

THE
AMERICAN LAW REGISTER.

FEBRUARY 1882.

MARITIME LIENS.

(Continued from p. 80, ante.)

THE lien of the material-man is the product of a later age, its origin and history too are essentially different from that of maritime liens in general, it has no necessary connection with shipping, but is merely a link in the chain, a relic of that system of implied hypothecation existing under the civil law. Contracts of the character alluded to are in the institution called *re* or *real*,¹ and include, therefore, both the *pignus* and *hypotheca*, the former arising from the express act of the parties, the latter from the implication of law.

The *pignus*, which bears a decided analogy to our English *pledge*, was the delivery of a thing to a creditor as a security for an advance or loan, the condition of obligation being that it should be by him restored on payment of the debt, or in default thereof a sale followed: Schouler on Bailments 161. The sale might be either public or private, judicial or non-judicial, as determined by the parties: Addison on Cont. 1017. The property pledged might be either lands or chattels, it might be either with or without life, it might be of a character either to yield or not to yield increase.² The essential requisite of the contract was the transfer of possession. The title remained in the borrower, the creditor was bound to account for the profits, if any, and to use ordinary

¹ They are so called because of their not being perfected until something had passed from one to the other.

² If no express stipulation be made, the law required notice to be given.

care and diligence in the preservation of the subject. If the thing pawned was movable or adapted to personal use or yielding fruits, the creditor could neither use it, wear it nor appropriate its increase to his own use unless the contract contained an express stipulation to that effect: *Studies in Roman Law* (Mackenzie) 202, 203. The *hypotheca*¹ was a step onward, and its existence evidences the growing confidence felt in the power of the law.

The creditor had neither possession nor title, but was, nevertheless, secure by reason of his privilege or *jus in re*, which the law would enforce against the *res* by seizure: *The Young Mechanic*, 2 Curtis 405.

The principle, thus established, rapidly found its way to public favor, and tacit liens were created in a numerous class of cases, amongst which may be enumerated—liens in favor of the public treasurer on all of the property of persons indebted to the government; in favor of a landlord as against the fruit belonging to his tenant; in favor of the owner of a shop for his rent, as against the goods belonging to his tenant; in favor of the lenders of money for repairs on a house or on a ship, and lastly, in favor of mechanics generally for repairs to property whether movable or immovable: Mackenzie's *Studies in Roman Law*, before cited.

This system of hypothecation manifestly rests on considerations entirely foreign to those which led to the inception of the lien accorded by the maritime law, it has no necessary connection with the wants of commerce, and it extends no special protection to those who furnish necessaries to ships. In principle it is much more analogous to the lien of an unpaid vendor, or to the mechanic's lien acts of our own time, than to a pure maritime lien. The system has been useful in supplying protection to a class who needed it, and by the general maritime law the advantages of the lien are given to material-men in general, but in the maritime law of the United States it has only been adopted in favor of material-men when dealing with a vessel at a foreign port, and has been rejected when the vessel is at her home port: *The Lottawana*, 21 Wall. 558. The considerations which govern the latter class of contracts will be considered subsequently.

¹ The derivation of the word is evidently from the Greek, and though there is reason to believe that contracts of this character were known to the Greeks, they did not exist amongst the Romans until a comparatively later period: Schouler on *Bailments* 161; Addison on *Cont.* 1019.

The designation material-men and the why and the wherefore of the lien is thus pithily explained by Sir Leoline Jenkins: "These are material-men," says he, "whose trade it is to repair or equip ships, or to furnish them with tackle, provisions or necessaries of any kind. These men, when they have furnished any victuals or materials upon the credit of the ship, are certain losers if they are prohibited from proceeding against her; if they be put to their personal action against the master they will find, in general, that he is not worth a fortieth part of that which he has taken upon the credit of the ship:" Life of Sir Leoline Jenkins, vol. 2, pp. 746, 747.

The term is one of very wide applicability; it embraces the lumber-man, or iron-factor, or smith who furnishes her the wood or metal requisite for her repairs.¹ The machinist, or sail, or spar-master who repairs her motive power, the artisan who ornaments and preserves her with paints and oils, the ropemaker who furnishes her anew with cordage, as well as the ship-chandler who supplies her with the various "necessaries" for the voyage.

It is sometimes a matter of some difficulty to determine whether the articles were furnished to a vessel already in existence, or whether they were furnished in part to bring her into existence; in the former event the contract is maritime. But the fact that the work was done after the vessel was launched does not, *per se*, render the contract maritime, nor is she necessarily a ship because she has made a voyage to a neighboring port, if she be towed there before she has received her motive power, and for the purpose of being supplied therewith on her arrival; nor does it matter in such a case that she had cargo on board, if the taking of such cargo be a mere incident of the undertaking: *The Iosco*, 1 Brown's Rep. 495. But see *contra*, *The Eliza Ladd*, Deady's Rep. 519.

Money advanced to pay for supplies or repairs constitutes the advancer a lien-holder, he is subrogated to the mechanic or ship-chandler who actually supplies them: *Davis v. Child*, Davis Rep. 71; *Thomas v. Osborn*, 19 How. 29. But the lender of money has only a lien when the advance is made to pay a debt

¹ But not if supplied for her construction, because a contract to build a ship, or to furnish articles for her construction, is not maritime: *Peoples' Ferry Co. v. Beers*, 29 How. 393; *Roach v. Chapman*, 22 Id. 129; *Young v. The Ship Orpheus*, 2 Clifford 29.

which is a lien.¹ The lien depends upon the declared object and purpose of the supply, and if the advance be thus made in good faith, the lender is not called upon to see to the application of the fund, nor is his lien divested by reason of any subsequent misapplication of it by the borrower: *The Ship Fortitude*, 3 Sumn. 228; *The Royal Stuart*, 2 Spink's Rep. 258; *The Nelson*, 1 Haggard's Rep. 169; *The Grapeshot*, 9 Wall. 141. The advancer will be required to file an exhibit, containing the various items for which the money has been advanced, together with such further proof as may be necessary in order to enable the court to judge of the necessity of the advance and of the application of the fund. It is not, however, the policy of a commercial court to scrutinize the account item by item with undue strictness, and they will allow for moneys advanced for purposes which would not, *per se*, make the furnisher a lien-claimant, provided that such payments were equally necessary: *Crawford v. The Wm. Penn*, 3 Wash. C. C. R. 484; *The Brig Bridgewater*, Olcott's Rep. 35; *The Emily B. Souder*, 17 Wall. 666; *The Rigi*, Law Rep., 3 Eccl. & Ad. 516; *The Tangier*, 2 Lowell's Dec. 7; *The Bark J. F. Spencer*, 5 Benedict 151; *The Sarah Harris*, 7 Id. 28 and 177.

The creditor, of course, must prove that he acted in good faith, or, in other words, that he believed in the existence of the necessity.² And under such circumstances, the necessity may be presumed, if the contract be made with the master, on the credit of the ship: *The Grapeshot*, *supra*. The presumption of law is that the credit of the vessel is an element in the contract, and this presumption is not rebutted by proving that the credit of the owner

¹ Hence, if a vessel be attached in consequence of a common-law action against her owners, money advanced to pay such a debt, and thus effect her discharge, confers no lien: *The A. R. Dumlup*, 1 Lowell's Dec. 350. But though the debt must be one growing out of a maritime contract, or maritime service, it is no longer true that the signification is so limited as to include only that which is physically annexed to the ship, such as repairs made to her, but will include towage, pilotage, custom-house dues, consular fees, charges for medical attendance to the crew: *The George T. Kemp*, 2 Lowell's Dec. 478; *The Emily B. Souder*, 17 Wall. 666; *The Riga*, Law Rep., 3 Eccl. & Ad. 516.

² The advancer acting in good faith will not be called upon to prove actual necessity—apparent necessity is sufficient under such circumstances: *The Fortitude*, 3 Sumn. 228; *The Grapeshot*, 9 Wall. 129.

was good at the time.¹ Of course, it is a valid defence to an asserted lien to aver and prove that the personal credit of the owner, and that only, was pledged; but it is no defence to say that the personal credit of the owner would have been sufficient, when, in fact, it was not relied on: *The A. R. Dunlap*, 1 Lowell's Dec. 350; *The Plymouth Rock*, 23 Int. Rev. Rec. 129.²

Nor does it matter whether the advance be made at the request of the owner, master or other agent acting within the scope of his authority.³ The inquiry of the advance should be to determine the purpose and object of the loan and its apparent necessity, and if these circumstances concur and if it be made upon the credit of the ship, the creditor will be protected.

When the contract is made with an agent instead of with the principal, the creditor must prove that the agent had not, or appeared not to have funds of the owner in hand. Not that the law of lien depends in general upon that of agency, but because in this instance it does, and inasmuch as the master is not a general agent for all purposes, the creditor will not, therefore, be protected when the master is known to be in funds, the maritime law not permitting him in such a case to pledge the property, just as the common law would not permit him to pledge the credit of his principal: *The A. R. Dunlap*, 1 Lowell's Dec. 350; *The Williams*, 1 Brown's Ad. R. 208.⁴

The peculiarities which have attended the enforcement of the liens of material-men in the United States, have led to the promulgation of some doctrines which, it is believed, were never sound on principle and which are no longer authority; prominent amongst these may be mentioned the dicta, "That where the contract is

¹ The text refers to vessels in foreign ports, the peculiarities which distinguish contracts of this character when made in the home port of the vessel will be subsequently considered.

² The mere advance of money without any hypothecation does not, by reason of its subsequent application to the payment of the liens, constitute the advancer a lien holder: *The Canal Boat W. A. Harris*, 8 Benedict 210.

³ A contrary doctrine was promulgated in *The St. Jago de Cuba*, *infra*, but was not necessary for the decision of the case, and has long since been overruled: *The Kalorama*, 10 Wall. 213; *The Guy*, 9 Id. 758; *The Walyrien*, 3 Benedict 394; *The Commonwealth*, 20 Int. Rev. Rec. 64; *The Belle Lee*, 12 Id. 123.

⁴ The master, however, is not the only agent by whom liens can be impressed. One who furnished supplies in good faith, to any agent acting within the usual scope of his employment, will, *prima facie*, have a lien on the vessel for their payment: *The Steamer Metropolis*, 9 Benedict 83; *The City of New York*, 3 Blatch. C. C. R. 187.

made with the owner in person, no lien is implied; that it is only the contracts which the master enters into as master, that specifically bind the vessel." Conkling's Admiralty 73, 78, 80; *St. Jago de Cuba*, 9 Wheat. 417.

This proposition would seem to imply a necessary connection between lien and agency—a connection which may be important in the contracts of material-men and yet not significant when applicable to liens in general. It is difficult to understand on principle why one who charters a ship or places his goods on board of her for carriage, or who handles her sail or moves her engines, should be denied a lien if the contract be made with the owner and have a lien, if the contract be made with the master.

The presence of the owner may defeat the authority of the master, but even where the contracts of material-men are concerned, it is idle to say that the mere presence of the owner or the fact that the contract was made with him, precludes the possibility of a credit given to the vessel. Nor is it any defence to a valid lien to assert that the personal credit of the owner would have been sufficient, when that in fact was not relied on.¹

Another error equally wide-spread has grown out of the peculiar status of the material-men in the admiralty courts of the United States. By the maritime law of this country, the material-man has no maritime lien for supplies furnished or repairs made in the home port. This exception is confined to one class of contracts, viz.: the contracts of material-men; but the exception has been made to swamp the rule and the broad statement is not infrequently made, that though the contract is confessedly maritime, there is no lien implied, because it was made in the home port of the vessel. Here again it is difficult to see how, on reason, principle or authority this dicta can be sustained. All maritime contracts have the same elements, the same tests, and should be adjudicated by the same rules; the mere circumstance that by the maritime code of the United States, the material-man is denied the implied lien which that code affords to maritime contracts in general, can scarcely be construed as warranting the dicta that the rule is, in the home port no lien is implied. On the contrary, it is believed

¹ The earlier cases have been overruled, even where the contracts of material-men are concerned: *The George T. Kemp*, 2 Lowell's Dec., 480; *The Kulorama*, 10 Wall. 204; *The James Guy*, 9 Id. 758; *The Walyrien*, 3 Benedict 394; 11 Blatch. 241.

that, apart from the contracts of material-men, the maritime law of the United States makes no distinction between home ports and foreign ports, and that the residence of the owners, or, in other words, the home port of the vessel is only material when the lien claimant is himself a material-man, or where the claimant stands in his shoes by right of subrogation.¹

The characteristics of the common law and the maritime lien are essentially different. The right of the lien-claimant in the first class is dependent upon possession; he holds as against the owner only. In the latter, however, his rights are independent of possession, and he holds not as against the owner, but as against all the world.

If the lien-holder sells the property by order of a common-law court, the purchaser takes the right, title and interest which the defendant had; but if the sale be made under a decree of the Admiralty Court, the purchaser takes the property discharged of all encumbrances: *The Steamer Raleigh*, 2 Hughes 44. When there is an express hypothecation the assignee may enforce his lien in the admiralty; but whether or not the lien arising from an implied hypothecation is lost by an assignment of the claim must be regarded as unsettled: *The Sarah I. Weed*, 2 Lowell's Dec. 555; *The Champion*, 1 Brown's Ad. Rep. 520. Seamen, in general, have a lien on the ship for their wages, but the master, by our jurisprudence law, has not.² He has a lien on the freight for any advances which he may have made: *Drinkwater v. The Spartan*, 1 Ware's Rep. 149; and so likewise has a part owner if the ship be held as partnership assets; but the rule is otherwise when the owners hold as tenants in common (*The Larch*, 2 Curtis 427), and an agreement "to run a vessel on shares" does not constitute

¹ Seamen have a lien for wages earned in the home port of the vessel: *The Sloop Canton*, 1 Sprague 437. The shippers of goods have a lien for their transportation in safety, though the voyage be confined to the home port of the vessel: *The E. M. McChesney*, 8 Benedict 150; 15 Blatch. 185. The wharfinger has a lien against a vessel for wharfage in the home port: *The Kate Tremaine*, 5 Benedict 60; *Ex parte Easton*, 5 Otto 68. Tug owners have a lien for towage performed in the home port: *The General Cass*, 1 Brown's Ad. 334. Pilots have a lien against domestic vessels irrespective of local law: *The Alice Tainter*, 5 Benedict 391.

² This exception to the general rule is based on the ground of the inconvenience which might result if the master, when his removal were desired, or his wages stopped for misconduct, keep possession of the ship or compel her sacrifice when abroad.

them partners: *Webb v. Peirce*, 1 Curtis 111. The master has a lien on the cargo for demurrage, and this is true even though demurrage be not expressly stipulated for in the bill of lading: *The Hyperion's Cargo*, 2 Lowell's Dec. 93.¹

The lien follows the ship wherever it goes, and may be enforced whenever there is a jurisdiction to enforce it.² It is not divested by a forfeiture of the vessel to the government for breach of municipal law (*St. Jago de Cuba*, 9 Wheat. 409), nor by a sale to a *bona fide* purchaser without notice (*The Bark Chusan*, 2 Story Rep. 456), nor by the death or insolvency of the owner (*The Young Mechanic*, 2 Curtis Rep. 404.)

The lien of course may be waived by act of the parties or it may be lost by laches. The making of an express contract is not, however, in itself, any waiver of the lien: *Peyroux v. Howard*, 7 Pet. 324; *The Bird of Paradise*, 5 Wall. 545. Nor is the mere taking of a note for the debt, unless it can be shown that the contract was to accept the lesser security for the greater: *Leland v. The Medora*, 2 Wood. & Minot 100. The lien should be enforced within a reasonable time, and if this be not done, it is at the risk of the lien-holder. But when the interests of third parties are not affected, the lien will be enforced, notwithstanding a very considerable time may have elapsed.

The state Statute of Limitations will not in such a case be regarded as a bar: *The D. M. French*, 1 Lowell's Dec. 43; but when the rights of third parties will be affected, or where there is danger of injustice being done, the rule of diligence will be upheld: *The Royal Arch*, Sunbury Rep. 269.

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¹ There is no lien in favor of one who has paid an insurance company the premiums on a policy of insurance on a vessel effected by her owner. The contract in such a case is one for the benefit of the owner; and if the vessel be lost the money is paid to him, not to advancer. But if one make advances on the credit of the vessel, or if one's services have been of such a character as to constitute him a lien-holder, he may insure, and in the event of a loss the money follows the lien: *The John T. Moore*, 3 Wood's Rep. 61.

² It has been held that a citizen of Canada may enforce in our courts a maritime lien for supplies furnished to an American vessel, though no such lien could have been enforced in the place at which the contract was made or supplies furnished: *The Champion*, 1 Brown's Ad. Rep. 520.

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(To be continued.)