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MARITIME LIENS.

MOTIVES of public policy and commercial convenience have, on both sides of the Atlantic, led to a wide extension of the jurisdiction of courts of admiralty.

The peculiar advantages possessed by the maritime lien, the facility with which, by its instrumentality, employment is secured for vessels, their repairs made or supplies furnished in localities wherein the owners are unknown, absent, or if present, without credit, the great safeguard it affords to all who deal with ships or ships' credit, providing them with a prompt and simple remedy in their own forum, and with something tangible against which to issue execution in the event of success, have been the means by which this result has been brought about.

To call a privilege applicable to cases sounding both in contract and *tort* a lien, must, to the majority of the profession, appear a misnomer.

It is indeed in name rather than in principle that any analogy to either the common-law or equitable lien will be found to exist. Unlike the former, it exists irrespective of possession, actual or constructive; unlike the latter, its origin is independent of the creation of a trust; unlike both, it arises and takes effect by virtue of the act done, whether it be the breach of a maritime contract or the commission of a maritime *tort*.

The ship is the most living of inanimate things. "She did it, and she ought to pay for it," is a familiar manner of expressing the liability incurred by the vessel held to be in fault in a case of collision: Holmes on Common Law 25–35.

The maritime law gives full recognition to this investiture of the ship with personality—it is *she* that may make a contract or commit a *tort*, and it is against *her* that the lien is implied. When procedure is commenced, the suit is brought not against a personal defendant, but against *her* by name; and, if the libellant succeeds, *she* is sold to discharge an indebtedness of *her* own creation.

In both the common law and the admiralty, the original method of enforcing legal liability was to arrest the wrongdoer. The method of procedure was confined to the action against him. The law knew no third person in the transaction, unless such third person subsequently interfered for the purpose of buying this vengeance off. In a numerous class of cases the person most likely to interfere was the master or owner of the offender; and, with the lapse of time, a new principle was recognised, viz., that of the responsibility of the master or owner by reason of the acts of the original wrongdoer.

It is at this point that the history of the common law and that of the admiralty diverge, each choosing that path which would best attain the common end. In the former system, the arrest of the original wrongdoer was, in a numerous class of cases, no longer resorted to; legal responsibility was more readily and more satisfactorily secured by proceeding immediately against the principal. In the latter system, the history of the question has been reversed. Principals were hard to get at; they often lived at points remote from the scene of contest, or, if present, there were circumstances and conditions under which they would not be liable by reason of the ship's being temporarily in charge of a third person, for whose acts or defaults they would not be liable. The maritime law therefore continued to cling to the arrest of the original wrongdoer; and, in so doing, they availed themselves of the popular fiction, regarding the ship as an animate object, and as responsible for her own acts. The necessary sequence of regarding the ship as an animate object and as being responsible in specie for her own acts, was that she may be bound, that she may be proceeded against *corporaliter*, and that as against her a liability may exist in cases wherein the law of agency would not bind her owners.[1]

[1] The lien has been enforced in a collision case against the vessel in fault, although she was at the time under the entire control of her charterers: *The Ticonderoga*,

The lien is a debt or privilege to be paid out of the *res ipsa*, the ship or its incidents, the cargo and freight, or any or all of them, the condition of the privilege being that the debt should have arisen out of such a transaction as is cognisable in the admiralty: Coote's Ad. Pr. 17.

Causes cognisable in the admiralty embrace both maritime contracts and maritime *torts*. The test of jurisdiction is in each class distinct. In the former it is determined by the subject-matter; in the latter, by locality.

Without enumerating in detail the various contracts which have been adjudged to be maritime, it is necessary to remember that the principle upon which the decisions rest is that the test is to be applied to the *subject*, not to the *object*—that is to say, it is the *subject-matter* of the contract which must be maritime, not the mere object—the ship: *Leland* v. *The Medora*, 2 Wood. & M. 109. Thus, neither a contract to build a ship (*Ferry Co.* v. *Beers*, 20 How. 393), nor the creation of a mortgage on her after she has become a ship (*Bogart* v. *The John Jay*, 17 How. 359; *Deely* v. *The Earnest and Alice*, 2 Hughes 77),[1] nor the storage of her sails between her voyages,[2] are such contracts as are cognisable in the admiralty. But if the subject-matter or service be in its nature maritime,[3] it matters not whether the object be propelled

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Swaby 215, 217. And the same rule has been applied when the vessel was in charge of a pilot whose employment was made compulsory by the law of the port: *The China*, 7 Wall. 58. Even though a charter-party amount to a demise of the ship, contracts of affreightment entered into with the master in good faith within the scope of his apparent authority bind the vessel: *The Freeman* v. *Buckingham*, 18 How. 182; *The City of New York*, 3 Blatch. C. C. R. 187; *The Canton*, 1 Sprague 437; *The Monsoon*, Id. 37. Sailors have a lien for their wages, though their contracts be made with the charterer: *Hart* v. *The Enterprise*, 3 Weekly Notes of Cases 172.

[1] But if the mortgage be given for necessaries, the material-man may recover on his implied lien, though his express one fail: *The Hilarity*, Blatch. & How. 90. In England, since the passage of the Judicature Acts of 1873 and 1875, the admiralty have jurisdiction over all questions relating to the mortgage of ships: they are not, however, maritime liens: Boyd's Merchant Shipping Laws 66-75.

[2] This service is wholly shore service, is performed on land, and is not connected with the navigation or employment of a vessel: *Hubbard* v. *Roach*, 2 Fed. Rep. 393.

[3] The breach of a contract to carry cargo is maritime in character, even though the vessel used is a canal boat, engaged in voyage between two ports in the same state: *The E. M. McChesney*, 8 Benedict 150. The services of a stevedore must be regarded as doubtful: *The Geo. T. Kemp*, 2 Lowell 477. The watchman has no lien: *The John T. Moore*, 3 Wood 68. Contracts made for the removal of ballast in port are maritime: *Roberts* v. *Bark Windermere*, 2 Fed. Rep. 722. A contract to cooper casks

by sails or steam, by motive power from within or without, whether she have anchors or chains; nor is it in any way dependent upon the size, form or capacity of the vessel: *The General Cass*, 1 Brown's Ad. Rep. 334; *The Daniel Ball*, 10 Wall. 557.

In *tort*, as in contract, the jurisdiction of the admiralty has been widely extended. Obsolete and inapplicable tests have been gradually swept away.

The presence or absence of tide is immaterial. It matters not whether the waters whereon the wrong has been committed be artificial or real, or whether or not they lie wholly within a single state, or whether or not they form a boundary line between contiguous states. If the injury be complete on *public navigable* waters of the United States the jurisdiction will be sustained (*The Genesee Chief*, 12 How. 443; *Fretz* v. *Bull*, Id. 466; *The Magnolia*, 20 Id. 298; *The Commerce*, 1 Black 574; *The Eagle*, 8 Wall. 15);[1] and the rule is that whenever one vessel does damage to another, within the admiralty and maritime jurisdiction, the offending vessel[2] becomes hypothecated to the vessel and

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for delivery, according to a contract of affreightment, is maritime: *The Onore*, 6 Benedict 564. The weighing, inspecting and measuring of cargo is a maritime service: *Constantine* v. *Schooner River Queen*, 2 Fed. Rep. 731. Supplies furnished to a floating elevator, to the restaurant of a boat plying between New York and Long Branch, and liquor intended for use at the bar, are maritime contracts: *The Hezekiah Baldwin*, 8 Benedict 556; *The Long Branch*, 9 Id. 89; *The Plymouth Rock*, 13 Blatch. 505.

[1] A collision on public navigable waters has been held to embrace canals. See *The Avon*, 1 Brown's Ad. Rep. 170; *The Steamboat Oler*, 14 Am. Law Reg. (N. S.) 300; *The Young America*, Newberry's Rep. 101; *Malony* v. *City of Milwaukee*, 1 Fed. Rep. 611. Those waters are navigable in law which are navigable in fact: *The Daniel Ball*, 10 Wall. 557; *The Montello*, 20 Id. 430. When the collision occurs between two objects, one of which is terrene and the other afloat, the wrong may or may not be a maritime *tort*. It is the locality of the thing *injured*, and not that of the object by which the injury was done, that determines the jurisdiction: Etting on Admiralty Jurisdiction, pp. 64, 65, 66, 67. The admiralty jurisdiction has been sustained in a case of collision between a vessel and a floating dock, the latter being moored to the shore: *Simpson* v. *Tug Ceres*, Leg. Int. (1879) 339. And see, also, *The Virginia Ehrman and Agnese*, 7 Otto 309.

[2] The lien does not, in such a case, extend to the cargo on board, but it includes the freight: *The Victor*, Lush. 72; *The Duchesse de Brabant*, Sum. 264; *The Leo*, Lush. 444. A vessel may be termed an "offending vessel," so as to confer a lien upon her by causing damage to another, even though no actual collision takes place: *The Industrie*, Law Rep., 3 Adm. & Eccl. 303. And if one ship, by the improper navigation of a second ship, is compelled to alter her course, and so does damage to a third ship, the lien is held to run against the ship which compelled the alteration of the course; and this liability attaches if the damaged ship was not actually

cargo sustaining the injury, and the injured persons have a lien or privilege upon the guilty property to the extent of the injury sustained: *Edwards* v. *The Stockton*, Crabbe 580; *The Rock Island Bridge*, 6 Wall. 213.

Every dispossession of property afloat on public navigable waters is *prima facie* a maritime *tort*, and the vessel is liable for all acts by the master done in the execution of the business in which she is employed by which third persons are injured, whether the injury be occasioned by an unlawful act, negligence or want of skill: *Dias* v. *The Revenge*, 3 Wash. C. C. 262; *Dean* v. *Angus*, Bee 369; *The Martha Anne*, Olcott 18; *Ralston* v. *The States' Rights*, Crabbe 22.[1]

A contract may be maritime and yet personal—or, in other words, the circumstances may repel the presumption of lien; or the cause may be maritime, and yet the policy of the law may refuse a lien.[2]

The jurisdiction is significant, not because a lien exists for the breach of every contract which has been held to be maritime, but because it points out certain definite limits, to the borders of which the lien may extend, but beyond which it cannot go.

Maritime liens are divisible into two classes:

(1.) Those which are created by the terms of the contract.

(2.) Those which arise by implication of law.

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negligent, even though by taking another course she might have avoided the collision: *The Sisters*, 1 Prob. & Div. (C. A.) 117. And the lien will extend to cases of personal injury suffered by a passenger or employee: *Gerrity* v. *The Bark Kate Cann*, 2 Fed. Rep. 241; *The Bark Tulchen*, Id. 600; *The Maverick*, 1 Sprague's Dec. 23. And if the injuries be caused by a vessel other than that on which he is embarked, the lien will run against the vessel adjudged to be in fault; or, if both be in fault, against both. And the entire sum awarded may be collected from either, in the event of the inability of both to pay it. But the primary liability would seem to be against the vessel with which the contract was made: *The Washington Gregory*, 9 Wal. 513; *The Steamer Philadelphia*, 1 Black 62.

[1] It is not necessary, in order to enable the libellant to recover, that he should show wilful misconduct or wrongful purpose on the part of the tort feasor. He may recover whether the claimant obtained possession by contract, or by conversion to his own use without any wrongful intent: *The Florence*, 23 Int. Rev. Record 105.

[2] The hiring of a master is quite as much a maritime contract as is that of hiring the crew. The latter have a lien for their wages, the former has not. This exception in the maritime law of the United States is said to have had its origin in the circumstance that it was contrary to the policy of the law to vest this power in the master, who might be thus in a position to avail himself of it as against his owners without proper cause: *The Ship Grand Turk*, 1 Paine 73.

As between themselves, *prima facie* parties may, by contract, agree upon what they please; they may agree to give a lien where none exists, or to renounce one where it does exist. It is only when the contract is illegal, or when the rights of third parties are contravened that the law interferes. The limits of this article preclude any consideration of liens thus created.

With regard to implied liens, the rule is that, by the general maritime law, liens are implied for the performance of all executed maritime contracts lawfully entered into: *The Williams*, 1 Brown 214.

The general maritime law is only so far the law of any country as it has been adopted by that country. Whilst, therefore, the general maritime law is the basis of the maritime law of the United States, certain qualifications and exceptions nevertheless exist which sensibly influence our maritime code.

The points of difference which exist in the maritime law of each nation are for the most part to be found on the border line, where the local or municipal law comes in conflict with the general maritime law.

In the United States this difficulty has been increased by the complex character of our government, where separate and distinct powers of sovereignty are exercised by the United States and a state independently of each other within the same territorial limits.

In order to draw the line of demarcation between the two classes of cases, it is proposed to consider separately (1) the liens implied by the maritime law of the United States; (2) the liens arising by force of the municipal law, but enforceable in the admiralty. The former class might with propriety be termed pure maritime liens, whilst the latter are but quasi maritime. Pure maritime liens arise and take effect by virtue of the act done or wrong committed without any express words stipulating therefor, or, in other words, the law implies a lien as a sequence to the responsibility attachable to the ship as a living thing, having the ability to make contracts or commit torts.

Of course, it is a good defence to a lien which is asserted, to aver and prove that the credit was personal, that it was given to the owner or master, and not to the ship.

The question of credit is one purely of fact, the presumption of law being in favor of the doctrine that the credit of the ship was implied, that it was an element of the original contract; the char-

terer of a vessel, the shipper of goods, the seamen who are hired for the voyage, all presumptively deal with the ship as a living thing, and contract with her on a credit of her own; and if it be asserted that the credit was personal, the presumption may be rebutted, but the law casts the burden of proof upon him who denies the existence of the lien. The lien is not dependent upon the doctrine of agency, the master can impress liens on his vessel by acts or neglects for which his principal would not be bound, as for example when he is appointed by a special owner or even in cases where he is not lawfully master at all; and so conversely there may be cases in which the *vessel* may be proceeded against, as for salvage services or for a bottomry bond negotiated on her credit, or for repairs caused by a collision, though her owners could not be sued therefor: *Oakes* v. *Richardson*, 2 Lowell 173; *Freeman* v. *Buckingham*, 18 How. 182; *The City of New York*, 3 Blatch. C. C. R. 187. The question of credit is especially significant when the advantages of the maritime lien are invoked in suits growing out of contracts with material men.

Contracts of this character will be subsequently considered; it is sufficient for our present purpose to say, that they differ essentially from maritime contracts in general, that they are not strictly maritime, and that the lien differs both in its origin, reason and application from that given by the general maritime law. In the cases of contracts previously referred to, it has been assumed that they were not only maritime but also executed. Suppose, however, they are maritime but executory.[1] The maritime law appears to draw a distinction between a misfeasance and non-feasance, in cases of this character. To illustrate, if there be concluded between A. and B. a charter-party by which it is agreed that A.'s vessel shall sail from Philadelphia for Boston, and she never clears for the latter port, B.'s remedy will be confined to a personal suit

[1] If they are executory in the sense of being incomplete, as in preliminary contracts leading to the execution of maritime contracts, they are without the jurisdiction of the admiralty. In the *Schooner Clytie*, 8 Weekly Notes of Cases 188, it was held that the admiralty had no jurisdiction *in personam* for the breach of a contract made by the master of the vessel to purchase cargo, and that the insertion thereof in the charter-party did not make it a maritime contract.

If, however, the contract as a whole be maritime, the mere circumstance that certain stipulations contained therein are not strictly maritime will not prevent the court's entertaining jurisdiction. In such a case the contract is not regarded as being severable: *The Pacific*, 1 Blatch. C. C. R. 470.

against A. But if, on the other hand, she does clear from Philadelphia, and instead of proceeding to Boston as stipulated for in the contract, goes elsewhere, B. may then elect either to sue A. personally or to proceed against the vessel. In either event the injured party may sue in the admiralty, because the subject-matter of the contract is maritime. But in order to entitle a suitor to sue *in rem*, it is not enough that the contract should be maritime, the breach must also be maritime, or there must, in other words, be both a maritime contract and a maritime cause of action: *The William Fletcher*, 8 Benedict 537; *The General Sheridan*, 2 Id. 294; *Scott* v. *Chaffee*, 2 Fed. Rep. 401. See, however, *contra*, *The Williams*, 1 Brown's 208; *The Pacific*, 1 Blatch. 507. This is, it is believed, the philosophical explanation of the principle upon which this distinction is based. The most obvious application of the doctrine is found in a line of cases wherein a lien has been claimed for the breach of a contract of affreightment.

It is an elementary principle of the maritime law that there exists a reciprocal obligation between the ship and cargo, that each is pledged to the other for the faithful performance of the contract. But it is manifest that so long as the contract remains executory, or, in other words, until delivery has taken place, there can be no duty to carry, and *ergo* no lien arises.[1] Actual contact of ship and cargo is not necessary; the rule would seem to be that whenever such a delivery has been made to the carrier as would impose upon him the extraordinary liabilities attaching to his character, there is created a lien upon the ship to secure the performance of the contract.[2]

[1] But when delivery has been made, the contract is no longer executory, and the duty to carry at once arises, and if the contract is rescinded by the shipper, the carrier may proceed to collect his damages against the cargo, even though he has never started on his voyage: *The Hermitage*, 4 Blatch. C. C. R. 474.

[2] In *The Edwin*, 1 Sprague 478, affirmed in 24 How. 386, the lien was sustained for cargo lost on a lighter whilst on its way to the vessel, the court holding that if the delivery be made to the master the lien existed, irrespective of the circumstance that actual contact had not taken place. A contrary doctrine was expressed in *Freeman* v. *Buckingham*, 18 How. 182, and also in *Vanderwater* v. *Mills*, 19 Id. 82. Neither case, however, was decided on that ground. The real issue in the former case being whether the ship was liable for the fraudulent signing of a receipt by the master for goods which he never received. In the latter case the contract was held to be one of partnership and not of affreightment, and therefore not within the jurisdiction of the court.