or charterer to discover, for instance, that a lien existed in favor of a foreign insurance company for a policy issued to a former part owner?

The interests of the underwriters can be fully protected without the lien, and it is thought that no sound reasoning, drawn from the law maritime, can be invoked in its favor, but, on the contrary, its establishment will lead to confusion and often to injustice, without corresponding advantage. The exceptions of respondent are sustained.

E. J. Dupont de Nemours & Co., Libellants and Appellants, v. John Vance et al, Claimants of the Brig Ann Elizabeth.

Supreme Court of the United States, 1856.

19 Howard 162.

[The statement of the case and the arguments of counsel are omitted. The facts are sufficiently stated in the opinion.]

Mr. Justice Curtis delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the eastern district of Louisiana.

The libel alleges that the appellants shipped on board the brig Ann Elizabeth, at Wilmington, in the State of Delaware, a large quantity of gunpowder, to be carried to New Orleans, in the State of Louisiana; and that, on the shipment thereof, bills of lading, in the usual form, were signed by the master of the brig; that, according to the invoices of the merchandise specified in the bills of lading, its value was $7,233.75; that, on the arrival of the brig at New Orleans, the libellants required the delivery of the merchandise thus shipped, but they received only a part thereof; and that the part not delivered consisted of 1,646 packages, which, according to the same invoice valuation, amounted to the sum of $5,936.54.

The libel further alleges that no part of that sum has been paid to the libellants; and it prays process against the brig, and a decree for the damages thus demanded, and for such other relief as shall to law and justice appertain.

The master of the brig, intervening for his own interest and that of his part-owners, admits that the shipment of goods was made, as alleged in the libel; but propounds that, in the course of the voyage, it became necessary, for the safety of all concerned, through the perils and dangers of the seas, to make a jettison of that part of the libellant's goods which were shipped and not delivered.

The first question is, whether the claimant has shown, in support of his defensive allegation, that the jettison was occasioned by a peril of the sea. If it was, then the carrier is exonerated from the delivery of the merchandise, and has only to respond for that part of its value which is his just contributory share towards indemnity for the common loss by the jettison. . . .

[Part of the opinion dealing with this question is omitted.]

We find . . . that the vessel is exonerated from the claim for the full value of the merchandise; and the remaining question is, whether the vessel is chargeable with any part of the value of the merchandise in this cause.

When a lawful jettison of cargo is made, and the vessel and its remaining cargo are thereby relieved from the impending peril, and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, he has a lien for that part of its value which the vessel and its freight are bound to contribute towards his indemnity for the sacrifice which has been made for the common benefit. And this lien on the vessel is a maritime lien, operating by the maritime law as a hypothecation of the vessel, and capable of being enforced by proceedings in rem.

The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment, has very long existed in the general maritime law. It is found asserted in a variety of forms in the Consulado, the most ancient and important of all the old codes of sea laws, (see chaps. 63, 106, 227, 254, 259;) and the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law. (The Schooner Freeman, 18 How., 182; The Ship Packet, 3 Mason, 261; The Volunteer, 1 Sum., 550; The Reeside, 2 Sum., 467; The Rebecca, Ware's R., 188; The Phoebe, Ib. 263; The Waldo, Davies's R., 161; The Gold Hunter, 1 Blatch. and How., 305.)

Pothier declares (Treatise of Charter-parties, preliminary chapter on Average) that the right to contribution in general average is dependent on the contract of affreightment, which embraces in effect an undertaking, that if the goods of the shipper are damaged for the common benefit, he shall receive a due indemnity by contribution from the owners of the ship, and of other merchandise benefited by the sacrifice.

The power and duty of the master to retain and cause a judicial sale of the merchandise saved, has also been long established. (Consulado del Mare, ch. 51, 52, 53, and note 1 in vol. 3, p. 103 of Pardessus's Collection; Laws of Oleron, art. 9; Ord. de la Marine, Liv. 3, tit. 8, sec. 21, 25; Nesbit on Ins., 135; Strong v. New York Firemen's Insurance Company, 11 John.R., 323; Simonds v. White, 2 B. and C., 805; Loring v. The Neptune Insurance Company, 20 Pick., 411; 3 Kent. Com., 243, 244.) And this right to enforce a judicial sale, through what we term a lien in rem, is not confined to the merchandise, but extends to the vessel.

Emerigon, (ch. 12, sec. 43,) speaking generally of an action of contribution, says it is in its nature a real action. Cassaregis, (dis. 45, N. 34,) "est in rem scripta."

It would be extraordinary if the right to a lien were not reciprocal; if it existed in favor of the vessel, when sacrifice was made of part or the whole of its value, for preservation of the cargo, and not against the vessel, when sacrifice was made of the cargo for preservation of the vessel.

By the ancient admiralty law, the master could bind both the ship and cargo by an express hypothecation, to obtain a ransom on capture. So he could, and still may, when the whole enterprise has fallen into distress, which could not otherwise be relieved, hypothecate both the vessel and cargo to obtain means of relief. These are cases of express hypothecation made by the master, under the authority conferred on him by the maritime law; but he can also sell a part of the cargo to enable him to prosecute his voyage, or deliver a part of it in payment of ransom of his vessel, and the residue of the cargo, on capture; and when he does so, the law of the sea creates a lien on the vessel, as security for the reimbursement of the loss of the shipper whose goods have been sacrificed. (The Packet, 3 Mason, 255; Pope v. Nickerson, 3 Story's R., 492; The Gold Hunter, 1 Blatch. and How., 300; The Boston, Ib., 309; Consol. del Mare, ch. 105; Laws of Oleron, art. 25; Ord. of Antwerp, art. 19; Emerigon Con. a la Grosse, ch. 4, secs. 9, 11.)

The authority to make a jettison of cargo is derived from the same source; an instant necessity, incapable of being provided for save by a sacrifice of part of what is committed to the master's care, and the presumed consent of the owners of all the subjects at risk, that the loss shall become a charge upon what is benefited by the sacrifice. (The Gratitudine, 3 Rob., 210.) If the sacrifice be made to enable the vessel to perform the voyage, by paying what the owners are bound to pay to complete it, the charge is on the vessel and its owners. If it be made to relieve the adventure from a peril which has fallen on all the subjects engaged in it, the risk of which peril was not assumed by the carrier, the charge is to be borne proportionably by all the interests, and there is a lien on each to the extent of its just contributory obligation. This authority of the master to make the sacrifice, and this consent of the owners of the subjects at risk to have it made, and their implied undertaking to contribute towards the loss, are viewed by the admiralty law as sufficient to create an hypothecation of the subjects benefited, for the security of the payment of the several sums for which those subjects are respectively liable. In other words, as the master is authorized to relieve the adventurer from distress, by means of an express hypothecation, in case of capture or distress in port, or by means of a sale of part of the cargo, thereby creating a maritime lien on the property ultimately benefited, in favor of the owner of what is sold or hypothecated; so he may also, in a case of necessity at sea, make a jettison of cargo, and thereby create a lien on the property thus saved from peril. Pothier (Con. Mar., n., 34, 72) and Emerigon (Con. a la Grosse, ch. 4, sec. 9) say that the sale of part of the cargo in port, to supply the necessities of the ship, is a kind of forced loan. Though the sacrifice

of part of the cargo at sea cannot be considered a loan, it is a forced appropriation of it to the general benefit of those engaged in a common adventure, under a contract of affreightment; and such use of the property of one, for the benefit of others, creates a charge on what was thus saved, for what may fairly be termed the price of that safety. (Abbott on Shipping, part 4, ch. 10, s. 6)

In United States v. Wilder, (3 Sumner, 311,) which was a case of general average, Mr. Justice Story likens it to a case of salvage, where safety is obtained by sacrifices of labor and danger, made for the common benefit; and he says the general maritime law gives a lien in rem for the contribution, not as the only remedy, but as in many cases the best remedy, and in some cases the only remedy. In the District and Circuit Courts of the United States. this jurisdiction has been exercised, and some cases of this kind are found in the books, though most of their decisions are not in print. (The Mary, 5 Law Reporter, 75; 6 Ib., 73; The Cargo of the George, 8 Law Reporter, 361; Sparks v. Kittredge, 9 Law Reporter, 349; Dunlap's Ad. Pr., 57; 2 Browne's Civ. and Ad. Law, 122; The Packet; The Gold Hunter; The Boston, above cited.) The restricted admiralty jurisdiction in England seems insufficient to enforce this lien. (The Constantia, 2 W. Rob., 487.)

Nor is there anything in the case of Rae v. Cutler, decided by this court in 1849, and reported in 7 How., 729, which conflicts with the view we have now taken.

That was a libel by the owner of a vessel against the consignee of cargo, to recover the contributory share of the average due from the goods which the master had voluntarily delivered to the respondent before the libel was filed. The court decided, that though the master, as the agent of the owner of the vessel in that case, had by the maritime law a lien upon the goods, as security for the payment of their just contribution, this lien was lost by their voluntary delivery to the consignee; and that the implied promise to contribute could not be enforced by an action in personam against the consignee, in the admiralty. This admits the existence of a lien, arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation; which, as is well known, is waived by an authorized delivery without insisting on payment.

On full consideration, we are of opinion that when cargo is lawfully jettisoned, its owner has, by the maritime law, a lien on the vessel for its contributary share of the general average compensation; and that the owner of the cargo may enforce payment thereof by a proper proceeding in rem against the vessel, and against the residue of the cargo, if it has not been delivered.

The remaining question is, whether the pleadings in this case are in such form as to present this claim for the consideration of

this court, and entitle the libellant to assert a lien on the vessel for its contribution.

The rules of pleading in the admiralty are exceedingly simple and free from technical requirements. It is incumbent on the libellant to propound with distinctness the substantive facts on which he relies; to pray, either specially or generally, for the relief appropriate to them; and to ask for such process of the court as is suited to the action, whether in rem or in personam.

It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defence, either in part or in whole, to the case made by the libel.

The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance, or departure in pleading, like those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel, because that entire case is not distinctly stated in the libel. Thus, in cases of collision, it frequently occurs that the libel alleges fault of the claimant's vessel; the answer denies it, and alleges fault of the libellant's vessel. The court finds on the proofs, that both were in fault, and apportions the damages.

Looking to this libel, we find it states that a contract of affreightment was made to transport these goods from Wilmington to New Orleans, on board this brig; that the goods were laden on board, and the brig had arrived, but only a part of the goods have been delivered. It states the value of the part not delivered, avers that the libellants have not been paid any part of that sum, prays for process against the brig, and a decree for the value of the merchandise not delivered, and also for such other relief as to law and justice may appertain.

The answer admits all the facts stated in the libel, but sets up, by way of defensive allegation, a necessary jettison of that part of the cargo not delivered. It is manifest, that though this answers, in part, the claim for damages made by the libel, it does not wholly answer it. It shows sufficient cause why the libellant should not assert a lien on the brig for the whole value of his merchandise, but at the same time shows that the libellant has a

valid lien on the brig for that part of the value of the merchandise which the vessel is bound to contribute. While it asserts that the performance of the contract of affreightment by transportation of the merchandise to New Orleans was excused by a peril of the sea, it admits that an obligation arose out of the relations of the parties created by that contract of affreightment, and out of the facts relied on as an excuse for not transporting the merchandise; that this obligation was to pay to the shipper a part of the value of his goods; that it was the duty of the master, at the port of New Orleans, to ascertain what part of that value the vessel was bound to contribute, and that there is a lien on the vessel to secure its payment.

If the technical rules of common-law pleading existed in the admiralty, there might be difficulty in admitting a claim for general average, in an action founded on a contract of affreightment; because, though the claim for such average grows out of the contract of affreightment, the implied promise to pay it is technically different from the promise on the face of a bill of lading. In the case of Pope v. Nickerson, (3 Story, 465,) Mr. Justice Story went into a very extensive examination of such claims, under an agreed statement of facts, in an action of assumpsit on bills of lading; and it does not seem to have occurred, either to him or the counsel, that it was inconsistent with any substantial rule of the common law so to do.

But in the admiralty, as we have said, there are no technical rules of variance or departure. The court decrees upon the whole matter before it, taking care to prevent surprise, by not allowing either party to offer proof touching any substantive fact not alleged or denied by him.

But where, as in this case, the defensive allegation of the respondent makes a complete case for the libellant, so that no evidence in support of it is required, and where that case is within the form of action and the prayer of relief, and the process used by the libellant, we think it not a sufficient reason for refusing relief, that the precise case on which the court think fit to grant it is not set out in the libel.

We understand, that in the court below the libellants relied on the duty of the master to adjust and collect, and pay to them, the general average contributions, as precluding the defence of a necessary jettison. We think this defence was properly overruled. The libellants did not there insist on their lien on the vessel for its contribution. We do not consider their failure to do so precludes them from calling on this court to make that decree, to which the record shows they are entitled. In Finlay v. Lynn, (6 Cranch, 238,) this court was of opinion that the appellant, whose bill was dismissed by the Circuit Court, was entitled to an account, on a ground not assumed in the Circuit Court. This court said: "The

plaintiff probably did not apply for this account in the court below and it does not appear to have been a principal object of his bill. This court therefore doubted whether it would be most proper to affirm the decree dismissing the bill, with the addition that it should be without prejudice to any future claim for profits, and for the debt due from one store to the other, or to open the decree and direct the account. The latter is deemed the more equitable course. The decree, therefore, is to be reversed, and the cause remanded, with directions to take an account of the profits of the jewelry store, if the same shall be demanded by the plaintiff." But, as the libellants failed to call the attention of the Circuit Court to this view of their rights, and placed their claim there solely on the grounds that the jettison was unlawful, or, if lawful, could not be a defence, because the master had failed to do the duty incumbent on him in a case of general average, we think the decree should be reversed, without costs. The cause must be remanded to the Circuit Court, with directions to ascertain the amount of the lien of the libellants on the Ann Elizabeth, for the share to be contributed by the vessel towards the loss sustained by the libellants, and to enter a decree accordingly. . . .

[The dissenting opinion of Mr. Justice Campbell, in which Mr. Justice Catron concurred, is omitted.]

Robert J. Vandewater, Appellant, V. Edward Mills, Claimant of the Steamship Yankee Blade, Her Tackle, &c.

Supreme Court of the United States, 1856

19 Howard 82.

[The statement of the case and the arguments of counsel are omitted. The facts are sufficiently stated in the opinion.]

Mr. Justice Grier delivered the opinion of the court.

The libel in this case sets forth a contract between the owners of certain steamboats, of which the Yankee Blade was one, to convey freight and passengers between New York and California. Among other things, it was agreed that the America should proceed to Panama, and the Yankee Blade should leave New York at such time as to connect with the America. The owner of the Yankee Blade refused to employ his vessel according to this agreement, and sent her to the Pacific under a contract with other persons. For this breach of contract the libellant demands damages, assuming that the vessel is subject, under the maritime law, to a lien which may be enforced in rem in a court of admiralty.

The Circuit Court dismissed the libel, being of opinion "that the instrument is of a description unknown to the maritime law; that it contains no express hypothecation of the vessel, and the law does not imply one."

In support of his allegation of error in this decree, the learned counsel for the appellant has endeavored to establish the following proposition:

"Agreements for carrying passengers are maritime contracts, pertaining exclusively to the business of commerce and navigation, and consequently may be enforced specifically against the vessel by courts of admiralty proceeding in rem."

Assuming, for the present, the premises of this proposition to be true, let us inquire whether the conclusion is a legitimate consequence therefrom.

The maritime "privilege" or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a "jus in re," without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in

the State courts, though by analogy loosely termed proceedings in rem, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore "stricti juris," and cannot be extended by construction, analogy, or inference. "Analogy," says Pardessus, (Droit Civ., vol. 3, 597,) "cannot afford a decisive argument, because privileges are of strict right. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another."

These principles will be found stated, and fully vindicated by authority, in the cases of the Young Mechanic, 2 Curtis, 404, and Kiersage, Ibid., 421; see also Harmer v. Bell, 22 E. L. and E. 62.

Now, it is a doctrine not to be found in any treatise on maritime law, that every contract by the owner or master of a vessel, for the future employment of it, hypothecates the vessel for its performance. This lien or privilege is founded on the rule of maritime law as stated by Cleirac, (597:) "Le batel est obligée à la marchandise et la marchandise au batel." The obligation is mutual and reciprocal. The merchandise is bound or hypothecated to the vessel for freight and charges, (unless released by the covenants of the charter-party,) and the vessel to the cargo. The bill of lading usually sets forth the terms of the contract, and shows the duty assumed by the vessel. Where there is a charter-party, its covenants will define the duties imposed on the ship. Hence it is said, (1 Valin, Ordon. de Mar., b. 3, tit. 1, art. 11,) that "the ship, with her tackle, the freight, and the cargo, are respectively bound (affectée) by the covenants of the charter-party." But this duty of the vessel, to the performance of which the law binds her by hypothecation, is to deliver the cargo at the time and place stipulated in the bill of lading or charter-party, without injury or deterioration. If the cargo be not placed on board, it is not bound to the vessel, and the vessel cannot be in default for the non-delivery, in good order, of goods never received on board. Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases.

See 2 Boulay, Paty Droit Com. and Mar., 299, where it is said, "Hors ces deux cas, (viz: default in delivery of the goods, or damages for deterioration,) il n'y a pas de privilege à pretendre de la part du marchand chargeur; car si les dommages et interets n'ont lieu que pour refus de depart du navier, pour depart tardif

ou precipité, pour saisie du navire ou autrement il est evident que a cet egard la créance est simple et ordinaire, sans aucune sorte de privilege."

Thus, in the case of the City of London, (1 W. Robinson 89,) it was decided that a mariner who had been discharged from a vessel after articles had been signed, might proceed in the admiralty in a suit for wages, the boyage for which he was engaged having been prosecuted; but if the intended voyage be altogether abandoned by the owner, the seaman must seek his remedy at common law by action on the case.

And this court has decided, in the case of The Schooner Freeman v. Buckingham, 18 Howard, 188, "that the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it."

Now, the damages claimed by the libellant, in this case, are not for the non-delivery of merchandise or cargo at the time and place according to the covenants of a charter-party, or for their injury or deterioration on the voyage, but for a refusal of the owners to employ the vessel in carrying passengers and freight from New York, so as to connect with the America when she should arrive at Panama. The owners have not made it a part of their agreement that their respective vessels should be mutually hypothecated as security for the performance of their agreement; and, as we have shown there is no tacit hypothecation, privilege, or lien, given by the maritime law.

We have examined this case from this point of view because the libel seems to take it for granted that every breach of contract, where the subject-matter is a ship employed in navigating the ocean gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the argument, that if this contract was in the nature of a charter-party, or had some features of a charter-party, the court would extend the maritime lien by analogy or inference, for the sake of giving the libellant this remedy, and sustaining our jurisdiction. But we have shown this conclusion is not a correct inference from the premises and that this lien, being stricti juris, will not be extended by construction. It is, moreover, abundantly evident that this contract has none of the features of a charter-party. A charter-party is defined to be a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. (Abbot on Ship., 241)

Now, by this agreement, the libellant has not hired the Yankee Blade, or any portion of the vessel; nor have the master or owners of the ship covenanted to convey any merchandise for the libellant, nor has he agreed to furnish them any. But the agent

for the Yankee Blade "agrees that when the America arrives at Panama, the Yankee Blade shall leave New York, conveying passengers and freight," which were afterwards to be received by the America, and transported to San Francisco; and the passage money and freight earned was to be divided between them--25 per cent to the Yankee Blade, and 75 to the America.

This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea, and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common-law courts.

The decree of the Circuit Court is therefore affirmed.

Henry T. Buckley, Claimant of the Barge Edwin, Appellant, v. The Naumkeag Steam Cotton Company.

Supreme Court of the United States, 1860.

24 Howard 386.

[The arguments of counsel are omitted.]

Mr. Justice Nelson delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States, sitting in admiralty, for the district of Massachusetts.

The libel in the court below was against the barque Edwin, to recover damages for the non-delivery of a portion of a shipment of cotton from the port of Mobile to Boston. The facts upon which the question in this case depends are found in the record as agreed upon by the proctors, both in the District and Circuit Courts, and upon which both courts decreed for the libellant.

From this agreed state of facts it appears that the master of the vessel, which was then lying at the port of Mobile, agreed to carry for the libellant 707 bales of cotton from that port to Boston, for certain freight mentioned in the bills of lading.

The condition of the bay of Mobile, which is somewhat peculiar, becomes material to a proper understanding of the question in this case.

Vessels of a large size, and drawing over a given depth of water, cannot pass the bar in the bay, which is situated a considerable distance below the city. Their cargo is brought to them in lighters, from the city over the bar, and then laden on board the vessels. Vessels which, from their light draft, can pass the bar in ballast, go up to the city and take on board as much of their cargoes as is practicable, and, at the same time allow them to repass it on their return, and are then towed below the bar, and the residue of their load is brought down by lighters and put on board.

In either case, when the vessel is ready to receive cargo below the bar, the master gives notice of the fact to the consignor or broker, through whom the freight is engaged, and provides at the expense of the ship, a lighter for the conveyance of the goods. The lighterman applies to the consignor or broker, and takes an order for the cargo to be delivered, receives it and gives his own receipt for the same. On delivering the cargo on board the vessel, below the bar, he takes a receipt from the mate or proper officer in charge.

The usual bills of lading are subsequently signed by the master and delivered.

In the present case, the barque Edwin received the principal part of her cargo at the city, and was then towed down below the bar to receive the residue. The master employed the steamer M. Streck for this purpose, and 100 bales were laden on board of her at the city to be taken down to complete her load, and for which the master of the lighter gave a receipt; after she had passed the bar and had arrived at the side of the barque, but before any part of the 100 bales was taken out, her boiler exploded, in consequence of which the 100 bales were thrown into the water and the lighter sunk. Fourteen of the bales were picked up by the crew of the vessel, and brought to Boston with the 607 bales on board. Eighty bales were also picked up by other persons, wet and damaged, and were surveyed and sold; four remain in the hands of the ship broker at Mobile, for account of whom it may concern; two were lost.

The master of the barque signed bills of lading, including the 100 bales, being advised that he was bound to do so, and that if he refused, his vessel would be arrested and detained. On her arrival at Boston, the master delivered the 607 bales to the consignees, and tendered the fourteen, which were refused.

A question has been made on the argument, whether or not the libellant could recover upon the undertaking in the bills of lading, they having been signed under the circumstances stated, or must resort to the original contract of affreightment between the master and the shipper. The articles in the libel place the right to damages upon both grounds. The view the court has taken of the case supersedes the necessity of noticing this distinction.

The court is of opinion that the vessel was bound for the safe shipment of the whole of the 707 bales of cotton, the quantity contracted to be carried, from the time of their delivery by the shipper at the city of Mobile, and acceptance by the master, and that the delivery of the hundred bales to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage in execution of the contract, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city, instead of the lighter. Thw lighter was simply a substitute for the barque for this portion of the service. The contract of affreightment of the cotton was a contract for its transportation from the city of Mobile to Boston, covering a voyage between these termini, and when delivered by the shipper, and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed -- the one entitled to all the privileges secured to the owner of cargo for its safe transportation and delivery; the other, the right to his freight on the completion of the voyage, as recognised by principles and usages of the maritime law.

The true meaning of the contract before us cannot be mistaken, and is in perfect harmony with the acts of the master in furtherance of its execution.

Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in the city, and to be transported thence to the port of discharge. After the delivery and acceptance at the place of shipment, the shipper had no longer any control over the property, except as subject to the stipulated freight.

The contract as thus explained being made by the master in the course of the usual employment of the vessel, and in respect to which he is the general agent of the owner, it would seem to follow upon the settled principles of admiralty law, which binds the vessel to the cargo, and the cargo to the vessel, for the performance of the undertaking, that the ship in the present case is liable for the loss of the hundred bales, the same as any other portion of the cargo.

It is insisted, however, that the vessel is exempt from responsibility upon the ground that the one hundred bales were never laden on board of her, and we are referred to several cases in this court and in England in support of the position. (18 How., 189; 19 Ib., 90; and 2 Eng. L. and Eq. R., 337; Grant and others v. Norway and others, 18 Eng. C.L. and Eq., 561; 29 Ib., 323.) But it will be seen, on reference to these cases, the doctrine was applied, or asserted, upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfillment on the part of the shipper, namely the delivery of the cargo.

It was conceded no suit could have been maintained upon the original contract, either against the owner or the vessel; but as the bill of lading had been signed by the master, in which he admitted that the goods were on board, the question presented was, whether or not the admission was not conclusive against the owner and the vessel, the bill of lading having passed into the hands of a bona fide holder for value.

The court, on looking into the nature and character of the authority of the master, and the limitations annexed to it by the usages and principles of law, and the general practice of shipmasters, held, that the master not only had no general authority to sign the bill of lading, and admit the goods on board when contrary to the fact, but that a third party taking the bill was chargeable with notice of the limitation, and took it subject to any infirmity in the contract growing out of it.

The first time the question arose in England, and was determined, was in the case of Grant and others v. Norway and others in the Common Pleas, (1851,) and was in reference to the state of facts existing in this and like cases, and in connection with the principles involved in its determination, that the court say the master had no authority to sign the bill of lading, unless the goods had been shipped; cases in which there had been no delivery of the goods to the master, no contract binding upon the owner or the ship, no freight to be carried, and, in truth, where the whole transaction rested upon similated bills of lading, signed by the master in fraud of his owners.

In the present case the cargo was delivered in pursuance of the contract, the goods in the custody of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it.

The argument urged against this lien of the shipper seems to go the length of maintaining, that in order to uphold it there must be a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. The unlading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien, unless the delivery is to the consignee of the cargo, within the meaning of the bill of lading; and we do not see why the lien may not attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf, or within the warehouse. In both instances the cargo is in the custody of the master, and in the act of conveyance in the execution of the contract of affreightment. We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope

and extent of them; and, in this view, we think no well-founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made, after the lading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession; the former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf.

The decree of the court below affirmed.

625

The Priscilla.

Circuit Court of Appeals of the United States, Second Circuit, 190?

114 Federal Reporter 836.

Appeal from the District Court of the United States for the Southern District of New York . . . .

Wallace, Circuit Judge. The court below decided that a maritime lien was created against the Priscilla for the value of the libelant's baggage, lost while in the custody of the vessel's owner. 106 Fed. 739. Unless this conclusion was correct, the court had no jurisdiction of the action in rem. The Priscilla was one of a line of steamships operated by the New York, New Haven & Hartford Railroad Company, known as the "Fall River & Providence Line." The company was accumstomed to receive at its pier in New York City the baggage sent there by passengers intending to take passage on its vessels, and keep such baggage until claimed by the passengers. Before the baggage is shipped, the rules of the company require the passenger to show a ticket, and have his baggage checked. Storage is charged on baggage after it has remained uncalled for for more than 24 hours. Until the owner comes to the pier and claims his baggage, it is held by the baggage master; and, until it has been checked, no baggage is received by the company on board a vessel.

On the afternoon of July 3, 1899, a trunk and a dress-suit case belonging to libelant were delivered by an expressman to the agent of the steamship company at its pier. Subsequently, on the same afternoon, the libelant came to the pier and purchased a ticket for Boston. He then went to the baggage agent, claimed his baggage, and presented the receipt of the express company, together with his ticket. The agent found the trunk, but the dress-suit case was missing. Before the Priscilla sailed, the baggage agent told the libelant that, if it was found, it would be forwarded on the next boat. The libelant had his trunk checked, and took passage by the Priscilla. The dress-suit case was never found.

A contract for the transportation of passengers by sea, like one for the transportation of merchandise, is a maritime contract, and there is no distinction in principle between them. The same liability attaches both to the owner and to the vessel for breach of performance. The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397.

When a vessel enters upon the performance of a contract of affreightment, she becomes pledged to its complete execution, and may be proceeded against in rem for any breach; but, when the contract is purely executory, no lien attaches for the breach. The Freeman , 18 How. 182, 15 L. Ed. 341; The Yankee Blade, 19 How. 82, 15 L. Ed. 554. The question was carefully considered, and the

authorities fully collated, in Scott v. The Ira Chaffee (D.C.) 2 Fed. 401. Later adjudications to the same effect are The Prince Leopold (C.C.) 9 Fed. 333; The J.F. Warner (D.C.) 22 Fed 342; The Vigilancia (D.C.) 58 Fed. 698. In the City of London, 1 W. Rob. Adm. 88, Dr. Lushington inclined to the opinion that "if a seaman is engaged on board a vessel, and the owners think fit to abandon the voyage for which the seaman has been engaged, he would not be entitled to sue in admiralty for redress, but must seek his remedy by an action on the case." In The Bella (D.C.) 91 Fed. 540, it was decided that there is no lien on the ship for the enforecement of a contract for the carriage of a passenger who has not rendered himself on board for the purpose of being carried. In the Eugene, 31 C.C.A. 345, 87 Fed. 1001, the same proposition was decided by the circuit court of appeals. Following the analogy in the case of a contract of affreightment, we have no doubt that the lien does not arise until either the passenger has been received on board, or his baggage has been put into the custody or under the control of the vessel.

In the present case the baggage was lost before the company had notice that it belonged to the libelant, and apparently before the libelant had entered into any contract of carriage. It was in the custody of the company, in contemplation that he would become a passenger; but the relation of carrier and passenger was inchoate, and the custody was a matter preliminary, although accessory to a contract of carriage. When baggage is delivered, as it was in this case, without any directions as to its destination or time of shipment, the carrier cannot be expected to know to whom it belongs, or whether it is to be carried by any particular vessel of the line, or even whether it is to be carried at all. Under such circumstances, it is in no sense within the custody or control of any particular vessel or its officers.

It is unnecessary to consider whether the company assumed the liability of a carrier, or only that of a warehouseman, towards the libelant. It suffices that the breach of its obligation took place before it had entered upon the performance of any contract of carriage, and consequently did not create any lien upon the vessel.

The decree is reversed, with costs, and with instructions to the court below to dismiss the libel.

Osaka Shosen Kaisha et al. v. Pacific Export Lumber Company.

Supreme Court of the United States, 1923.

260 United States 490.

[The arguments of counsel are omitted.]

Mr. Justice McReynolds delivered the opinion of the Court.

March 19, 1917, through its agent at Tacoma, Wash., Osaka Shosen Kaisha, incorporated under the laws of Japan and owner of the Japanese steamer "Saigon Maru," then at Singapore, chartered the whole of that vessel, including her deck, to respondent Lumber Company to carry a full cargo of lumber from the Columbia or Willamette River to Bombay. In May, 1917, the vessel began to load at Portland, Ore. Having taken on a full under-deck cargo and 241, 559 feet upon the deck, the captain refused to accept more. After insisting that the vessel was not loaded to capacity and ineffectively demanding that she receive an additional 508, 441 feet, respondent libeled her, setting up the charter party and the captain's refusal, and claimed substantial damages. The owner gave bond; the vessel departed and safely delivered her cargo.

The Lumber Company maintains that it suffered material loss by the ship's refusal to accept a full load; that she is liable therefor under the general admiralty law and also under the Oregon statute (Olson's Laws of Oregon, § 10,281), which declares every vessel navigating the waters of the State shall be subject to a lien for the damages resulting from non-performance of affreightment contracts.

Petitioner excepted to the libel upon the ground that the facts alleged showed no lien or right to proceed in rem. The trial court ruled otherwise and awarded damages upon the evidence. 267 Fed. 881. The Circuit Court of Appeals approved this action. 272 Fed. 799.

Little need be written of the claim under the state statute. The rights and liabilities of the parties depend upon general rules of maritime law not subject to material alterations by state enactments. The Roanoke, 189 U.S. 185; Southern Pacific Co. v. Jensen, 244 U.S. 205; Union Fish Co. v. Erickson, 248 U.S. 308.

Both courts below acted upon the view that while the ship is not liable in rem for breaches of an affreightment contract so long as it remains wholly executory, she becomes liable therefor whenever she partly executes it, as by taking on board some part of the cargo. In support of this view, it is said; Early decisions of our circuit and district courts held that under maritime law

the ship is liable in rem for any breach of a contract of affreightment with owner or master. That The Freeman (1856), 18 How. 182, 188, and The Yankee Blade (1857), 19 How. 82, 89, 90, 91, modified this doctrine by denying such liability where the contract remains purely executory, but left it in full force where the vessel has partly performed the agreement, as by accepting part of the indicated cargo. The Hermitage, 12 Fed. Cas. No. 6410; The Williams, 29 Fed. Cas. No. 17,710; The Ira Chaffee, 2 Fed, 401; The Director, 26 Fed. 708; The Starlight, 42 Fed. 167; The Oscoda, 66 Fed. 347; The Helios, 108 Fed. 279; The Oceano, 148 Fed. 131; Wilson v. Peninsula Bark & Lumber Co., 188 Fed. 52, were cited.

We think the argument is unsound.

Prior to The Freeman and The Yankee Blade, this Court had expressed no opinion on the subject; but, so far as the reports show, the lower courts had generally asserted liability of the ship for breaches of affreightment contracts. "It is grounded upon the authority of the master to contract for the employment of the vessel, and upon the general doctrine of the maritime law, that the vessel is bodily answerable for such contracts of the master made for her benefit." The Flash, 1 Abb. Adm. 67. 70; The Rebecca, 1 Ware, 188; The Ira Chaffee, supra, Since 1857, some of the lower courts have said that the ship becomes liable for breaches of affreightment contracts with her owner or master whenever partly executed by her; but is is forcibly maintained that in none of the cases was the point directly involved. The Hermitage, The Williams, The Ira Chaffee, The Director, The Starlight, The Oscoda, The Helios, The Oceano, Wilson v. Peninsula Bark & Lumber Co., supra.

The Freeman and The Yankee Blade distinctly rejected the theory of the earlier opinions. They are inconsistent with the doctrine that partial performance may create a privilege or lien upon the vessel. And in so far as the lower courts express approval of this doctrine in their more recent opinions, they fail properly to interpret what has been said here.

While, perhaps, not essential to the decision, this Court, through Mr. Justice Curtis, said in The Freeman: "Under the maritime law of the United States the vessel is bound to the cargo, and the cargo to the vessel, for the performance of a contract of affreightment; but the law creates no lien on a vessel as a security for the performance of a contract to transport cargo, until some lawful contract of affreightment is made, and a cargo shipped under it."

[In an omitted part of the opinion the court referred to Vandewater v. Mills, 19 How. 82; and Bulkley v. Naumkeag Steam Cotton Co., 24 How. 386.]

Later opinions approve the same general rule.

"The doctrine that the obligation between ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed and so long settled, that it would be useless labor to restate it, or the principles which lie at its foundation. The case of the Schooner Freeman v. Buckingham, decided by this court, is decisive of this case." The Lady Franklin, 8 Wall. 325, 329.

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master or some one authorized to receive it." The Keokuk, 9 Wall. 517, 519.

The maritime privilege or lien, though adhering to the vessel, is a secret one which may operate to the prejudice of general creditors and purchasers without notice and is therefore stricti juris and cannot be extended by construction, analogy or inference. The Yankee Blade, supra. The contract of affreightment itself creates no lien, and this Court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in the master's custody. We think the lien created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the cargo. See The Thomas P. Sheldon, 113 Fed 779, 782, 783.

The theory that partial acceptance of the designated cargo under a contract of affreightment creates a privilege or lien upon the ship for damages resulting from failure to take all, is inconsistent with the opinions of this Court, and, we think, without support of adequate authority. In The S. L. Watson, 118 Fed. 945, 952, the court well said:

"The rule of admiralty, as always stated, is that the cargo is bound to the ship and the ship to the cargo. Whatever cases may have been decided otherwise disregarded the universal fact that no lien arises in admiralty except in connection with some visible occurrence relating to the vessel or cargo or to a person injured. This is necessary in order that innocent parties dealing with vessels may not be the losers by secret liens, the existence of which they have no possibility of detecting by any relation to any visible fact. It is in harmony with this rule that no lien lies in behalf of a vessel against her cargo for dead freight or against a vessel for supplies contracted for, but not actually

put aboard. The Kiersage, 2 Curt. 421, Fed. Cas. No. 7,762; Pars. Ship. & Adm. (1869), 142, 143. It follows out the same principle that Mr. Justice Curtis states in The Kiersage, 2 Curt. 424, Fed. Cas. No. 7,762, that admiralty liens are strictijuris, and that they cannot be extended argumentatively, or by analogy or inference. He says, 'They must be given by the law itself, and the case must be found described in the law.'"

Reversed.

4,885 Bags of Linseed -- 1

4,885 Bags of Linseed: Wills, Claimant; Sears, Libellant.

Supreme Court of the United States, 1861.

1 Black 108.

Appeal from the decree of the Circuit Court of the United States for the district of Massachusetts. . . .

The parties did not dispute about the facts of the case. It appeared by their mutual admissions that the libellants were owners of the Bold Hunter, and, in October, 1856, chartered her to Tuckerman, Townsend & Co. for a voyage from Calcutta to Boston, at $15 per ton on whole packages and half that rate on loose stowage. The charter party contained the usual lien clause, with a stipulation that the freight should be paid in five and ten days after discharge at Boston, the credit not to impair the ship-owner's lien for freight. On the ship's arrival at Calcutta, the charterers did not furnish an entire cargo, and procured some shipments on freights among others, one to Augustine Wills--for which the master signed bills of lading, in the usual form, at various rates of freight, all less than the charter rates. These bills of lading were passed over to the libellants by Tuckerman, Townsend & Co. in part settlement of the charter money, and the libellants undertook to collect the freights. The ship arrived at Boston in October, 1857. The larger portion of the goods consigned to Wills were discharged by the consent of all parties, without being landed, into the ship Cyclone, bound to London, and the remainder were delivered to the claimant, who took them to the customhouse stores, and entered them in bond in the name of Augustine Wills. When the Bold Hunter arrived, Augustine Wills, the consignee, was sick, and he died before the goods were all discharged. Rufus Wills, the claimant, acted as his agent before his death, and was his administrator afterwards. The goods were discharged and delivered without qualification, and nothing was said about holding them or any part of them for freight. The claimant, before the death of the consignee, paid $5,000 on the freights, but afterwards declined to pay any more saying that he did not know how the estate of Augustine Wills would turn out.

The District Court dismissed the libel, and the decree was afterwards affirmed by the Circuit Court. Whereupon the libellant took this appeal to the Supreme Court of the United States.

[The arguments of counsel are omitted.]

Mr. Chief Justice Taney. The rights of the parties in this case depend altogether on the contract created by the bill of lading. That instrument does not refer to the charter party, nor can the charter party influence in any degree the decision of the question before us. Augustine Wills was not a party to it, and it

is not material to inquire whether he did or did not know of its existence and contents; for there is nothing in it to prevent Wills & Co., the sub-charterers, or Augustine Wills, the consignee, from entering into the separate and distinct contract stated in the bill of lading, and the assignees took the rights of Wills & Co. in this contract, and nothing more. The circumstance that it came to hands of the shipowners by assingment from the sub-charterers, who knew and were bound by all the stipulations of the charter party, cannot alter the construction of the bill of lading, nor affect the rights or obligations of Augustine Wills.

Undoubtedly the ship-owner has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount; and, as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the shipowner may enforce his lien by a proceeding in rem in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the shipowner has parted from the possession, but is analogous to the lien given by the common law to the carrier on land, who is not bound to deliver them to the party until his fare is paid; and if he delivers them, the incumbrances of the lien does not follow them in the hands of the owner or consignee. It is nothing more than the right to withhold the goods, and is inseparably associated with his possession, and dependent upon it.

The lien of the carrier by water for his freight, under the ordinary bill of lading, although it is maritime, yet it stands upon the same ground with the carrier by land, and arises from his right to retain the possession until the freight is paid, and is lost by an unconditional delivery to the consignee. It is suggested in the argument for the appellant, that, as a general rule, maritime liens do not depend on possession of the thing upon which the lien exists; but this proposition cannot be maintained in the courts of admiralty of the United States. And, whatever may be the doctrine in the courts on the continent of Europe, where the civil law is established, it has been decided in this court that the maritime lien for a general average in a case of jettison, and the lien for freight, depend upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid. Rae vs. Cutler, (7 How., 729;) Dupont de Nemours & co. vs. Vance and others, (19 How., 171.)

In the last mentioned case, the court, speaking of the lien for general average, and referring to the decision of Rae vs. Cutler on that point said: "This admits the existence of a lien arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation, which, as is well known, is waived by an authorized delivery without insisting on payment."

After these two decisions, both of which were made upon much deliberation, the law upon this subject must be regarded as settled in the courts of the United States, and it is unnecessary to examine the various authorities which have been cited in the argument. But it may be proper to say, that while this court has never regarded its admiralty authority as restricted to the subjects over which the English courts of admiralty exercised jurisdiction at the time our Constitution was adopted, yet it has never claimed the full extent of admiralty power which belongs to the courts organized under, and governed altogether by, the principles of the civil law.

But courts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade. And it often happens that the necessities and usages of trade require that the cargo should pass into the hands of the consignee before he pays the freight. It is the interest of the ship-owner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery. And it would be a serious sacrifice of his interests if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty. The consignee, too, in many instances, might desire to see the cargo unladen before he paid the freight, in order to ascertain whether all of the goods mentioned in the bill of lading were on board, and not damaged by the fault of the ship. It is his duty, and not that of the ship-owner, to provide a suitable and safe place on shore in which they may be stored; and several days are often consumed in unloading and storing the cargo of a large merchant vessel. And if the cargo cannot be unladen and placed in the warehouse of the consignee, without waiving the lien, it would seriously embarrass the ordinary operations and convenience of commerce, both as to the ship-owner and the merchant.

It is true, that such a delivery, without any condition or qualification annexed, would be a waiver of the lien; because, as we have already said, the lien is but an incident to the possession, with the right to retain. But in cases of the kind above mentioned it is frequently, perhaps more usually, understood between the parties, that transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, and that the ship-owner reserves the right to proceed in rem to enforce it, if the freight is not paid. And if it appears by the evidence that such an understanding did exist between the parties, before or at the time the cargo was placed in the hands of the consignee, or if such an understanding is plainly to be inferred from the established

local usage of the port, a court of admiralty will regard the transaction as a deposit of the goods, for the time, in the warehouse, and not as an absolute delivery; and, on that ground, will consider the shipowner as still constructively in possession, so far as to preserve his lien and his remedy in rem.

But in the case before us, there is nothing from which such an inference can be drawn. The goods were delivered, it is admitted, generally, and without any condition or qualification. Upon such a delivery there could be neither actual nor constructive possession remaining in the ship-owner; and, consequently, there could be no right of retainer to support his lien.

The decree of the Circuit Court, dismissing the libel, must therefore be affirmed.

Decree affirmed.

The Hyperion's Cargo.

District Court of the United States, District of Massachusetts, 1871.

2 Lowell 93.

Lowell, J. The libellant's right to freight is not contested; but it is said that there can be no recovery for demurrage, because no express contract was made concerning it, and the law will not imply one against a consignee: Gage v. Morse, 12 Allen, 410, is cited as conclusive on this point. That case decided that a consignee, merely as such, does not, by accepting the goods, make an engagement with the master that he will receive them at any particular time, unless there is something on the face of the bill of lading fixing the time. Judge Betts came to the opposite conclusion in a case in which the consignee was the owner of the cargo: Sprague v. West, Abb. Adm. 548. The case at bar resembles in its circumstances that before the court in New York; for I understand the title to this coal to have been in the claimants from the time it was loaded on board the Hyperion, if not before. But I am not concerned here with the question whether the claimants are personally responsible for demurrage, but with the liability of the cargo to such a demand. There is no doubt that the shipper of goods by an ordinary bill of lading impliedly agrees that they shall be received at the port of destination within a reasonable time after the arrival of the vessel, according to the usual course of the trade. By the common law the master has no lien upon the goods, as security for this obligation. In my opinion he has such a lien, or, more strictly speaking, such a privilege, by the maritime law, and that it may be enforced in the admiralty. It is a maxim of the general law-merchant that the ship is bound to the merchandise, and the merchandise to the ship. Pardessus, Droit Com. arts. 709, 961; Valin, Comment. book 3, tit. 1, arts. 11, 24; Boucher, Droit Marit. §§ 926-934. This reciprocal privilege appears to extend to all claims which may arise on the one side or the other out of the contract of affrieghtment. Thus art. 308 of the French Code de Commerce declares that the captain is privileged before all creditors for the payment of his freight and the averages (avaries) that are due him. The word avaries I understand to include all damages which the master may lawfully demand in the premises. Indeed, the distinction between liquidated and unliquidated damages is unimportant in those jurisdictions in which the master's lien is a privilege to be enforced by the courts, and not a mere right of retainer; for the courts can deal as readily with the one kind of damages as with the other. I have found no exception of any class of charges or damages; and though the term avaries is the most common, yet "debts" and "expenses" and some other expressions are used, showing that "averages" has no technical signification. See Pardessus, n. 6 to art 24 of the Laws of Oleron, 3 Pard. Collect. 345; Ed Code of Charles XI. of Sweden, 3 Pard.

Collect. 158. Indeed, the learned author whom I have so often cited says that the master contracts rather with the merchandise than with the shipper; and he has his privilege for the freight even against the true owner of the goods, though they had been stolen, Pard. Droit Com. art. 961; and Valin says, that the contrary opinion is absurd, Valin, ubi supra. I quote this example to show that the privilege does not depend on any doctrine of agency, as well as to fortify my opinion that the merchandise is liable for whatever the shipper is liable for.

When the common law of England was modified by the introduction of manyrules from the law-merchant, the former law had no process for enforcing this reciprocal privilege of the ship and the goods, and had succeeded in repressing the only court that had the requisite modes of action; and was, therefore, obliged to say that it could not recognize the maxim, even when embodied in express contract, as it usually is in English charter-parties: Birley v. Gladstone, 3 M. & S. 205; Gladstone v. Birley, 2 Meriv. 401. From the time of those decisions to that of Gray v. Carr, L.R. 6 Q.B. 522, the history of this question in the courts of common law in England has been that of a struggle between ship-owners to create liens by stipulation, especially liens for demurrage, and of the courts to narrow the stipulations by construction. See Phillips v. Rodie, 15 East, 547; Faith v. E. I. Co., 4 B. & Ald. 630; How v. Kirchener, 11 Moore, P.C. 21; Tindall v. Taylor, 4 Ellis & B. 219; Bishop v. Ware, 3 Camp. 360. In nearly all those cases the obvious intent of the parties has been disregarded, and a remedy refused for a violated right. In this country the courts of admiralty have retained their proper jurisdiction, and can enforce the privilege, by whichever party this action may be invoked. Dupont de Nemours v. Vance, 19 How. 162; The Belfast, 7 Wall. 624; The Maggie Hammond, 9 id. 450. Cases in which the cargo has been libelled for freight are numerous, The Volunteer, 1 Sumner, 551; Certain Logs of Mahogany, 2 id. 589; The Spartan, 1 Ware, 134; The Salem's Cargo, 1 Sprague, 389; The Eliza's Cargo, 1 Lowell, 83; and so of a contribution for general average and other demands, Cargo of the George, Olcott, 89; Bags of Linseed, 1 Black, 108; The Convoy's Wheat, 3 Wall. 225. The only question of any difficulty is, whether the privilege extends to demurrage not expressly stipulated for in the bill of lading. Upon this point the cases at common law do not afford much aid; because they recognize no general responsibility of the goods to the ship, but only a right of retainer, which, they say, cannot be conveniently exercised in support of a demand for unliquidated damages, -- a point of no consequence in the admiralty:: Sprague v. West, Ab.. Adm. 548. Nearly all salvage claims against cargo are unliquidated. We uphold libels against the ship every day in behalf of the merchant for unliquidated damages to his goods; and there is no reason for not doing so, on the other side, for damages in not receiving the goods in due season. My own conviction is that the privilege of the shipowner in the admiralty is not limited by the master's lien

at common law, but depends on the law-merchant, and that by the law-merchant the privilege extends to all charges, damages, and expenses arising out of the affreightment.

The evidence in this case is plenary, that the cause of the delay at the wharf was the lack of cars to take away the coal; that it might easily have been taken out and received at the rate of one hundred tons a day, which is the rate usually agreed on in the trade, but that the consignees wished to receive it in the cars. They refused to receive it in any other way, and said they would pay the freight when it should all be out, but no demurrage. The master was justly angry at this language, and brought his libel. I am much inclined to think his action for the freight was premature; though not for demurrage, which accrues from day to day; but as the claimants admit a liability for the freight, and the libellants admit that part of the demurrage they now ask for was not due when the libel was filed, it seems to me just to give to the libellants their whole damages, but without costs. A libel will not be dismissed merely because it was brought too soon, if substantial justice can be done, and ought to be done, under it: The Salem's Cargo, 1 Sprague, 392; The Isaac Newton, Abb. Adm. 11; The Magoun, Olcott, 55. Here, as in the case before Judge Sprague, the cargo is now beyond the reach of process, and therefore the libel ought to be retained.

A specification of the libellants' damages, which was used at the trial, shows that they ask for twelve days' demurrage. Upon the evidence, it seems to me that the vessel was delayed at least that length of time by the want of cars, and I shall give damages at thirty dollars a day for the twelve days.

Decree for libellants.

The Schooner Highlander

District Court of the United States, District of Massachusetts, 1859

1 Sprague 510.

Libel by five seamen for wages, claimed to have been earned on a wrecking voyage to the British Provinces, in the summer of 1859. The shipping articles showed the wages to have been put down in decimals at twenty-five and eighteen cents per month. It was not denied, however, that the real contract was for eighteen and twenty-five dollars per month; and the libellants insisted that they saw only the figures 18 and 25 in the articles, when they signed, and supposed that they meant dollars and not cents. The defence offered was, that the vessel had been chartered for the voyage, to one Charles Sanborn, under a contract to victual and man her, at his own expense; that the libellants had been distinctly informed, when they shipped, that they were to look to the charterer only, for their pay; that the wages in the articles were nominal, and that this arrangement was assented to by the crew. Before the filing of this libel, the libellants had attached the vessel in an action at common law, which they afterwards abandoned.

Sprague, J. -- The objection of the claimants that an attachment of the vessel at common law, made and abandoned before the filing of a libel in this court, defeats the lien of seamen for wages, cannot be sustained. A common law lien depends on possession, and is lost when the creditor causes the res to be taken possession of by an officer, by writ of attachment. The property, in such case, is in the custody of the law, and out of the possession of the creditor, and a common law lien is therefore lost. But a maritime lien does not depend on possession.

I hold, as I have held before in the case of the Paul Boggs, ante, p. 369, decided some years since, that the lien is not defeated by a previous attachment in a State court. It has been also objected by the claimants, that the services for which two of these libellants were employed, viz., diving and wrecking, are not of a maritime character. I cannot adopt this view. Though principally hired for their skill as wreckers, they were also required to aid in the general management of the vessel, and I am of the opinion that they, like the rest of the crew, are entitled to enforce their claims for wages by a libel against the schooner, in this court.

There is no controversy, that seamen, prima facie, have a right to look to the vessel for their wages. The entries of twenty-five cents and eighteen cents, in these articles, are admitted not to be the wages agreed upon, which were eighteen and twenty-five dollars; and the principal ground of defence is that the libellants, by their original contract, relinquished their lien, and agreed to look to the personal credit of Sanborn alone.

Agreements varying the rights given to seamen by the general maritime law, are always scrutinized with great care, by courts of admiralty. Seamen, as a class, are ignorant and credulous, and rely in great measure, in their contracts with their employers, on the general known rights of sailors, as expressed in the shipping articles, which are a printed document known to contain certain well-understood stipulations, and any variation from them is looked on with jealousy by the courts. New clauses impairing the rights of seamen, are generally held inoperative.

Whenever an unusual clause is introduced into the shipping articles, impairing the rights of seamen, or imposing any additional duties or obligations on them, two conditions are required:

1st. That the seaman had the agreement so explained to him that he fully understood its meaning, and,

2d. That a reasonable compensation was given him for the renunciation of the right, or for the new obligation assumed.

The agreement set up in defence, in this case, was not inserted in the articles, but rests only in parol. Certainly the requirements will be not less rigorous, in the case of a parol agreement, than when a written alteration of the articles is made.

Was there, then, a sufficient explanation made to these libellants, of the extent of the waiver which they are alleged to have made? And was there an adequate consideration for this waiver? [The judge here went into an examination of the evidence, and concluded by saying:] It has not been shown, either that the libellants knowingly agreed to relinquish their lien, or that they received any compensation for the alleged renunciation.

Decree for libellants for the full amount of their claims and costs.

The William M. Hoag.

District Court of the United States, District of Oregon, 1895.

69 Federal Reporter 742.

Bellinger, District Judge. The most important question in these cases, and one that is common to them all, is the question whether a seaman can acquire a lien on a vessel by reason of services rendered while employed by a receiver who has charge of such vessel, and is employing it in navigation under the orders of the court appointing him. It is argued against the lien that no lien can attach to property in the custody of the law, and therefore no lien can attach to property in a receiver's hands; that to authorize a lien the employment must be made or authorized by, and the service must be for the benefit, actual or constructive, of, the owner; that the relation of the owner to the transaction must be of such a character that a right of action in personam can be maintained against him to recover the debt sought to be enforced as a lien against his property, and that it is against the policy of the law to allow admiralty to interfere with the operation of a vessel by a court having jurisdiction to operate it through a receiver. The holding in the Esteban de Antunano, 31 Fed. 920, and in The Augustine Kobbe, 37 Fed. 702, is that, when a vessel is in the custody of the law by an officer having her in possession under process, the authority of her owners and of their agents, the master and ship's husband to thereafter affect the ship by any conduct or contract to result in a lien on the ship, is ended. In Parker v. The Little Acme, 43 Fed. 925, it is held that when a sheriff having possession of a vessel by virtue of a writ of execution ran the boat a few days without the knowledge or consent of the owner no lien would exist in favor of one who acted as master and pilot during the time, but such person must look to the sheriff for his compensation. In The Young America, 30 Fed. 790, the general and well-understood rule was applied that when a vessel is arrested in admiralty the law requires that she be safely kept by the marshal, and that such officer has no authority to create or permit charges upon the property beyond such as are necessary for its due care and preservation. These cases are relied upon by the claimants as embodying principles necessarily decisive of the cases on trial. The rule of these cases is against a lien as a result of an unauthorized employment of a vessel by an officer having her in charge. The cases are those of legal custody for safe-keeping or for sale under process. The employment of a vessel in such case by the officer is not authorized. But when the custody is for the purpose of operating the property, of navigating a vessel by a court having jurisdiction, there is no reason to distinguish it from any other authorized employment. The receiver stands in the relation of owner. The expenses of his administration of property managed by him is always paid out of the assets in his hands, and constitute a first charge upon it. The court appointing a receiver may

incumber the property in its custody by the issue of receiver's certificates, or may otherwise apply it in its operation. The owner's control is, therefore, not necessary in such a case to the creation of an obligation enforceable against his property. The objection urged in these cases has reference to the rights of the owner; but the owner's rights are subordinate to the authorized contracts and obligations of the receiver in any case, so that the enforcement of a claim for wages by a proceeding in rem does not prejudice the owner in any right which he otherwise has.

Does the fact that the wages are earned in an employment by a receiver take the case out of the general rule which confers jurisdiction upon the admiralty courts for any reason? It is urged that that the court appointing the receiver is competent to protect the marineers' rights, and that by taking jurisdiction a court of admiralty interferes in the administration of the receivership. Maritime liens grow out of the necessities of commerce, and when they are for services they depend upon the character of the employment, and these are not affected by the fact of a receivership. The character of the ownership or control of a vessel cannot in any case affect its liability nor lessen the necessity for that credit which the law of maritime liens supplies, nor render less meritorious the services which that law compensates. Whether the court appointing the receiver might have provided for the payment of these claims, or had the power to do so, is not material. It has not done so, and the property is no longer in its custody. The right is a subsisting one under the law, and this court cannot properly refuse to enforce it.

Objection is made to the claims of Youn and Raabe on the ground that the services rendered by them were as masters, and that for such services a lien does not exist. Such is the general rule in admiralty. The state statute, however, provides for a lien without exception as to masters of vessels. I cannot extend the admiralty exception to a case like this created by the state statute, unless the case is within the reason that authorizes such exception. The services in this case were upon a vessel plying between points in the river at which agents were stationed by the receiver, who were clothed with authority to conduct the business of the vessel; thus leaving to the master merely the ordinary duties of navigation. The master was not a representative of the ship, authorized to create liens, and is, therefore, not within the reason of the rule that leaves him no lien. Nor do I think that such lien is barred by the limitations of the state statute. That statute provides as follows: "All actions against a boat or vessel under the provisions of this title shall be commenced within one year after the cause of action shall have accrued." Hill's Ann. Laws Or. § 3706. This limitation applies to the procedure provided for by the state statute. It relates to the remedial provisions of the statute. It does not qualify the right of lien, nor constitute a condition of the lien. The statute provides for actions to

enforce the liens it creates, and it limits the time within which such actions shall be brought. All these provisions which undertake to confer upon the state courts this right to bring actions to enforce the lien thus created are void. The Hine v. Trevor, 4 Wall. 555. And the limitation of such actions is therefore necessarily ineffectual and void.

It is contended that the assignee of the firemen's claim for wages for services on the Resolute cannot enforce the assigned claim; that the lien of a claim for mariners' wages is a personal privilege in the mariner, and for the mariner's protection, and is not assignable. The authorities are not in harmony upon this point. The assignment of a shipwright's lien for repairs is upheld in Park v. Hull of the Edgar Baxter, 37 Fed. 219, and that of a mariner's lien for wages is upheld in The New Idea, 60 Fed. 294. I am of the opinion that the lien of mariners for wages should stand upon the same footing with those of other laborers upon vessels and of material men. When the services are rendered, and the right is perfected, the assignability of a think enhances its value, and a nonassignable character given to a mariner's lien is more likely to injure than protect the owner. When the services are rendered, and the right is perfected, there is no more reason to deny the mariner's right to dispose of this property than there is of any other belonging to him. The law guards him against imposition without imposing disabilities upon him in the enjoyment of his property and rights. Unless the assignee is a speculator, or there is other reason to question or suspect the fairness of the transaction, the lien for wages in the hands of the assignee should be enforced.

The exceptions to the libels are overruled.

Hart v. Proceeds of The Oakland and Another.

District Court of the United States, Northern District of Ohio, 1887.

32 Federal Reporter 254.

This was a libel by a seaman on the propeller Oakland, On the seventeenth day of September, A.D. 1883, by the order of her captain, the crew of the propeller, including the libellant, left the propeller, then water-logged and in a foundering condition, in a storm on Lake Erie. They saved the yawl-boat, compass, barometer, clock, and marine glasses. The propeller was still afloat when left, and it was uncertain whether she would continue to float or go to pieces. Under these circumstances the propeller and articles saved were sold for the sum of $500, which was placed in the hands of H.D. Goulder, for the purpose of paying the debts of the propeller. As a preliminary thereto, the principal creditors of the propeller signed a paper by which they approved of said sale at said price, and further agreeing . . . "That the said sum of $500 may be paid to H.D. Goulder, and shall be applied pro rata upon the debts of said propeller. . ." None of the sailors signed this agreement. . .

[The arguments of counsel are omitted.]

Upon the questions whether this money was the proceeds of the vessel, and whether libelant had a lien thereon, Welker, J., found that the money in the hands of Goulder was the proceeds of the sale of the remnants of the vessel; and that the libelant had a lien upon the said proceeds in the hands of Goulder, the same as he would have had against the vessel for his unpaid wages, and was not bound to receive the pro rata amount thereof; and decreed that Goulder should pay to him the amount of his wages.

The Acorn

District Court of the United States, Western District of Pennsylvannia, 1887

32 Federal Reporter 638.

Acheson, J. According to the allegations of the libel, which for the present must be accepted as true, the libelants were hired as firemen on the steam-boat Acorn, for a trip from Pittsburgh to Cincinnati or Louisville, at certain wages; and, pursuant to the terms of the hiring, presented themselves at the wharf where the boat lay, ready and desirous to perform their part of the contract, but were refused admission to the boat, without good reason, other persons having been hired in their places. It was then too late for the libelants to procure employment on that rise upon any other boat, and thus they lost a trip. The Acorn made the voyage for which the libelants were hired.

Upon such a state of facts, why may not the libelants proceed in rem against the boat in this court for redress? They sue, not as is supposed, for damages for breach of the contract, but for their stipulated wages, to which they are as much entitled as if there had been actual performance on their part. Kirk v. Hartman, 63 Pa. St. 97. If, after a voyage has begun, it is lost or abandoned by the wrongful act of the owner or master, it is not to be doubted that the seamen are entitled to full wages, recoverable in admiralty by suit in rem. Sheppard v. Taylor, 5 Pet. 675, 710. It has been distinctly held, also, that where a mariner has been improperly discharged from a vessel after shipping articles have been signed, but before the commencement of the voyage, he may sue in admiralty for his agreed wages, the voyage for which he was engaged having been prosecuted. The City of London, 1 W. Rob. 88. To the like effect was the ruling in the case of The Dolphin, 6 Ben. 402. I deem it unimportant that the libelants did not actually enter upon any maritime service, since they were wrongfully prevented by the owners of the boat or their agent from going aboard the Acorn.

The exceptions to the libel are overruled.

The Putnick.

District Court of the United States, Western District of Washington, 1923.

291 Federal Reporter 902.

[Libel by A.L. Van Valin, master, against the gas screw Putnick, etc., in which the Marine Hardware Co. and others intervened.]

[The statement of the case and part of the opinion are omitted.]

Neterer, District Judge. The solution of the claim of the libelant is not free from difficulty; the employment was arranged for and entered into in California; the service was to bring the vessel to Puget Sound and operate it in the water thereof. Libelant was registered as master. For master's wages admiralty affords no lien. Bene. on Admr. § 190. The California statute denies a lien for master's wages, Kerr's Cal. Code, §3055. The Washington statute section 1182, R.C.S., gives a lien for master's wages. The testimony shows that the employment was accepted only upon condition that the owner, Turck, would deposit in the bank bi-monthly the master's wages. The testimony of both master and owner is that the employment was predicated upon the credit of the ship. The vessel sailed immediately upon the employment, and on August 16th was at Astoria, Or., and was at Anacortes, Wash., some time prior to August 27th; the particular date not being established. As to the contention of the interveners that the master's lien on the ship being denied by the California statute, a lien in Washington could not be enforced, I am of opinion that the contract being entered into having in view services in Washington, and no service being contemplated in California, other than such as would be necessary to bring the vessel to Washington, and the wage being a monthly wage, and the earning of the wage created the indebtedness, and thereupon and not until then can the lien attach, that in contemplation of law the contract is extended to the place where the debt is created, where the work is done, and comes within the operation of the Washington statute for services rendered in Washington waters (Crawford v. Collins, 45 Barb. [N.Y.] 269), and this view I think lies within the sense of Hyde v. Goodnow, 3 N.Y. 266; and that the master's lien should be established for the wages earned within the waters of the state of Washington, which is established from August 27th.

The General Smith, Hollins et al. Claimants.

Supreme Court of the United States, 1819.

4 Wheaton 438.

Appeal from the Circuit Court of Maryland.

This was a libel filed on the 4th day of October, 1816, in the District Court of Maryland, setting forth that James Ramsey, the libellant, had supplied and furnished for the use, accommodation, and equipment of the ship General Smith, at Baltimore, in the district of Maryland, to equip and prepare her for a voyage on the high seas, various articles of cordage, ship chandlery, and stores, amounting in the whole to the value of 4,599 dollars, and 75 cents, for no part of which he had received any compensation, payment, or security. That the said ship was then owned by a certain George Stevenson, to whom he had applied for payment of said materials furnished, but without effect. And praying the usual process against the ship, and that she should be sold under the decree of the Court, to pay and satisfy the libellant his claim.

A claim was given for the ship by John Hollins and James W. M'Culloch, merchants, of Baltimore.

On the hearing of the cause in the Court below, it was proved, or admitted by the parties, that the ship was an American ship, and formerly was the property of George P. Stevenson, a merchant of Baltimore, and a citizen of the United States; and that whilst the ship so belonged to Stevenson, the libellant, a ship chandler of Baltimore, furnished for her use various articles of ship chandlery to equip and furnish her, it being her first equipment to perform a voyage to a foreign country, to wit, to Rotterdam and Liverpool, and back to Baltimore. That Stevenson was also the owner of several other vessels, for which the libellant from time to time furnished articles for their equipment for foreign voyages, and that payments were made by Stevenson to the libellant, at different times, on their general account, without application to any particular part of the account. That the ship soon afterwards sailed, &c. That the ship departed from Baltimore, on the voyage, without any express assent or permission of the libellant, and also, without objection being made on his part, and without his having attempted to detain her, or enforce any lien which he had against her for the articles furnished. That the ship continued to be the property of said Stevenson, during the said voyage, and after her return, and was not sold or disposed of in any way by him, until the 3d day of October, 1816, when finding himself embarrassed in his pecuniary affairs, and obliged to stop payment, he executed an assignment to the claimants of his property, including the ship General Smith, in trust for the payment of all bonds for duties due by said Stevenson to the United States, and for the payment and satisfaction of his other creditors, &c.

[The statement of facts with respect to a second libel is omitted].

The District Court ordered the ship to be sold, and decreed, that the libellants should be paid out of the proceeds the amount of their demands for materials furnished. In the Circuit Court this decree was affirmed, pro forma, by consent, and the cause was brought by appeal to this Court. . . .

[The arguments of counsel are omitted.]

Mr. Justice Story, delivered the opinion of the Court.

No doubt is entertained by this Court, that the Admiralty ... rightfully possesses a general jurisdiction in cases of material men; and if this had been a suit in personam, there would not have been any hesitation in sustaining the jurisdiction of the Disctict Court. / Where, however, the proceeding is in rem to enforce a specific lien, it is incumbent upon those who seek the aid of the Court, to establish the existence of such lien in the particular case. / Where repairs have been made, or necessaries have been furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit in rem in the Admiralty to enforce his right. But in respect to repairs and necessaries in the port or State to which the ship belongs, the case is governed altogether by the municipal law of that State; and no lien is implied, unless it is recognised by that law. / Now, it has been long settled, whether originally upon the soundest principles it is now too late to inquire, that by the common law, which is the law of Maryland, material men and mechanics furnishing repairs to a domestic ship, have no particular lien upon the ship itself for the recovery of their demands. / A shipwright, indeed, who has taken a ship into his own possession to repair it, is not bound to part with the possession until he is paid for the repairs, any more than any other artificer. But if he has once parted with the possession, or has worked upon it without taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself.

Without, therefore, entering into a discussion of the particular circumstances of this case, we are of opinion, that here there was not, by the principles of law, any lien upon the ship; and consequently, the decree of the Circuit Court must be reversed.

Decree reversed.

The St. Jago de Cuba

The St. Jago de Cuba. Vinent and Others, Claimants.

Supreme Court of the United States, 1824.

9 Wheaton 409.

Appeal from the Circuit Court of Maryland.

Mr. Justice Johnson delivered the opinion of the Court.

This vessel, with her lading, found on board at the time of seizure, were libelled for an infraction of the laws prohibiting the African slave trade. . . .

The Court below having subjected the vessel to forfeiture, and the proceeds being in the registry, was then called on to distribute these proceeds among the various claimants, the seamen and material men. . . ,

The next question arises on the claims of the material men .

On this point, the material facts are these: that this vessel, although appearing under the character of a foreign vessel, was, in reality, in her home-port: and this, whether considered as the property of Gunn, or of Maher and Strike. The questions then arise, on what does the privilege of material men depend? On the state of facts, or on their knowledge or belief of facts? On the actual absence of a vessel from her home-port, or the power given to the shipmaster, in another port, to subject his vessel to Admiralty process and implied lien, in favour of material men? And lastly, whether the prior forfeiture of the vessel to the United States precludes their general rights, and places them on the footing of subsequent purchasers, whether with or without notice of the forfeiture?

These questions are all solved by a reference to the nature, origin, and objects of maritime contracts. The precedence of forfeiture has never been carried further than to overreach common law contracts entered into by the owner; and it would be unreasonable to extend them further. The whole object of giving Admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete her voyage.

There are two considerations that fully illustrate this position. It is not in the power of any one but the shipmaster, not the owner himself, to give these implied liens on the vessel; and, in every case, the last lien given will supersede the preceding. The last bottomry bond will ride over all that precede it; and an abandonment to a salvor, will supersede every prior claim.

The vessel must get on; this is the consideration that controls every other; and not only the vessel, but even the cargo, is sub modo subjected to this necessity.

For these purposes, the law maritime attaches the power of pledging or subjecting the vessel to material men, to the office of shipmaster; and considers the owner as vesting him with those powers, by the mere act of constituting him ship-master. The necessities of commerce require, that when remote from his owner, he should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests. But when the owner is present, the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived. From this view of the subject, this Court will be best understood, when it speaks of the home-port of the vessel, an epithet which, it is very easy to perceive, has no necessary reference to State or other limits. And from this view of the subject it results, both that the forfeiture does not ride over the rights derived under maritime contracts whether they be called liens or privileges, and that the real owners of a vessel, who have themselves contributed to give her a foreign aspect or character, hold out the foreign captain to material men, as one legally authorized to exercise the rights and powers over his vessel which appertain to a foreign vessel. They are thus precluded by their own act from denying her foreign character. In case of wreck and salvage, it is unquestionable that forfeitures would be superseded; and we see no ground on which to preclude any other maritime claim, fairly and honestly acquired.

We concur, then, in the opinion, of the Court below, that the fair claims of seamen, and subsequent material men, are not overreached by the previous forfeiture; and that, even in the home-port, a vessel may be subjected to the liabilities of a vessel in a strange port, by being falsely held up as foreign by her owners. And the question will now be considered, whether these material men have sustained their claims against this vessel upon that principle.

[The court held that the claims were not sustained. The material men were charged in each instance with express or constructive notice.]

The decree of the Court below, therefore, so far as the appeal of the United States brings it before this Court, will be reversed, and the proceeds of the vessel and cargo adjudged to the United States.

Decree reversed.

Sylvan Peyroux and Others, Claimants of Steamboat Planter, Appellants, v. William L. Howard and Francois Varion, Libellants.

Supreme Court of the United States, 1833.

7 Peters 324.

Appeal from the district court of the United States for the eastern district of Louisiana.

In the district court a libel was filed on the 10th December 1830, by Howard and Varion, shipwrights, residing in New Orleans, against the steamboat Planter, claiming the sum of two thousand one hundred and ninety-three dollars and thirty-five cents, being the balance asserted to be due to them for the price of work, labour, materials furnished and repairs made on the said boat, under contracts of 13th September and 19th October 1830; and alleging that, by the admiralty law and the law of the state of Louisiana, they had a lien on the said boat for the payment of the same; and that she was about leaving the port of New Orleans, and praying process, &c. The account for the work, materials, &c. was annexed to the libel.

The owners of the steamboat Planter filed a claim and plea setting forth that they were all citizens of Louisiana, all resided in the city of New Orleans, and that the libellants were also citizens of that state; and that therefore the district court of the United States had not jurisdiction of the case.

By a supplemental answer the respondents denied all the facts set forth in the libel.

The plea to the jurisdiction of the court was overruled and dismissed; and the parties proceeded to take the testimony of witnesses by depositions, which were filed as part of the proceedings in the case.

By the first contract the shipwrights stipulated to do certain specified work, and furnish certain materials, the same to be approved by "experts," for which they were to be paid the sum of one thousand one hundred and fifty dollars.

By the contract of the 19th of October the Planter was to be hauled on shore, and in consideration of four hundred and seventy-five dollars, of which two hundred was to be paid in cash, and two hundred and seventy-five in one month after the boat should be launched and set afloat, certain other repairs were to be done to her, and she should be delivered and ready to receive a cargo by the 20th of November, under a penalty of twenty-five dollars per day for each day her delivery should afterwards be retarded by the shipwrights.

The evidence in the case is fully stated in the opinion of the court.

[The district court decreed for libellants in the sum of $2,193.35 and costs. The district court's decree is omitted.]

From this decree the owners of the Planter appealed to this court. . . .

[The arguments of counsel are omitted.]

Mr. Jusitice Thompson delivered the opinion of the Court. . .

The proceeding is in rem against a steamboat, for materials found and work performed in repairing the vessel in the port of New Orleans, as is alleged in the libel, under a contract entered into between the parties for that purpose. It is therefore a maritime contract; and if the service was to be performed in a place within the jurisdiction of the admiralty, and the lien given by the local law of the state of Louisiana, it will bring the case within the jurisdiction of the court.

By the Civil Code of Louisiana, article 2748, workmen employed in the construction or repair of ships and boats enjoy the privilege established by the code, without being bound to reduce their contracts to writing, whatever may be their amount; but this privilege ceases if they have allowed the ship or boat to depart without exercising their right. The state law, therefore, gives a lien in cases like the present.

In the case of the General Smith, 4 Wheat. 438, it is decided that the jurisdiction of the admiralty in such cases, where the repairs are upon a domestic vessel, depends upon the local law of the state. Where the repairs have been made, or necessaries furnished to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in the admiralty to enforce his right. But as to repairs or necessaries in the port or state to which the ship belongs, the case is governed altogether by the local law of the state, and no lien is implied unless it is recognized by thatlaw. But if the local law gives the lien, it may be enforced in the admiralty.

[Part of the opinion dealing with the question whether the place where the services were performed was within admiralty jurisdiction is omitted.]

The second exception is founded on a supposed waiver of any privilege or lien, and that the appellees trusted alone to the personal responsibility of the owners of the steamboat.

To determine this question, it becomes necessary to look at the contracts under which the repairs were made.

The first bears date on the 11th of September 1830, by which certain specified repairs were to be made, for which the appellants stipulated to pay one thousand five hundred dollars. No time is fixed for the payment. The repairs contemplated by this contract were such only as could be made without hauling up the boat. In the progress of the work, however, it was discovered that more repairs were necessary than had been supposed, and which could not be made without hauling up the boat. And on the 19th of October 1830, another contract was entered into, by which the owners agreed to pay four hundred and seventy-five dollars for hauling up the boat, two hundred dollars of which was to be paid in cash, and the balance in one month after the boat shall be launched and set afloat. The boat was then to be repaired under the instruction of Captain Jarreau, the work to be paid for when the account shall be approved by Captain Jarreau. The boat to be repaired and delivered afloat by the 20th of November, ready to receive a cargo; the appellees were to allow twenty-five dollars a day for each day they retarded the delivery.

An express contract having been entered into between the parties under which these repairs were made is no waiver of the lien, unless such contract contains stipulations inconsistent with the lien, and from which it may fairly be inferred that a waiver was intended, and the personal responsibility of the party only relied upon. Express contracts are generally made for freight and seamen's wages, but this has never been supposed to operate as a waiver of a lien on the vessel for the same. There are certainly some of the older authorities which would seem to give countenance to the doctrine that an express contract operated as a waiver of the lien; but whatever may have been the old rule on the subject, it is settled at the present day that an express contract for a specific sum is not of itself a waiver of the lien, but that to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien, or from which a waiver may fairly be inferred. Hutton v. Bragg, 2 Marshall, 339; 4 Camp. 145, and the cases cited in note.

Applying these rules to the case before us, we can discover nothing (except as to two hundred and seventy-five dollars, the balance for hauling out the boat, which will be noticed hereafter), inconsistent with the right of a lien, or indicating any intention to waive it. In the first contract no time is fixed for the payment of the one thousand five hundred dollars; it became payable, therefore, as soon as the work was completed. And the repairs under the second contract were to be paid for as soon as the account was approved by Captain Jarreau. There is nothing, therefore, from which it can be inferred that any time of credit was to be allowed. The balance of two hundred and seventy-five dollars, for hauling out the steamboat, stands upon a footing a little different. That was to be paid in one month after the boat was launched and set

afloat. A credit was here given; and a credit too beyond the time when, in all probability, the boat would have left the port of New Orleans; for it can hardly be supposed that it would have taken thirty days to load her. And by the Civil Code of Louisiana, Art. 2748, the privilege ceases if the ship or boat is allowed to depart without exercising the right.

As to this sum, therefore, the decree is erroneous. . . .

Upon the whole, we are of opinion, that the decree of the district court, as to the two hundred and seventy-five dollars, must be reversed, and in all other respects affirmed.

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An Act Relating to liens on vessels for repairs, supplies, or other necessaries, June 23, 1910, ch. 373.

36 Statutes at Large 604.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

Sec. 2. That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is intrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

Sec. 3. That the officers and agents of a vessel specified in section two shall be taken to include such officers and agents when appointed by a charter, by an owner pro hac vice, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

Sec. 4. That nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise, and this Act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed in personam.

Sec. 5 That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings in rem against vessels for repairs, supplies, and other necessaries.

The Yankee.

Circuit Court of Appeals of the United States, Third Circuit, 1916.

233 Federal Reporter 919.

Woolley, Circuit Judge. This is an appeal from a decree of the District Court, affirming the report of a Commissioner and dismissing five libels filed against a vessel for supplies. As the report was affirmed and the decree entered without an opinion, we must assume that the Commissioner's findings were accepted by the court as an expression of its views.

It is not necessary to recite or even summarize the testimony of each case. It will be sufficient to state only so much thereof as will present to the best advantage the theory of the law upon which the claimant made its defense and the Commissioner based his findings.

The dredge Yankee was a centrifugal blower dredge, owned by the Rivers and Harbors Improvement Company and leased to the Breakwater Construction Company under covenants which prohibited the lessee "to suffer or permit any lien or liens, maritime or other, to attach" to the vessel. The Yankee was then chartered or "rented" by the Breakwater Company to the Atlantic Dredging Company, for use in its dredging operation on the River Deleware. A written charter was prepared but not executed. There was an exchange of letters between the officers of the two companies stating the terms upon which the Yankee was to be used. These letters were lost, but their contents were proven. For the purpose of this discussion we will assume, without deciding, that this correspondence constitutes a charter party, that thereby the Dredging Company derived from the Breakwater Company no greater power than the latter company acquired under the lease, and that therefore the Dredging Company was without authority to bind the vessel for supplies and necessaries.

It is conceded that the possession of the dredge by the Dredging Company was not tortious or unlawful, and it is not denied that the Dredging Company, in its relation to the dredge, was in the position described by the statute, of a "person to whom the management of a vessel at the port of supply is entrusted."

The Dredging Company was engaged in dredging the channel of the Deleware river south of Philadelphia under contract with the United States. The Yankee was procured to enlarge the fleet already assembled and to promote the operation then under way. In preparing the Yankee for work, and during its progress, certain repairs, supplies and necessaries were required. These were

ordered from the libellants on one occasion by the captain and on all others by the Dredging Company. Each order specified the supplies to be for the Yankee, and in each instance the supplies were forwarded to her pursuant to shipping instructions accompanying the order. These instructions varied according to the source of the supplies and to the railroad over which they were to be shipped, but in each instance the instructions designated a wharf or pier in Philadelphia to which the supplies were to be delivered, whence they were carried either by tugs or barges of the Dredging Company or by other river craft to the Yankee in her position on the lower river.

The transaction of delivery which best presents the position of the claimant, is that of Charles H. Whitney and Company. The Dredging Company inquired of that company its price for dredge pipe. Whitney and Company replied, quoting price "f.o.b. works" at an interior point in Pennsylvania, "freight allowed to Philadelphia." The Dredging Company gave the order as follows:

"Ship to Atlantic Dredging Company at Christian Street Wharf, % Armstrong and Latta Company, via P.R.R., marked 'For Dredge Yankee," immediately, 1000 feet I.D. pipe."

Pursuant to these instructions, the pipe was marked and billed "For Dredge Yankee," and shipped over the Pennsylvania Railroad to Christian Street wharf in Philadelphia, at which place it was unloaded by the dredging Company and then loaded on one of its barges and towed to the Yankee, and by her received and used as a part of her tackle and equipment. The claimant maintained, and the Commissioner found, that as these supplies were not delivered by the libellant directly to the vessel, but were delivered to her by means of transportation instrumentalities which were not the agents of the libellant, the transaction, therefore, did not constitute "furnishing * * * supplies * * * to the vessel" within the meaning of the act conferring a maritime lien, but constituted a delivery to the Dredging Company at the interior point of consignment in completion of a common law sale to that company.

The Act of June 23, 1910 (36 Stat. 604, c. 373). . . affords a maritime lien, under certain circumstances, to any person "furnishing repairs, supplies or other necessaries * * * to a vessel." It is maintained by the claimant, that this expression had received judicial interpretation prior to its use in the act, that the expression, as employed by the act, conveys the meaning judicially given it, and that that meaning supports the contention of the claimant and the finding of the Commissioner. Of the cases on which the claimant relies for authority, several have been decided since the enactment of the statute and two before. The later cases are Ely v. Murray, 200 Fed. 368, 118 C.C.A. 520; The Geisha (D.C.) 200 Fed. 865; The Bethulia (D.C.) 200 Fed. 879. These do not require discussion, for they do not bear upon the

matter before us except as they cite with approval a certain expression found in the two earlier cases are the Vigilancia (D.C.) 58 Fed. 698, decided by the District Court of the United States for the Southern District of New York in 1893, and the Cimbria (D.C.) 156 Fed. 378, decided by the District Court of the United States for the District of Massachusetts in 1907.

The Vigilancia was libeled for supplies. The circumstances were unique. The vessel was lying in her home port of New York, and the supplies ordered by her owner were furnished by the libellants from the State of New Jersey. They consisted of oleomargarine, the sale and delivery of which within the State of New York were prohibited by the laws of that state. As delivery of supplies of this kind to the vessel lying in New York would be an infraction of the law, and as delivery of supplies of any kind to the vessel at her home port would not at that date raise a maritime lien, the libellants disclaimed delivery in New York and maintained that the supplies had been furnished to the vessel in the State of New Jersey and a maritime lien had there been acquired under an arrangement with the owner that the sale and delivery were intended to be completed in Jersey City upon their delivery to truck-men for transfer to the ship in New York.

In The Cimbria, supra, the facts were strikingly similar to those of The Vigilancia. Equipment for that vessel had been shipped f.o.b. New York on the owner's order. The vessel was lying in Bangor, Maine, her home port. Because of this impediment to a maritime lien, the libellant disclaimed delivery to the ship at her home port, and maintained that delivery had been made to the ship in New York at the time of consignment.

In each of these cases the court was called upon to determine a question then always present in cases of maritime liens, namely, whether the supplies were furnished the owner upon his credit or the ship upon her credit. The courts in the two cases decided, that to hold a vessel in rem for supplies or cargo, actual delivery thereof must be made to the vessel. Pollard v. Vinton, 105 U.S. 7,9-11, 26 L. Ed. 998; and that when supplies are concededly delivered at a port distant from the port in which the vessel lay, there can be no constructive delivery to the absent vessel, and the delivery must therefore be to her owner. In neither case did the court decide, that a materialman at an interior point could not ship and actually deliver supplies to a vessel lying in a distant port. In announcing its decision with reference to facts which precluded actual delivery to the vessel, the court, in The Vigilancia repeated a well recognized principle of maritime law, that:

"There can be no delivery to a ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship in rem, until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship."

The claimant has grasped this expression and clings to it as authority for its contention that when a materialman does not himself deliver supplies directly to the ship, but delivers them by the indirect means of rail and water carriers, the delivery is made at the point of consignment. The difference in fact between The Vigilancia and The Cimbria and the cases under consideration, as well as the difference in the law effected by the act of Congress of 1910, deprives those cases of a bearing upon the question under consideration. In The Vigilancia and The Cimbria, actual delivery to the vessels, either by direct or indirect means, was impossible and was specially disclaimed because of the necessities of the situation. In the cases before us, supplies could actually be delivered and in fact were actually delivered to the vessel at her port of supply. The question in these cases is not whether there was a constructive delivery to the vessel, but whether the delivery made was to the charterer at the source of the supplies or to the vessel at their destination. What proof does the law require to determine this question?

The liability of a ship for materials and services has been the subject of controversy in maritime jurisprudence, running through the centuries. Its origin is obscured by antiquity and its continuance has been characterized by confusion and perplexity, an appreciation of which may be obtained from the exhaustive opinion of Judge Lowell in The Underwriter (D.C.) 119 Fed. 713. Until recently the right of a materialman to a maritime lien rested upon a variety of considerations. Stated very briefly, it depended upon whether the supplies had been furnished in a foreign or domestic port, whether they had been furnished upon the credit of the ship's representative or upon the credit of the ship, and then whether upon the order of the owner or the master. The enforcement of these rights was made difficult by reason of rules of evidence respecting the burden of proof and because of conflict of jurisdiction claimed and asserted by different courts. The City of Milford (D.C.) 199 Fed. 956; Ely v. Murray, 200 Fed. 368, 118 C.C.A. 520; Trust Co. v. Bermuda A.S.Co. (D.C.) 211 Fed. 989, 996; The Underwriter, supra. By the Act of June 23, 1910, 36 Stat. 604, Congress attempted to simplify the law and to quiet its controversies by defining when and under what circumstances a maritime lien may be acquired. Compliance with requirements of a state statute as a condition precedent to the assertion of a lien, as held by some cases, is disposed of by making the federal act supersede the provisions of all state statutes. The distinction between foreign and domestic ports is abolished. The allegation and proof that credit was given to the vessel is no longer required, and a

maritime lien, enforceable by a proceeding in rem, is afforded "any person furnishing repairs, supplies or other necessaries * * * to a vessel * * * upon the order of the owner or owners of such vessel, or of a person by him or them authorized." To stay controversy as to whether another person has been authorized by the owner to procure supplies and bind the vessel, the statute affords a presumption of such authority in certain designated persons or officers, thereby relieving the libellant of the difficulty and sometimes the impossibility of presenting proof of that authority. They are "the managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted." Those so entrusted include "officers and agents of a vessel* * * appointed by a charterer or by an owner pro hac vice, or by an agreed purchaser in possession of the vessel."

The effective provisions of this act, by which Congress disposed of the controversial features of the law of maritime liens, are those which dispense with proof that credit was given the vessel, and substitute a presumption in lieu of proof of the authority of the owner and of a person other than the owner to procure supplies and pledge the vessel. Being relieved of the necessity of proving credit to the vessel and being clothed with the presumption of the validity of the order, the libellant, upon proving delivery to the vessel, enters court with a prima facie right to a maritime lien.

Thus came the libellants in the cases before us. What did these prima facie cases show? They disclosed, first, an order for supplies given by the Dredging Company, which was lawfully in possession of the vessel and was the "person to whom the management of the vessel at the port of supply [had been] entrusted"; second, the presumption, afforded by the act in lieu of proof, that the Dredging Company, as such person, had "authority from the owner" to give the order and "procure" * * * for the vessel"; and third (excepting in one case), actual delivery of the supplies to the vessel. To these prima facie cases the claimant made a twofold defense; first, that delivery was not made to the vessel but was made to the charterer; and second, if made to the vessel, then the libellants are within an exception to the presumption afforded by the act, and are without right to maritime liens. With respect to the first ground of defense we may say, that we do not hold that a materialman may not waive the right to a maritime lien, for the act especially provides for such a waiver, or that he may not forfeit the right under circumstances showing delivery not to the ship but to the owner or charterer. Ely v. Murray, 200 Fed. 368, 371, 118 C.C.A. 520. But as against the contention of the claimant, we hold that a materialman may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from their point of origin to the vessel side, when the transaction is begun

by a valid order indicating that the supplies are for the vessel and are to be delivered to her, and is completed by an actual delivery to the vessel consistent with the instructions of the order and the intentions of the parties giving and accepting it. Without discussing the evidence, we are satisfied that in four cases supplies were furnished to the vessel in the maritime sense by deliveries actually though indirectly made by the libellants to the vessel at her port of supply.

But is is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel, they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. The Patapsco, 80 U. S. (13 Wall.) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred "when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, a person ordering repairs, supplies or other necessaries, was without authority to bind the vessel therefor." This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. The Kate, 164 U.S. 458, 17 Sup. Ct. 135, 41 L. Ed. 512; The Valencia, 165 U.S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law.

What are the circumstances upon which the claimant relies to bring the libellants within the proviso of the act? They consist, first, of the libellants knowledge of the financial difficulties of the Dredging Company, and second, of the failure of the libellants to inquire concerning the authority of the Dredging Company to bind the Yankee for supplies. The circumstance of financial difficulty of the Dredging Company would not have deprived a materialman of a right to a lien had the Dredging Company owned the Yankee. Therefore, knowledge of the Dredging Company's embarrassment suggested nothing concerning that company's ownership of the Yankee or its authority to pledge her for supplies. Nor did there devolve upon the materialman the duty to inquire concerning its ownership and the authority of the Dredging Company without attendant circumstances raising the question. Such circumstances must

include something more than a mere order from a new customer, and without circumstances suggesting or compelling inquiry the statute does not require a supplyman to ascertain the authority of the one giving the order, if he be a person designated by the statute. If such a duty devolved upon a materialman to be performed at his peril in all instances and without regard to circumstances then the act would impose upon the materialman the duty to ascertain with absolute certainty the validity of an order as a condition precedent to a maritime lien. If this were true, the presumption of authority afforded by the act would be without purpose and the very object of the act defeated.

But the law contemplates the removal of the presumption of authority to pledge the vessel only when there are circumstances which require the exercise of reasonable diligence to ascertain the authority, and places upon the one attacking the presumption the burden of removing it by establishing such circumstances by affirmative evidence. The Patapsco, 80 U.S. (13 Wall.) 329, 20 L. Ed. 696; The Iola (D.C.) 189 Fed. 972, 979; The Ha Ha (D.C.) 195 Fed. 1013; The Lucille (D.C.) 208 Fed. 424. Such evidence, in our opinion, was not produced by the claimant. In all the cases, excepting one presently to be mentioned, the testimony discloses that the libellants did not know that the Yankee was under charter to the Dredging Company, and fails to disclose any circumstance which gave an inkling to the libellants that the Yankee was under charter to the Dredging Company. The course of dealing in every instance (save one) was an order from the Dredging Company to the materialman for supplies for the Yankee, accompanied by shipping instructions. The negotiations developed nothing as to the charter of the Yankee and suggested nothing otherwise than that the Yankee was owned by the Dredging Company. It is in just such a case as this, that the statute affords the presumption of authority of the person ordering supplies to bind the vessel therefor, and intends that the presumption shall remain and control until removed.

Hesitating, as we always do, to disturb facts found by a trial court in an equity case, we are constrained to hold that in four cases there is a clear mistake of fact as well as a misapplication of the law, and we therefore direct that the decree be reversed in so far as it relates to the libels of John S. Latta and Company, Charles H. Whitney and Company, Paul J. Devitt and Glen Brook Coal Company.

With respect to the claim of the last named libellant, which grew out of a contract to supply coal for the whole fleet, we are satisfied that in giving the order, the quantity to be supplied to and daily consumed by the Yankee, was mentioned and considered by the parties, and that of the total amount of coal supplied, a definite portion was appropriated for and furnished to the

Yankee within the rule of law applicable in such cases. The Kiersage, Fed. Cas. No. 7762; The Murphy Tugs (D.C.) 28 Fed. 429; McRae v. Bowers Dredging Co. (C.C.) 86 Fed. 344.

The decree is affirmed in so far as it relates to the libel of Benjamin F. Shaw Company. In that case the Commissioner found as a fact that the evidence does not disclose that the supplies were actually delivered to or received by the dredge or used in connection with her. In this we think he was correct. It follows, therefore, that the libel of the Benjamin F. Shaw Company is squarely within the law of The Vigilancia and The Cimbria, for the delivery here made, not having been made to the vessel, must have been made to the charterer, and even if made to the vessel, was made under circumstances with regard to knowledge of the charter, that precluded the right to a maritime lien. From these circumstances it appears that Townsend W. Miller was secretary and treasurer of the libellant and was also a member of a creditors' committee of the Dredging Company. The supplies were shipped by the libellant under his supervision, and the affairs of the Dredging Company were known to him, at least to the extent that the Yankee was not owned by the Dredging Company, but was in its possession under rental. These are circumstances such as are contemplated by the proviso of the act, which suggest a doubt and compel inquiry with reasonable diligence. In this instance, the knowledge of its secretary and treasurer was knowledge of the libellant, and as the libellant forwarded supplies without pursuing inquiry as to the doubtful authority of the one ordering them to pledge the vessel,,it is without right to recover against the vessel. A modification of the decree in harmony with this opinion is directed.

Piedmont & Georges Creek Coal Company v. Seaboard Fisheries Company, Claimant, &c.

Supreme Court of the United States, 1920.

254 United States 1.

[The arguments of counsel are omitted.]

Mr. Justice Brandeis delivered the opinion of the court.

The Atlantic Phosphate and Oil Corporation owned a fleet of nineteen fishing steamers. It owned also factories at Promised Land, Long Island, and Tiverton, Rhode Island, to which the fish caught were delivered and at which its vessels coaled. When the fishing season of 1914 opened the company was financially embarrassed. Its steamers and factories had been mortgaged to secure an issue of bonds. Bills for supplies theretofore furnished remained unpaid. The company had neither money nor credit. It could not enter upon the season's operations unless some arrangement should be made to supply its vessels and factories with coal. After some negotiations, the Piedmont and Georges Creek Coal Company, then a creditor for coal delivered during the year 1913, agreed to furnish the Oil Corporation such coal as it would require during the season of 1914 -- the understanding of the parties being that the coal to be delivered would be used by the factories as well as by the vessels, that the greater part would be used by the vessels, that the law would afford a lien on the vessels for the purchase price of the coal and that the Coal Company would thus have security. Shipments of coal were made under this agreement from time to time during the spring and summer as ordered by the Oil Corporation. In the autumn receivers for the corporation were appointed by the District Court of the United States for the District of Rhode Island, and later a suit was brought to foreclose the mortgage upon the vessels and factories. At the time the receivers were appointed five cargoes of coal shipped under the above agreement had not been paid for. The Coal Company libeled twelve of the steamers asserting maritime liens for the price and value of either all the coal or of such parts as had been used by the libeled vessels respectively. Meanwhile, the vessels were sold under the decree of foreclosure. The Seaboard Fisheries Company became the purchaser and, intervening as claimant in the lien proceedings, denied liability. The District Court held that the Coal Company had a maritime lien on each vessel for the coal received by it. The William B. Murray, 240 Fed. Rep. 147. The Circuit Court of Appeals reversed these decrees with costs and directed that the libels be dismissed. The Walter Adams, 253 Fed. Rep. 20. Then this court granted the Coal Company's petition for a writ of certiorari. 248 U.S. 556.

As to the facts proved there is no disagreement between the two lower courts. The substantial question presented is whether

these facts constitute a furnishing of supplies by the Coal Company to the vessels upon order of the owner within the provisions of the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604. That coal was furnished to the vessels to the extent to which they severally received it on board, is clear. The precise question, therefore, is: Was the coal furnished by the libelant, the Coal Company, or was it furnished by the Oil Corporation, the owner of the fleet? In determining this question additional facts must be considered:

No coal was delivered by the Coal Company directly to any vessel; and it had no dealings of any kind concerning the coal directly with the officers of any vessel. All the coal was billed by the Coal Company to the Oil Corporation and there was no reference on any invoice, or on its bonds, either to the fleet or to any vessel. There was no understanding between the companies when the agreement to supply the coal was made or when the coal was delivered that any part of it was specifically for any one of the several vessels libeled, or that it was for any particular vessel of the fleet, or even for the vessels then composing the fleet. Indeed, the first shipment was stated on the invoice to be "coal for factory." The negotiations of the Oil Corporation with the Coal Company did not relate to coal required at that time by the particular vessels subsequently libeled as distinguished from other vessels of the fleet.

The coal was sold f.o.b. at the Coal Company's piers which were at St. George, Staten Island, and Port Reading, New Jersey. At these piers it was loaded on barges which were towed either to the Oil Corporation's plant at Promised Land or to that at Tiverton. Some of these barges were supplied by the Oil Corporation, some by the Coal Company. If supplied by the latter, trimming and towing charges were added to the agreed price of the coal. Upon arrival of the coal at the factories it was placed in the Oil Corporation's bins. At Promised Land- which received four of the five shipments - the bins already contained other coal (1068 tons) which had been theretofore purchased by the Oil Corporation and had been paid for. With this coal on hand that delivered by libelant was commingled. At each plant both the vessels and the factory were from time to time supplied with coal from the same bins; but the greater part of the coal supplied from each plant was used by the vessels. Weeks, and in some instances months, elapsed between placing the coal in the bins and the delivery of it by the Corporation to the several vessels. When it made such deliveries it furnished coal to the vessels, as it did to the factories, not under direction of the Coal Company but in its discretion as owner of the coal and of the business.

The quantity of coal delivered to each vessel was proved; but to what extent the coal supplied to the several vessels which bunkered at Promised Land came from the 1068 tons previously purchased, and to what extent it came from the lots purchased from

the Coal Company, it was impossible to determine. In making the computations which formed the basis of the decrees in the District Court, it was assumed that, of the coal supplied to the several vessels which bunkered at Promised Land, a proportionate part of that received by each had come from the coal purchased from libelant

The Coal Company contends on these facts that it furnished necessary supplies to the several vessels within the meaning of § 1 of the Act of June 23, 1910. But the facts show that no coal was furnished by that company to any vessel "upon the order of the owner." The title to the coal had passed to the Oil Corporation when it was loaded on board the barges at the Coal Company's piers. It was delivered to Promised Land and Tiverton as the Oil Corporation's coal and placed in its bins. As its coal the later distribution was made in its discretion to vessels and factories. A large part of the coal so acquired by the Oil Corporation for use in its business was subsequently appropriated by it specifically to the use of the several vessels of the fleet and this use of the coal by vessels of the fleet was a use which had been contemplated by the parties when it was purchased. But the fact that such a use had been contemplated does not render the subsequent appropriation by the owner a furnishing by the coal dealer to the several vessels.

To hold that a lien for the unpaid purchase price of supplies arises in favor of the seller merely because the purchaser, who is the owner of a vessel, subsequently appropriates the supplies to her use would involve abandonment of the principle upon which maritime liens rest and the substitution therefor of the very different principle which underlies mechanics' and materialmen's liens on houses and other structures. The former had its origin in desire to protect the ship; the latter mainly in desire to protect those who furnish work and materials. The maritime lien developed as a necessary incident of the operation of vessels. The ship's function is to move from place to place. She is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished. Since she is usually absent from the home port, remote from the residence of her owners and without any large amount of money, it is essential that she should be self-reliant -- that she should be able to obtain upon her own account needed repairs and supplies. The recognition by the law of such inherent power did not involve any new legal conception, since the ship had been treated in other connections as an entity capable of entering into relations with others, of action independently and of becoming responsible for her acts. Because the ship's need was the source of the maritime lien it could arise only if the repairs or supplies were necessary; if the pledge of her credit was necessary to the obtaining of them; if they were actually obtained; and if they were furnished upon her credit. The mechanic's and materialman's lien, on the other hand, attaches ordinarily although the labor and material cannot be said to have been necessary although at the time they were furnished there was no thought of

obtaining security upon the building; and although the credit of the owner or of others had in fact been relied upon. The principle upon which the mechanic's lien rests is, in a sense, that of unjust enrichment. Ordinarily, it is the equity arising from assumed enhancement in value resulting from work or materials expended upon the property without payment therefor which is laid hold of to protect workmen and others who, it is assumed, are especially deserving, would ordinarily fail to provide by agreement for their own protection and would often be unable to do so.

The fact found by the lower courts that the parties understood the law would afford a lien on the vessels for the coal is, in this controversy, without legal significance. If the coal had been furnished to the several vessels by the libelant, maritime liens would have arisen and could have been established under the statute without proof that credit was given to the vessels. Since the libelant did not furnish any coal to the vessels, the erroneous belief of the parties that the law would afford a lien either for all the coal furnished to the Oil Corporation or for that delivered by it to the several vessels could not create a lien under the statute. Clearly no maritime lien could arise therefrom valid as against the claimant which had acquired title to the vessels under a mortgage antedating the purchase. Astor Trust Co. v. E.V. White & Co., 241 Fed. Rep. 57.

The difficulty which confronts the Coal Company does not lie in the fact that the contract for the coal was made with the Oil Corporation. A vessel may be made liable in rem fro supplies, although the owner can be made liable therefor in personam; since the dealer may rely upon the credit of both. The Bronx, 246 Fed. Rep. 809. Likewise, the fact that the coal which was supplied to the several vessels had been purchased under a single contract presents no difficulty. For while one vessel of a fleet cannot be made liable under the statute for supplies furnished to the others, even if the supplies are furnished to all upon orders of the owners under a single contract, The Columbus, 65 Fed. Rep. 430; 67 Fed. Rep. 553; The Newport, 114 Fed. Rep. 713; The Alligator, 161 Fed. Rep. 37; Astor Trust Co. v. E.V. White & Co., 241 Fed. Rep. 57, 61; each vessel so receiving supplies may be made liable for the supplies furnished to it. The Murphy Tugs, 28 Fed. Rep. 429. The difficulty which, under the general maritime law, would have blocked recovery by the Coal Company is solely that it did not furnish coal to the vessels upon which it asserts a maritime lien; and there is nothing in the Act of June 23, 1910, which removes that obstacle.

It is urged by the Coal Company that it was the intention of Congress in passing the act to broaden the scope of the maritime lien and that the construction of the act adopted by the Circuit Court of Appeals renders the statute inoperative in an important class of cases which it was intended to reach. The language of the

statute affords no basis for the latter assertion, and the Reports of the Committees of Congress (Senate Report, No. 831, 61st Cong., 2d sess.) show that it is unfounded. Those reports state that the purpose of the act was this: First, to do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or state, but denied where the supplies were furnished in the home port or state. The General Smith, 4 Wheat. 438. Second, to do away with the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises. The St.Jago de Cuba, 9 Wheat. 409. Third, to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries. Peyroux v. Howard, 7 Pet. 324. The reports expressly declare that the bill makes "no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes." The act relieves the libelant of the burden of proving that credit was given to the ship when necessaries are furnished to her upon order of the owner, but it in no way lessens the materialman's burden of proving that the supplies in question were furnished to her by him upon order of the owner or of some one acting by his authority. The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice. It is therefore stricti juris and will not be extended by construction, analogy or inference. The Yankee Blade, 19 How. 82,89; The Cora P. White, 243 Fed. Rep. 246,248.

The Coal Company relies strongly upon The Kiersage, 2 Curtis, 421, and Berwind-White Coal Mining Co. v. Metropolitan Steamship Co., 166 Fed. Rep. 782; 173 Fed. Rep. 471. The language of the state statutes there under consideration differs from that of the federal act. Furthermore, the state legislation creating liens for work and materials furnished in the repair and supply, as well as in the construction of vessels, are largely extensions of the local mechanic's lien laws applicable to buildings.

The Coal Company also urges upon our attention The Yankee, 233 Fed. Rep. 919, 925, 927. There the court in sustaining a maritime lien declared that the supplies were delivered not to the charterer but to the vessel holding that "a materialman may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from point of origin to the vessel side, when the transaction is begun by a valid order indicating that the supplies are for the vessel and are to be delivered to her, and is completed by an actual delivery to the vessel consistent with the instructions of the order and the intentions of the parties giving and accepting it."

The Penn.

Circuit Court of Appeals of the United States, Third Circuit, 1921.

273 Federal Reporter 990.

Woolley, Circuit Judge. These cases were argued together, both below and on appeal, and may be disposed of in one opinion. They raise two questions. The one which evidently controlled the court's judgment in dismissing the libels was: Were the supplies which the libellant furnished the steamers reasonable and proper under the circumstances; or, in other words, were they necessaries?

The Steamers Penn and Lord Baltimore, hailing from the Port of Philadelphia and owned by the Baltimore,and Philadelphia Steamboat Company, were chartered to Charles W. Harrison. The charter party gave the charterer an option to purchase the steamers within a named period and the right to assign the "working of this charter party to a corporation of his choice," and provided, among other things, that the charterer should pay all expenses incidental to the operation of the steamers. Pursuant to a contemporaneous agreement between the owner and charterer, the charterer deposited $10,000 with a trust company"to secure the owner "against any and all claims of a maritime nature * * * that may arise during the possession of said steamers by the said Harrison or his assignees under (the cited) charter party." The charterer then assigned the charter party to the Washington-Southern Navigation Company, Inc.

This corporation operated the Steamers Penn and Lord Baltimore during the time in question, in the transportation of passengers and freight between Washington and Norfolk, and other Bay points, on a daylight schedule, the vessels, bound on opposite courses, leaving one of the named ports in the morning and arriving at the other in the evening. Each carried ordinarily several hundred passengers and maintained a restaurant service, but the passage money did not include the price of meals.

The libelant delivered to the two steamers at Norfolk Virginia supplies of the kind, in the amount, and at the prices named in his libels, under orders to which we shall presently refer. These supplies consisted of a variety of things. A few were non-edible, such, for instance, as toothpicks, cigars and matches. But they consisted in the main of food ranging from plain substantial food like potatoes, and bread and butter to delicacies such as spring chicken and ice cream. After payment for the supplies had been refused and libels had been filed, the learned trial judge, on the hearing (first reviewing in the companion case of O'Brian v. Steamer Lord Baltimore [D.C. Pa.] 269 Fed. 824, the law of maritime liens as revised and clarified by the Act of Congress of June 23, 1910, 36 Stat. c. 373 [Comp. St. §§ 7783-7787], was unable to

find from their quantity and character that the supplies "were for the crew or were necessaries, " but found that the supplies themselves indicated "that they were intended for a stock in trade to be sold on the ship but in no real sense were intended for her," and on this ground dismissed the libels. These appeals followed.

Thus the real question raised by the decree is whether supplies for the restaurant of a passenger ship are necessaries within the maritime sense, for which a maritime lien against the ship can be maintained.

There is no dispute about the facts. The steamers were licensed passenger ships; they were provided with dining quarters; the charter party provided "that the owners shall * * * furnish at their expense full equipment for dining saloons, lunch counter, etc., ready for service"; the voyage of about twelve hours which each ship made daily covered a time within which at least one of several meals is ordinarily served; and the supplies, though not of the kind and quality usual for victueling a crew, were not unusual for passengers.

There is no hard and fast definition of "supplies or other necessaries " in the maritime law as declared by the act of June 23, 1910. The test of what is necessary is what is reasonably needed in the ship's business. If the ship is a freighter, supplies of the kind and quality usually used for victualing the crew are "necessaries," in that they are needed to enable the ship to prosecute the particular business in which she is engaged. Obviously, supplies of another kind and quality furnished afreighter are not necessaries for which a lien may be enforced under the Act. The Sterling (D.C.) 230 Fed. 543.

If the ship is a passenger ship, or, as in this case, partly one, she becomes engaged in another business with other needs in prosecuting the same. Among these needs are supplies for victualing the passengers she carries, considered with regard, as in this case, to the length and character of her voyages. In The Plymouth Rock, 13 Blatchf. 505, Fed. Cas. No. 11,237, where a passenger steamer plied between the City of New York and Long Branch, New Jersey, making several trips a day each way, the court found that food furnished the steamer for its passengers were necessaries, and, though dispensed to passengers through a restaurant, furnished a basis for a lien on the ship. The same principle, though concerned with wages of one engaged in dispensing nourishment on the ship, was invoked in the J.S. Warden (D.C.) 175 Fed. 314, and in cases there cited. Following these cases, the court in The Satellite (D.C) 188 Fed, 717, though enforcing a Massachusetts statute distinguished from general maritime law only in that it afforded a maritime lien against a vessel in her home port, granted a maritime lien for liquor supplied a passenger vessel, saying:

"If passengers are carried, whatever may be reasonably supposed to meet the ordinary wants of the class of passengers expected must * * * be necessaries, whether strictly essential to their safety and comfort or not."

Without protracting this discussion, we express the opinion that the law of this line of cases is sound, that the facts of the instant cases invoke its principle, and that, in consequence, the decrees below must be reversed -- if the other requisites of a valid maritime lien are present.

The next requisite of a maritime lien for supplies or other necessaries furnished a vessel, enforceable by proceeding in rem under the Act of June 23, 1910, is that they must have been furnished upon the order of "the owner or owners of such vessel, or of a person by him or them authorized." Section 1 (Comp. St. § 7783) In cases where supplies are furnished a vessel, when, as here, there is between the owner and charterer an obligation on the part of the latter to protect the vessel and its owner from maritime liens, and the order for supplies is not given by the owner, the statute meets the situation by naming the persons who "shall be presumed to have authority from the owner or owners to procure * * * supplies, and other necessaries for the vessel." Section 2 (section 7784). These are, among others, "any person to whom the management of the vessel at the port of supply is intrusted" (section 2), including officers and agents of a vessel "when appointed by a charterer" (section 3 [section 7785]). But an order for "supplies or other necessaries," even when given by a person with apparent authority, does not sustain a maritime lien when "the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party. * * * or for any other reason, the person ordering the * * * supplies, or other necessaries was without authority to bind the vessel therefor." Section 3; The Yankee, 233 Fed. 919, 922, 147 C.C.A. 593; The Oceana, 244 Fed. 80, 156 C.C.A. 508.

The evidence which was offered to prove that the supplies were furnished on the order of one in authority shows that while the actual orders were given by the stewards of the vessels respectively, they were filled and the supplies delivered at the instance and request of Charles H. St. Johns, the Vice-President and General Manager of the Washington-Southern Navigation Company, Inc. This was the corporation to which the "working of the charter party " had been assigned by the charterer according to the charter party terms, and to which "the management of the (vessels) at the port of supply was intrusted"; and St. Johns was the managing officer of the corporation. We find nothing in the evidence to indicate that the libellant "knew, or, by the exercise of reasonable diligence could have ascertained that because of the terms of the charter party * * * the person ordering the * * * supplies, or other necessaries, was without authority to bind the vessel."

The Yankee, 233 Fed. 919, 147 C.C.A. 593; The Oceana, 244 Fed. 80, 156 C.C.A. 508. On the contrary, the libellant was led to believe that the steamers belonged to the Washington-Southern Navigation Company, Inc. The libellant asked St. Johns whether the steamers belonged to his company and St. Johns replied that his company had purchased them. We are of opinion that on these facts the supplies were delivered on the order of one in authority within the meaning of the Act.

The remaining question is, whether the supplies were delivered to the vessels libeled. As there was no dispute about this, we find that the three essentials of a maritime lien under the Act of Congress of June 23, 1910, as stated by the court below in its opinion and as defined by the Supreme Court in Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 41 Sup. Ct. 1, have been met, and that, in consequence, the decrees below must be reversed and the libels reinstated.

The Muskegon.

Circuit Court of Appeals of the United States, Second Circuit, 1921.

275 Federal Reporter 348.

Hough, Circuit Judge. The events giving rise to this action occurred before the enactment of the Merchant Marine Act of 1920 and the cause is unaffected by the changes thereby made in the Lien Act of June 23, 1910 (36 Stat. 604 [Comp. St. §§ 7783-7787]). Libellants are a firm of master stevedores. The Muskegon is an American vessel, whose home port,is New York. She was under charter, and the charterers in her home port were loading cargo. These charterers themselves made a contract with libelants to do the stevedoring necessary to load the Muskegon; libelants performed the labor by and through their workmen, whom they paid; but charterers did not pay libelants' bill, who thereupon filed this libel in rem, which was dismissed by the lower court.

The whole case for appellants, rests on the assertion that under the act of 1910 this master stevedore's bill constitutes a lien against the vessel, because the statute provides (section 1) that "any person furnishing repairs, supplies, or other necessaries, including the use of dry dock, or marine railway, to a vessel," shall have a maritime lien therefor, and stevedoring should be included under the head of "other necessaries." Comp. St. § 7783.

It is no longer doubted that the service of loading and stowing a ship's cargo is maritime. Atlantic, etc., Co. v. Imbrovek, 234 U.S. 52, 61, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L.R.A. (N.S.) 1157. Clearly, therefore, out of the labor of a stevedore rendered to a ship elsewhere than in her home port, a maritime lien arises.

Whether there be any legal difference between the claim of a working stevedore for the reward of his own labor and that of a master stevedore or contractor for what is really the worker's wage, plus profit, is a matter we need not consider, and on which we express no opinion The Seguranca (D.C.) 58 Fed. 908.

It may be assumed, but not held, that these libelants rendered a maritime service for which in a port other than the home of the vessel they would have a lien by general maritime law, yet it remains clear that they have no lien in the home port unless it be conferred by the statute, and the only phrase in that statute on which they can rely is "other necessaries."

We adhere to the views concerning the purpose and general scope of the Federal Lien Act expressed in The Oceana, 244 Fed. 80, 156 C.C.A. 508, certiorari refused Morse Dry Dock & Repair Co. v. Conron Bros. Co., 245 U.S. 656, 38 Sup. Ct. 13, 62 L. Ed. 533,

and also to the ruling made in The Hatteras, 255 Fed. 518, 166 C.C.A. 586 in respect of the words "other necessaries" as sought to be applied to towage.

The reasoning of The J. Doherty (D.C.) 207 Fed. 997, 1000, as to the meaning of "necessaries," is as fatal to appellant's contention regarding stevedoring as it was in respect of towage before by the act of 1920 the word "towage" was specifically inserted. "Other necessaries" mean matters ejusdem generis with repairs and supplies, and that the charge of a master stevedore does not belong to that class is we think entirely plain.

To the full enjoyment and profitable occupation of a ship there are many services which are convenient, useful, and at times necessary; stevedoring is one of them, but is cannot be promoted into that class of claims, long described as "repairs and supplies" by force of the statute, unless the statute be deemed as intended to create a maritime lien in the home port for everything that gives a maritime lien abroad. No such intention can be discovered in the language of the act nor from the history thereof.

The case is most strongly put for appellant if it be supposed that the owner himself had in the home port enployed these libelants to do what they did. That act and the consequent service, would have been a maritime contract and a maritime service, but it would have given no maritime lien by general law, and none is created by the statute.

The decree appealed from is affirmed, with costs.

We have examined The Rupert City (D.C.) 213 Fed. 263, and observe that the stevedoring claim there considered (page 267) was for services rendered to a British vessel in the harbor of San Francisco, and do not think that the learned court intended to declare that stevedoring in the home port was within the act of 1910, or to differ with the construction of that statute announced in The Doherty, supra.

The South Coast

Supreme Court of the United States, 1920.

251 United States 519.

[The arguments of counsel are omitted.]

Mr. Justice Holmes delivered the opinion of the court.

This is a libel against the Steamer South Coast, belonging to the claimant, a California corporation, and registered in San Francisco, for necessary supplies furnished in San Pedro, California. The answer denies the authority of the master to bind the steamer. The bare vessel at the time was under charter to one Levick, the contract stipulating that Levick was to pay all charges and to save the owner harmless from all liens or expenses that it might be put to in consequence of such liens. There was also a provision that the owner might retake the vessel in case of failure of Levick to discharge within thirty days any debts which were liens upon it, and another for surrender of the vessel free of all liens upon Levick's failure to make certain payments. When the supplies were ordered representatives of the owner in San Pedro warned the libellant that the steamer was under charter and that he must not furnish the supplies on the credit of the vessel. He replied that he would not furnish them in any other way, but the reply does not affect the case because by the terms of the charter the master who ordered them, although appointed by the owner, was under the orders of Levick. It is agreed by both courts below that if the owner had power to prevent the attaching of a lien by its warning it had done so. Both courts however held that the charter gave the master power to create the lien. 233 Fed. Rep. 327. 247 Fed. Rep. 84. S.C. 159 C.C.A. 302.

By the Act of June 23, 1910, c. 373, § 1, 36 Stat. 604, a maritime lien is given for such supplies and by § 3 a presumption is declared that a master appointed by a charterer has authority from the owner to procure them. It is true that the act goes on that nothing in it shall be considered to give a lien where the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, or for any other reason, the person ordering the necessaries was without authority to bind the vessel. But the authority of the owner to prohibit or to speak was displaced, so far as the charter went, by that conferred upon the charterers, who became owners pro hac vice, and therefore, unless the charter excluded the master's power, the owner could not forbid its use. The charter-party recognizes that liens may be imposed by the charterers and allowed to stand for less than a month and there seems to be no sufficient

reason for supposing the words not to refer to all the ordinary maritime liens recognized by the law. The statute had given a lien for supplies in a domestic port and therefore had made that one of these ordinary liens. Therefore the charterer was assumed to have power to authorize the master to impose a lien in a domestic port, and if the assumption expressed in words was not equivalent to a grant of power, at least it cannot be taken to have excluded it. There was nothing from which the furnisher could have ascertained that the master did not have power to bind the ship.

Decree affirmed.

Mr. Justice McKenna, Mr. Justice Pitney and Mr. Justice Clarke dissent.

United States, Owner of the Steamships "Clio," "Mooseabee," "Fort Logan," and "Morganza," et al. v. Carver et al., Co-partners, Under the Firm Name of Baker, Carver, and Morrell.

Supreme Court of the United States, 1923.

260 United States 482.

Questions certified by the Circuit Court of Appeals, arising upon an appeal from a judgment of the District Court, in admiralty, upholding a claim of right to a maritime lien, in a suit in personam brought against the United States and the receiver of a ship corporation, under the Suits in Admiralty Act. . . .

[The arguments of counsel are omitted.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel in personam against the United States and the receiver of State Steamship Corporation, a company of the State of Deleware, bankrupt, to charge the United States for supplies furnished to the steamships Clio and Morganza. Act of March 9, 1920, c. 95, 41 Stat. 525. The United States owned the vessels, but they were in the possession of the corporation under charters by which the corporation was to pay all costs and expenses incident to the use and operation of the vessels, and "will not suffer nor permit to be continued any lien, encumbrance, or charge which has or might have priority over the title and interest of the owner in said vessel." It was stipulated further that in any event within fifteen days the charterer would make adequate provision for the satisfaction or discharge of every claim that might have priority over the title, &c. or would cause such vessel to be discharged from such lien in any event within fifteen days after it was imposed. Supplies or necessities were furnished to the Clio upon the orders of the corporation's port captain who was charged with the duty of procuring them. The libelants did not know any facts tending to show that the corporation did not own the vessel, and so far as appears made no inquiry or effort to ascertain what the facts might be. The case of the Morganza is similar except that before furnishing some of the supplies the libelant's agent who dealt with the corporation knew facts putting the libelants upon inquiry but preferred to avoid making it. The liability of the corporation is admitted. That of the vessels is asserted under the Act of June 23, 1910, c. 373, 36 Stat. 604, and the Ship Mortgage Act, being § 30 of the Merchant Marine Act, 1920; Act of June 5, 1920, c. 250, § 30, subsections P.Q. & R., 41 Stat. 988, 1000, 1005.

The questions certified are whether a maritime lien would have arisen against (1) the Clio or (2) the Morganza, if they had been

privately owned; (3) if yes, whether the United States is liable for the amount of what would have been the lien; and (4) whether the United States is liable for the personal indebtedness of the State Steamship Corporation for supplies in respect of which no maritime lien would have arisen if the vessel had been privately owned.

We take up first questions 1 and 2. The Act of 1910, by which the transactions with the Clio were governed, after enlarging the right to a maritime lien and providing who shall be presumed to have authority for the owner to procure supplies for the vessel, qualifies the whole in § 3 as follows: "but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor." We regard these words as too plain for argument. They do not allow the material-man to rest upon presumptions until he is put upon inquiry, they call upon him to inquire. To ascertain is to find out by investigation. If by investigation with reasonable diligence the material-man could have found out that the vessel was under charter, he was chargeable with notice that there was a charter; if in the same way he could have found out its terms he was chargeable with notice of its terms. In this case it would seem that there would have been no difficulty in finding out both. The Ship Mortgage Act of 1920 repeats the words of the Act of 1910.

But it is said that the charter-party if known would have shown that the master at least, if not the agent who ordered the supplies, had authority to impose a lien, since the charter-party contemplated the possibility of one being created and provided for its removal. The South Coast, 251 U.S. 519, is cited as establishing the position. But there is a sufficient difference in the language employed there and here to bring about a different result. In The South Coast the contract went no farther than to agree to discharge liens within a month. Here the primary undertaking was that "the charterers will not suffer nor permit to be continued any lien," &c. We read this as meaning will not suffer any lien nor permit the same to be continued. Naturally there are provisions for the removal of the lien if in spite of the primary undertaking one is imposed or claimed. But the primary undertaking is that a lien shall not be imposed. We are of opinion that the libellants got no lien upon the Clio, and a fortiori that the Morganza was free. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times. Therefore it is unnecessary to consider whether the libelants' argument is supported by the decisions to which they refer. The Yankee, sub nom. Rivers & Harbors Improvement Co. v. Latta, 243, U.S. 649. The Oceana, sub nom. Norse Dry Dock &

Repair Co. v. Conron Brothers Co., 245 U.S. 656.

As the libelants disclaim the contention that the United States is liable even if the vessels would not have been subject to a lien it is unnecessary to answer the fourth question. It is enough that the first and second are answered, No.

Answer to questions 1 and 2, No.

The J.C. Williams.

District Court of the United States, Southern District of New York, 1883.

15 Federal Reporter 558.

Brown, J. This cause, having been tried before a commissioner to whom it was referred, comes before me upon exceptions to his report in favor of the libelants for the sum of $4,150.10. The libelant is the receiver of Brett, Son & Co., who, in March, 1875, took a mortgage upon five-eighths of the bark, to secure $10,000 from John C. Williams, to whom they advanced that money to aid in the construction of the vessel. The bark was built at Shelbourne, Nova Scotia, and was a British vessel. At the time of the advances it was agreed that Brett, Son & Co., for their security, should have this mortgage, and also be the agents of the ship in New York.

The libel was filed in October, 1882, to recover a balance due to Brett, Son & Co. for various advances and payments on account of the ship from February 24 to May 31, 1882; and a supplementary libel was afterwards filed for additional charges and payments.

During several years after the bark was finished, Williams was in charge of her navigation as master and as owner of five-eighths, Brett, Son & Co. being her general agents in New York. Prior to the charges for which the libel is brought, however, Williams had left the vessel, and was succeeded by the first mate, Smith, as master, who is not a part owner; and the business of the bark remained under the management of Brett, Son & Co., as before. So far as appears from the evidence, the bark seems to have run from New York to various ports and back, and the entire business management, procuring charters, attending to her outfit, repairs, payment of bills, and the collection of freights, seems to have been wholly in the hands of Brett, Son & Co. The owners of the other three-eighths, who appear as claimants of the vessel, received their share of dividends from Brett, Son & Co. as profits were made, while the proportion due to Williams, as owner of the remaining five-eighths, was applied on the mortgage debt.

Upon the hearing before the commissioner, some proof in regard to various items having been given, the correctness of the libelant's charges and credits were admitted by the claimants, reserving only the question whether they constituted a maritime lien which could be enforced in rem against the vessel.

If the situation of Brett, Son & Co., and their relation to the ship and her owners, were merely that of general agents, or ship's husband, making the advances here sought to be recovered merely in the ordinary course of their duties as such, I should

be compelled to hold upon the authorities, that they have no lien upon the ship therefor, although the owners would be personally liable to them for their several shares. In such cases the agent or ship's husband, is presumed to act upon the personal responsibility of the owners only. He represents them in advancing moneys or in paying charges. His act is their act, and, ordinarily, must be presumed to be designed to discharge the ship from burdens, not to charge her, or to retain liens upon her, through any presumed equitable assignment or subrogation. The Larch, 2 Curt. 427; The Sarah J. Weed, 2 Low. 555, 562; The Tangier, 2 Low. 7. But in this case the agency of the vessel was evidently attendant upon the mortgage, and designed as a further security for the payment of the money advanced. When Capt. Williams left the vessel, no considerable part of the mortgage had been paid, and from that time, at least, Brett, Son & Co. had exclusive management of the business of the ship for the purpose of working off the mortgage debt.

Under such circumstances, it seems to me that it cannot be presumed that the advances and payments made by Brett, Son & Co., in the business of the ship, were made upon the personal credit of the owner. On the contrary, they were charges and payments necessarily made by Brett, Son & Co. in their endeavor to realize something to the credit of their mortgage on five-eighths of the vessel, and, in my judgment, should be deemed to be made upon the credit of the vessel. This it seems to me, would be clearly so, as respects Williams, owner of the five-eighths, and as respects the three-eighths owned by the claimants. I think the same inference should be drawn from the fact that the claimants clearly acquiesced in the management of the vessel by Brett, Son & Co., and must have known the circumstances, their situation as mortgagees, and the object of the management of the ship by them. As all these payments and advances were made with the claimants' knowledge and acquiescence, they would be, clearly, personally liable to Brett, Son & Co. for their shares of these necessary payments and disbursements. To them it does not appear to have been of any practical account whether the advances, as respects the three-eighths, are considered to have been made upon the credit of the vessel or upon their own personal credit. The former was clearly the case as to the five-eighths, and from that, I think, a similar intention should be inferred as to the three-eighths.

All the evidence points to the credit of the vessel and the recovery of the mortgage debt as the grounds of all the advances and payments by Brett, Son & Co.; and such, I think, must, in this case, be considered as the understanding of all the parties. Liens arising in the course of the business of the ship in favor of other persons would have priority over the mortgage lien, and in paying the amounts of such prior liens for the protection of their mortgage interest, Brett, Son & Co. should be deemed equitably

subrogated thereto. The Cabot, Abb. Adm. 150; The Tangier, 2 Low. 7; The Sarah J. Weed, Id. 562.

For these reasons I think the present case should be held to be an exception to the ordinary rule as respects a ship's husband or general agent, and that the claim of a maritime lien by Brett, Son & Co. should be sustained for such necessary charges and payments for supplies or other necessaries furnished in the business of the ship as would have constituted liens if furnished by other persons, as being made in this case upon the credit of the vessel, and upon an equitable subrogation to the liens paid. Their own commissions, however, on the charter procured by them, should not be allowed as a maritime lien, nor commissions on their own advances, amounting together to $243.90. With this deduction the report should be confirmed, and a decree entered accordingly for the libelant, with costs.

The Alcalde.

District Court of the United States, District of Washington, 1904.

132 Federal Reporter 576.

[The case was a libel in rem for money advanced to the master at the termination of the voyage and by him applied to the payment of claims against the ship, including the payment of his own wages.]

Hanford, District Judge. . . . This case must be determined by application of the general rule which prescribes the conditions essential to a valid maritime lien in favor of a materialman. The libelant is a creditor by reason of having advanced money on the credit of the Alcalde to her captain, which money was all used to disburse the ship. A lender of money for the benefit of a ship occupies the same position as other creditors who supply ship's stores, or materials required for repairs; that is to say, his claim to a lien as security for his debt must be grounded upon the peculiar facts which constitute the basis of all materialmen's liens in the maritime law. If the combination of requisite facts is complete, the money lender acquires a valid lien. Thomas v. Osborn, 19 How. 22, 15 L. Ed. 534; The Grapeshot, 9 Wall. 129, 19 L. Ed. 651. On the other hand, the equitable rule of subrogation does not ipso jure transfer existing liens to a mere volunteer who advances money to disburse a ship, when there is no stress of necessity. A maritime lien is the offspring of necessity; its purpose is to give wings and legs to commerce; hence the necessity to which the law pays regard has reference to the employment of the vessel. Maritime liens are given as a basis of credit to enable the master of a ship, when her owner is absent, to secure means to make his vessel seaworthy, so that she may proceed on her voyage without detention for lack of necessaries. The St. Jago de Cuba, 9 Wheat. 416, 6 L. Ed. 122; Hubbard v. Roach (C.C.) 2 Fed. 393; The Emily B. Souder, 17 Wall. 666, 21 L. Ed. 683; The Robert Dollar (D.C.) 115 Fed. 220. In the case at hand the libelant advanced money upon the request of Capt. White after the appointment of a receiver by a court of equity to take the vessel into legal custody. Whether the receiver had lawful authority to take the vessel out of the captain's custody is a serious question, which I will avoid by assuming that Capt. White continued to be master with all the authority of a master of a vessel in a foreign port, until he voluntarily relinquished his command to the receiver, after having obtained from the libelant the money which he used in the manner above stated. I will also avoid discussion of the question whether the captain had a lien for the wages due him under the provisions of the statute of Washington, in which state he was employed and installed in the position of master, and assume that he did have a lien, and that all the money advanced by the libelant was used by the captain to

satisfy demands which were existing liens upon the Alcalde. Having assumed so much in favor of the libelant, there remains yet to be considered only the question whether at the time the money was advanced by the libelant there existed a necessity for immediate use of the money which could justify the libelant in making a loan to the master upon the credit of the vessel. The Alcalde was in the port to which she had been dispatched to deliver a cargo, and, so far as the evidence discloses, it was her final port of discharge; that is to say, she was not under charter or contract to make another voyage, and in fact no other voyage was made with Capt. White as master. He borrowed the money to pay what was due to himself and to release himself from obligations, without having in contemplation another voyage. The money was not used, nor intended to be used, to clear the vessel from restraint by legal process, and she was voluntarily delivered up to a representative of legal authority. There was ample time to have communicated with the owners, and to have sued them, without exposing the vessel to peril, and without causing delay in her employment. The kind of necessity essential to the creation of a maritime lien was entirely absent, and the libelant did not acquire a lien, because in the absence of necessity, the master had no authority to pledge the vessel.

The claimant has filed a cross-libel for damages caused by the attachment and detention of the vessel under process in this case, but I consider that in prosecuting this case the libelant has acted in good faith, under the advice of learned counsel, and that the process of the court has not been abused in such manner as to entitle the claimant to demurrage or compensation other than the costs legitimately taxable. The Alex Gibson (D.C.) 44 Fed. 371. Therefore the cross-libel will be dismissed, and I direct that a decree be entered in favor of the claimant for only the taxable costs.

The Cimbria.

District Court of the United States, District of New Jersey.
1914.

214 Federal Reporter 131.

Rellstab, District Judge. Libelant was a stockholder and director of the New York & Rockaway Beach Transportation Company, the owner of the Cimbria. He was familiar with the financial condition and the business of such company and participated in its management. He had a desk in the company's office, and carried on no other business during the period covered by his claim. Some of the company's moneys were mingled with his own, deposited by him in his own bank account, and used by him to pay some of the company's bills. His libel alleges that there is due him the sum of $784.33, for which he claims a maritime lien. Of this sum, $146 is for supplies furnished to the boat. The remainder, $638.33 is the aggregate of moneys advanced by him to pay some of the company's indebtedness, incurred in repairing such vessel and furnishing it with supplies.

The commissioner, acting under a stipulation filed in the cause that he should report not only as to the amount due libelant, but also whether he was entitled to a maritime lien against such vessel, reported that he was so entitled for the first named sum, but not for any of the items totaling that last mentioned. With reference to the latter, he said:

"I am satisfied that an officer of a company owning a vessel, standing in the position occupied by this libelant, does not have a maritime lien for the amounts advanced by him for the purpose of the operation of a vessel; also, that this was a mere advance of money by one in authority, rather than the advances of one on the request of one in authority having the right to bind the ship. The New York & Rockaway Beach Transportation Company could not file a claim for money expended by it in paying the debts of the steamer, and on the same line of reasoning I think that a managing director cannot have a lien for funds advanced by his personal check issued to keep the vessel in operation, and this especially in view of the fact that Mr. Gallaher had on at least one occasion the moneys of the company deposited in his personal bank account, and had advanced them for the company's purposes without apparently having rendered any account of them to the company."

A maritime lien does not exist in favor of the owner or any other person who does not render services or furnish supplies to and on the credit of the vessel. It depends upon a tacit hypothecation, implied in law; the theory being that the ship's necessities,

in the absence of the owner's personal credit, can only be relieved by pledging her, and therefore excludes owners.

Whether a part owner can, in any circumstances, obtain a maritime lien against his partner, is not settled, the authorities being in conflict; but it is clear, on principle as well as authority, that as against a stranger to the title, having a maritime lien, no such lien can be enforced by one who, as part owner, is himself liable for the debt underlying such lien. Petrie v. The Steam Tug Coal Bluff No. 2 (D.C.) No. 2 (D.C.) 3 Fed. 531; The Benton, 3 Fed. Cas. 256, No. 1,334.

Maritime liens are an exception to the rule which disfavors secret liens. This exception, when limited to strangers to the title, has sound public policy for its support. To extend the exception, and allow the owner and those standing in privity with him to have a secret lien upon the vessel, would open the door to fraud and collusion, be contrary to such policy, and tend to destroy the very protection which the exception is designed to secure, viz., that strangers to the title of the vessel who, by the rendition of services and the furnishing of supplies on its credit, give it means and opportunity to fulfill the purpose of its being, should have the vessel in its entirety as security. A stockholder of a corporation owning a vessel, while not holding the legal title, is in essence a part owner of such vessel. See The Queen of St. Johns (C.C.) 31 Fed. 24. In the present case, libelant was more than a mere stockholder. He was a director and actively engaged in transacting the business, involving both the company's finances and its use of the vessel. The depositing of the company's funds in his own personal bank account, and his checking it out in payment of the company's bills, prove such a close identification of himself with the company's affairs as to create the presumption that in his subsequent sale of merchandise to the company, and his advances to pay their bills, which are now asserted as maritime liens, he was looking, not to the boat, but exclusively to the company, from whose receipts he expected to reimburse himself. That a fortuitous happening -- collision-- frustrated this expectation, is no reason why he should be permitted to transfer the credit to the boat, to the prejudice of strangers who have strict maritime liens. As to these, libelant stands in the place of the owner; and, as against such lienors, his claim must be postponed, whatever may be its merit or standing against the owner, and regardless of whether it would be a lien against "remnants and surplus." The conclusion here reached, while contrary to that reached in The City of Camden (D.C.) 147 Fed. 847, is fully supported by The Murphy Tugs (D.C.) 28 Fed. 429, and The Queen of St. Johns (C.C.) 31 Fed. 24, which, squaring more with my own judgment, I am constrained to follow.

The commissioner has distinguished between the advances made by libelant and the value of the goods furnished by him, allowing a lien for the latter; but as, in my judgment, the libelant must be alligned with the owner, and not with strangers to the title, in the matter of his dealings with the company and its vessel, I am constrained to disallow his claim for supplies furnished, as well as that for advances. I fail to see how he can be entitled to one and not the other; or, rather, how he can be said not to have a lien for the one and still have one for the other. In parting with his money in making advances, he parted with his property just as much as when he turned over the supplies, and his relation to the company and the vessel in selling them the supplies is no different from his relation in advancing money. In both instances he did it as one having an interest in the company, its property, and enterprises, and he must be held to have dealt exclusively on the credit of the owner; and, while against it he is entitled to be reimbursed, he is not entitled to a maritime lien therefor as against strangers to the title who admittedly have maritime liens for the amounts due them.

The conclusions of the commissioner as to the merchandise sold to the company must be disaffirmed, and those relating to advances affirmed. A decree may be entered in conformity with this opinion.

The Gloucester.

District Court of the United States, District of Massachusetts, 1923.

285 Federal Reporter 579

Morton, District Judge. The commissioner has disallowed the claims of the Gorton-Pew Fisheries Company (which I shall refer to as the Fisheries Company), the Gorton-Pew Vessels Company (which I shall refer to as the Vessels Company), and the Fort Wharf Company, and the present questions are whether he was right in so doing.

As to the Fort Wharf Company, its claim is not now insisted on, and the commissioner's action is confirmed.

As to the other two claims, the commissioner found that the supplies and repairs had been furnished as claimed. While he makes no express finding that the prices charged were reasonable, I infer from the report that there was no contention to the contrary, and that such was the fact. He found and ruled that no maritime lien existed because of the relation in which those companies stood to the Cape Ann Otter Trawler Company, the owner of the Gloucester. Taking first the bill of the Fisheries Company, it appears that the company owned $25,000 out of $186,200 capital stock in the trawler company. Its president, B.A. Smith, was also a stockholder in the trawler company and for a time its financial officer, its books being kept in his office, and the directors of the two companies were to some extent identical. The actual management of the trawler company was, however, in the hands of Capt. Spinney, who was not in any way connected with the Fisheries Company and does not appear to have been coerced or unduly influenced by it or its officers in his management of the trawler company, buying and selling for it where he thought best. In the Fisheries Company "T.J. Carroll, vice president and manager, was the moving spirit" (Report, p. 11). He took no active part in the management of the trawler company. The Fisheries Company dealt publicly in ship stores and supplies, and sold to many vessels besides those of the Gorton-Pew fleet. There is no finding or suggestion in the report that the Fisheries Company or its managers took unfair advantage of their position as stockholders or officers in the trawler company, and there appears to be nothing really inequitable or unfair to other claimants in allowing the bill of the Fisheries Company. My inference from the report is that the supplies were furnished without any special understanding as to credit, in the same general way as supplies were furnished to vessels, other than the Gorton-Pew vessels, which bought from the Fisheries Company, and under circumstances which would ordinarily create a maritime lien.

The Commissioner disallowed the bill on the ground that, as the Fisheries Company was a stockholder in the trawler company and the officers of the two companies were to some extent identical, there was a presumption that the sales were made on the credit of the trawler company and not of the vessel, and that, as no evidence had been offered to rebut this presumption, it controlled the decision. He relied in so doing on the analogy furnished by cases in which part owners of vessels who had sold supplies to them were held not entitled to a maritime lien. The Fisheries Company and Smith can be considered part owners in the Gloucester only by disregarding the corporate entity of the trawler company, which was in law and in fact her real owner. When a corporate form of organization has been resorted to for fraudulent purposes, courts under some circumstances disregard it and look to the individuals behind it; but the general rule is that a corporation is a separate entity distinct from its stockholders. In the present case there was no identity of buyer and seller, either theoretical or actual; the officers of the Fisheries Company took no part in the actual management of the Gloucester, and the persons who bought supplies for her were not connected with the Fisheries Company, and, as above stated, the transactions do not appear to have been unfair or even suspicious.

To say that the rights of the Fisheries Company in an honest and ordinary transaction are diminished, and for practical purposes lost, because of the relations between it and the trawler company, would be a result which is plainly unjust and should not be reached unless unavoidable under the decided cases. I do not think that the cases lay down so strict a rule. As the commissioner points out, Judge Brown said (in The Murphy Tugs [D. C.] 28 Fed. 429):

"The mere fact that he [the person claiming the lien] was a director and stockholder would [not] necessarily prevent his contracting with the company, nor from acquiring a lien upon the property."

In The Puritan [D.C.] 258 Fed. 271 it was the fact that the libelant was agent of the vessel, as well as a stockholder in the company owning her, which created the doubt. That decision is in no way inconsistent with Judge Brown's opinion. Without undertaking to analyze all the cases which have been relied on against this claim -- the principal ones are referred to in the footnote at the end -- I think it will be found that, where a party who would otherwise have a maritime lien has been held not entitled to it because of the relation in which he stood to the vessel, he was either (1) a real part owner of her, or (2) occupied a fiduciary relation towards her and her owners, or (3) dealt with himself on her account. Even within these classes the lien has under peculiar circumstances occasionally been allowed.

In other words, the lien is really denied because of insuperable legal difficulties in the enforcement of it, or because -- on grounds similar to estoppel -- to recognize it would be inequitable to other claimants. Neither of those obstacles exists in the present case. The facts stated in the report do not, therefore, seem to me sufficient ground for holding that there is a presumption against the lien of the Fisheries Company and that the credit was extended by it to the trawler company and not to the vessel nor for denying to the Fisheries Company the usual rights accorded by statute to those furnishing supplies and repairs to vessels. The claim of the Fisheries Company will therefore be allowed.

The claim of the Vessels Company was disallowed by the commissioner for the reason that all the stock of the Vessels Company was owned by the Fisheries Company, and it was therefore, in his opinion, to be regarded, for the purposes of this suit, as the same concern. The Vessels Company owned no stock in the trawler company. This claim is no more open to objection, to say the least, than the claim of the Fisheries Company. What has been said with regard to the latter claim applies also to the objections made against this one. It may be allowed.

A decree may be entered, confirming the commissioner's report, except as herein modified.

Section 3.

Priorities Among Maritime Liens.

The Gustaf.

High Court of Admiralty of Great Britain, 1862.

Lushington 506.

The barque Gustaf, belonging to the port of Nystad, in Russian Finland, when on a voyage to London, laden with timber, on the 21st of September, 1861, struck on the Shipwash Sand, and was assisted by the crews of two smacks into Harwich. On the 9th of October the vessel was placed in the yard of a shipwright, and there continued under repairs, the crew remaining on board. On the 5th of February, 1862, the vessel, whilst still in the shipwright's yard, was arrested by the salvors. Subsequently six other actions were entered against the ship; one by the master, and one by the crew, claiming wages up to the 22nd of February, and four actions for necessaries supplied to the vessel in Harwich, including an action by the shipwright for the price of the repairs. The proceedings in all the actions were in poenam: the ship was sold, and the proceeds were brought into Court.

On the 29th of April, 1862, the Court awarded to the salvors the sum of 78 l. 3s. 4d. in respect of services to the ship: there was no salvage due on freight, the voyage having been abandoned. On the same day the Court pronounced for the other claims against the ship; and the proceeds of the ship being insufficient to meet them all, the question arose in what order the claims should be paid. . . .

The arguments of counsel are omitted.

On the 27th of May, Dr. Lushington gave judgment.

The present question, what claims shall be allowed to take preference of the lien by common law of the shipwright, who retains the ship in his possession until the Court of Admiralty lays its hand upon it and orders it to be sold, is not without difficulty. I am not aware that before I occupied this chair, any such question ever arose. Indeed, I may confidently say that none such ever did arise, and consequently I have no authority to resort to, beyond the proposition which is subject to no doubt - that certain liens, such as salvage and wages, attach to the ship.

On consideration, I think that, save in cases which may appear to have a paramount claim, the right of a shipwright - the common law lien - ought not to be infringed upon. The principle which I shall adopt will be to give precedence to such liens only as existed when the ship was put into the yard of the shipwright. I think it may not unreasonably be presumed that he took the ship into his yard cum onere, with the existing obligations then complete and due.

The first of these obligations I hold to be the claim for salvage; for, beyond all doubt, from the earliest times, salvage has been deemed a lien on the ship. Without the exertions of the salvors, indeed, the ship itself might never have entered into the shipwright's yard. I therefore shall hold the salvors to be intitled to priority of payment.

The next claim for which there was an undoubted lien on the ship when taken into the yard was the mariners' wages; that is to say, the wages up to that time, with the ordinary allowance for the mariners' return to their own country. But I am not prepared to say that, as against the claim of the shipwright, there was a continuing lien for further wages whilst the ship was in the yard, and therefore the shipwright's claim will take precedence of all such wages.

With regard to the claims for necessaries, I am of opinion that they cannot compete with the shipwright's lien. As I have said, no claim not perfected at the time the ship entered the yard can stand against the shipwright; claims for necessaries moreover do not possess, ab origine, a lien; but carry only a statutory remedy against the res, which is essentially different.

I think it right to add, that the chief difficulty I have experienced is in satisfying my own mind that any claim at all could compete with the common law lien, which is, that the shipwright may hold till paid, or until possession is forcibly demanded by this Court. It was under this impression that, in the case of the Perseverante, I held the common law right of lien to prevail against all claims, but that case was not fully argued. It was a decision in Chambers; and, moreover, the claims then made were, for the greater part, utterly inadmissible. . . .

The Jerusalem, Catara.

Circuit Court of the United States, First Circuit, 1815.

2 Gallison 345.

The Greek ship Jerusalem having been libelled in a case of bottomry, and sold under an interlocutory order of this Court, an act on petition was interposed on behalf of Henry Dewhurst, praying an allowance out of the proceeds, in preference to the bottomry interest, of a sum due him for repairs of the ship since her arrival in the port of Boston. . . .

The arguments of counsel are omitted.

Story, J., delivered the opinion of the Court. . . .

In an omitted part of the opinion Justice Story sustained the jurisdiction of admiralty over suits by material men and the petitioner's right to a lien for repairs on a foreign ship.

If then the repairs in this case were a lien on the ship, it remains to consider, whether they constitute a privileged lien, entitled to a preference over a bottomry interest; for the proceeds now in court are insufficient to answer both claims. In point of time the bottomry interest first attached, and the right became absolute by a completion of the voyage, before the repairs were made. Upon general principles, then, the rule would seem to apply, qui prior est tempore, potior est jure. But it is to be considered, that the repairs were indispensable for the security of the ship, and actually increased her value. They are, therefore, not like a dry lien by way of mortgage or other collateral title. The case is more analogous to that of a second bottomry bond, or the lien of seamen's wages, which have always been held to have a priority of claim, although posterior in time, to the first bottomry bond.

Let a decree be entered for payment of the sum claimed by the petitioner out of the proceeds of the sale. . . .

The Dora.

District Court of the United States, Eastern District of Louisiana, 1887.

34 Federal Reporter 343.

Billings, J. These three causes consolidated and tried as one, present the following state of facts: On the 10th and 11th days of March, 1886, the Austrian ship Dora was at Pensacola, Fla., laden for a voyage to Genoa, Italy, with a cargo of lumber. Having need of money for disbursements, and being without funds, the master, made and delivered two instruments, - the one, for 6,000 francs, on March 10th; and the other, for 617 pounds sterling, upon March 11th. The tenor of these instruments was that the master, for necessary disbursements of the vessel, pledged the vessel and freight for the payment of the amount, expressed to be made 10 days after the arrival of the vessel at the port of destination, any other draft or obligation to be secondary. On March 14th the vessel set sail on her voyage, and proceeded to sea. She encountered rough weather, and sprung aleak. The master, after consultation with the other officers, to save the vessel and the residue of the cargo, caused a jettison to be made of a portion of the lumber, and, for safety of life, vessel, and cargo, determined to and did turn aside from his voyage, and seek New Orleans as a port of refuge, at which port she arrived on March 24th. On same day the Austrian consul appointed surveyors, who on 29th made an examination, and ordered cargo to be unladen, to allow of further survey. The cargo was unloaded between March 31st and April 22d. On April 29th the surveyors recommended that the vessel be condemned and sold. The master was about to have the vessel sold, when, on May 18th, the libel in the first of the causes was filed. Upon her arrival the vessel had been placed in the hands of J. A. Cosulich & Co., who had made the disbursements, and afterwards libeled her in the third suit. These libelants knew the owner of the vessel, and that he was a man of wealth. There is no other evidence that the disbursements were not made upon their reliance upon the vessel and the cargo for the amounts respectively required for them. Messrs. Cosulich & Co. advanced in all the sum of $3,206.88. A general average was adjusted of the loss arising by the jettison, and the expenditures at this the port of refuge; and for the part of this loss and these expenditures, put by the adjustment upon the ship, claim is made by Cosulich & Co. upon the vessel and its proceeds. The vessel was sold, and brought $2,400, which is in the registry of the court. The questions are as to the validity and priority of these alleged claims upon the ship.

First. What is the character of those two hypothecations made at Pensacola? The proctors for those who hold them contend that they are bottomry instruments. Bottomry is defined to be a maritime

contract by which a ship (or bottom) is hypothecated in security for money borrowed for the purposes of her voyage, under the condition that, if the ship arrive at the port of her destination, the borrower, personally, as well as the ship, shall be liable for the repayment of the loan, together with such premium thereon as may have been agreed on; but that, if the ship be lost, the lender shall have no claim against the borrower, either for the sum advanced or the premium, (which is often termed "maritime interest", since it may be fixed without necessary limit from the legal rate of interest in the country where the loan is made, or where it is to be paid.) The earlier bottomry contracts were executed under seal, and contained a special clause renouncing all claim for repayment of the loan, unless the ship arrived at her port of destination. The later usage has dispensed with the seal.

As to the absence of the old clause of renunciation of claim of repayment unless the ship arrived: In Simonds v. Hodgson, 3 Barn. & Adol. 50, the court of king's bench, presided over by Lord Tenterden, C. J., reversing the judgment of the common pleas, (6 Bing. 114), held that where from the whole instrument it was manifest that the lender takes upon himself the peril of the voyage, the instrument is one of bottomry. In The Nelson, 1 Hagg. Adm. 169, Lord Stowell held that when the instrument simply provided that "the money was to be paid at a certain time after the arrival of the ship at her port"; that that was a sufficient description of a sea risk, and made the instrument one of bottomry. I consider it to be settled by authority that these instruments have the validity and force of bottomry bonds.

Second. As to their rank with reference to each other. The fact appears to be that those obligations, though dated one one day, and the other the next day, were for moneys expended during the same period, and to relieve the same necessity of the ship. In The Virgin, 8 Pet. 551, the court say, it is the practice to execute the bond after the money has been furnished on an agreement for a bottomry, as the precise amount cannot sooner be ascertained. It is settled law that the holder of a bottomry bond must show that there was a necessity for the hypothecation, and that a bottomry bond may be good for a portion of the loan, and bad for another portion. It would follow that the priority must be determined according to the necessity at the time of the advances, and, as the advances were contemporaneous, and for a single necessity, the obligations must rank as of the same date.

Third. There remains the question as to the rank of these bonds considered as one obligation, and the claims of Cosulich & Co. for their advances at this port. A study of the elements and grounds of the apportionment made by the adjusters shows this: That before the case came into the hands of the proctors for the ship's agents at this port, they had caused a general average to be made, to which the owners of the cargo had submitted, and their proportion of which they had paid. There is a further question as to

expenditures in this port by the ship's agents, not included in the general average, amounting to #346.31. I shall first consider the question as if the lien upon the proceeds of the ship arose from a general average. The elements which make up the total which is apportioned are: $128.40, value of the cargo jettisoned; $193.34, the value of the yawl and tackle of the ship thrown overboard and destroyed to save cargo; and upwards of $6,000, expended by the ship's agents here. This total is apportioned upon cargo valued at $8,686.40, and one-half value of vessel, making $1,884.17. So that the chief question strictly is as to the right to enforce a lien against the bottomry obligations arising from expenditures made by the ship through its agents in a foreign port, a large portion of which has been satisfied by the owners of the cargo. As to the amount of the cargo jettisoned, the question is as to the validity and effect of a general average as against the bottomry holders. The general doctrine as laid down by the text writers, and as concurred in by the judges, is that money loaned upon bottomry is not affected by average or salvage. This language has led to some perlexity. In Oologaardt v. The Anna, in the United States district court in Rhode Island, reported in 9 Amer. Law Reg. (N.S.) 475, the court, after stating four reasons in favor of the claim of the libelants, which was for the enforcement of a claim for bottomry money against a general average, maintains libelant's claim. But I think it fair to infer that the court held that no general average could operate against bottomry. But this case stands alone as an express adjudication of that conclusion. In Cargo ex Galam, Brown & L. (1863-65) p. 184, the court interpreted this often-quoted maxim as to bottomry obligations not being liable to average, and held it was true only as between the owner of the thing hypothecated and the owner of the bottomry bond; but that, as between the holder of the bottomry bond and those whose lien arises in respect of services by which the thing hypothecated had been benefited, this maxim did not hold. This case maintained the lien arising from a general average for rescuing a portion of the cargo against the ship and rest of the cargo, as having a priority over a former respondentia. There can be no doubt but that this last decision is based upon a correct appreciation of the subject of maritime liens, and is correct. In Cope v. Dock Co., 10 Fed. Rep. 142, 144, is given the reason for maritime liens upon ships, as follows:

"The ship and all things pertaining to it are, in the law of admiralty, so far as moneyed responsibility is concerned, clothed with personality. Those who repair her, or loan money upon her, or equip or man her, or who work for her, those who are injured by her, and those who save her, may look to her for judgment as the debtor. The reason for this is that ships are often distant far from home and their owners, and commerce was vastly facilitated, and the interest of all concerned therein vastly promoted, by their being endowed by law with the attributes or faculties of a personal debtor. This reason is the origin of the whole doctrine of maritime liens; and by this reason maritime liens are to be ascertained and measured and ranked."

Whoever lends money upon a bottomry obligation for the ordinary transactions of her voyage, has a lien upon the vessel which outranks all lienholders, save the mariners for their wages. But where maritime services or sacrifices or expenditures are rendered necessary which carry with them maritime liens, the holder of the bottomry bond, like any other mortgagee or pledgee, has his conditional interest burdened precisely as if he were to that extent an owner. Indeed, the bottomry holder can be no more than absolute owner, so far as third persons are concerned. To hold any more restricted doctrine would prejudice the interests of the bottomry holder himself. It is for his interest as well as for that of all other absolute or conditional owners that the whole should be saved by a sacrifice of a part, and that the whole thus saved should contribute to make good the sacrifice, and that salvors and all other who render benefits which save or render available the bottom pledged to him, should have a lien upon that bottom, even against him. See Williams & B. Adm. Jur. 64, 65; and Macl. Shipp. 702-705. I think that, upon reason and authority, the general average should be paid before the bottomry bonds. The transactions out of which the general average arose were subsequent to these bonds, and aided in providing and making available the bottom which these bonds contingently represented.

But it is urged by the learned proctors for the bottomry that the general average does not carry with it any maritime lien which can subject the ship to admiralty jurisdiction. It will be conceded that all jurists have held that the general average carried with it a lien, either at common law or in admiralty. Those who, under certain circumstances, have denied that it constituted a privilege enforceable in the courts of admiralty have admitted that it gave a lien which was good in the common-law courts. This would be sufficient to dispose of this point in favor of the claimants as to the jettison and later disbursements. The three consolidated cases may be treated as one case initiated by the bottomry holders, and, the res being in the possession of the court, the lienholders other than those of an admiralty character might be decreed to be satisfied out of the res or its proceeds. This is the point decided in The Lottawanna, 21 Wall. 558, 581, 582. But the weight of authority is in favor of the general average in this case carrying with it such a lien as would of itself give and maintain admiralty jurisdiction. It would be idle to review all the cases in which the question has been passed upon. It may be said that in England this lien is treated as purely of a common-law character; while the weight of American authorities is decidedly in favor of its carrying an admiralty lien capable of being enforced in a proceeding in rem in a court of admiralty. Nor is it necessary to examine the earlier decisions in the United States supreme court bearing upon this subject, because this precise question was presented to that court in Nemours v. Vance 19 How. 162, 171. It was there held that the owner of a cargo jettisoned has a maritime lien on the vessel for the contributory share due from the vessel on an adjustment of a general average,

which lien may be enforced by a proceeding in rem in the admiralty.

Lastly, as to the claim of Cosulich & Co. for the $362 expended by them as the ship's agents, after she was brought into this port, and which was not included in the general average. For the most part, or to the extent of a great part, these expenditures were made for the preservation of the ship, and, after she was condemned, to place her in a condition where she could be sold as a condemned vessel. They were therefore expenditures made in a foreign port, which tended directly to enable the bottomry-men to realize out of the vessel in a port where she had to be sold. Those which are valid against the ship rank before the bottomry holders, precisely as would the expenses of an auctioneer in making the sale; they were a necessity or there could have been no realizing out of the vessel for the bondholder. There is a series of cases in which the supreme court of the United States have defined the liens of those who expend moneys upon ships in foreign parts, which, in their own language, have "had the effect to place these liens upon a more substantial footing". Those decisions maintain the general doctrine that expenditure which benefits the res creates a lien. These cases are The Grape-Shot, 9 Wall. 129; The Lulu, 10 Wall. 192; The Patapsco, 13 Wall. 329; The Emily Souder, 17 Wall. 666. Those cases also dispose of the point taken that, because the parties making the expenditures know the owners, and know them to be persons of wealth, that therefore they gave the credit to the owners, and not to the ship; for they hold, among other propositions, (Patapsco, 13 Wall. 334,) that the burden of displacing the lien from the vessel, where expenditures were necessary, was upon the claimants. In that case the charge upon the books of the libelants was against the owner personally, and still the court held the credit was given to the vessel. The conclusion is that Cosulich & Co, must first be paid the amount adjusted by the general average as the contributory share of the vessel's loss and expense, viz., $1,308.40, and for such portion of the expenditures of $346 as were necessary in order to preserve the vessel, (and to ascertain these items there may be a reference). The balance of the proceeds must go to the holders of the two bottomry obligations pro rata.

The J. W. Tucker.

District Court of the United States, Southern District of New York, 1884.

20 Federal Reporter 129.

On December 12, 1883, the canal-boat J. W. Tucker was libeled in this court by David Cox, and in that proceeding she was subsequently sold. After satisfying the amount due on that libel with costs, the sum of $206.23 remained, which was deposited in the registry of the court. Prior to the sale the petitioner Stillman filed his libel against the boat on the twenty-seventh of December, 1883; and on the twenty-second day of January following, the petitioner Dentz filed her petition against the same; both claiming maritime liens on the boat and its proceeds. The claim of Stillman amounts to $398.90 for various towage services rendered to the canal-boat on the Connecticut river, between Saybrook, New Haven, Middletown, and Hartford, during each month from April 9, 1883, to November,2, 1883. The claim of the petitioner Dentz is for a balance of $340 for towage services during each month from May to November 6, 1883, between Jersey City, Saybrook, and New Haven, or Greenpoint. The claims for towage services rendered by each were in the usual course of the business of the canal-boat upon her trips from Jersey City to the points upon the Connecticut river above named and back. The money in the registry being insufficient to pay the claim of either in full, the libelant Stillman claims the whole amount on the ground that the boat was first libeled and attached in his suit. . . .

Brown, J. The claim of the libelant Stillman presents in its simplest form the question whether, as between maritime liens of the same rank, priority is to be given to that on which the libel is first filed and the vessel first arrested, without regard to the dates at which the liens respectively accrued. Such was the rule declared in this district in the case of The Triumph, (1841), 2 Blatchf. 433, note, and The Globe, Id. 433, (1852), and which has been more or less followed since. The principle on which this rule was based, in the language of those cases, is that a maritime lien "is, in reality, only a privilege to arrest the vessel for a debt which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment." Upon this view of the nature of a maritime lien, it is obvious that the parties first attaching the vessel must necessarily have a prior right. But this view of the nature of maritime liens, which is the foundation of the rule in question, has long since been superseded. In the case of The Young Mechanic, 3 Ware, 85, Ware, J., defines it as "a jus in re, a proprietory interest in the thing which may be enforced directly against the thing itself by a libel in rem, in whosesoever possession it may be, and to whomsoever the general title may be transferred." The subject was elaborately considered by Curtis, J., on appeal in the same case, 2 Curt. 404. The

definition of maritime liens, as stated by Ware, J., was affirmed, and the view of the nature of such liens, as expressed in the case of The Triumph, was shown to be unsound, (page 412). The same view was affirmed in the following year (1856) by the supreme court, in the case of The Yankee Blade, 19 How. 82,89, and has since then been universally recognized and followed. In the case of The Lottawanna the supreme court say, (21 Wall. 579) : "A lien is a right of property, and not a mere matter of procedure." Ware, J., in the case of The Paragon, 1 Ware, 322, 330, held, according to this view of such liens, that "when all the debts hold the same rank of privilege, if the property is not sufficient to fully pay all, the rule is that creditors shall be paid concurrently, each in proportion to the amount of his demand." Lowell, J., in the case of The Fanny, 2 Low. 508, says "The general rule in admiralty is that all lienholders of like degree share pro rata in the proceeds of the res, without regard to the date of their libels or suits, if all are pending together." The same view was taken by Judge Hall, in the case of The America, 16 Law Rep. 264, 271. So, in the case of The Superior, 1 Newb. 176; The Kate Hinchman, 6 Biss, 367; The General Burnside, 3 Fed. Rep. 228, 236; The Arcturus, 18 Fed. Rep. 743; The Desdemona, 1 Swabey, 158, it was held that concurrent liens of the same rank should be paid pro rata, where the proceeds were insufficient to pay all, without regard to the date of the libel or the attachment of the vessel by either. Roscoe, Adm. 101. Such is the provision, also, of the French law. Code de Com. 191.

The precise question here presented has not, so far as I can ascertain, arisen of late years within this district. In the Eastern district, in the case of The Samuel J. Christian, 16 Fed. Rep. 796, the question seems to have been regarded by Benedict, J., as an open one. He there held that a lien for damages by collision was subject to the prior claims of material-men, and do not acquire any priority over the latter through the prior filing of the libel; and he concludes his opinion by saying that "it is unnecessary to consider the question whether, as between claims of equal rank, a prior seizure of the vessel secures priority in the distribution of the proceeds."

The recent decision in the circuit court in this district, however, in the case of The Frank G. Fowler, 17 Fed. Rep. 653, accords in principle with the several cases recently decided, to which I have above referred, holding that mere priority of attachment does not entitle to a preference. That decision seems to me plainly incompatible with the rule adopted in the cases of The Triumph and The Globe, supra, and with the views upon which that rule was founded. In the case of The Fowler, damages in favor of different lienors had accrued by two collisions upon successive voyages of the same vessel. The libel for the last collision was filed three days before the libel for the previous collision; but the attachment of the vessel by the marshal was made upon both processes at the same time. The proceeds of sale being insufficient to pay both claims,

this court held, for reasons which need not be here referred to, that the liens should be paid in the inverse order of the time at which they accrued. 8 Fed. Rep. 331. On appeal, Blatchford, J., reversed this ruling, and held that the earlier damage should first be paid in full. Had the rule of priority depended upon the time of filing the libel, the judgment of the district court should have been affirmed, since the libel on the last lien was first filed; had priority depended upon the time of the arrest of the vessel alone, then, as the arrest upon both libels was at the same time, and the claims were of the same rank, neither had priority of the other, and the proceeds should have been divided pro rata between them. Neither of these courses was pursued. The decision, on the contrary, in awarding priority to the earlier lien, established for this circuit the principle, which has been repeatedly affirmed elsewhere, that a lien is a vested proprietary interest in the res itself, from the time when it accrues; and also that failure to enforce such a lien by immediate suit, before the vessel proceeds on another voyage, is neither laches nor sufficient, by any equity or rule of policy, to displace its priority, as a vested proprietary interest, over a subsequent lien of the same rank upon which the vessel is arrested at the same time. The former rule in this district, which made priority among liens of the same rank depend upon the date of filing the libel, or the arrest of the vessel in the proceeding to enforce it, must be regarded, therefore, as superseded; not merely because the foundation upon which that rule rested has been wholly swept away, but also because the rule adopted by the circuit court in the case of The Frank G. Fowler is incompatible with its longer existence.

Viewing maritime liens, therefore, as a proprietary interest in the vessel itself, and the filing of the libel and seizure of the vessel as proceedings merely to enforce a right already vested, it follows, necessarily, that, as between different lienors, any proceeds in the registry should be distributed according to the rightful priorities of the liens themselves, and not according to priority of the proceedings merely to enforce them. This rule permits all the equities of such liens to be considered and enforced, instead of subordinating these equities to a mere race of diligence.

Where the liens are of the same rank, there is often an equitable priority among them arising out of the character of the liens themselves, or the time when they accrued. A later lien for salvage is entitled to priority over a former slavage, because the last service has preserved the benefit of the former. The same is true of successive repairs of a vessel on different voyages, or on different parts of the same voyage, or of liens on successive bottomry bonds. The later improvements or advances are for the preservation of the former, or for further improvements upon the vessel; and they have, therefore, an equitable priority. As regards such liens, therefore, the rule is that they shall be discharged in the inverse order of their dates. 3 Kent, 197; The Eliza, 3 Hagg. 87; The

Rhadamanthe, 1 Dods. 201; The Bold Buccleugh, 7 Moore, P. C. 267; The St. Lawrence, 5 Prob. Div. 250; The Fanny, 2 Low. 508; The Jerusalem, 2 Gall. 345; The America, 16 Law Rep. 273; Roscoe, Adm. 98; The De Smet, 10 Fed. Rep. 489, note.

If the liens are of the same rank and for supplies, or materials, or services in preparation for the same voyage; or if they arise upon different bottomry bonds to different holders for advances at the same time, for the same repairs, such claims are regarded as contemporaneous and concurrent with each other, and they will be discharged pro rata. The Exeter, 1 C. Rob. 173; The Albion, 1 Hagg. 333; The Desdemona, 1 Swab. 158; The Saracen, 2 Wm. Rob. 458; The Rapid Transit, 11 Fed. Rep. 322, 334, 335; The Paragon, 1 Ware, 325, and cases first above cited. But if the liens arise from causes which are of no benefit to the ship, such as liens for damages by collision, or other torts, or negligence; and if the claims are such as cannot be treated as contemporaneous or concurrent; and if there are no equitable grounds for preferring the later liens, such as laches in the enforcement of prior ones, or other grounds of general policy, - then, as stated by Story, J., in the case of The Jerusalem, "the rule would seem to apply, qui prior est tempore, potior est jure", (2 Gall. 345, 350); and the liens should be satisfied in the order in which they accrue, as was held in this circuit in the case of The Frank G. Fowler, supra; Macl. Shipp. 702, 703.

As maritime liens are secret incumbrances, and tend to mislead those who subsequently trust to the ship, unless they are enforced with diligence, according to the circumstances and the existing opportunities for enforcing them they will be deemed either abandoned through laches as against subsequent lienors or incumbrancers, or postponed to the claims of the latter, as circumstances may require. There is no fixed rule applicable to all cases determining what shall be deemed a reasonable time, or what shall be considered as laches in enforcing such liens. In ordinary ocean voyages, the preference allowed even to bottomry will be lost after a subsequent voyage, if reasonable opportunity previously existed for the arrest of the ship. Blaine v. The Carter, 4 Cranch, 332; The Royal Arch, 1 Swab. 269-284; The Rapid Transit, 11 Fed. Rep. 322, 334. Betts, J., held that the same rule should be applied to ordinary liens for supplies. The Utility, Blatchf. & H. 218, 225; The Boston, Id. 309, 327. If this rule were strictly applied to vessels which make very short and frequent voyages, of only a few days' or a few weeks' duration, and which remain in port but a short time between such trips, the effect would be practically to destroy all credit to the ship, and to defeat, therefore, the very object for which maritime liens are allowed; since every lienor would be compelled to enforce his lien almost immediately, or run the risk of having it postponed to all subsequent ones.

As respects liens arising in the course of navigation on the western lakes and rivers, where the voyages are short and frequent, the rule has been adopted to a considerable extent of making the

division of claims by the successive open seasons of navigation, instead of by the separate voyages during each season. The Buckeye State, 1 Newb. 111; The Dubuque, 2 Abb. (U.S.) 20, 32; The Hercules, 1 Brown, Adm. 560; The Detroit, Id. 141; The Athenian, 3 Fed. Rep. 248; The City of Tawas, Id. 170; The Arcturus, 18 Fed. Rep. 743, 746. The Uniform practice, therefore, has been there adopted of paying maritime liens for repairs and supplies accruing during the same season pro rata, without regard to the particular date or voyage at which they accrued. The Superior, 1 Newb. 176, 185; The Kate Hinchman, 6 Biss. 367; The General Burnside, 3 Fed. Rep. 228, 236; The Athenian and The City of Tawas, ut supra.

While this rule is neither strictly logical nor consistent with the theory of beneficial liens, yet, as applied to short and frequent voyages during the open season of each year, it is not merely convenient in application, but on the whole, as I think, it works out practical justice better than any other rule suggested. It occupies a middle ground, and is in effect a compromise between the theoretical right of priority of the material-man who furnishes supplies for the last voyage on the one hand, and the corresponding obligation on his part to prosecute at once in order to retain that priority which commercial policy would disallow. The season of navigation is regarded as in the nature of a single voyage; and the rules applicable to a single ocean voyage are applied, as regards liens for supplies, to the navigation of a whole season. The City of Tawas, 3 Fed. Rep. 170, 173.

As respects liens arising under the state laws, the decisions are at variance whether such liens stand upon the same footing as strictly maritime liens. While the greater number of decisions do not allow the same status to statutory liens, (The Superior, 1 Newb. 176; The E. A. Barnard, 2 Fed. Rep. 712, 721, 722, and cases there cited), the contrary view, according to later decisions, placing both on the same footing, seems the more likely to prevail. The General Burnside, 3 Fed. Rep. 228; The Guiding Star, 18 Fed. Rep. 263.

As the best practical rule attainable in such cases, and as a rule already supported by many decisions in the western districts, I think the pro rata rule of distribution should be adopted here as respects beneficial liens of the same class, in the case of canal-boats and other similar craft which make short and frequent trips upon the canals and rivers, and are laid up during the winter season, when the canals and rivers are frozen over. The same considerations of convenience, justice, and policy apply to this class of cases as in navigation upon the great lakes. They cannot be applied, however, to other craft navigating about this port, making short ocean voyages, without interruption, the year round.

The towage services rendered in this case hold the same rank as claims for necessary materials and supplies, (The City of Tawas,

3 Fed. Rep. 170; The St. Lawrence, 5 Prob. Div. 250; The Athenian, 3 Fed. Rep. 248; The Constancia, 4 Notes Cas. 512; Macl. Shipp. 703), and on the above rule the claims should be paid pro rata.

In one of the bills there is a credit of $130. This credit should be applied upon the earliest items. The costs of the first libel should first be paid out of the fund, and the residue should be divided pro rata between the claimants without regard to the dates during the season at which they accrued.

Where there are various lienors entitled to the fund, and the fund is small, no costs after the first libel, beyond necessary disbursements, should be allowed out of the fund. The Jerusalem, 2 Gall. 351; The Kate Hinchman, 6 Biss. 369; The Guiding Star, 18 Fed. Rep. 269. See The De Smet, 10 Fed. Rep. 490, note. Bonds for latent claims are not now required, except on special order, even in the English practice, (Rule 129, Coote, Adm. Pr. 205; The Desdemona, 1 Swab. 159;) and other parties, if any, who have liens, but have not appeared under the monition and after due publication, will be barred from the time of the final decree of distribution, (The Saracen, 2 Wm. Rob. 451; The City of Tawas, 3 Fed. Rep. 170.)

Since the foregoing was written I have consulted the circuit judge, and am authorized to say that a decision to the same substantial effect has been heretofore made by him in a case arising in the Northern district.

The Samuel Little.

Circuit Court of Appeals of the United States, Second Circuit, 1915.

221 Federal Reporter 308.

Appeal from the District Court of the United States for the Eastern District of New York. . . .

Rogers, Circuit Judge. This appeal raises for the first time in this court the question whether what is known as "the forty-day harbor rule" is to be upheld and applied to the wages of men employed on tugs in and about the harbor of New York. The amount involved is small, but the principle involved is one of considerable importance, All the wage claims, with the exception of the claim of John J. McCambridge, are within the 40-day rule. McCambridge was employed on the tug as a deck hand at $30 a month, and his claim amounted to $60, and was for wages due during the months of June and July, 1912. His petition as originally filed alleged that he was employed on the tug from September 1, 1912 to October 30, 1912. But his testimony at the trial showed this to be error, and he was allowed to amend his petition to conform with the proof. His employment ended, therefore, 6 months prior to the filing of the libel, and yet his claim for wages was given priority by the court below over the claim for coal which had been supplied to the tug within 40 days prior to the attachment. . . .

Under the general maritime law the rule was established at an early day that services, supplies, and repairs incurred on a subsequent voyage outranked those incurred on a prior voyage; the vessel being employed in the navigation of the seas. The liens connected with every new voyage were accorded priority over all former ones after the vessel had sailed, if there had been reasonable opportunity for the enforcement of the earlier ones prior to the second sailing. See Jones on Liens, § 1801 (3d Ed. 1914); The Charles Carter, 4 Cranch, 328, 332, 2 L. Ed. 636 (1808).

The application of the voyage rule to vessels employed simply upon the inland waters of this country unduly limited the period of credit. The courts therefore modified the rule with respect to vessels employed upon the Great Lakes and inland waters, and the principle was established that claims for repairs, supplies, and other maritime services rendered to such vessels in one season should outrank claims for repairs, supplies, and maritime services rendered during the preceding season, without regard to the particular voyage in which they were incurred. The season of open navigation of such waters, and not the paricular voyage, was made the rule by which the priority of the payment of the claims against the vessels were to be determined. The question arose in 1856 in the District Court of Michigan in The Buckeye State, Newb. 111, 114, Fed. Cas. No. 13,445, and Judge Wilkins said:

"Especially in the navigation of these Northwestern lakes, - where several voyages are made during the season, from port to port, traversing every two weeks from one extreme point to the other, there is great reason to limit these tacit liens to the season of navigation, and not extend their obligation beyond a year."

And see The Dubuque, 2 Abb. U.S. 20, 32, Fed. Cas. No. 4,110 (1870); The Detroit, 1 Brown, Adm. 141, 147, Fed. Cas. No. 3,832 (1874); The Hercules, 1 Brown, Adm. 560, 563 (1875); The City of Tawas (D.C.) 3 Fed. 170 (1880); The Athenian (D.C.) 3 Fed. 248 (1877); The Nebraska, 69 Fed. 1009, 1014, 17 C.C.A. 94 (1895). In The J. W. Tucker, 20 Fed. 129,134 (1884), Judge Addison Brown, in a case in the Southern district of New York, thought the season rule should be applied to the case of a canal boat on the Connecticut river. After calling attention to the rule which had been adopted as respects vessels navigating the Western lakes and rivers, of making the division of claims by the successive open season of navigation, instead of by the separate voyages during each season, he said:

"The season of navigation is regarded as in the nature of a single voyage, and the rules applicable to a single ocean voyage are applied, as regards liens for supplies, to the navigation of a whole season."

And then he stated that he thought the same rule should be applied - "in the case of canal boats and other similar craft which make short and frequent trips upon the canals and rivers, and are laid up during the winter season, when the canals and rivers are frozen over. The same consideration of convenience, justice, and policy apply to this class of cases as in navigation upon the Great Lakes. They cannot be applied, however, to other craft navigating about this port, making short ocean voyages, without interruption, the year round."

While the application of the voyage rule to ships navigating the inland waters unduly limited a vessel's credit, the application of the season rule to vessels or tugs engaged in harbor navigation unduly extended credit. It came to pass, therefore, that the rule again underwent modification, and the 40-day rule was formulated and applied to tug and ferry boats engaged in harbor navigation. The boats make daily voyages and are amenable to process practically all the time. The 40-day rule was laid down for the first time in 1890 by Judge Addison Brown in the District Court for the Southern District of New York in The Gratitude, 42 Fed. 299. In that case 10 libels had been filed against the tug. Two of them were for wages; the rest were for materials, repairs, and labor. More than two-thirds of the amounts of the items were over a year old. Judge Brown called attention to the fact that the general maritime law adjusted all liens by the voyage, and that the priority of the liens continued only till the next voyage and to the season rule applied on the Great Lakes, and which had been adopted in cases arising as

to tugs in New York Harbor, and then stated that the time allowed for retaining priority in these harbor cases should be reduced to 40 days.

"If the general maritime rule, however, were applied literally", he said, "to the daily or hourly trips of harbor tugs, treating such trips as voyages, liens on them would be practically disallowed altogether, since business could not be carried on with daily libels."

The voyage rule applied to ocean steamers and the season rule applied to vessels on the Great Lakes could not properly be applied to harbor tugs, and the 40-day rule was accordingly adopted, upon the theory that it would give the short credit incident to the usual rendering of monthly bills and 10 days more for settlement, or libeling the boat in case of nonpayment.

The 40-day rule was followed in 1894 in the Eastern district of New York by Judge Benedict, and accomplished admiralty judge, in The Samuel Morris, 63 Fed. 736. It does not appear what the claims were for, whether for wages or for supplies. Judge Benedict simply declared:

"The rule laid down in the case of The Gratitude seems to be a very proper rule, and I see no reason why it should not be applied in a case like this."

The question was before the same judge again in 1896 in The Glen Iris (D.C.) 78 Fed. 511. In that case the wage claims had all been paid. The dispute was over claims for repairs, supplies, wharfage, and damages for collision. The 40-day rule was applied. The question came up in the Southern district of New York in 1912 in The Glen Island, 194 Fed. 744. In that case wages were not involved, but the dispute related to liens for supplies and repairs, and the 40-day rule was applied; Judge Hough in his opinion saying:

"It remains to inquire whether any reason exists for disturbing the rule of The Gratitude, supra. This is mentioned because it was said at bar that not much has been heard of that rule in recent years, and its abandonment was suggested. No reason for such change is seen. It is just as true now as when The Gratitude was decided that in the interest of lienors generally some limit must be set measuring out periods of time within which claims of the same rank shall share pro rata, and the measure fixed by Brown, J., has in my judgment, been justified by experience."

The 40-day rule was adhered to without dissent in both the Southern and Eastern districts of New York until 1914. In that year the question came before Judge Chatfield in the Eastern district in The Towanda, 215 Fed. 232, and he held that the 40-day rule did not apply to claims for wages for services rendered in the case of

harbor tugs, but that such claims were entitled to priority for a reasonable time. After citing the act of Congress of June 23, 1910 (36 Stat. 604, c. 373), and stating that by it a maritime lien is given for repairs, supplies, and other necessaries, to a foreign or domestic vessel, he stated that the act contained no provision with respect to seamen's wages, and that such wages were entitled to a preference as before the enactment. Then he added:

"Under the United States statute just cited, no period is stated within which the lien must be prosecuted, and hence a reasonable time would seem to be the only limit which can be imposed; that is, laches in bringing a claim should be held to be a defense."

A few months later in a suit against the same steam lighter the same judge seems to have adopted the 90-day rule by analogy to the New York statute.

"It would seem," he declares, "that in this case all claims accruing within 90 days before the attachment should be paid pro rata, after payment of costs of the action in which the boat was sold." The Towanda (D.C.) 216 Fed. 270.

The reasons by which the District Judge was led to his abandonment of the 40-day rule are to be found in the following excerpt from his opinion:

"It is urged that no materialman would wish, as a matter of business, to file a libel and attach a vessel which was continuing to obtain supplies, unless some other claimant found it necessary to begin action. It would also appear that great discrepancies would result in case the 40 days did not correspond to the exact 30 days and 10 days' grace with respect to each of the claims affected. No two claims would become due at the end of the same 40 days. The rule seems to have been disregarded and considered a dead letter for a long time. The principle has rather been applied of considering each case from the standpoint of due diligence; but in no case has more than one voyage or one season been considered a 'reasonable period'. In most cases, claims of the same rank and of approximately the same period have been prorated, and this would seem to be fairer than to establish a fixed period within which to order payment in inverse order. Each case, where agreement cannot be reached, must be considered by itself."

The question arose a third time in the Eastern district in the same year, coming before Judge Veeder in the case at bar, and he refused to apply the 40-day rule to the wage claims and contented himself with the filing of a memorandum in which he simply states:

"In the absence of authority I am not disposed to apply the 40-day harbor rule to these wage claims."

It thus appears that the 40-day rule has been steadily adhered to in the Southern district of New York for nearly a quarter of a century, but that recently in the Eastern district it has been rejected in its entirety in favor of a theory of a reasonable time or possibly of a 90-day rule. That a conflict of opinion should exist on this subject in the two districts, separated from each other by the East River and having concurrent jurisdiction over New York Harbor, is certainly unfortunate. Harbor liens in the harbor of New York clearly should not be determined upon one principle in the Southern district and by another in the Eastern district. This case has been brought to this court, that a uniform rule may be established and an end put to the doubt which now exists in this circuit as to what the law on this subject is.

We are thus brought to inquire whether the 40-day rule as laid down by Judge Brown in The Gratitude, supra, is to be adhered to,or whether circumstances have so changed as to make the rule which was equitable and proper when adopted inequitable at the present time. It is our opinion that there has been no such change of conditions here as to justify a departure from the rule. The equity of the rule seems to have been accepted and conceded by all up to the present time, as is shown by the fact that the matter has never before reached this court. The rule, as we have seen, was established in the first instance because the longer extension of time which had been given to these liens had led to evils and abuses of so serious a nature that the court deemed itself justified in correcting them by shortening the time to 40-days. The change in the rule worked well, and corrected the evils incident to the former rule, and worked no prejudice to the vessels. We have looked in vain into conditions as now existing to discover what reasons there are for now departing from a principle which has so long been accepted without question, and which was originally laid down by a judge whose great knowledge of admiralty law has been for many years widely recognized, and whose wisdom concerning matters relating to maritime affairs has been conceded by all. It is as true to-day as it was when the 40-day rule was established that a longer extension of credit to the vessel would lead to abuses and evils, without any corresponding advantage to the vessels. Secret liens do not deserve encouragement. They should retain their priority for a short period of time. The reasons for a longer period, instead of becoming more cogent, have steadily become less cogent. If the 40-day rule is to be changed at all, it should be by shortening it rather than by extending it.

It may be conceded that in some cases the rule may work a hardship in special cases. But that may be said of most rules, and perhaps of all rules. The advantage, however, of knowing in advance the exact period within which a lien can retain its priority more than compensates for any hardship which occasionally is suffered in an isolated case. It may be said that the 40-day rule simply fixed an arbitrary period. That may be true. But the same thing may be

said with equal truth of the voyage rule and of the season rule. Any period of time that may be fixed upon is necessarily an arbitrary period.

This brings us to inquire whether under the 40-day harbor rule the preferred lien of seamen's wages earned during an earlier period of 40 days should be postponed to a maritime lien for supplies which is later in time. . . .

The appellee contends that the court has no inherent power to establish a rule fixing the period of time a lien shall retain its preference or priority. That the court has a right to regulate its practice and procedure under section 918 of the Revised Statutes (Comp. St. 1913, § 1544) is conceded, but it is said that a rule which fixes and determines the duration of a lien or the priority of a lien is a rule of property, and not one of practice or procedure, and therefore beyond the potency of the judicial power. . . .

The contention that the admiralty courts of the United States are without authority to marshal the assets and give priority to one class of claims over another is a startling proposition. It is without merit. But in the argument before this court counsel do not deny the authority of the court to state whether or not a claim is stale, but they assert that it is beyond the power of the court to lay down a rule that all claims are stale unless prosecuted within 40 days after the debt becomes due. The court in establishing the 40-day rule does not, however, undertake to enact a statute of limitations. The rule simply requires that, if a preference is to be asserted, it should be done within the designated period, or it may be postponed to a later claim which is more vigilantly prosecuted. That the court has the right to do this surely cannot be seriously controverted. . . .

In laying down the 40-day rule in The Gratitude, supra, the learned District Judge said:

"In the above cases there will be paid: (1) Seamen's wages; next (2) supply liens arising within 40 days before August 28, 1889, on which day the towage lien for damage accrued; next (3) the lien for damage in towing; next (4) the residue to be divided pro rata among the remaining claims for supplies. The costs are allowed with the claims."

Because the District Judge expressly limits the supply liens to those arising within 40 days, without expressly placing a like limitation upon the wages, it is suggested that the 40-day rule was not intended to be applied to wages. We are not able to accept that view. We find no authority for any such distinction as to seamen's wages, and no reason why such distinction should be made. In determining such a question, the same rules apply to liens for wages as to liens for repairs and supplies. In The Dubuque, 2 Abb. U.S. 20,

Fed. Cas. No. 4,110, the court in discussing the subject of laches says:

"In determining this question, the same rules apply to liens for wages as to liens for repairs and supplies."

And in The Nebraska, 69 Fed. 1009, 17 C.C.A. 94 (1895), the court says:

"And liens for wages, supplies, and bottomry bonds arising upon a subsequent voyage are given priority to those arising upon a previous voyage, unless peculiar circumstances should demand equality in their payment."

In the present suit the proposition is not disputed that a claim for a seamen's wages earned in a first voyage, or season, or 40-day period, is entitled to priority over a claim for supplies, when both claims arise in connection with the same voyage, or season, or 40-day period, if such a period is to be recognized. But the contention is that if the wages claim arises in the first voyage, or season, or 40-day period, and the claim for supplies originates in a subsequent voyage, or season, or 40-day period, then the claim for wages loses its priority over the claim for supplies.

Upon the precise question involved we find very little in the authorities. In The Union, Lushington, 128 (1860), Dr. Lushington laid down the rule that seamen's wages have precedence over a bottomry bond, whether they were earned before or after the date of the bond. See also, The William F. Safford, Lushington, 69 (1860). In both The Union and The William F. Safford the wages seem to have been earned on the voyage in the course of which the bond was given. It was thus an established principle in the English maritime law that claims for seamen's wages had priority over a bottomry bond. But it appears that in 1873 Sir R. Phillmore in The Hope, 1 Aspinall's M. C. (N.S.) 563, gave priority to the bottomry bond over the claim of a master for wages in a suit in which the wages were earned on prior voyages to that on which the bottomry bond was given

At first thought this decision would seem to justify the conclusion that claims belonging to a superior class lose their priority over claims of an inferior class which originate upon a subsequent voyage. But it is not at all clear that any such conclusion can properly be deduced from the decision. The case related, not to seamen's wages, but to the wages of a master, and they are not in the same class, and the editor of the great work of Maclachlan on the Law of Merchant Shipping, p. 260, note (5th Ed. London, 1911), takes the pains to point out that it is doubtful whether the rule adopted in The Hope Case, postponing the master's claim to wages, would be applied to the claim of a seaman. The editor says:

"The decision in The Hope cannot be considered decisive, as different considerations may apply to the question of priority in the case of the master who grants the bond and in the case of the seaman. See The Jonathan Godhue (1858) Swab. 524; The Salacia (1862) Lush. 545."

In the report which the registrar made in the Hope, and which Sir R. Phillmore confirmed, it is said, after a review of the cases:

"But I do not find any case in which it has been held that a master is entitled to priority over a bondholder for wages and disbursements incurred on voyages prior to that in which the bond was given. This being so, I must adhere to the general rule, as stated by Mr. Maclachlan, that liens in the nature of rewards for services rendered rank against the fund in the inverse order of their attachment on the res, and that the last in time should be the earliest in payment. I must therefore hold that, except in respect of the comparatively trifling sum which is due to the master for his services after he had resumed the command of the vessel at Londonderry, the bondholder is entitled to priority."

The decision in The Hope Case does not seem to rest upon any general principle that claims of a superior class arising on a first voyage are to be postponed to claims of an inferior class arising on a second voyage. If it rested on that principle, there could be no doubt but that the decision would be as applicable to seamen as to masters. But it seems rather to rest upon the peculiar nature of a bottomry bond and of the master's rights, which are in some respects different from those of the seamen and inferior thereto.

A question somewhat analogous to that in the pending suit was before the District Court of Michigan in The City of Tawas, supra. That was decided by District Judge Henry B. Brown, later Mr. Justice Brown of the Supreme Court of the United States, and a distinguished authority in maritime law. He, too, alludes to the fact that "the subject of marshaling liens in admiralty is one which unfortunately is left in great obscurity by the authorities." He makes no allusion to the case of The Hope, and, indeed, refers to no authorities upon the exact question under discussion. He says:

"While there are several authorities to the effect that a creditor who obtains a final decree before another creditor, having a co-ordinate or equal claim, has intervened to enforce such claim, is entitled to be paid in preference to him who did not assert his right until after the entry of such decree. See The Saracen, 2 W. Rob. 451; The America, 16 Law Rep. 264. I know of none which gives such preference to a creditor holding a claim of an inferior class, notwithstanding he may have obtained a decree before the filing of other libels of a higher class."

He also says:

"Claims of the same class are sometimes ordered put in the inverse order in which they accrue. This, I believe, is invariably observed in the case of bottomry bonds; the last being put first, and the first last. Maclachlan on Merchant Ship. 652. In some cases it is said that necessaries furnished for the last voyage should be paid in preference to those furnished for a former voyage, and the rule certainly seems a reasonable one as applied to long voyages upon the ocean, but wholly inapplicable to the daily or weekly trips made by vessels upon the Lakes. I regard it, however, as a reasonable modification of the general practice that claims of equal rank should be paid pro rata, that each year should be considered as a voyage, and that claims accruing the last year should be paid in preference to claims of the same rank accruing the year before; each season of navigation here being separated from the preceding season by four months of inaction. This will encourage diligence in the prosecution of claims, and prevent the proceeds of sale from being absorbed by dilatory creditors. But I know of no authority or principle which would justify the court in ordering a claim of an inferior rank to be paid prior to claims of a superior rank, on the ground that the latter claim accrued the year before the former, unless the defense of stale claim is pleaded to the libel. Maclachlan, 652."

The conclusion to which we have arrived after giving the matter careful consideration is that we are not justified upon the authorities or upon principle in holding that a claim of inferior rank is to be paid prior to a claim of a superior rank solely on the ground that the latter claim accrued within 40 days preceding the filing of the libel and the former did not. The holder of a claim of superior rank undoubtedly may lose his right to priority of payment over a claim of inferior rank by his laches. But if the holder of the inferior claim seeks priority, because of the laches of the holder of the superior claim, he should assert it in his pleading. The general rule is that laches must be pleaded. See 16 Cyc. 176. It is undoubtedly true that it is not always necessary to plead it. If it is plainly apparent on the complainant's own showing that he has slept too long on his rights, there is no reason for insisting that laches shall be specially pleaded. See Lansdale v. Smith, 106 U.S. 391, 1 Sup. Ct. 350, 27 L. Ed. 219 (1882). But we cannot say that a delay of a few months in asserting a seaman's claim for wages is such apparent or gross laches that it makes inapplicable the general rule requiring laches to be pleaded. In The City of Tawas, supra, the contention was that claims in the third class which accrued in 1876 should be preferred over claims in the second class which accrued in 1875. Staleness of the prior claim, not having been pleaded, was not, as we have seen, allowed.

While we do not agree in the particulars stated in this opinion with the reasons given by the court below for the conclusion it reached, we think that no error was committed in directing that McCambridge's claim for wages, being of the superior rank and not shown to be stale, should be paid before the claim, inferior in rank, of William Horre & Co., although the latter claim accrued within 40 days of the filing of the libel, and the former did not.

Decree affirmed.

The Frank G. Fowler.

District Court of the United States, Southern District of New York, 1881.

8 Federal Reporter 331.

Choate, D. J. In both of these cases the steam-tug Frank G. Fowler has been condemned to satisfy the claims of the libellants. They are both cases of tort, or damage caused to the tow by faults of navigation on the part of the tug. In the case of Conway the cause of action grew out of the negligence and improper navigation of the tug on the sixth of November, 1880. In the case of the Phoenix Insurance Company it grew out of similar act of neligence on the twenty-fifth of November, 1880. The Phoenix Insurance Company filed its libel December 23, 1880. Conway and others filed theirs December 24, 1880. Processes of attachment were issued upon the same, dated as of the dates of the libel, respectively, and they were served by the marshal on the twenty-fourth of December. There is nothing in the marshal's returns or in evidence aliunde to show that either process was in fact served before the other. The tug has been released on an appraisement, and the deposit in court in the two cases of her appraised value - $4,500. The Phoenix Insurance Company has obtained a report of the commissioner in its favor for $6,383.33 damages. This report has been confirmed nisi and no exceptions have been filed. The libellant now applies for a final decree. The libellants Conway et al. having an interlocutory decree in their favor, and a reference to compute their damage, have not yet obtained a report of the commissioner, but their libel claims damages to the amount of $2,266.91, and they now resist the entering of a final decree in favor of the Phoenix Insurance Company which would absorb the whole fund in court, claiming that they are entitled to a priority of payment, and that the final decree in the case of the Phoenix Insurance Company should be only for such part of the fund as will remain after satisfaction of their damages. The Phoenix Insurance Company, on the other hand, claim that they are entitled to a priority in payment over the libellants Conway and others. . . .

[In an omitted part of the opinion the court considered and rejected the test of the time of service of process as a means of determining priorities.]

If, then, the test of the time of service of process be rejected, by what principle of the maritime law is the case governed? There are three possible theories of the case: (1) That the two parties be paid pro rata; (2) that the party suffering the first loss has the prior claim; (3) that the party suffering the second loss has the prior claim.

I think there is no authority which would justify a pro rata distribution of the fund. Judge Lowell, in the case of The Fanny, indeed says that the general rule in admiralty is that all lienholders of like degree share pro rata in the proceeds of the res, without regard to the date of their libels or suits, if all are pending together. By "lienholders of like degree", however, I unde stand him to mean lienholders who by the rules of the maritime law are not, either from the nature of their claims or from the difference in time when they attached, entitled to any preference over each other. I think the subsequent part of his opinion shows that he does not regard similar claims arising at different times as liens of the same degree, since he distinctly approves the rule that material men are to be paid in the inverse order of the creation of their liens; and he approves the opinion of Judge Hall in The America, where it was held that a lien for damage by collision was of as high a character as the lien of a material man, and as between such claims they were to be paid in the order of their creation.

The argument for the parties first suffering damage is that they acquired a lien on the tug for their damages; that this was a subsisting right or interest on the twenty-fifth of November, when the damage of the other party occurred; that it had not been forfeited or lost by laches; that whatever right or lien the party suffering the second damage acquired in the tug was acquired subject to this existing right and lien; that as their lien was good and available even against a bona fide purchaser without notice, so it must be good against a party acquiring any less interest than a purchaser; that the right of the party suffering the second damage cannot be greater than the right of a purchaser would be; that the reasons growing out of the necessities of commerce, which have led to the preferring of the last material man over the earlier ones, do not apply to successive torts, where the creditor is made such in invitum, and no credit is given to the vessel; that nothing has happened to displace the earlier lien, and being earlier in time it has the stronger equity. It is true that the delay in libelling the vessel from November 5th to November 25th cannot, on the authorities, be regarded as laches which will operate to extinguish the lien as against the vessel in favor of a purchaser. And the reason why the purchaser takes subject to the lien is that the purchaser takes by contract with the owner, and can take only the title which the owner has to convey, therefore he takes that title subject to all existing encumbrances, including the lien created by the former marine tort, which, as shown by the above cases, is in the nature of a tacit hypothecation of the vessel, an encumbrance upon or diminution of the interest of the owner. But the right or interest created in the injured party by the second marine tort does not depend upon contract, but upon the principles of the maritime law relating to marine torts and their effect upon, or the claim that they create upon, the vessel. Now I think it is the established rule of the maritime law that for the torts of the master and mariners

the vessel becomes bound to the injured party to the extent of the damage. A lien or tacit hypothecation is at once created and vested in the damaged party, subject to be defeated only by unreasonable laches in bringing the proceeding in rem, by which alone it can be enforced. A party who has already suffered such a damage has such a lien or hypothecation of the vessel. He is to that extent in the position of an owner, - he has a quasi proprietary interest in the vessel. It is true he cannot, as an owner, control her employment or prevent her departure on another voyage, except by the exercise of his right or power to arrest her for the injury to himself, and in some cases the second injury may be done before he has an opportunity to arrest her; yet if her continued employment is not his own voluntary act, nor with his own consent, it is his misfortune that the vessel in which he has an interest is used in a manner to subject herself to all the perils of navigation. This use, unless he intervenes to libel and arrest her, is perfectly lawful as against him. If she is lost by shipwreck, of course his lien becomes valueless, and I think his interest is not exempted from this other peril to which the vessel is liable, namely; that she may become bound to any party injured through the torts of the master and mariners. The principle as to marine torts is that the ship is regarded as the offending party. She is liable in solido for the wrong done. The interest of all parties in her are equally bound by this lien or hypothecation, whether the master and mariners are their agents or not. In the case of The Aline, 1 Wm. Rob. 118, Dr. Lushington says:

"I am also of opinion that neither the mortgagee nor bottomry bondholder could be a competitor with the successful suitor in a cause of damage, and for this reason that the mortgage or bottomry bond might and often does extend to the whole value of the ship. If, therefore, the ship was not first liable for the damage she had occasioned, the person receiving the injury might be wholly without a remedy, more especially where, as in this case, the damage is done by a foreigner, and the only redress is by a proceeding against the ship."

Commenting on this decision in the case of The Bold Buccleugh, ut supra, the court says:

"In that case there was a bottomry bond before and after the collision, and the court held that the claim for damage in a proceeding in rem must be preferred to the first bondholder, but was not entitled against the second bondholder, to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he or others were interested was liable to its value at that date for the injury done, without reference to his claim."

I think the same principle is applicable to a prior lienholder, who, by the tort of the master and mariners, has become, so to speak, a part owner in the vessel. His property, the vessel, though not by his own voluntary act, has been used in commerce. That use was not tortious as to him. It is subject in that use to all ordinary marine perils. One of those marine perils is that it may become liable to respond to another party injured by the negligence of the master and mariners. No exception to the liability of the vessel, exempting the interests of parties interested in the ship, has been established by authority. To create such exceptions would greatly impair and weaken the security against negligent navigation, which the rule of liability of the vessel is at least partly designed to promote. Since the act of congress, passed in 1851, limiting the liability of ship-owners, their personal liability is in most cases of marine tort unavailable. That act itself implies that by the rule of the maritime law the party injured by a collision or other tort of the master and mariners has an unquestioned lien on the vessel in solido. In The America, ut supra, Judge Hall says:

"In short, all parties except seamen, holding ordinary maritime liens upon a vessel, are to some extent treated as though they had a proprietary interest in the ship; and their interests, whatever they may be, are subject to all liens which the necessities of the ship, or a collision caused by the carelessness or misconduct of those in charge, may subsequently impose."

For the reasons above stated, I think this is the true rule of the maritime law; and, applying it to the present case, the interest or lien of libellants Conway and others in the vessel was not exempt from becoming liable, like all other interests in the tug, to the lien of the party subsequently suffering damage by the tort of the master. The case has thus been considered without reference to the circumstance that the libellants Conway and others had an opportunity to libel the tug before she left this port upon the towing voyage, out of which the second cause of damage arose. While this failure to arrest the vessel was not laches operating to forfeit their lien, it yet gives the subsequent lienholder a stronger equity since the first lienholder, in suffering her to go without arrest, clearly took the chances of her incurring new liabilities, according to the principles of maritime law, and in a sense may be said to have consented to her being employed in another towage service, out of which they must be held to have understood that such a claim for damage might grow.

On these grounds a decree will be entered for the payment of the fund in court to the libellant the Phoenix Insurance Company, in part satisfaction of its damages, unless an appeal be taken within the time prescribed by the rules of the court.

The F. H. Stanwood.

Circuit Court of Appeals of the United States, Seventh Circuit, 1892.

49 Federal Reporter 577.

On Appeal from the District Court of the United States for the Northern District of Illinois. . . .

Before Gresham, Circuit Judge, and Jenkins, District Judge.

Jenkins, District Judge, (after stating the facts.) The record presents for consideration the single question whether a maritime lien arising out of damage done in a collision caused by negligent navigation should be subordinated, with respect to its payment, to the maritime lien of the crew of the offending vessel for wages earned by them on board of such vessel. It is undoubted, as a general rule, that, as against claims arising ex contractu, the claim for seamen's wages is preferred. This is stated to arise out of the needed protection extended by the admiralty to a class of men improvident, reckless, and exposed to imposition, and also because "by his labor the common pledge for all the debts is preserved." The latter reason is perhaps the better foundation for the rule. Possibly, also, the reason of the rule may, in part, be found in the nature of the service, and in the encouragement supposed thereby to be held out to the crew to "stand by the ship" in all times of peril. Upon whatever foundation it may rest, the rule is not without its exceptions. Thus salvors are awarded priority over wages earned prior to the salvage service, and this upon the equitable consideration that the subsequent service has preserved the subject of the lien. The Selina, 2 Notes Cas. Adm. & Ecc. 18; The Athenian, 3 Fed. Rep. 248.

The contention that wages should be postponed to the payment of damages by collsion is rested upon two grounds: First, that the seamen share in the fault of the offending vessel, and from considerations of public policy to discourage negligent navigation; Second that it would be inequitable to permit a fund impounded to compensate a wrong to be diverted to the payment of a participant ir that wrong, or to one having a remedy against the owner of the offending vessel denied to the owner of the injured vessel.

We are of opinion that the contention is well sustained. The negligent navigation causing collision and consequent injury was the act of the crew, or of some one or more of them. The negligent act or omission is, in the law, charged upon the vessel so negligently navigated. She is treated as the offending thing. The fault of the crew is visited upon the agent by which the fault became effective, causing injury. It is an instance of imputed guilt, the sin of the crew being attributed to the innocent instrument. So, also,

we think that, as to the injured vessel, the crew should share in the fault imputed to the offending vessel. As to the injured vessel the offending thing and her crew are one. The crew participate in the navigation of the ship. She is the passive instrument of their active co-operation in effecting the injury. Ship and crew constitute the common enemy that has worked destruction. There may be but one directing mind. The others are, however, like the ship, his instruments in the perpetration of the wrong, and, as to the injured vessel, participants in the fault. They are joint tort-feasors. Which one, inter se, was directly and immediately responsible for the negligent act or negligent omission is of no moment to the vessel injured through their co-operation. We think it opposed to every principle of natural justice to permit one or more of an offending crew to hold priority over a claim for damages caused, directly or indirectly, by their act, and in the course of a common employment. That would be to reward guilt at the expense of innocence, and to tender premium to negligence. Careful navigation is essential to safety. It should be the constant care of courts of admiralty that no license be given to conduct prejudicial to life or property; that no safeguard to prudent navigation be removed; that no immunity be offered to negligent conduct. With the greatest care, navigation is hazardous. Seamen will not be less vigilant in the performance of duty if, as aginst the injured and the fund created to compensate the wrong, they are held sponsors for the crew. They will not be less careful if the res charged with the payment of their wages be first subjected to the payment of the injury their fault had occasioned. The wrong done arose from the dclictum of either the master or crew of the vessel at fault, and should be first compensated. This conclusion, as it seems to us, rests upon and finds support in the highest considerations of public policy. A fund already insufficient to compensate the injury should not be diverted to compensate those who actively, or by inference of law, have occasioned or contributed to the wrong. It is essential to the safety of commerce upon the seas to punish negligent navigation, and to redress the consequent injury, that others may not be encouraged to breach of duty. Careless navigation, reckless conduct of master and crew, avoidable collision, will be less frequent if punishment, not reward, shall surely follow transgression.

The second ground is also controlling. The seamen have a remedy by personal action against the owner of the offending vessel for the wages he has earned. There is no suggestion here of the insolvency of the owner. The insufficiency of the fund to pay the damages awarded is apparent. The owner of the injured vessel has no remedy, except against the offending vessel. Rev. St. § 4283; Norwich Co. v. Wright, 13 Wall. 104. It is a settled principle of equity that when one party has several, and the other but one remedy, the former will be remitted to his additional remedy, and will not be permitted to select that which is the only remedy of the other party, when so to do would absorb or diminish the fund, and

leave a just claim unsatisfied. There arises no element of hardship in remanding these seamen to their personal action. The owner is solvent, and able to respond to their just demands. To yield them precedence or equality in the distribution of the fund would be to compensate those who were the cause of the damage at the expense of those who suffered the injury; to so far absolve the owner responsible to those seamen, and whose vessel should make good the injury; to reward the wrong-doer; and to punish the innocent victim of wrong. We cannot bend our judgment to such inequitable conclusion.

The suggestion that the owner of a vessel may insure against collision, and so obtain indemnity, is without merit. Insurance would be the subject of independent contract for the benefit of the insured, not the wrong-doer. In respect to that, there is no privity between the offending crew and the owner of the injured vessel. The insurer, paying the loss, is subrogated to the rights of the insured, and clothed with all his remedies for the negligent injury. The insurer then stands in the shoes of the insured. This works mere change in the ownership of the right to redress. It neither extinguishes nor diminishes that right.

We conceive our views to have the support of the decided weight of authority. In England it would appear to be no longer an open question. Abb. Shipp. (11th Ed.) 621; MacL. Shipp. (3d. Ed.) 703; The Chimera, Coote, Adm. 121; The Benares, 7 Notes Cas. Adm. & Ecc. Supp. 50, 54; The Aline, 1 W. Rob. 111; The Linda Flor, Swab. 309; The Elin, 8 Prob. Div. 39, affirmed on appeal, Id. 129. In America there would seem to be some divergence of opinion. The conclusion to which we have arrived is upheld upon one or the other of the grounds upon which it is rested, in Henry, Adm. 199; The Spaulding 1 Brown, Adm. 313; The Pride of The Ocean, 3 Fed. Rep. 162, 7 Fed. Rep. 247; The Maria and Elizabeth, 12 Fed. Rep. 627; The M. Vandercook, 24 Fed. Rep. 472; The R. S. Carter, 38 Fed. Rep. 515, affirmed on appeal by Mr. Justice Blatchford, 40 Fed. Rep. 331. Some support is also derived from the dictum of Mr. Justice Bradley in Norwich Co. v. Wright, 13 Wall. 104, 122.

In some of the discussion upon the subject, as notably in The America, infra, the priority awarded the creditor in damage is sought to be rested upon the rule of the admiralty that maritime liens are to be paid in the inverse order of their inception. We think such decision to be lodged upon faulty foundation. That rule relates to liens ex contractu, not to those arising ex delictu; and it is bottomed upon the obvious and just ground that each foregoing incumbrancer is benefited by means of the subsequent incumbrance, and is applied only to maritime liens of the same class or rank of privilege. It can have no application, as between a damage lien and a prior contract lien. In such case the reason of the rule fails. The lien for damages by collision is injurious, not beneficial, to a prior contract lien.

The cases opposed, or seemingly opposed, to our conclusion, demand consideration. First in order, The America, 16 Law Rep. 264, decided by Judge Hall, of the northern district of New York, in 1853, is strongly urged to our attention. It was there held that the lien of the collision claimant was not preferred to, but stood in equal rank with, that of material-men. The learned judge asserts the principle upon which the admiralty has recognized the right to redress for collision, that it is not only a civil indemnification, but a quasi penalty for the wrong, always to be enforced, that such wrong may not pass unredressed, inciting others to similar negligence, (page 276); that the damage claimant is not in equal position to the creditor on mortgage or bottomry, or for materials, the injury to the one being in invitum, the extension of credit by the other being at his option; and concludes that, therefore, they stand upon equality, and are to be governed by the general rule of preference stated by him, (page 273), that maritime liens of the same class or rank of privilege should be paid in the inverse order of the dates of their creation. The decision that was actually made, as we read the case, was that the damage claimant had precedence of the claimant for material previously supplied, because the lien was of later date. The decision was correct enough, but the reason upon which it was bottomed was, as we have shown above fallacious. With respect to seamen's wages, - and all that is said upon the subject is merely obiter, the wages of the seamen having been paid without contention, - Judge Hall asserts the general rule of preference accorded to such claims, and declares, (page 273):

"In some cases other claims, such as claims in cases of collision and salvage and bottomry claims, have been preferred to seamen's wages; but these cases proceeded upon the same general principle, the preferred claims having accrued subsequent to the claim for wages."

He also declares (page 277) that "his [the seaman's] demand for wages is preferred to all other demands, for the same reason that the last bottomry bond is preferred to one of prior date." Referring then (page 282) to the case of The Chimera, wherein Dr. Lushington is stated to have held that seamen's wages do not take preference of the damages awarded in a cause of collision, Judge Hall states that, after an examination of the cases of The Sidney Cove, 2 Dod. 13, and The Louisa Bertha, 1 Law & Eq. Rep. 665, he is inclined to the opinion that seamen's wages for the same voyage should be preferred to the claims of the suitor in damage. The cases referred to, and upon which he seems to base his conclusion, were not cases of collision at all. The contention there was as between seamen's wages and a subsequent bottomry bond. The allowance of priority in such cases rests upon the general rule awarding precedence to seamen's wages over all other liens ex contractu. It seems to us that the argument of Judge Hall should have led him to a conclusion directly opposed to that reached by him, respecting the priority of seamen's wages in cases of collision. In The

America, Judge Hall undertook a wide field of discussion, not involved in the case, as he expressly declares at pages 266, 284. He ventured to declare principles of maritime law in advance of any cause requiring their application. Naturally he fell into error. He failed to consider the principle upon which seamen's wages for prior service should be subrogated to claims for collision. He lost sight of the question of public policy involved, and of the equitable consideration that the seaman has another remedy than that in rem, and that, in a case like that now under consideration, the allowance of a claim would permit a solvent wrong-doer, liable for the wages of the seamen, to divert a fund applicable to the satisfaction of the wrong to the payment of his debts at the expense of the injured party. With deference, we are unable to yield assent to the dictum or reasoning invoked.

The other cases to which we are referred, as opposing the conclusion to which we have arrived, are, with the exception of The Daisy Day, 40 Fed. Rep. 538, cases arising in the eastern and southern districts of New York. The Orient, 10 Ben. 620; The Samuel J, Christian, 16 Fed. Rep. 796; The Grapeshot, 22 Fed. Rep. 123; The Young America, 30 Fed. Rep. 789; The Amos D. Carver, 35 Fed. Rep. 665; The Daisy Day, 40 Fed. Rep. 538; The Gratitude, 42 Fed. Rep. 299. With the exception of The Orient and The Carver, these were cases of damage arising from negligent towage, and the decisions are, with the exception of The Daisy Day, predicated upon the express ground that they are claims arising ex contractu, for violation of the contract to tow safely, and present quasi torts in distinction from cases of pure torts. It may well be doubted whether, in the light of the cases of The Quickstep, 9 Wall. 665, and Norwich Co. v. Wright, 13 Wall. 104, the distinction can be upheld. Judge Severens, in The Daisy Day, expressly repudiates the distinction, and holds that claims in damage outrank claims arising ex contractu; but follows the doctrine of The Orient and The Samuel J. Christian, so far as to prefer seamen's wages to claims "for such torts as negligence in towage, provided the seaman whose claim is in question was free from fault". With respect to the cases in the district of New York, - or so far, at least, as respects cases of pure torts,- they are expressly overruled by Mr. Justice Blatchford in The R. S. Carter, 40 Fed. Rep. 331. Notwithstanding the ability manifested in the discussion of the question in those cases, they are shorn of their power by the later and controlling holding of superior authority. That decision was not rendered when The Daisy Day was decided. Had it been otherwise, it is possible that Judge Severens would have held differently. At all events, it may be said that the equitable consideration that the seaman has a double, and the damage claimant a single, remedy was not considered by him in that decision. In The Gratitude, Judge Brown, who had held negatively on the priority of liens for damages by collision, recognizes the binding authority of Mr. Justice Blatchford's decision, but seeks to distinguish between cases of damage done in invitum to an independent vessel and

damage by negligence under a voluntary contract of towage. As suggested above, the distinction may not be sustainable. We are not, however, here called upon to determine that question. It is proper, also, to add that the decision of Mr. Justice Blatchford seems to have escaped the attention of the distinguished jurist whose ruling is here involved.

In The Elin, supra, the maritime lien for damage by collision was allowed precedence of the lien of the seamen for wages earned by them since the collision, upon the ground that it would give relief to the owner of the wrong-doing ship in the hands of the court. We are unable to follow the ruling to that extent. That ruling is in forgetfulness of the equitable consideration that the subsequent service has been beneficial to the fund. Like the case of salvage, the service following the collision preserved the res for subjection to the lien of the damage claimant, and brings the case, as to such subsequent service, within the rule that he shall be preferred who has contributed most immediately to the preservation of the thing. This rule imposes an equity upon an equity, - an equity not discharged by the consideration that, by inference of the law, the seamen were participants in the prior fault occasioning injury, nor impaired by the fact that they may have personal resort to the owner of the offending ship, the rule in the latter regard not applying to a superior equity. We hold, therefore, that in cases of pure tort, as to precedent wages, the damage claimant has priority, and that wages earned since the collision have precedence over the claim for damage by collision. The decree appealed from will be reversed, and the cause remanded for further proceedings in conformity to this opinion.

The John G. Stevens.

Supreme Court of the United States, 1898.

170 United States 113.

[The statement of the case is omitted.]

Mr. Justice Gray, after stating the case, delivered the opinion of the court.

The question presented by this record is whether a lien upon a tug, for damages to her tow by negligent towage bringing the tow into collision with a third vessel, is to be preferred, in admiralty, to a statutory lien for supplies furnished to the tug in her home port before the collision.

This question may be conveniently divided, in its consideration by the court, as it was in the arguments at the bar, into two parts: First. Is a claim in tort for damages by a collision entitled to priority over a claim in contract for previous supplies? Second, Is a claim by a tow against her tug, for damages from coming into collision with a third vessel by reason of negligent towage, a claim in tort?

In the case of The Bold Buccleugh, 7 Moore P. C. 267, decided in 1852 by the Judicial Committee of the Privy Council, upon appeal from the English High Court of Admiralty, and ever since considered a leading case, both in England and in America, it was adjuged that a collision between two ships by the negligence of one of them created a maritime lien upon or privilege in the offending ship, for the damage done to the other, which attached at the time of the collision, and might be enforced in admiralty by proceedings in rem against the offending ship, even in the hands of a bona fide purchaser; and Chief Justice Jervis, in delivering judgment, said: "A maritime lien does not include or require possession. The word is used in maritime law, not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession." "This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding in rem, relates back to the period when it first attached." And, after observing that this rule could not be better illustrated than by the circumstances of The Aline, (1839) 1 W. Rob. 111 - in which Dr. Lushington had expressed the opinion that, in a proceeding in rem, the claim for damages must be preferred to a bottomry bond given before the collision; but was not entitled, as against the holder of a like bond given after the collision, to the increased value of

the vessel by reason of repairs effected at his cost - Chief Justice Jervis summed up the matter as follows: "The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So, by the collision, the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties. and he would be bound by that transaction. This rule, which is simple and intelligible, is, in our opinion, applicable to all cases." 7 Moore P. C. 284, 285.

The decision in The Bold Buccleugh has never been departed from in England, but has been constantly recognized as sound law in the courts exercising admiralty jurisdiction. The Europa, Brown. & Lush. 89, 91, 97; S. C. 2 Moore P.C. (N.S.) 1, 20; The Charles Amelia, L. R. 2 Ad & Ec. 330, 333; The City of Mecca, 5 P.D. 106, 113, 119; The Rio Tinto, 9 App. Cas. 356, 360; The Dictator, (1892) P.D. 304, 320. And in a very recent case in the House of Lords, that decision has been deliberately and finally declared to have established beyond dispute, in the maritime law of Great Britain, that a collision between two vessels by the fault of one of them creates a maritime lien on her for the damage done to the other. Currie v. McKnight, (1897) App. Cas. 97.

It has been generally laid down in the English text books that a maritime lien for damages by a collision takes precedence of all earlier maritime liens founded in contract. Abbott on Shipping, (Shee's ed.) pt. 6, c. 4, § 2; Coote's Admiralty Practice, 118; Maclachlan on Shipping, c. 15; Foard on Shipping, 217; Marsden on Collisions, (3d ed.) 82. And the English and Irish courts have even held that a claim for damages from a collision by the negligence of a foreign ship creates a lien upon the whole value of the ship and freight, without deduction for seamen's wages, because, it has been said, the owner of the ship, being personally liable to the seamen for their wages, should not be permitted to deduct expenses for which he is liable, and thus benefit the wrongdoer at the expense of him to whom the wrong has been done. The Elin, 8 P. D. 39, 129, and cases there cited. . . .

There can be no doubt, therefore, that in the English admiralty courts the lien for damages by collision would take precedence of an earlier claim for supplies.

In this country, the principle, applied in the case of The Bold Buccleugh to a claim for damages by collision, that a maritime lien is created as soon as the claim comes into being, has long been held to be equally applicable to all claims, which can be enforced in admiralty against the ship, whether arising out of tort or of contract. General Ins. Co. v. Sherwood, 14 How. 351, 363; The Creole,

2 Wall. Jr. 485, 518; The Mayurka, 2 Curtis, 72, 77; The Young Mechanic, 2 Curtis, 404; The Kiersage, 2 Curtis, 421; The Yankee Blade, 19 How. 82, 89; The Rock Island Bridge, 6 Wall. 213, 215; The China, 7 Wall. 53, 68; The Siren, 7 Wall. 152, 155; The Lottawanna, 21 Wall. 558, 579; The J. E. Rumbell, 148 U.S. 1, 10, 11, 20; The Glide, 167 U.S. 606.

Accordingly, in our own law, it is well established that a maritime lien or privilege, constituting a present right of property in the ship, jus in re, to be afterwards enforced in admiralty by process in rem, arises, not only from a collision and for the damages caused thereby; General Ins. Co. v. Sherwood, The Rock Island Bridge, The Siren and The China, above cited; but also for necessary supplies or repairs furnished to a vessel, whether under the general maritime law in a foreign port, or according to a local statute in her home port. The Young Mechanic, The Kiersage, The Lottawanna, The J. E. Rumbell and The Glide, above cited. . . .

By our law, then, a claim for damages by collision, and a claim for supplies, are both maritime liens. The question of their comparative rank is now for the first time presented to this court for adjudication; and it has been the subject of conflicting decisions in other courts of the United States, and especially in those held within the State of New York.

In The America, (1853) Judge Hall, in the Northern District of New York, appears to have held liens for collisions and those for supplies to be of equal rank, without regard to the date when they attached to the ship. 16 Law Reporter, 264. A claim for damages by collision has been postponed to an earlier claim for supplies, by Judge Brown, in the Southern District of New York, in The Amos D. Carber, 35 Fed. Rep. 665; but has been preferred to such a claim, by Judge Benedict, in the Eastern District of New York, and by Mr. Justice Blatchford on appeal, in The R. S. Carter & The John G. Stevens, 38 Fed. Rep. 515, and 40 Fed. Rep. 331. And, in an earlier case, a claim for collision had been allowed by Judge Benedict a like preference over a previous bottomry bond. The Pride of the Ocean, 3 Fed. Rep. 162.

The preference due to the lien for damages from collision, over earlier claims founded on contract, has been carried so far as to allow the lien for damages to prevail over the claim of seamen for wages earned before the collision, by Judge Lowell, in the District of Massachusetts, in The Enterprise, 1 Lowell, 455; by Judge Nixon, in the District of New Jersey, in The Maria & Elizabeth, 12 Fed. Rep. 627; by Judges Gresham and Jenkins, in the Circuit Court of Appeals for the Seventh Circuit, in The F. H. Stanwood, 9 U.S. App. 15; and by Judge Swan, in the Eastern District of Michigan, in The Nettie Woodward, 50 Fed. Rep. 224. The opposite view has been maintained, in the Southern District of New York, by Judge Choate, in The Orient, 10 Benedict, 620, as well as by Judge Brown, in The Amos D. Carver, 35 Fed. Rep. 665, above cited; and in the

Eastern District of New York, by Judge Benedict, in The Samuel J. Christian, 16 Fed. Rep. 796; and in the Western District of Michigan, by Judge Severens, in The Daisy Day, 40 Fed. Rep. 538.

The case at bar, however, presents no question of the comparative rank of seamen's wages, which may depend upon peculiar considerations, and which, according to the favorite saying of Lord Stowell and of Mr. Justice Story, are sacred liens, and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages. The Madonna D'Idra, 1 Dodson, 37, 40; The Sydney Cove, 2 Dodson, 11, 13; The Neptune, 1 Hagg, Adm. 227, 239; Sheppard v. Taylor, 5 Pet. 675, 710; Brown v. Lull, 2 Sumner, 443, 452; Pitman v. Hooper, 3 Sumner, 50, 58; Abbott on Shipping, pt. 4, c. 4, § 8; 3 Kent Com. 197. Yet see Norwich Co. v. Wright, 13 Wall. 104, 122.

Nor does this case present any question between successive liens for repairs or supplies, the general rule as to which is that they are to be paid in inverse order, because it is for the benefit of all the interests in the ship that she should be kept in condition to be navigated. Abbott on Shipping, pt. 2, c. 3, § 32; The St. Jago de Cuba, 9 Wheat. 409, 416; The J. E. Rumbell, 148 U.S. 1, 9; The Fanny, 2 Lowell, 508, 510.

Nor does it present a question of precedence between two claims for distinct and successive collisions, as to which there has been a difference of opinion in the Southern District of New York; Judge Choate, in the District Court, giving the preference to the later claim, upon the ground that the interest created in the vessel by the first collision was subject, like all other proprietary interests in her, to the ordinary marine perils, including the second collision; and Mr. Justice Blatchford, in the Circuit Court, reversing the decree, because the vessel libelled had not been benefited, but had been injured, by the second collision. The Frank G. Fowler, 8 Fed. Rep. 331, and 17 Fed. Rep. 653.

Nor yet does it present the question whether a lien for repairs made after the collision, so far as they increase the value of the vessel, may be preferred to the lien for the damages by the collision, in accordance with the English cases of The Aline and The Bold Buccleugh, cited at the beginning of this opinion.

But the question we have to deal with it whether the lien for damages by the collision is to be preferred to the lien for supplies furnished before the collision.

The foundation of the rule that collision gives to the party injured a jus in re in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic

has been more clearly established, and more fully carried out, in this country than in England. Henry on Admiralty, § 75, note; Marsden on Collisions, (3d ed.) 93. . . .

In an omitted part of the opinion the court referred to The Little Charles, 1 Brock. 347; The Palmyra, 12 Wh. 1; The Malek Adhel, 2 How. 210; and The China, 7 Wall. 53.

The same principle has been recognized in other cases. The John Fraser, 21 How. 184, 194; The Merrimac, 14 Wall. 199; The Clarita & The Clara, 23 Wall. 1; Ralli v. Troop, 157 U.S. 386, 402, 403.

That the maritime lien upon a vessel, for damages caused by her fault to another vessel, takes precedence of a maritime lien for supplies previously furnished to the offending vessel, is a reasonable inference, if not a necessary conclusion, from the decisions of this court, above referred to, the effect of which may be summed up as follows:

The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, jus in re, a proprietary interest in the offending ship, and which, when enforced by admiralty process in rem, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done. The owner of the injured vessel is entitled to proceed in rem against the offender, without regard to the question who may be her owners, or to the division, the nature or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests, existing at the time of the collision, in the offending vessel, whether by way of part-ownership, of mortgage, of bottomry bond or of other maritime lien for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in The Bold Buccleugh, before cited, of the holder of an earlier bottomry bond, under the law of England, "so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim." 7 Moore P.C. 285.

We are then brought to the question, whether a claim by a tow against her tug, for damages from coming into collision with a third vessel because of negligent towage, is a claim in tort, standing upon the same ground as a clair of the third vessel for damages against the tug.

Upon this question, again, there have been conflicting opinions in the District Courts of the United States.

On the one hand, it has been held by Judge Benedict, in the Eastern District of New York, in several cases, including the case at bar, that a claim by a tow against her tug for damages caused by the negligence of the latter is founded on a voluntary contract between the owner of the tow and the owner of the tug, and should be postponed to a claim against the tug for necessary supplies or repairs furnished before the contract of towage was made. The Samuel J. Christian, 16 Fed. Rep. 796; The John G. Stevens, 58 Fed. Rep. 792; The Glen Iris, 78 Fed. Rep. 511. The same conclusion has been reached by Judge Brown, in the Southern District of New York, proceeding upon the hypothesis that the security for the maritime obligation created by the contract of towage is subject to all liens already existing upon the vessel, and upon the theory that, by the general maritime law, liens ex delicto, including all liens for damage by collision, are inferior in the rank of privilege to liens ex contractu. The Grapeshot, 22 Fed. Rep. 123; The Young America, 30 Fed. Rep. 789; The Gratitude, 42 Fed. Rep. 299.

On the other hand, the claim by a tow against her tug for damages caused by negligent towage has been held to be founded in tort, arising out of the duty imposed by law, and independent of any contract made, or consideration paid or to be paid, for the towage, by Mr. Justice Blatchford, when District Judge, in The Brooklyn, 2 Benedict, 547, and in The Deer, 4 Benedict, 352; by Judge Lowell, in The Arturo, 6 Fed. Rep. 308; and by Judge Swing, in the Southern District of Ohio, in The Liberty, 7 Fed. Rep. 226, 230. In The Arturo, Judge Lowell said: "These cases of tow against tug are, in form and fact, very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet. There is, therefore, an analogy between the two classes of cases so close that the tow may sue, in one proceeding for damage, her own tug and a strange vessel with which there has been a collision." 6 Fed. Rep. 312. And it has accordingly been held, by Judge Nixon, and by Judge Severens, that such a claim by a tow against her tug is entitled to priority of payment over liens on the tug for previous repairs or supplies. The M. Vandercook, 24 Fed. Rep. 472, 478; The Daisy Day, 40 Fed. Rep. 538.

The decisions of this court are in accordance with the latter view, and are inconsistent with any other.

It was argued that the liability of a tug for the loss of her tow was analogous to the liability of a common carrier for the loss of the goods carried. But even an action by a passenger, or by an owner of goods, against a carrier, for neglect to carry and deliver in safety, is an action for the breach of a duty imposed by the law, independently of contract or of consideration, and is therefore founded in tort. Philadelphia & Reading Railroad v. Derby, 14 How.

468, 485; Atlantic & Pacific Railroad v. Laird, 164 U.S. 393.

In Norwich Co. v. Wright, 13 Wall. 104, 122, Mr. Justice Bradley, referring to Maclachlan on Shipping, (1st ed.) 598, laid down these general propositions: "liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause." Although these propositions went beyond what was required for the decision of that case, which was one of a collision between two vessels, owing to the fault of one of them, causing the loss of her cargo, as well as of the other vessel and her cargo, yet the very point adjudged was that the lien on the offending vessel for the loss of her own cargo was a lien for reparation of damage, and therefore was upon an equality with the lien upon her for the loss of the other vessel and her cargo.

This court, more than once, has directly affirmed that a suit by the owner of a tow against her tug, to recover for an injury to the tow by negligence on the part of the tug, is a suit ex delicto and not ex contractu.

In The Quickstep, 9 Wall. 665, 670, a libel by the owner of a tow against her tug set forth a contract with the tug, for a stipulated price, to tow directly, and a deviation and unreasonable delay in its performance, and that the tug negligently backed into the tow and injured her. An objection that the libel could not be maintained, because the contract alleged was not proved, was overruled by this court. Mr. Justice Davis, in delivering judgment, said: "The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep."

Again, in The Syracuse, 12 Wall. 167, 171, which was a libel by a tug against her tow for negligently bringing her into collision with a vessel at anchor, the court, speaking by the same justice, said: "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement the canal boat was being towed at her own risk, nevertheless the steamer is liable, if, through the negligence of those in charge of her, the canal boat suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require, on the part of the persons engaged in her management, the exercise of reasonable care, caution and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences." And see The J. P. Donaldson, 167 U.S. 599, 603.

The essential likeness between the ordinary case of a collision between two ships, and the liability of tug to her tow for damages caused to the latter by a collision with a third vessel, is exemplified by the familiar practice in admiralty, (followed in the very proceeding in which the question now before us arose), which allows the owner of a tow, injured by a collision caused by the conduct of her tug and of another vessel, to sue both in one libel, and to recover against either or both, according to the proof at the hearing. The Alabama & The Gamecock, 92 U.S. 695; The Atlas, 93 U.S. 302; The L. P. Dayton, 120 U.S. 337; The R. S. Carter & The John G. Stevens, 38 Fed. Rep. 515, and 40 Fed. Rep. 331.

The result of applying to the case at bar the principles of the maritime law of the United States, as heretofore declared by this court, is that the lien for the damages occasioned by negligent towage must be preferred to the previous lien for supplies.

In the argument of this case, copious references were made to foreign codes and commentaries, which we have not thought it important to consider, because they differ among themselves as to the comparative rank of various maritime liens, and because the general maritime law is in force in this country, or in any other, so far only as administered in its courts, or adopted by its own laws and usages. The Lottawanna, 21 Wall. 558, 572; The Belgenland, 114 U.S. 355, 369; Liverpool Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 444; Ralli v. Troop, 157 U.S. 386, 407.

Question certified answered in the affirmative.

The Glen Island.

District Court of the United States, Southern District of New York, 1912.

194 Federal Reporter 744.

In Admiralty, Suit by the Chelsea Iron Works against the steam tug Glen Island, with 11 other actions against the same tug. On determination of priority of liens.

Each of the libels above mentioned asserts a lien against the tug, which has been sold under decree obtained in the first cause. All the libels were filed before sale. One is for seamen's wages, and is admittedly entitled to preference. One libel (that of Pendleton) claims damages for negligent towage occurring on July 26, 1910. All the other libels are either for repairs or supplies, and it is admitted that most of the repairs were executed and supplies furnished subsequent to the date of the alleged negligent towage. The fund produced by sale and in court is sufficient to pay all claims for wages, supplies, and repairs, but is not sufficient also to discharge the alleged towage damage. Libelants who proved their claims before the Commissioner and obtained final decree moved for payment, asserting that, even if Pendleton's claim be good, and good for the entire amount demanded, it must as matter of law be postponed to repair and supply claims accruing after the alleged negligent towage. . . .

Hough, District Judge (after stating the facts as above). Until The John G. Stevens, 170 U.S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969, several points of law more or less applicable to the facts herein were thought well supported by authority in this circuit. Thus: (1) A lien for pure tort, e.g., collision, ranked all antecedent liens ex contractu (The R. S. Carter [C.C.] 40 Fed. 331, Blatchford, J.), except (2) seaman's wages (citations in Stevens Case, supra, 170 U.S. 119, 18 Sup. Ct. 544, 42 L. Ed. 969). But (3) a lien for negligent towage did not rest wholly or principally on tort, but arose quasi ex contractu from the negligent performance of contract, wherefore it was inferior to wholly contractual and beneficial liens earlier in date (The J. G. Stevens in trial [D.C.] 58 Fed. 792, Benedict, J.), even arising on the same voyage, which (4) in the case of harbor vessels might be equitably estimated and fixed at 40 days (The Gratitude [D.C.] 42 Fed. 299, Brown, J.). Finally (5) these rules had no application as between two nearly cotemporaneous torts. The Frank G. Fowler (C.C.) 17 Fed. 653, Blatchford, J.

The answer of the Supreme Court to the question certified in 170 U.S. 113, 119, 18 Sup. Ct. 544, 42 L. Ed. 969, changed these rulings in one respect only, viz., it reversed the third; it being held that negligent towage gave rise to a lien as completely founded on tort as that for negligent collision. Rule 1 was positively

affirmed, and the exception in favor of seamen impliedly approved. The other local rulings above stated were not disturbed, enlarged, or approved.

It thus appears that the leading case of The Stevens does not touch the question here, viz., whether liens for repairs and supplies accruing subsequent to a lien for pure tort rank with, above, or below such tort lien. This question will be considered without any reference to the accusations of laches contained in some of the papers submitted. Libellants are nearly equal in sloth.

It was said in The Stevens, supra, that two English decisions (The Aline, 1 W. Robinson, 111, and The Bold Buccleugh, 7 Moo. P. C. 267) held that the liens for repairs made after collision, in so far as they increase the value of the vessel, may be preferred to a lien for damages by the collision. 170 U.S. 120, 18 Sup. Ct. 544, 42 L. Ed. 969. This apparently means that the two cases cited held the same thing. The facts in The Aline are fairly summarized by Brown, J., in The Young America (D.C.) 30 Fed. at 789; but in The Bold Buccleugh, Sir John Jervis declared those facts to be that:

"There was a bottomry bond before and after the collision, and the court held that the claim for damage in a proceeding in rem must be preferred to the first bondholder, but was not entitled against the second bondholder to the increased value of the vessel by reason of repairs effected at his cost."

This is a singular misunderstanding of the evidence before Dr. Lushington, and on this misstatement Jervis, J., makes the following declaration of law:

"The interest of the first bondholder took effect from the period when his lien attached. He was, so to speak, a part owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done without reference to his claim. So by the collision the interest of the (collision) claimant attached, and dating from that event the ship in which he was interested having been repaired was put in bottomry by the master acting for all parties, and he would be bound by that transaction. This rule, which is simple and intelligible, is in our opinion applicable to all cases."

This is not the reasoning of The Aline; but I think it is true that, if the facts of that case had been as Sir John Jervis thought they were, Dr. Lushington would have held what the Privy Council declared to be the law.

There are at least two plainly recognizable lines of thought by which the usual admiralty rule of paying liens of the same class in the inverse order of their accrual is justified. One is the idea advanced in The Buccleugh, namely, that each person who acquires a

jus in re becomes a sort of coproprietor in the res, and therefore subjects his claim to the next similar lien which attaches. This is a highly artificial style of reasoning, though interesting as furnishing internal evidence of the civilian origin of admiralty. The simpler, and therefore it is thought the better, reasoning is briefly adverted to by Blatchford, J., in The Fowler, supra, 17 Fed. at page 656. It is that the last beneficial service is the one that continues the activity of the ship as long as possible and therefore is to be preferred, supposing always that that which is produced or contirubted to by the service is a voyage.

It makes no difference which theory be accepted, the logical result is that, since repairs and supplies are what enable the vessel to continue about her business after she has wronged another vessel, liens for those repairs and supplies are to be preferred to the lien for the wrong - a wrong committed by a res as yet unrepaired and unbenefited by the necessaries subsequently supplied. This is surely true after the party injured has had reasonable opportunity to enforce his tort lien by appropriate seizure, and thereby cut off the possibility of future liens, however beneficial to the res so seized. The Young America (D.C.) 30 Fed. 790.

It follows, therefore, that all the liens here in question and arising after the expiration of what may be called the voyage on which the Glen Island was engaged on July 26, 1910, are entitled to a preference over all claims of any kind arising on such voyage.

It remains to inquire whether any reason exists for disturbing the rule of The Gratitude, supra. This is mentioned because it was said at bar that not much has been heard of that rule in recent years, and its abandonment was suggested. No reason for such change is seen; it is just as true now as when The Gratitude was decided that in the interest of lienors generally some limit must be set measuring out periods of time within which claims of the same rank shall share pro rata, and the measure fixed by Brown, J., has in my judgment been justified by experience.

Since, therefore, the claim of the Pendleton libel for negligent towage is (under the authority of The Stevens, supra) superior to all antecedent repair and supply claims, the final inquiry is whether it has any preference over or ranks in equality with supplies furnished and repairs executed within 40 days from July 26, 1910.

That repairs and supplies procured upon the same voyage on which a collision happens, and after such collision, are superior in kind and preferred in rank to earlier damage claims, wns in my opinion settled law for centuries before Brown, J., so declared it in The Gratitude, 42 Fed. 300.

So far as repairs are concerned, The Aline, supra, is flat authority. The application of that case is not so plain where the earlier tort is of such a nature that it does not injure the offending ship; yet it is plain enough that repairs executed after a tort make the ship a different and better ship than she was when the wrong was done, and to such a situation whether the offending vessel be injured or not, the reasoning of Dr. Lushington applies, viz., that the tort claimant shall not absorb for his lien that which did not exist when the lien accrued. By hypothesis every repair upon a vessel puts into her the value of the repair; therefore shall the value of repairs be taken out before the tort claimant is permitted to proceed.

With supplies the case is only apparently different. The lien in every case attaches not only to the vessel, but "her tackle, apparel, and furniture," and these words are wide enough to include necessary supplies without which the ship is not fully furnished. Moreover, repairs and necessary supplies have long stood upon the same basis, and liens for both are equally justified by the reasoning referred to in The Frank Fowler.

It follows that, without calling in the aid of the doctrine of laches, the claim of the Pendleton is (1) subordinate to all claims of every kind herein mentioned accruing subsequent to a date forty days after July 26, 1910. This conclusion is based on the doctrine of voyages; and (2) it is also subordinate to all repair and supply claims arising within 40 days after July 26, 1910, because of the inherently inferior nature of prior tort demands depending upon collision or negligent towage, which wrongs are for legal purposes exactly alike. The standing of a tort lien owned by one injured in benefiting the vessel is not here considered.

The proceedings before the Commissioner may be regulated by this opinion, and orders of distribution will be signed in accordance herewith.

It may be that the proctors for claims earlier in date than July 26, 1910, will desire to contest the Pendleton libel, in which case the stipulation offered to me, and now directed to be filed regarding reservations for costs, may be enforced.

An Act to provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes, June 5, 1920, ch. 250, sec. 30.

41 Statutes at Large 988, 1000.

Subsection M. (a) When used hereinafter in this section, the term "preferred maritime lien" means (1) a lien arising prior in time to the recording and endorsement of a preferred mortgage in accordance with the provisions of this section; or (2) a lien for damages arising out of tort, for wages of a stevedore when employed directly by the owner, operator, master, ship's husband, or agent of the vessel, for wages of the crew of the vessel, for general average, and for salvage, including contract salvage.

(b) Upon the sale of any mortgaged vessel by order of a district court of the United States in any suit in rem in admiralty for the enforcement of a preferred mortgage lien thereon, all pre-existing claims in the vessel, including any possessory common-law lien of which a lienor is deprived under the provisions of subsection L shall be held terminated and shall thereafter attach, in like amount and in accordance with their respective priorities, to the proceeds of the sale; except that the preferred mortgage lien shall have priority over all claims against the vessel, except (1) preferred maritime liens, and (2) expenses and fees allowed and costs taxed, by the court.

The Priscilla.

High Court of Admiralty of Great Britain, 1859.

Lushington 1.

Bottomry. In September, 1858, the Priscilla, then lying in Constantinople, was chartered for a voyage to Odessa and thence to England; whilst lying at anchor there, she was run into by a vessel called the African, and to repair the damages, a bond (bond No. 1) was given on the ship and the freight to grow due on the chartered voyage. This bond was dated 12th October, 1858, and was for 500£. and interest. The Priscilla then sailed to Odessa and took in a cargo of peas for England. Shortly after leaving Odessa, she was forced to put back damaged by a gale, and a bond (bond No.2) for 120£. was, on the 11th December, 1858, given on ship and cargo. The ship again sailed, and in the course of the voyage was obliged to be put into Syra to be repaired, and a bond (bond No.3) for 261£. 1s. also on ship and cargo was there given, dated 12th January, 1859. On final arrival in this country actions were brought on the several bonds, the ship was sold, the cargo (value 600£) was released on bail, and the freight, 108£., brought into Court. Bond No. 1 was partly paid by damages received from the owners of the African. Actions of wages and pilotage were also brought, after payment of which there remained, as proceeds of ship and freight, the sum of 410£. There then remained the following claims on the several bonds:-

Bond No. 1 (action against proceeds and freight) . .	£387	12	11
Bond No. 2 (action against ship, freight and cargo).	120	0	0
Bond No. 3 (action against ship and cargo).	261	1	0
Total. . . .	£768	13	11

. . .

[The arguments of counsel are omitted.]

Dr. Lushington. . . . A motion is now made on behalf of the holder of bond No. 3, to be paid out of ship and freight. This is opposed on behalf of the holder of bond No. 1, who says that bond No. 3 should be paid out of cargo; and the motion is in turn supported by the owners of the cargo, who are clearly the parties really interested.

The demands are, in round numbers, for the three bonds, 768£. The fund available from the proceeds of the ship and freight is 410£. The deficiency, therefore, if the cargo is not made at all liable, will be 358£. The sum due on the last bond (bond No. 3) is 261£. Assuming that it is paid out of the ship and freight, there will remain out of the ship and freight 149£. applicable to the discharge of bond No. 2. Bond No. 2 is for 120£., and therefore for bond No. 1 there will remain only 29£.; in fact, nothing at all, for the costs will have amounted to a very much larger sum than that small balance; bond No. 1 will be unpaid.

The effect then of granting this motion, if a similar course is taken with bond No. 2, will therefore be that nothing will be left for the satisfaction of bond No. 1, and that the cargo will be wholly exonerated from any payment to any of the bonds. The substantial question, then, is, whether the cargo ought not to be made to discharge the two last-executed bonds, so as to leave a fund for the payment of the first-executed bond.

Now the cargo was not laden until November, 1858, after the execution of the first-executed bond, and previous to the other two. This circumstance would be perfectly fatal to the holders of bond No. 1 asking to be paid out of the cargo, which was not hypothecated to them; but they make no such demand; they only ask that the cargo shall be made applicable to the payment of bond No. 3, which does bind the cargo as well as the ship. Several cases were cited in argument, to which I will now shortly advert. The first is the Dowthorpe. 2 N. of C. 264. That was a most complicated case, raising many questions, and some of them of difficulty; but upon a consideration of all that is reported, it does not appear to me to have any stringent bearing on the present question. The dispute there was as to the payment of a bottomry bond on ship and freight, and certain other charges, as wages and pilotage; there was no reference whatever to any demands which could affect the cargo. The case is only useful for the present purpose as containing a report of the Prince Regent. Ibid. 272. The case of the Constancia, 4 N. of C. 285, was also a most peculiar one. There were three bonds: first, on ship alone; second, on cargo alone; third, on ship alone. The case was brought on by motion only. The decision in that case cannot affect the present. If there were doubtful questions, they were whether the Court was right in giving preference to the first bond over the second, because the ship was not mentioned in the second bond; and whether the Court was right in holding the ship and freight tacitly hypothecated in the second bond: both very difficult questions, but not hujus loci. I see no reason to depart from what I said in that case, but I cannot apply it to the present. The Trident 1 W. R. 29, was also cited. The main question in that case was wholly different from the present; it was whether a bond granted at Plymouth on a vessel belonging to an owner resident in Scotland was valid; but certain observations incidentally falling from the Court are reported at page 35, which have a bearing upon the present question. These observations did not apply to the main question, but had reference to an argument that other bonds might be prejudiced. It may be that in declaring the general principle by which the Court would be guided, namely, that of marshalling the assets where I could lawfully do so, I illustrated my opinion without sufficient accuracy. I did not bear in mind the case of the Prince Regent. I am of opinion that the principle of marshalling the assets ought to prevail in this Court whenever it can be carried into effect without violating other rules entitled to preferential observance. But the question now before me is, whether the present case falls within this principle, and the Court ought to compel the holders of

the last bond to resort to the cargo. If the holders of the last bond, which is upon ship and cargo, have the same and equal right to proceed against the cargo as against the ship and freight, I should be disposed to hold that in equity they should be compelled to proceed against both, and in aid of the other bonds to resort, in the first instance, to the cargo. But I apprehend that, upon the authority of the Prince Regent, and the reasoning of Lord Stowell's judgment in the Gratitudine, 3 C. R. 255, the holders of the last bond have no such right against the cargo; they cannot make the cargo answerable until the ship and freight have been exhausted. The owners of the cargo have a perfect right to avail themselves of the principle of that decision. They have a right to say that by law the cargo, though legally hypothecated, cannot be touched till the ship and freight have been exhausted. They are strangers to all previous bonds on ship and freight. The result is, that the holders of the last bond, who are entitled to be paid in priority, are thrown on ship and freight exclusively. This motion must be granted.

The Edward Oliver.

High Court of Admiralty of Great Britain, 1867.

Law Reports 1 Admiralty and Ecclesiastical 379.

This was a motion on behalf of the master of the Edward Oliver, for payment of his wages and disbursements out of the proceeds of the ship and freight, under the following circumstances:-

Four causes had been instituted against the Edward Oliver: one by the master John Lucas Follett, for wages and disbursements; two by bottomry bondholders, the bonds in each case being upon ship, freight, and cargo, and stating the master to be personally liable; and the fourth for towage. The owners of the ship had not appeared: the owners of the cargo had appeared and given bail for the payment of the bottomry bonds. Freight had been paid into court and the vessel had been sold. The Court, reserving all question of priorities, had pronounced in favour of the master's claim; and with respect to the bonds had pronounced in favour of their validity, and had condemned the proceeds of the vessel and freight in the amount and in costs, and had condemned the owners of the cargo and their bail in the balance, if any, due on the bonds, after the proceeds of ship and freight had been exhausted, and in costs. The amounts of the claims were as follows:-

Cause 3689, master's claim . .	£1281	9	4
Cause 3709, bottomry . . .	1162	6	2
Cause 3744, bottomry	3486	18	6
Cause 3972, towage			

exclusive of costs in each cause.

To meet these charges there were the following funds:-

Vessel, gross proceeds . . .	£2310	0	0
Freight paid into court . . .	350	0	0
	2660	0	5
Deduct marshal's fees . . .	207	13	4
Balance in registry . . .	£2452	6	8

. . .

[The arguments of counsel are omitted.]

Dr. Lushington. It appears that the amount of proceeds of ship and freight is insufficient not only to pay both the master's claim and the bonds, but even the bonds alone. The bondholders, however, are secure, because they have the bail of the owners of cargo to fall back upon, but the master's lien for wages and disbursements extends only to ship and freight. The motion to the Court is to pronounce the master entitled to priority of payment out of the proceeds of ship and freight now in the registry. If this motion is refused the ship and freight will be exhausted in payment of the bonds (and indeed will have tc be supplemented by the cargo), and the master, who has no claim against the cargo, will lose his remedy

in rem altogether. If, on the other hand, it is granted, the result will be that the master will first be paid out of ship and freight; then the remainder of the proceeds of ship and freight will be exhausted in part payment of the bonds, and the balance will be paid by the owners of cargo. This balance, as compared with the balance in the other alternative, will of course be greater by the exact sum paid out of the proceeds of ship and freight to the master. In either case the bonds would be paid in full. The contention is solely between the master and owners of cargo.

The owners of the cargo contend that the rule of the Court - established in the case of The Jonathan Goodhue, Swa. 524 - that the holder of a bottomry bond, upon which the master has made himself personally liable, is paid out of the proceeds of ship and freight before the master, is an absolute rule. In support of this contention, reference was made to the case of The Priscilla, Lush. 1.

In that case there were two bonds, one upon ship and freight only, and the other, of posterior date, on ship, freight, and cargo; and the rule that a posterior bond takes precedence over an earlier bond was enforced, although the enforcement of the rule was not necessary for the protection of the posterior bond, and resulted in the earlier bond being left unpaid. For the effect of precedence being given to the posterior bond, coupled with the rule that ship and freight must be exhausted before cargo is resorted to in payment of bottomry bonds, was that the whole of the proceeds of ship and freight were exhausted in payment of the posterior bond, and nothing was left to satisfy the earlier bond. Whereas, if the earlier bond had been paid out of proceeds of ship and freight, the remainder, supplemented by the cargo, would have been enough to discharge the second bond in full. The point, however, as to whether the rule gave an absolute priority does not seem to have been raised in argument.

Mr. Clarkson further directed the attention of the Court to a well-known rule of equity, that no marshalling is permitted to the prejudice of third parties. In the present instance it was alleged that marshalling of assets between the master who has ship and freight as his only securities, and the bondholders who have ship, freight, and cargo, would work to the injury of the owners of cargo, who would thus become charged with a larger sum than they would otherwise be liable to; and further, that this additional charge would be improperly saddled upon the cargo, because, though nominally due under a bond affecting cargo, it would really represent a burden to which cargo is not liable, viz., wages and disbursements of master.

On the other hand, it is argued for the master, that the master's lien on ship and freight for wages and disbursements in general takes precedence of a bottomry bond, and though this lien is liable to be postponed to a bottomry bond, for which the master

has made himself personally liable, there is no absolute rule to this effect; that it is a rule made only for the protection of the bondholder, and consequently does not obtain where the bottomry bondholder does not need such protection. That in this instance the bottomry bonds will certainly be paid in full out of cargo, if not out of ship and freight; that the holders, therefore, have no interest in claiming to be paid out of ship and freight before the master, and that the owners of cargo have no equity to insist upon the holders of the bonds pressing their claim.

This is the first time the point has been raised. The general principle is clear. If a master, by the terms of the bottomry bond, has bound himself as well as ship and freight for the payment of the bond, it would be manifestly wrong that in defeasance of his own contract he should not only not pay the bond himself, but obtain out of the proceeds of ship and freight payment of his own claims against the owners, leaving the bottomry bondholder unpaid. Hence the rule by which the master's claim is liable, under those circumstances, to be postponed. But this rule frequently operates with great severity against the master, depriving him of his real remedy for recovering his wages and disbursements, and certainly ought not to be carried beyond the exigency of the case; that is, ought not to be extended to circumstances where the bottomry bondholder would not be prejudiced by the master being paid before him. I see no reason why the owners of cargo should be benefited at the expense of the master; for the master, though he may have bound himself for the payment of the bond to the holder thereof, has made no such contract with the owners of cargo, and they are not entitled to invoke a rule made only for the protection of the bondholder.

The Court will therefore pronounce the proceeds of the ship and freight to be first applied in payment of the master's claim for wages and disbursements.

In the Matter of the Petition of the Bank of Nova Scotia v. The Proceeds of the Brig Lillian.

District Court of the United States, Eastern District of New York, 1880.

4 Federal Reporter 667

Benedict, D. J. The question presented by this petition arises as follows: The master and crew of the brig Lillian libelled that vessel, and also the freight earned upon her last voyage, to recover their wages. The vessel has been seized and sold, the proceeds amounting to $4,000. The freight proceeded against, amounting to $1,095.96, has also been attached. The master has obtained a decree by default for his wages, amounting to $270.41, against both the vessel and the freight. The seamen have obtained a decree for their wages, amounting to the sum of $264.30; also against both vessel and freight. Several other claims were presented which are not in dispute; but, after paying all liens but those of the master and seamen, there remain of the proceeds of the vessel in court more than sufficient to pay their wages without resort to the freight, and of the freight more than sufficient to pay the wages without resort to the vessel. The Bank of Nova Scotia now makes it appear that they have a mortgage upon the vessel exceeding in amount the whole of the proceeds now remaining in the registry, and having made due proof of their mortgage, and the amount due thereon, they apply to the court, by petition, for an order directing that the wages of the master and crew may be paid out of the freight, and that the whole of the proceeds of the vessel remaining in the registry may be paid to them in satisfaction pro tanto of their mortgage.

James A. Moran also makes it appear that the freight in question was made payable to him, by the bill of lading, as security for certain advances made by him to pay expenses of the vessel incurred in fitting out and performing the voyage in which the freight now in the registry was earned, which advances he has shown amount to more than the amount of the freight in the registry, whereupon he asks to have the wages of the master and crew paid out of the proceeds of the vessel, and the amount of the freight in the registry paid over to him.

In this controversy the owners of the vessel have not appeared, and no claim has been made, on their behalf, to any part, either of the proceeds of the vessel or the freight. No defence was made to the demand of the master and crew, either by the owners or by the Bank of Nova Scotia, or any other person, and accordingly the master as well as the seamen have obtained decrees for their wages against both the ship and the freight. As the demands of the master and crew can be paid in full, either out of the freight or out of the proceeds of the vessel, they care not to which fund they resort for the satisfaction of their decrees, and make no opposition to

any order that may be made respecting the payments of their demands. It is thus seen that this is a controversy between two creditors, one of whom has made advances on the security of the ship, the other on the security of the freight.

It has been contended, in behalf of the holders of the mortgage upon the ship, that Moran acquired no lien upon the freight by reason of his advances, and, therefore, inasmuch as his right is simply that of an assignee of the ship-owner, that the question at issue is the same as if the controversy were between the ship-owner and the mortgagee, in which case, as the master and crew can resort to either the ship or the freight for the satisfaction of their demand, while the mortgagee can resort to the ship alone, the wages should be satisfied out of the freight, in accordance with a familiar rule in equity. This contention is partly right and partly wrong. It is undoubtedly true that Moran acquired no lien upon the freight for his advances. His right depends upon the contract made with him by the ship-owner, that the freight should be collected by him and applied to him to repay whatever might be due him for the moneys he had advanced. His interest in the freight must, therefore, be subject to that of the seamen. But it does not follow that he is thereby eliminated from this controversy, as the mortgagee contends. If he were, the same reasoning would eliminate the mortgagee. The ship-owner is the one that has been eliminated, leaving the mortgagee of the ship and the assignee of the freight the only parties to the controversy, and their right and their equities alone to be considered.

It has been urged in behalf of the assignee of the freight that his advances were made for the purpose of enabling the ship to earn the very freight which he now claims, and a superior equity arises in his favor out of that fact. But, as before stated, the law gave him no lien upon the freight for his advances, and I am unable to see that the fact that the money was applied to payments for the outfits of the vessel for this voyage gives him any greater equity in the freight than that acquired in the ship by the mortgagee of the ship, through his advances. As between these two parties the equities are equal.

If the holder of the mortgage upon the ship has no equity superior to that of the assignee of the freight, his application to have the wages paid out of the freight cannot be granted, unless it can be held, as matter of law, that the lien of the seamen does not attach to the ship when there is freight sufficient to pay the wages, and available to the seamen for that purpose. Manifestly, no such proposition can be sustained. The seamen have a right in the freight and at the same time a lien upon the ship. The ship is as much bound for the payment of the wages as is the freight. The seamen may resort to either fund in the first instance, and, that proving insufficient, they may resort to the other; or, as here, they may proceed against both at the same time. When, however, they do

proceed against both, and, as here, either proves sufficient, the court has the undoubted right to control the method of satisfying their decrees. And when there are two creditors whose equities are equal, one of whom is entitled to the surplus of the freight and the other to the surplus proceeds of the ship, the only equitable method is to direct that the wages be charged against both funds pro rata. That is to say, that out of the freight shall be paid the master and crews, upon their decrees, a sum bearing the same proportion to the whole amount of the wages as the amount of the freight bears to the balance of the proceeds of the ship in the registry, and that the remainder of the wages shall be paid out of the proceeds of the ship. The freight moneys in court after such deduction may then be paid to Moran, upon his filing his petition therefor, and the proceeds of the ship remaining after such deduction may then be paid to the Bank of Nova Scotia, upon the present petition.

Section 4.

The Extinguishment of the Maritime Lien.

The Trenton.

District Court of the United States, Eastern District of Michigan, 1880.

4 Federal Reporter 657.

This was a libel for supplies and materials furnished at Cleveland, the home port of the vessel, in 1876, for which a lien was claimed under the law of the state of Ohio. The present owner of the schooner, appearing as claimant, pleaded in substance that in July, 1878, the libellants caused the vessel to be seized at Toronto, Ontario, by virtue of a warrant issued by the maritime court of Ontario, upon a petition filed by the libellants for the same cause of action for which their libel was filed in this court; that in August, 1878, one Michael Gallagher intervened with a claim for wages as watchman and ship-keeper from December 1, 1877, to June 27, 1878; that about the same time one William McAllister also intervened with a claim for wages as mate from April 4 to May 4, 1877, to the amount of $52.50; that the two last-mentioned claims were consolidated, and on September 25, 1878, the vessel was condemned and ordered sold to satisfy these claims; that upon such sale she was purchased by the claimant for $1,000, and she has since been registered at the custom-house in Toronto; that notice of the pendency of these proceedings, and of the sale, was given by publication, pursuant to the practice of the court, and by the arrest and detention of the vessel; that the maritime court of Ontario had jurisdiction of these causes and authority to direct the sale, and that claimant became the owner of the vessel, discharged of all liens.

It appeared, from the proceedings in the Canadian case, that a demurrer was interposed to libellants' upon the ground that the maritime court had no jurisdiction to enforce a claim for necessaries supplied to an American vessel in a port in the United States. This demurrer was sustained by the court, and libellants' petition dismissed. The vessel was sold, as above stated, by virtue of a decree rendered upon the consolidated claims of Gallagher and McAllister. The question in this case was whether this sale was sufficient to divest the libellants of their claim for necessaries. . . .

That the sale of a vessel, made pursuant to the decree of a foreign court of admiralty, will be held valid in every other country, and will vest a clear and indefeasible title in the purchaser, is entirely settled, both in England and America. Story on Conflict of Laws § 592; Williams v. Armroyd, 7 Cr. 423; The Tremont, 1 W. Rob. 163; The Mary, 9 Cr. 126; The Amelie, 6 Wall. 18; The Granite State, 1 Sprague, 277. In the case of The Helena, 4 Rob. Adm. 4, this doctrine was carried so far as to sustain a sale made after a capture by pirates. See, also, Grant v. McLaughlin, 4 John. 34.

These cases fully establish the doctrine stated by Mr. Justice Story, (Conflict of Laws § 592,) that "whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foregin tribunal. This is very familiarly known in the cases of proceedings in rem in foreign courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture, or of any of the like nature over which courts have a rightful jurisdiction, founded upon the actual, rightful, or constructive possession of the subject-matter". This is not the law of England and America alone. The commercial code of France contains similar provisions regarding the judicial sale of ships.

Article 193: "The liens of creditors shall be extinguished, independently of the general methods of extinguishing obligations, by a judicial sale made according to the forms established by the following title, or when, after a voluntary sale the ship shall have made a voyage at sea under the name and at the risk of the purchaser, and without opposition on the part of the creditors of the vender."

In commenting upon this article, Dufour observes, (2 Droit Maritime, 47:) "Moreover, the sale upon seizure has always had the effect, in our law, of purging the encumbrances with which the property was charged." "The decree clears all liens," said Loysel. "We perceive the reason of this. These kinds of sales are made notoriously and publicly. The creditors are perfectly advised of what is passing. It is for them to take precautions to assure their payment from the price of the ship but if they persist in remaining unknown their negligence ought not to prejudice the purchaser. To these general reasons we ought to add another peculiar to the maritime law. He who buys at a judicial sale must pay his price upon the spot. He is not bound to wait until the creditors are made known to pay into their hands. He ought then, to be protected against their claims. Otherwise the judicial sale, instead of offering security which attracts buyers, would be only a snare from which they would eagerly escape. For these reasons, according to our article, the purchaser at a judicial sale receives the vessel free and clear of all encumbrances." Page 53. "Moreover, it would not follow that the creditors are entirely disarmed by this result. On the one hand their debt, in effect, subsists; and, on the other, nothing is easier than to transfer the entire amount, with the lien which it draws after it, to the price of the ship."

Article 766 of the German Mercantile Code expressly provides that the lien of ships' creditors upon the vessel becomes void; (1) "By a compulsory sale of the vessel in a home port the purchase money takes the place of the ship, as regards the ship's creditors must be publicly summoned to protect their rights. In other respects

the provisions regulating the proceedings for a sale are reserved to the laws of the various countries." The 600th article of the Spanish Code is equally explicit: "If the sale takes place at public auction and with the intervention of judicial authority, according to the formulas prescribed by article 608, every responsibility of the ship in favor of its creditors is extinguished from the moment in which the written evidence of sale is agreed to." Similar provisions are found in article 1398 of the Portuguese, article 193 of the Belgian, article 290 of the Italian, article 840 of the Chilian, and article 477 of the Brazilian Code. In short, the doctrine that the sale of a vessel by a court of competent jurisdiction discharges her from liens of every description, is the law of the civilized world.

Such sales, however, may be impeached by the owner of other person interested by showing (1) that the court or officer making the sale had no jurisdiction of the subject-matter by actual seizure and custody of the thing sold. Rose v. Himely, 4 Cranch, 241; Bradstreet v. The Neptune Ins. Co. 3 Sunn. 601; The Mary, 9 Cranch, 126; Woodruff v. Taylor, 20 Vt. 65; Daily v. Doe, 3 Fed. Rep. 903. Whether it be not also essential that there should have been proper judicial proceedings upon which to found the decree, and personal or public notice of the pendency of such proceedings, it is unnecessary here to determine, since it appears that sworn petitions were filed, and notice of the pendency of the proceedings given through the newspapers, pursuant to the practice of the maritime court. (2) That the sale was made by a fraudulent collusion, to which the purchaser at such sale was a party. Parkhurst v. Sumner, 23 Vt. 538; Annett v. Terry, 35 N. Y. 256; Castrique v. Imrie, L. R. 4 H. of L. 427. (3) That the sale was contrary to natural justice. The Flad Dyen, 1 C. Rob. 135; Castrique v. Imrie. In case of sale by a master, the court will inquire into the circumstances and see whether it was necessary and for the interest of all concerned; but the effect of such sale to discharge liens is the same. The Amelie, 6 Wall. 18.

In the case under consideration none of these objections are taken to the validity of the sale, but it is insisted that it cannot be held to have discharged the vessel of liens which the court making the sale had no jurisdiction to enforce. I have found no case, except possibly that of The Angelique, (17 Law Rep. 104, since expressly overruled,) which lends countenance to this proposition. Upon principle, it seems to me wholly untenable. It is true the vessel was originally condemned, in part at least, upon a claim for ship-keepers' fees, which would not in this country be considered to import a maritime lien. The Thomas Scattergood, Gilpin, 1; The Havana, 1 Sprague, 402; The Island City, 1 Low. 375; The Sarah Jane, 2 Am. Law Rev. 450; Gurney v. Crockett, Abb. Ad. 493. But this was a question exclusively for the consideration of the maritime court under the laws of Canada, and the presumption is conclusive that the facts necessary to give that court jurisdiction existed. Hudson v. Guestier, 6 Cr. 281; Comstock v. Crawford, 3 Wall. 396. To say that the judicial sale of a vessel frees her only from such liens as the

court making the sale had jurisdiction to enforce by original process, is a practical denial of the principle that such a sale vests a clear title in the purchaser. This would make the validity of the sale depend, not upon the power of the court to condemn and sell, but upon its authority to assume jurisdiction of all claims which, by the law of another country, might be liens upon her. There are probably no two countries in which the jurisdiction of the admiralty courts is identically the same. That of our own courts does not extend tc all cases which would fall within such jurisdiction according to the civil law, and the practices and usages of continental Europe. By the codes of most civilized nations the cost of construction, the wages of ship-keepers, the rent of warehouses for the storage of her tackle and apparel, money lent to the captain for the use of the vessel, are all ranked among privileged debts. In England the court of admiralty is vested with jurisdiction, not only of ordinary collisons, but of damages done by a ship tc wharves, breakwaters, and other fixtures annexed to the soil; while in this country it is limited to floating structures. In England a master has a remedy against the ship and freight for wages. In the United States he is confined to a proceeding in personam. By the law of continental Europe a lien arises for necessaries furnished in a home port, while in this country there is none unless created by a state statute, and none in England if an owner is domiciled within the kingdom. We also recognize liens for general average, wharfage, stevedores' wages, and premiums of insurance, none of which are within the jurisdiction of the admiralty division of the high court of justice. We also admit claims for damage to cargoes, while the English court can only proceed against the vessel where the cargo is brought into England or Wales, and no owner is domiciled therein. It may be added that the English admiralty has jurisdiction of accounts between part owners, and may decree the sale of a share or shares in the ship, while we can only take cognizance of such disputes incidentally to the distribution of the proceeds.

Now, if the theory of the libellant be correct, a judicial sale of a vessel in one country would free her from none of the liens which the courts of that country were unable to enforce. A sale under such circumstances would be utterly destructive of the interests of owners and a complete sacrifice of the vessel. No one could possibly know the value of his purchase, for no one could forsee the amount of claims that might be made against the vessel in other countries. It would also compel us to inquire in each case whether such foreign court could have taken cognizance of the claim, either by original proceeding or by petition against the proceeds of sale, and, as the foreign law in each case must be proved as a question of fact, the errors and confusion into which we should fall will be readily appreciated.

The truth is that all these liens are inchoate rights, subject to the contingency of loss in case of disaster to the vessel

necessitating a sale by the master, or in case judicial proceedings are taken against her in a foreign country to subject her to claims recognized by the law of such country. The recognition of liens, and the order in which they shall be marshalled and paid, pertain to the remedy, and are administered according to the lex fori. When the courts of such country have obtained jurisdiction of the res by actual seizure, they have full power to dispose of the property and to transfer the title, and such transfer will ordinarily be respected in every other country. Nor is this power limited to the final determination of the case. The title to property sold pendente lite will be respected in another country, though the proceedings upon which the property was originally seized fail. Stringer v. The Marine Ins. Co. L. R. 4 Q. B. 676.

In these cases of judicial sales in rem the liens of creditors are not extinguished, but are merely transferred from the res itself to the fund in court. The decree of the maritime court deprived the libellant in this case of no right of property. It was merely adjudged that his claim was not of that character which entitled him to set the machinery of the court in motion. It does not follow that the court would not have entertained a petition by the libellant for payment from the proceeds of sale, after the satisfaction of what under the laws of Canada are maritime liens, upon proof that by the lex loci contractus he was entitled to a lien. It is a constant practice in our courts of admiralty to decree the payment of surplus proceeds to mortgages and others having liens which are not enforceable by original proceedings. As Mr. Justice Story observes, (Conflict of Laws § 322b): "Where the lien or privilege is created by the lex loci contractus, it will generally, though not universally, be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the lex fori. And on the other hand, where the lien or privilege does not exist in the place of the contract, it will not be allowed in another country, although the local law where the suit is brought would otherwise sustain it." Section 323: "But the recognition of the existence and validity of such liens by foreign countries is not to be confounded with the giving them a superiority or priority over all other liens and rights justly acquired in such foreign countries under their own laws, merely because the former liens in the country where they first attached had there, by law or by custom, such a superiority or priority." In Harrison v. Sterry, 5 Cranch, 289, Chief Justice Marshall used the following language: "The law of the place where the contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right or priority forms no part of the contract itself. It is extrinsic, and rather a personal privilege, dependent upon the law of the place where the property lies, and where the court sits which is to decide the cause."

It is believed to be the rule of the English as well as American courts of admiralty, after the payment of maritime liens, to direct the surplus proceeds to be paid over to any one who may have a lien upon such proceeds by the law of the place where the contract from which the lien arose is made; or, at least, to retain the fund in court until the court of chancery shall have made an order for its distribution. The Flora, 1 Hagg. 298; The Harmonie, 1 W. Rob. 178; The Nordstjernen, Swab. 260; The Gustaf, 6 L. T. (N. S.) 660.

But even if the foreign court should misjudge this question, and hold that, by the law of Ohio, the libellant had no lien at all upon the vessel, or should deny his petition for payment from the remnants in court, the sale would not thereby be invalidated, or the vessel remain subject to arrest in this country. This was the precise question decided in Castrique v. Imrie, L. R. 4 H. of L. 427. That was an action of trover by the assignee of a mortgagee for the conversion of the ship Ann Martin. Defendant claimed title as purchaser at a judicial sale in France. The question arose whether the proceedings in the French civil tribunal were in personam or in rem. It was held that the sale ordered was not of the interest of the owner in the ship, as upon execution, but of the ship itself; and that such sale divested the title of the plaintiff, although he had set up his mortgage in the French court, and that court had disallowed it under a misapprehension of his rights under the English law.

In delivering the opinion of the court of exchequer chamber, on appeal from the common pleas, Mr. Justice Blackburn remarked: "We think the inquiry is--First, whether the subject matter was so situated as to be within the lawful control of the state under authority of which the court exists; and, secondly, whether the sovereign authority of that state has conferred on the court power to decide as to the disposition of the thing, and the court has acted within its jurisdiction." The judgment of the exchequer chamber was affirmed by the hous of lords, their lordships holding that the error of the French court in construing the law of England did not render its judgment void in a foreign country, although it would have been otherwise in a case of fraud, and that they were bound to give it effect, at least so far as to sustain the validity of the sale.

The fact that the vessel in this case was sold for the small sum of $1,000, is due to a multiplicity of causes, amongst others the uncertainty of the law; but in the absence of fraud it cannot be considered an element in the decision of the case. I am clearly of the opinion that the sale was valid, and vested a complete title to the property in the purchaser. The libel must be dismissed.

The Louis Olsen.

District Court of the United States, District of Oregon, 1896.

74 Federal Reporter 246.

Bellinger, District Judge. The steamer Louis Olsen, having been forfeited to the United States, and sold for illegal sealing in Bering Sea, the North American Company files its libel of intervention, alleging that in July, 1894, at the port of Dutch Harbor, a foreign port, at the request of the master of the Olsen, the company furnished such vessel with provisions, supplies, and other necessaries, amounting to $400; that these supplies were necessaries, and were used by the vessel on the sealing voyage upon which she was seized, and were essential for such voyage, and were supplied in good faith, and with no knowledge that any illegal venture or voyage was about to be undertaken. Upon these facts, the intervener claims a lien against the vessel and the proceeds of sale superior to the United States in said vessel and fund, and prays that such claim, with costs, be paid out of the fund derived from the sale of the vessel. To this intervention exceptions are filed on behalf of the United States.

I was of the opinion in The Haytian Republic, 65 Fed. 120, that the forfeiture of a vessel to the United States cuts off prior claims like this, and cited The St. Jago de Cuba, 9 Wheat. 410, in support of such view. The reconsideration which I have given the question in the present case leads me to doubt the correctness of that opinion; neverthless, I do not feel warranted in overruling it.

In U. S. v. Wilder, 3 Summ. 314, Fed. Cas. No. 16,694, Mr. Justice Story says: "Besides, it is by no means true that liens existing on particular things are displaced by the government becoming or succeeding to the proprietary interest. The lien of seamen's wages and of bottomry bonds exists, in all cases, as much against the government becoming proprietors, by way of purchase or forfeiture, or otherwise, as it does against the particular thing in the possession of a private person."

The case was one of salvage, and the question was whether goods belonging to the United States were liable, like those of private shippers, for contribution to the expenses of saving such goods with the rest of the cargo of the wrecked vessel. The question presented here was not involved in the case, the only question being whether the government is liable for contributions for services in saving its property the same as are private parties. In case of forfeiture, "the decree of the court acts upon the thing itself, and binds the interest of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new title acquired by the forfeiture travels with the thing in all its future progress". Gelston v. Hoyt, 3 Wheat. 318. A forfeiture necessarily, as it seems to me, divests every existing right, whether of

title or lien, or other interest, in the thing forfeited. There is no reason why it should not extinguish the right of a lienholder, equally with that of the owner. "It binds the interests of all the world." In Six Hundred Tons of Iron Ore, 9 Fed. 595, the court says:

"No matter how long afterwards proceedings are taken to enforce the forfeiture, the right of the government runs back, by relation, to the time of the commission of the wrongful acts, and cuts out all intervening claims, however innocent."

In all the cases cited where liens have been allowed against the government, holding through proceedings of forfeiture, the liens enforced were subsequent to the wrongful acts from which the forfeitures dated. Such liens, whether for supplies or services, were for the benefit of the new title, and are therefore maintained upon the principle by which subsequent claims, inuring to the benefit of the security or fund to which prior claimants must look for payment, are given precedence.

The exceptions to the libel of intervention are sustained.

Hawgood & Avery Transit Co. v. Dingman et al.

Circuit Court of Appeals of the United States, Eighth Circuit, 1899.

94 Federal Reporter 1011.

Appeals from the District Court of the United States for the District of Minnesota.

These are appeals from two decrees in admiralty rendered in proceedings against the steamer Belle P. Cross. On December 14, 1896. Gustave Herman, Ralph E. Herman, and Edward G. Ashley filed a libel in the court below against this steamer, her engine, boilers, tackle, apparel, and furniture. This libel was in the usual form, except that it contained an allegation that after the supplies on account of which it was filed had been furnished, the owner of the vessel had taken her engine boilers, and machinery out of her hull, and had placed them in the steam tug G. A. Tomlinson. A monition issued on the libel, and the marshal arrested the hull of the Belle P. Cross, and also her engine, boilers, and machinery, which he found in the G. A. Tomlinson. On March 8, 1897, the appellant the Hawgood & Avery Transit Company petitioned the court for an appraisal of the engine, boilers, and machinery in the Tomlinson. An appraiser was appointed, and an appraisal thereof was made pursuant to a stipulation signed by the transit company, and all those who had then filed libels against the steamer Belle P. Cross or its engine, boilers, and machinery. This stipulation recited that it was made "for the purpose of fixing a value thereto, and to enable said property to be released under the provisions of rule 17 of this court and the statute in such case made and provided." The appraiser fixed the value of the engine, boilers, and machinery at $2,000. The transit company executed and filed a bond for this amount for the benefit of "whom it may concern", conditioned that if that company should abide by all the orders of the court, and pay the amount awarded by the final decree, the bond should be void. Upon the filing of this bond, and on March 10, 1897, the engine, boilers, and machinery were released and surrendered to the transit company pursuant to an order of the court to that effect. But the hull of the steamer Belle P. Cross remained in the possession of the marshal. After this release, and on April 3, 1897, the Inter-Ocean Coal & Coke Company filed an intervening libel against the Belle P. Cross and her boilers, engine, and machinery, and caused the engine, boilers, and machinery to be again arrested in the tug Tomlinson under a monition issued upon this libel. On September 4, 1897, the Barry Towing & Wrecking Company, which had succeeded to the title of the transit company, filed a claim for this engine, these boilers, and this machinery, and gave a bond in the sum of $2,329.66 to

R. T. O'Connor, the marshal of the district, which recited the filing of the intervening libel and the seizure of the engine, boilers, and machinery thereunder, and was conditioned that the wrecking company should abide by and perform the decree of the court in relation to the claim of the coal and coke company. On September 11, 1895, the wrecking company filed an answer to the intervening libel, in which it set forth the prior proceedings, which we have detailed, alleged that it had bought the engine, boilers, and machinery for value, and without notice, on April 1, 1897, that it was the owner thereof, and that the release of March 10, 1897, discharged this property from all maritime liens. Meanwhile the hull of the steamer Belle P. Cross had been condemned and sold, and the proceeds of the sale, which were only $310, had been paid into the registry of the court. Upon the final hearing the court below entered two decrees, one of the effect that the money in the registry of the court and the proceeds of the bond of the transit company of March 4, 1897, should be distributed among those who had filed their libels prior to March 10, 1897, and the other to the effect that N. J. Trodo, who had become the assignee of the coal and coke company, should have summary judgment for $1,333.53 and interest, the amount of that company's claim against the Barry Towing & Wrecking Company and the sureties upon its bond of September 4, 1897. From these decrees the transit company and the wrecking company have appealed. . . .

Sanborn, Circuit Judge (after stating the facts as above, delivered the opinion of the court.

The questions presented in this case turn upon the legal effect of the discharge of the engine, boilers, and machinery upon the appraisal and bond on March 10, 1897. If that discharge released this property from the maritime liens of those who had not then filed their libels in the court below, the decrees were erroneous; but if it left these liens unimpaired, and discharged the property from the liens of those who were then parties to the proceedings only, they were right. The theory of the appellants is that the bond of March 4, 1897, became a substitute for the engine, boilers, and machinery as to all who claimed maritime liens upon this property, whether they had presented their liens in the court below or not when the bond was given and the machinery was released. Upon this theory they insist that the court erred in refusing to include the Inter-Ocean Coal & Coke Company, or its assignee, and the Hawgood & Avery Transit Company, among the distributees of the proceeds of that bond, although neither of them had filed any libel against or pleaded any lien upon the machinery or the vessel when this bond was given, and they contend that the seizure of the machinery under the subsequent libel of the coal and coke company and the decree that the wrecking company and the sureties on its bond shall pay the claim of that company are erroneous, because, as they say, the machinery was discharged of all maritime liens by the substitution of the earlier bond in its place on March 10, 1897. When a ship which has been

arrested under a libel is released upon an appraisal and a deposit, or a bond, or a stipulation, not given under the limited liability act, the deposit or bond or stipulation is substituted for the vessel as to all those who have then filed their libels and become parties to the proceeding, but as to no other parties. The proceeds of the deposit, bond, or stipulation inure to the benefit of those who were parties to the proceeding when the release was made. But they inure to the benefit of no others. The vessel is discharged from the liens of these parties, and from their liens only. Lien-holders who have not filed their libels, and have not become parties to the proceeding when the ship is discharged, may not be permitted to share in the proceeds of the deposit or bond or stipulation, and their liens are neither detached nor affected by the release. The vessel returns to the claimant subject to the maritime liens of all who were not parties to the proceeding before the discharge was made, and they may libel and arrest her to enforce their liens to the same extent and with the same effect as though she had never been seized before. Rev. St. § § 940, 941; Adm. Rules, 11, 26; The Langdon Cheves, 2 Mason, 58, Fed. Cas. No. 8,063; The Union, 4 Blatchf. 90, Fed. Cas. No. 14,346; The Antelope, 1 Ben. 521, Fed. Cas. No. 481; The Haytian Republic, 57 Fed. 508, 509; Id., 154,U. S. 118, 14 Sup. Ct. 992; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804. If the transit company in the case at bar had claimed both the hull and the machinery of the steamer, and had procured the appraisal and given the bond for the entire res, and the vessel and machinery had both been discharged thereunder, the right of the coal and coke company to subsequently libel her and to enforce its lien by seizure and sale of every part of the vessel and of the machinery could not have been successfully questioned under these authorities. The reason for this rule is that the maritime lien of that company had attached to every part of the ship and to every part of her machinery before any libel was filed against her, and the acts of third parties in seizing her and releasing her on an appraisal and bond could not effect the right and lien of this company in its absence, and without its consent. On this ground all the authorities are that, if the entire thing had been libeled and discharged here, the lien of the coal and coke company would have remained untouched. How, then could a discharge of a part of this thing have a greater effect than the release of the whole? Every reason which tends to support the lien of the absent holder when the entire thing is discharged pleads with equal cogency for its maintenance when only a part is released. The lien attaches to every part as much as to the whole. If one-half, two-thirds, or any other portion of the res is destroyed, the maritime lien still adheres to the remnant that has escaped, and no persuasive reason occurs to us why it should not hold as firmly every part which has been released from a seizure made by strangers to pay their debts. Any other rule would permit the first libelants and the owner to destory the value of the liens of all others by an appraisal and discharge of the valuable part of the thing seized, leaving, as in this case, nothing but a worthless remnant for their satisfaction. Every consideration of reason and of equity

demands that the same rule should apply to a discharge of a part which governs the release of the whole. Our conclusion is that a release to a claimant under an appraisal and stipulation or bond, not made under the limited liability act, of a part of the res seized under a libel in admiralty, has the same effect upon the liens upon the part released that a discharge of the entire res under a like appraisal and stipulation or bond would have had upon the liens upon the whole thing. The result of this conclusion is that there was no error in the decrees of the court below. The coal and coke company was not entitled to share in the distribution of the proceeds of the bond given by the transit company on March 4, 1897, as the claimant of the engine, boilers, and machinery, because it had not filed its libel when they were discharged under that bond. The transit company had no right to share in the proceeds of that bond as the assignee of the maritime lien of the Phenix Iron Works, because it had not filed any libel to enforce that lien, nor had it pleaded the same, or made any claim upon it in any way, when the engine, boilers and machinery were discharged under that bond on March 10, 1897. The course of the transit company was this: It appeared on March 5, 1897, and filed a claim for the engine, boilers, and machinery, in which it alleged that it was the owner thereof. On March 6, 1897, it filed a petition for leave to intervene, in which it pleaded that it had an interest in the vessel by reason of a mortgage. But it was not until May 8, 1897, that it first presented to the court below the claim that it had a maritime lien which it had derived fron the Phenix Iron Works. The engine, boilers, and machinery had then been discharged under the bond of March 4, 1897, and it was too late for the transit company to present a claim to share with the libelants who were parties to the cause on March 10, 1897, in the proceeds of a bond which they had secured for their own benefit. Not only this, but the transit company was prevented from asserting such a claim as against those libelants by the fact that it had induced them to accept its bond, and to return to it the engine, boiler, and machinery, by its silence regarding the maritime lien it now urges, and by its positive averment in its claim to the property that it was the owner of it. Chase v. Driver, 92 Fed. 780. Moreover, the transit company did not present its claim to enforce this maritime lien in a libel or a cross libel. It merely pleaded it in its answer. When the machinery was released by the order of March 10, 1897, it undoubtedly went back to this company, subject to all the maritime liens that had not been presented to the court below before the property was discharged. That company might have filed a libel or a cross libel, and it might have caused this machinery to be arrested upon the maritime lien it now presses. But it could not have acquired any right to enforce that lien, or to share in the distribution of the proceeds of the engine, boilers, and machinery, or in the proceeds of a bond or a stipulation taken for them by other parties, by simply setting if forth in its answer. Respondents in a libel suit are required to file a cross libel, to take out process, and have it served in the usual way, if they have maritime liens which they desire to enforce. Ward v. Chamberlain,

21 How. 572, 574. The coal and coke company pursued the proper and legal course to enforce its lien. After the machinery had been released from the liens of all the libelants who had appeared in court before March 10, 1897, it caused the engine, boilers, and machinery to be arrested upon a monition issued upon a libel against the ship and its machinery, which it filed subsequent to that date. The decree of the court below that its lien existed, and that the wrecking company and its sureties were liable upon the bond which they gave to abide by and perform the decree upon this libel, was in accordance with the rules and principles of law to which we have referred, and both the decrees below must be affirmed. It is so ordered.

The Key City.

Supreme Court of the United States, 1871.

14 Wallace 653.

Appeal from the Circuit Court for the Eastern District of Wisconsin; the case being thus:

Young shipped a quantity of wheat on the steamboat Key City, a vessel owned by a corporation called the Northwestern Packet Company which had this and several other steamboats engaged in the navigation of the Upper Mississippi River. The cargo was lost, and so never delivered. At the time when the shipment was made and the cargo lost on the Key City, there was engaged in the same business in the same waters with the Northwestern Packet Company, a rival corporation known as the La Crosse and Minnesota Steam Packet Company.

After the loss of the wheat, these two companies united their stock in trade, their steamboats, barges, and other property, and formed a new corporation, the corporators of which were taken exclusively from those in the two old companies; and to the new corporation they gave the name of the Northwestern Union Packet Company. To this company all the property of the two other companies was transferred by appropriate instruments. Whether at the time of this union and transfer the La Crosse and Minnesota Company owed debt or not, or what became of them, did not appear. But it did appear that the Northwestern Company, the original owner of the Key City, was largely indebted, and that this was well known to all the parties. Not only was it well known, but provision was made for the payment of the debts generally of that company by the newly formed company out of a fund to come within its control. The nature of that provision was this: certificates of stock of the value of the boats, barges, and other property of the Northwestern Company merged in the new company were issued, but on their face they recited that no dividends would be paid on such stock until the debts of the Northwestern Company should be paid out of the proportion of the net profits which the shareholders of that company would otherwise be entitled to.

In this state of things, Young, three years and a half after the wheat was lost, and his cause of action had accrued, filed a libel in admiralty against the Key City for its failure to perform its contract of affreightment. The Northwestern Union Packet Company, that is to say, the new corporation appeared as claimants, and set up as a defence that the lien was lost by the lapse of time, to wit, the three years and a half which had intervened between the date when the cause of action accrued and the date of the commencement of the suit; and that defence was sustained by the Circuit Court. The change in the ownership of the vessel during the interval was relied on as strengthening the defence.

[The arguments of counsel are omitted.]

Mr. Justice Miller delivered the opinion of the court.

The authorities on the subject of lapse of time as a defence to suits for the enforcement of maritime liens are carefully and industriously collected in the briefs of counsel on both sides, to which reference is hereby made without specifying them more particularly.

We think that the following propositions as applicable to the case before us may be fairly stated as the result of these authorities.

1. That while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence.

2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.

3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued.

Counsel for the appellees argue that the libel in the present case was rightfully dismissed under this last proposition; and we are of opinion that if the claimants had shown an ordinary case of purchase and payment without notice, the lapse of time would protect them. While on the other hand we are of opinion that if the claimant had been the owner when the lien accrued, it would not be a good defence in this instance.

We must, therefore, inquire into the special circumstances under which the claimant became the owner of the vessel against which the lien is asserted. These show that there was no sale of the property of one of these original corporations to the other, but that they agreed to unite their property and their interests, and for convenience assumed a new corporate name; that in doing this they recognized a large and undefined indebtedness on the part of the Northwestern Company, and provided for its payment out of the earnings otherwise payable to that company. No doubt these debts were most of them, like the present one, liens on the property of that company, and known to be so by all who united in the transaction. And, finally, that neither the stockholders of the La Crosse and Minnesota Company, nor of the new corporation, have ever parted with or paid any money or other thing of value for the Key City, otherwise than by this consolidation of the

companies into one; and it is not apparent, nor even a reasonable presumption, that if the new company has to pay the libellant's debt in this case they will be the losers, but it is nearly certain the loss will fall where it should, on the stockholders coming in through the Northwestern Company.

We do not see, under these circumstances, how the claimants can avail themselves of the rule for the protection of purchasers without notice.

Decree Reversed, with directions to enter a decree for libellant for the amount due him for his wheat lost by the Key City

With Interest By Way of Damages.

The Tiger

District Court of the United States, Northern District of California, 1898.

90 Federal Reporter 826.

De Haven, District Judge. This is a suit in admiralty to enforce a lien against the steam tug Tiger for the balance due the libelant for work performed by him on board that boat as carpenter and seaman between the 17th of March, 1896, and the 18th of October of the same year. On March 15, 1898,--13 days prior to the commencement of this action,--the vessel was sold for a valuable consideration to one Bennett, who has appeared as claimant, and made answer to the libel. The defense interposed is that the lien sought to be enforced is barred by reason of the laches of the libelant in failing to take appropriate proceedings to enforce the same before the tug was purchased by, and passed into the possession of, the claimant. It appears from the evidence that for 10 months prior to the 15th of March, 1898, the Tiger was out of commission, and lying in the harbor of San Francisco, and the libelant was during the same time residing in the city of San Francisco. The claimant at the time of his purchase knew that the tug had been out of commission during the period named, and before purchasing inquired of her owners in relation to outstanding liens, and was informed by them that there were none, and he had no notice from any source of the claim of lien sought to be enforced in this action. That upon these facts the claimant must be deemed to be a bona fide purchaser without notice of libelant's asserted lien, does not admit of doubt. He knew that the tug had been out of employment for nearly a year, and was without a master, and in seeking information from the vendors the claimant did all that was reasonably required of him for the purpose of ascertaining what claims were outstanding against the tug. There was nothing whatever in the circumstances attending the transaction to suggest to a man of ordinary prudence the necessity for inquiry from any person other than the vendors. The question, then, arises whether upon these facts the libelant is now entitled to enforce his lien. I am of the opinion that he is not. The lien claimed is maritime in its nature, and such a lien cannot be enforced to the detriment of a bona fide purchaser, when the person in whose favor it exists had a reasonable opportunity to commence proceedings to enforce it before the change of ownership and neglected to do so. The question as to what length of delay in proceeding to enforce such a lien will constitute laches is always one of fact to be determined in view of the particular facts of each case where the question arises. The Key City, 14 Wall. 653. But unreasonable delay will defeat the lien when the rights of a bona fide purchaser have intervened. Thus, in the case of The Lyndhurst, 48 Fed. 840, it was sought to enforce a lien for materials furnished about one year before the libel was filed, and more than five months after the vessel had been sold to a bona fide purchaser, and the court in holding that the lien was lost by laches said:

"As against a bona fide purchaser who makes all reasonable efforts to discover incumberances, and fails to find any, such a lien, after a delay of nearly a year to take any steps to enforce it where the vessel has been all the time within easy reach of process, and the vendor meantime, as in this case, has become insolvent, is lost through laches. After such ample opportunity to enforce the lien, the loss should fall upon the lienor, and not on the bona fide vendee. The period of limitation of liens in admiralty, as against a bona fide purchaser, is 'a reasonable opportunity to enforce them.

So, also, in The Lillie Mills, 1 Spr. 307, Fed. Cas. No. 8,352, the same principle was declared in the following language:

"When the rights of third persons have intervened, the lien will be regarded as lost if the person in whose favor it existed has had a reasonable opportunity to enforce it, and has not done so. This is the well-settled rule of the admiralty. The lien for supplies has its origin in the necessities and convenience of commerce and navigation. It is for the interest of navigation and commerce that these liens should exist, and it is equally so that they should not be allowed to extend unnecessarily, to the injury of innocent third persons."

The same rule is also approved in The Utility, 1 Blatchf. & H. 218, Fed. Cas. No. 16,806; The Bristol, 11 Fed. 156, 20 Fed. 800; Nesbit v. The Amboy, 36 Fed. 926. That in this case the libelant had, during the 10 months the Tiger was lying in the harbor of San Francisco, ample opportunity to commence proceedings to enforce his lien, cannot well be disputed; and as such lien was latent, and without such action upon his part could not well be known to the public, his delay in filing this libel until after the vessel was sold to a bona fide purchaser was at his own peril, and operates as a waiver of the lien in favor of such purchaser. The libel will be dismissed the claimant to recover costs.

The Nebraska

Circuit Court of Appeals of the United States, Seventh Circuit, 1895.

69 Federal Reporter 1009.

In April, 1892, the steamer Nebraska, a freight boat built in 1868, enrolled at the port of Buffalo, was owned by Hume, Galvin & Tyler. In that month they sold the steamer to Edward D. Comings of Chicago, for the sum of $40,000 taking upon the vessel to secure $37,000 of the purchase money, a mortgage duly recorded in the office of the collector of customs at the port Buffalo. Comings purchased the vessel with the purpose of changing her into a passenger boat to carry passengers during the World's Columbian Exposition at Chicago, from the port of Chicago to the exposition grounds. Upon the purchase the vessel proceeded from the port of Buffalo to the port of Chicago. Prior to her arrival at the port of Chicago, the appellant, the Milwaukee Dry Dock Company, learning of the purchase and its object, entered into negotiations with Comings at the city of Chicago to make the necessary alterations in the vessel at its dry dock at the city of Milwaukee, and an agreement was arrived at by which the steamer was to be sent to Milwaukee to have the necessary changes mad at the dry dock of the Milwaukee Dry Dock Company. About the 1st day of May, 1892, the vessel proceeded in ballast to Milwaukee, and upon her arrival was placed in the dry dock and stripped. Extensive repairs and alterations were found to be necessary to render her full seaworthy and fit for a passenger boat, and were made at a cost of some $15,623.25, upon which a payment of $1,000 only was made. There is testimony tending to show that, prior to these repairs, and before the boat had left Chicago for Milwaukee, the president of the Milwaukee Dry Dock Company, upon inquiry, learned that Comings was pecuniarily irresponsible, and the company declined to extend credit for the work, and that afterwards, and about the time of the commencement of the work, Comings agreed that the company should have a lien upon the vessel for the work to be done upon her. About the 25th day of July the company allowed Comings to sail the boat to Ludington upon an excursion, upon his promise to return her to Milwaukee, which he did. On the 27th day of July, 1892, the Milwaukee Dry Dock Company exhibited a libel against the vessel in the district court of the United States for the Eastern district of Wisconsin to establish a maritime lien upon the vessel for the value of the changes and repairs so made by the company. The vessel was arrested on that day by the marshal upon process issued upon the libel, and remained in his custody until August 20th, 1892, when the libel was dismissed and a warrant of restitution was ordered to issue.

Soon after the arrest of the vessel the mortgagees, Hume, Galvin & Tyler, had a conference at Milwaukee with Comings and the Milwaukee Dry Dock Company, and it was thereupon agreed, on the 20th day of August, 1892, that Comings should, and he did, give the mortgagees a

bill of sale of the boat, which had been enrolled at the port of Chicago on the 12th day of July, 1892, and they on their part agreed to give the Milwaukee Dry Dock Company their promissory notes, secured by a mortgage upon the steamer, for the amount due to that company, which should be payable in three installments, on or before the 6th days of July, September, and December, 1893, respectively, with interest. Hume, Galvin & Tyler agreed with Comings to extend the time of payment of the notes given by Comings to them; to pay, or postpone the payment of all other claims upon the vessel; that the vessel should be employed in the excursion and passenger business in and about the city of Chicago so long as she profitably could be under the direction and management of Comings, but that they should employ a purser who should receive the earnings of the boat and apply the same, first to her running expenses, and the balance to a trustee named, to be paid by him on account of the debt to the dry dock company so assumed by them. In pursuance of that agreement Hume, Galvin & Tyler executed and delivered to the Milwaukee Dry Dock Company their three several promissory notes,--one for $5,545.53 payable on or before July 1, 1893, one for $5,000 payable on or before September 1, 1893, and one for $5,000 payable on or before December 1, 1893; each of such notes containing the following: "It is agreed and understood by and between the makers and payee of this note that the same is given in consideration of work and material furnished and done for the propeller 'Nebraska' for which material and labor the Milwaukee Dry Dock Co. has a lien for the value thereof. And it is further agreed by and between the makers of this note and the payee that the payee, by accepting this note and extending time of payment of their demand, in no wise waives its lien upon said vessel for the said work and material so done and furnished to the said propeller 'Nebraska' aforesaid. This note is secured by a mortgage upon the said propeller 'Nebraska' of even date herewith. It is also agreed between the makers and payee of this note that in case the said propeller 'Nebraska' shall be attached and sold upon any claim before this note becomes due, then and in that case this note shall become immediately due and payable." The mortgage given to secure these notes contained no reference to the agreement quoted from the note with respect to the nonwaiver of the lien upon the vessel by reason of the acceptance of the note. This mortgage was recorded at the port of Buffalo, the residence of the mortgagors, on the 22nd day of August, 1892.

Upon the consummation of the agreement and the execution and delivery of the notes and mortgage, the libel was dismissed upon the motion of the libelant, the appellant here, and possession of the vessel was surrendered pursuant to the agreement. The steamer thereafter continued to run in and out of the port of Chicago until July 3, 1893, when a libel was exhibited against the vessel in the district court of the United States for the Northern district of Illinois by one Frank Hoffman to recover for supplies furnished the vessel in April and May, 1893. The steamer was arrested upon process issued upon that libel and sold on the 19th day of September, 1893, upon a writ of venditioni exponas issued out of that court, for the sum of $13,000, to one A. M. Joy, and the proceeds covered into the

registry of the court. A number of claims for supplies furnished subsequently to the 20th of August, 1892, were presented to the court, and on the 11th day of October, 1893, the Milwaukee Dry Dock Company filed its intervening petition setting forth its claim as above stated, and copies of the notes executed by Hume, Galvin & Tyler, and also certain other claims for advances not here in controversy, and praying for the payment of its claim out of the proceeds of the sale of the vessel. It is asserted in this petition that the last date of furnishing materials by the dry dock company to the steamer Nebraska was July 21, 1892. On the 8th day of November, 1893 the Independent Fuel Company, furnishing supplies during the season of 1893 filed objections to the demand of the Milwaukee Dry Dock Company, setting forth the facts substantially as above, stated, and claimed--First, that the alterations and changes were in fact a reconstruction of the vessel, and that the cost is not by the maritime law a lien upon the vessel or her proceeds; and, secondly, that any supposed lien for the repairs became merged in the mortgage and notes given for the claim by Hume, Galvin & Tyler, and that the Milwaukee Dry Dock Company was entitled to rank in distribution simply as a mortgagee. A certain other claimant filed similar exceptions to the allowance of the claim of the Milwaukee Dry Dock Company. The matter of the classification of the claims filed against the proceeds was referred to a master, who reported that certain claims for wages to the amount of $675.03 were entitled first to be paid; secondly, certain foreign claims, to the amount of some $10,000 should be next paid; and, thirdly, claims ranking as domestic claims, among which was included that of the Milwaukee Dry Dock Company for the changes and repairs before referred to. The Milwaukee Dry Dock Company filed exceptions to the report, insisting that its claims should be classed as a foreign demand, and rank as a maritime lien against the fund, and be preferred to all claims and demands except those of equal rank contracted during the season of 1892 in the port of Milwaukee. The court overruled the exceptions, and directed distribution of the fund substantially in accordance with the master's report, from which ruling this appeal is taken; the Milwaukee Dry Dock Company insisting by its assignment of errors that the court erred in not placing its claim and demand on the footing of a foreign lien, and in classifying it as a domestic lien. . .

Jenkins, Circuit Judge, after statement of the foregoing facts, delivered the opinion of the court.

Upon the assumption that the contract with respect to the repairs and alterations of the Nebraska was maritime in character, and that by express agreement with the owner the appellant was accorded a maritime lien upon the vessel therefore,--questions which we do not determine,--and that the work was performed in a foreign port, we are yet of the opinion that the appellant, under the circumstances of the case, ought not to be permitted to share in the distribution of the proceeds arising from the sale of the vessel, upon equality with claims subsequently arising against the vessel.

There are certain principles established in the admiralty by which, as we think, the allowance or disallowance of this claim should be judged, and which should be stated and considered before passing to the peculiar circumstances under which this claim is presented.

It is to be observed that continuing secret liens upon vessels are discouraged in the admiralty, because they tend to encumber commerce While doubtless such liens are necessary aids of navigation, it is equally true that they should not be permitted to be unduly and unnecessarily extended, nor allowed to remain dormant and unknown, to the injury of innocent third persons. It was asserted by Judge Betts, more than half a century ago, "that it is a principle common to the maritime law, wherever it is administered, that all liens upon vessels are temporary and evanescent, and cannot be continued any longer than until a reasonable opportunity has been offered for their enforcement". The Utility, 1 Blatchf. & H. 218, Fed. Cas. No. 16,806. Courts of admiralty, equally with courts of equity, demand vigilance in the assertion of rights. Where the rights of others have intervened, a claimant may not remain inactive with respect to the assertion of his claim, and cannot be permitted to unduly extend the time of its payment. He cannot be allowed, by his conduct or by his silence, to induce or allow innocent parties to part with their property upon the credit of the vessel, and as against such claims to assert a dormant lien. It was well asserted in The Lillie Mills, Spr. 307, Fed. Cas. No. 8,352. that "when the rights of third persons have intervened the lien will be regarded as lost, if the person in whose favor it existed has had a reasonable opportunity to enforce it and has not done so. It is the well-settled rule in admiralty." So, also, the principle is declared in The Key City, 14 Wall. 653, 660, that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense. The effect to be given to the delay depends upon the peculiar circumstances of the case. The cases are numerous which support and follow this doctrime. Many of them will be found assembled in The Bristol, 11 Fed. 156.

It is true that it has been held that one does not waive his lien by the mere fact of taking the promissory note of his debtor for the claim. Most of the cases to which we were referred upon that point seem to proceed upon the doctrine that, to enable the claimant under such circumstances to assert his lien, the note received should be surrendered (Ramsey v. Allegre, 12 Wheat. 611; Andrews v. Wall. 3 How. 573; The Kimball, 3 Wall. 45; The Emily Souder, 17 Wall, 666, 670; The St. Lawrence, 1 Black, 523, 531; The Eclipse, 3 Biss. 99, Fed. Cas. No. 4,268), unless possibly the note is valueless (The Bird of Paradise, 5 Wall. 545, 561). We cannot perceive the force of the reason for the surrender of the note, since, if the note be not taken in payment, but merely as collateral and further security for the debt, there would seem to be no propriety, as against other claims upon the vessel, in allowing the secured claimant to share in the proceeds upon surrender of his additional security, because such surrender can in no way benefit the other claimants upon the proceed

and operates only to release the additional debtor. It would, we think, be more equitable to require such secured creditor first to pursue and exhaust his collateral security. However that may be, we think the rule declared should be qualified in this, that the time of payment granted by the note should not extend the term of payment of the debt beyond the period within which by the law the lien should be prosecuted; for, if the lienor may be indulged in granting such time of payment as he may elect, he would thereby be permitted to retain a dormant lien upon the vessel, to the injury of the subsequent lienors, and to the sustaining of stale demands. If, therefore, time of payment be granted beyond the time declared by statute or general law for the assertion of the lien, the lienor has disqualified himself to prosecute the lien within the permitted time, and it is gone. Peyroux v. Howard, 7 Pet. 324; The Highlander, 4 Blatchf. 55, Fed. Cas. No. 6,475; Green v. Fox, 7 Allen, 85; Bailey v. Hull, 11 Wis. 289; Schmidt v. Gilson, 14 Wis. 514; Dey v. Anderson, 39 N. J. Law, 199.

It has also been held that the mere taking of a mortgage upon the res, to secure the note given for the claim, may not be, of itself, a waiver of the claim. The D. B. Steelman, 48 Fed. 580. It may seem somewhat inconsistent to accept a subordinate for a superior lien, retaining at the same time a claim for the superior. In Kornegay v. Styron, 105 N. C. 14, 11 S. E. 153, it was held that the taking of the mortgage was a waiver of the lien, and estopped the lienor to assert the lien. We need not here determine the question. It is sufficient to say that in The D. B. Steelman, supra, Judge Hughes, reviewing the decisions in The Ann C. Pratt, 1 Curt. 340, Fed. Cas. No. 409, Stapp v. The Swallow, 1 Bond, 189, Fed. Cas. No. 13,305, and Dudley v. The Superior, 1 Newb. 176, Fed. Cas. No. 4,115, distinguished the case then in hand from those, pointing out the fact that there the claimant had taken notes for the amount of his lien, extending the time of payment for a period not exceeding four months, and a mortgage upon an undivided one-half interest in the vessel, and observes:

"If, however, the taking of the mortgage be attended by acts inconsistent with the lien, or prejudicial to other maritime creditors (for instance, if the credit given by it be so long as to make the claim it is intended to secure stale, in the sense of the maritime law), or if the execution of the mortgage be in manner such as to make it conflict with the rights of maritime creditors whose claims are of equal dignity with that secured by the mortgage, then it would be inequitable to allow to the mortgagee the benefit of two remedies against the ship, and his taking the mortgage would be held as waiving the maritime lien."

And he further observes, with respect to the case there involved that:

"It is not the case of a voluntary abandonment of the remedy in admiralty for a resort to the inconsistent and different remedy of attachment and personal judgment in a state court. Nor, in this

case, has there been a sleeping by the claimant upon his mortgage so long as to allow his claim to grow stale, to the prejudice of the rights of maritime lien creditors whose claims are fresh."

The period within which a maritime lien should be enforced has not been determined with precise definiteness. The subject has, however, frequently been under deliberation, and the considerations which should induce to a short period of limitation have been strongly presented. A longer period is allowed as against the owner of the vessel than as against a subsequent innocent purchaser or subsequent innocent lienor. With respect to vessels navigating the high seas, from an early time the limit has been by the voyage. The Charles Carter, 4 Cranch, 332. And liens for wages, supplies, and bottomry arising upon a subsequent voyage are given priority to those arising upon a previous voyage, unless peculiar circumstances should demand equality in their payment. The Paragon, 1 Ware, 331, Fed. Cas. No. 10,708; Porter v. The Sea Witch, 3 Woods, 75, Fed. Case. No. 11,289. But with respect to lake and harbor navigation a different rule has prevailed. Upon the Great Lakes the time has been limited by the seasons of navigation, and not by the voyage, and claims of equal rank arising during each season are paid pro rata, without respect to the particular voyage. In the open harbors where there is no close of the season of navigation, a limit of 40 days has been determined. Stillman v. The Buckeye State, Newb. 111, Fed. Cas. No. 13,445; The Detroit, 1 Brown, Adm. 141, Fed. Cas. No. 3,832; The Hercules, 1 Brown, Adm. 560, Fed. Cas. No. 6,400; The Dubuque, 2 Abb. (U. S.) 20, 32, Fed. Cas. No. 411; The Delos De Wolf, 3 Fed. 236, 239; The J. W. Tucker, 20 Fed. 129, 134; The Proceeds of The Gratitude, 42 Fed. 299; The Samuel Morris, 63 Fed. 736.

The rule with respect to the Great Lakes and harbors is a modification of the general maritime law, which adjusted liens by the voyage. The rule is somewhat arbitrary, as would be any rule that was a departure from the rule of the general maritime law. It was, however, rendered necessary in the interest and for the protection of maritime liens, and because of the shorter voyages upon the lakes; and the rule as applied to the Great Lakes commends itself to our judgment as wise and proper. In these days of swift and easy communication by telegraph and telephone between all ports of our country, the reasons upon which maritime claims are upheld have lost somewhat of their cogency, and while it is not within our province to disturb the settled law of the admiralty, as held in this country, we think we should be doing violence to the spirit of the law and the genius of the times by extending, instead of restricting, the period within which secret liens upon vessels may be asserted.

Coming now to the consideration of the facts in this case, and judging them in the light and spirit of the principles which have been stated, we observe that from the first the appellant distrusted the responsibility of Comings, and insisted that for the repairs and

alterations which should be made the appellant should have a lien upon the vessel. We need not stop to consider the nature of the lien that was in the contemplation of the parties, for we proceed upon the assumption that it was a maritime lien that was contemplated. It is also manifest that the appellant did not propose to allow the vessel to get beyond the reach of process from the courts of the district within which repairs were made. The repairs were complete on the 21st day of July, 1892. On the 27th of July the appellant exhibited a libel against the vessel under which she was arrested and held in the custody of the marshal until the 20th day of August. Up to this time there was exhibited upon the part of the libelant a determined, energetic prosecution of its claim. At this date the mortgagees appeared upon the scene, and an arrangement was arrived at in effect that Comings, the owner, should, and he did, execute a bill of sale of the vessel to the mortgagees, and that the mortgagees should, and they did, execute their notes to the appellant for the amount of their claim, secured by mortgage upon the vessel. There was also an agreement between Comings and the mortgagees by which the vessel should be operated by Comings in connection with the Columbian Exposition, so long as it should prove profitable, but that the financial affairs of the vessel should be conducted by the original mortgagees, now owners of the boat, and that the net proceeds of operation should be paid over to a trustee for the payment of the note given by Hume, Galvin & Tyler to the appellant. It is in dispute whether the appellant was informed of the agreement between Hume, Galvin & Tyler and Comings. It does not appear, however, that the appellant knew that Galvin or Tyler were to give their personal attention to the management of the boat and its finances. Upon the consummation of the agreement the appellant voluntarily dismissed the libel which it had exhibited, and consented to the release of the vessel by the marshal, and its surrender to Hume, Galvin & Tyler. The notes which the appellant accepted extended payment of the debt,--a portion until July 1, 1893, a portion until September 1, 1893, and another portion until December 1, 1893. We have thus the case where one, having a maritime lien for the enforcement of which he had invoked the power of a court of admiralty, caused the vessel to be taken and held in custody, and then voluntarily surrendered his position and the custody of the vessel which the court had taken, and permitted its surrender to the original mortgagees, accepted their notes in payment of the debt, extended payment for a period of about 15 months, on the average, and placed himself in such position that he could not assert his lien, if he had one, until the close of the second season of navigation after the work was done. We think that, under such circumstances, the appellant ought not to be permitted to assert its claim against subsequent innocent lienors. We do not think it our duty in the interest of commerce thus to foster the maintenance of secret liens. We do not think it right, when one has thus invoked the power of the court to enforce an asserted right, and had voluntarily abandoned the proceeding,

accepting the obligation of third parties for the debt,--parties who are not satisfactorily shown by any means to be unable to meet their obligation in whole or in part,--that he should be allowed to be reinstated in his original right, to the detriment of those who have subsequently and innocently furnished supplies for the operation of the vessel, contemplated and made possible by his action. The case is somewhat analogous to the case of a vessel libeled, and released upon stipulation to pay the debt. In such case, as against subsequent parties, courts remand the claimant to his remedy upon the stipulation.

We have not failed to consider that by the notes received it was stipulated that their acceptance should not be construed as a waiver of the appellant's lien upon the vessel, but we do not think that that stipulation should be permitted to avail as against subsequent innocent purchasers or lienors, however valid and effectual it might be as against the owner and mortgagees of the vessel. The appellant certainly held itself out to the world as abandoning its lien, and the assertion of it in the courts of admiralty, and as willing to accept for the debt the notes of Hume, Galvin & Tyler, with their mortgage upon the vessel as security. This mortgage was silent as to the stipulation for retention of the lien. It gave no notice of it, and its existence was hidden in the breasts of the contracting parties. It cannot be permitted that one may thus play fast and loose with the rights which the law accords him. It cannot be allowed that a lienor, under the circumstances here disclosed, may surrender the possession of the vessel, accept a mortgage upon it for his claim, and the notes of third persons extending the time of payment beyond the period which the law permits for the enforcement of the right, and still retain its lien. To uphold such conduct would, in our judgment, work great injustice, and prove most injurious to commerce.

The decree will be affirmed.

The Eastern.

District Court of the United States, District of Massachusetts, 1919.

257 Federal Reporter 874.

Morton, District Judge. The tug Eastern is owned by the Easte: Transportation Company, the claimant. In November, 1916, she was chartered to the New York & Boston Transportation Company. By the charter the charterers were to pay for her coal. On December 20th, while under this charter, the Eastern was supplied with coal by the City Fuel Company, as stated in the libel. She had been coaled by it many times before while being operated by her owner. On this occasion she had the same engineer as on the former ones; he ordered the coal, and after it had been put on board he told the representa-tive of the Fuel Company that the Eastern was under charter to the New York & Boston Transportation Company, and that the charterer was to pay for the coal. A notation to that effect was made on the delivery slip of the fuel company.

The information that the steamer (or tug) was under charter was not communicated to the fuel company until the coal had been furnished, and I do not think that the libelant was lacking in reasonable diligence, within the meaning of the statute, in not ascertaining the existence of the charter before the coal had been put on board. See U. S. Compiled Statutes § 7785. "The management of the vessel" in respect to her coal supply was intrusted to Snyder, her chief engineer, by whom the coal was ordered. See U. S. Compiled Statues § 7784. The furnisher, therefore, acquired a lien for the price of the coal under Act June 23, 1910 , c. 373 § 1, 36 Stat. 604 (U. S. compiled Stats. § 7783).

The real question is whether the lien was waived and lost. The coal was promptly billed by the libellant to the New York & Boston Transportation Company, and later the New York & Boston Transporta-tion Company was pressed by the libellant for payment of the accoun: Not until the charterer had suspended payment was any effort made to collect from the tug.

If the information that the charterer was to pay for the coal had been given to the fuel company before the coal was put on board, no lien would have arisen. Section 7785, supra. Immediately after the coal had been furnished, and before the steamer left the libellant's wharf, it was notified that the vessel was not in fact liable for the coal. Under such circumstances, if the libellant intended to hold the vessel, prompt intimation of such intention ought to have been given to her owner and the libellant should have made it plain that it was insisting on the condition which it understood to exist at the time when the coal was put on board, instead of the real condition of things. It is difficult to see

how the libellant could hold both the charterer and the tug, and slight evidence is sufficient to show a waiver of the apparent liability of the vessel and an acceptance of the charterer in her stead. The libellant's act in billing the coal to the charterer, after it knew that the charterer had no right to pledge the credit of the tug, seems to me an acceptance of the actual situation, and to leave the libellant in the same position as if the information as to the charter had been given to it before the coal had been put on board, instead of just afterwards. The Samuel Marshall, 54 Fed. 396, 404, 4 C. C. A. 385; The J. Doherty (D.C.) 207 Fed. 997, 1001.

I therefore find and rule that the lien was waived and abandoned. A decree may be entered dismissing the libel.