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MARITIME LIENS.

(Continued from p. 88, ante.)

THE second class of liens which it is proposed to consider are those which arise by virtue of the municipal law, but which are enforceable in the admiralty.

The most noteworthy causes of this character are those arising from the liens of material men for services rendered in the "home port" of the vessel.

The maritime law of the United States is that, if repairs have been made or necessities furnished to a ship in the port of a state to which she does not belong, or to a foreign ship, the material-man's lien is dependent wholly on the principles of the general maritime law, and he may, irrespective of the municipal law, proceed *in rem* to enforce it in any District Court of the United States which may, by seizure of the vessel, obtain jurisdiction. So far then do we follow the general maritime law; we say to the libellant, that the contract being maritime, he can proceed in the admiralty, and that the usual methods of procedure, both in *personam* and *in rem*, are open to him, but that if he elects to file a libel *in rem* when no maritime lien exists, he must abide the consequences. Jurisdiction and jurisprudence go hand in hand; the existence or non-existence of the lien is a matter of law, and is in each particular case decided in accordance with the principles of maritime jurisprudence. This is certainly not only good law but good logic. But, on the other hand, if the repairs have been made or necessities furnished to a ship in the port of a state to which she belongs, technically known as her "home port," the question

of lien or no lien is no longer determinable by *maritime* jurisprudence, but by *local municipal* law; and though the contract be maritime, though the repairs be made on the credit of the ship, the material-man has no lien other than that which is given him by the local law; we do not deprive him of his right to sue in the admiralty, we do not declare his contract to be no longer maritime, but we say that his rights as a *lien* claimant must depend on the municipal law and not on the law maritime.

The father of this curious offspring was *The General Smith*, 4 Wheat. 438.¹

The immediate effect of the decision of the Supreme Court in the case of *The General Smith* was to restrict the suitor to a personal action, whether prosecuted in the admiralty or common-law courts. He had his common-law lien, but this was valueless without that possession which was impracticable if not impossible. Realizing this, the legislatures of the several states came to his relief: acts creating maritime liens, or liens in the nature of maritime liens enforceable by actions in the state courts, were passed by the several state legislatures. When the constitutionality of those several acts was tested, they were closely scrutinized, and whenever they purported to create a maritime lien, they were declared unconstitutional, and when they fell within these limits and were but *quasi* maritime in character, their enforcement in *the state courts* was prohibited: *The Belfast*, 7 Wall. 624; *The Moses Taylor*, 4 Id. 411.

After various modifications of the admiralty rule, the question in 1874 again came squarely before the Supreme Court, and it was held that no maritime lien existed for repairs made in the home port of the vessel, but that so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each state by state legislation.

State laws, it was said, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, nor

¹ *Held*, that in respect to necessaries and repairs in the port of a state to which the ship belongs, the case is governed by the municipal law of that state, and that no lien is implied unless it is recognised by that law. It is noticeable that at the time that this case was decided, the Supreme Court were of the opinion that the admiralty jurisdiction was commensurate with the commercial clause in the Constitution, and that it therefore did not extend to contracts of affreightment between two ports in the same state, nor to supplies furnished to a vessel engaged in such trade. From this position they have long since receded: *The Belfast*, 7 Wall. 624.

can they confer such jurisdiction upon state courts as to enable them to proceed *in rem* for the enforcement of liens created by state laws, but the District Court of the United States having jurisdiction of the contract as a *maritime* one, may enforce liens given for its security even when created by state laws: *The Lottawanna*, 21 Wall. 558; see also, *The John T. Moore*, 3 Wood's R. 61.

Nominally, *The Lottawanna* was decided on the doctrine of "*stare decisis*," *The General Smith* was cited with approval; in name it was followed, it would seem, however, in principle at least, that *The Lottawanna* has created a new order of things. If we understand *The General Smith* aright, it stated the maritime law of the United States to be that in respect to necessaries and repairs in the port of a state to which a ship belongs, the case is governed by the municipal law of that state, and that no lien is implied unless it is recognised by that law. If we understand *The Lottawanna* aright, it states the maritime law of the United States to be that in respect to necessaries and supplies furnished to a ship in the port of a state to which she belongs, *there exists no maritime lien*, but that, until Congress chooses to interpose, the rights of material-men furnishing necessaries to a vessel in her "home port" may be regulated in each state by the state legislature. If this interpretation be correct, the distinction is not only obvious but significant; the maritime law of the United States is no longer dependent on the municipal law, but is decisive whether the vessel be domestic or foreign, and by its terms the material-man can have no maritime lien, if the repairs be made or necessaries furnished to a vessel in the port of a state to which the vessel belongs, but may have a lien if the repairs be made or if the necessaries be furnished in the port of a state to which she does not belong. If the vessel be in her home port, and the state statute is sought to be enforced in the admiralty, the requirements of the statute must be complied with. The act should be referred to in the proceedings, and if the statutory requirements are not complied with, the admiralty court will not enforce the lien, but once the cause is properly before the court, the principles and mode of procedure followed in the admiralty will govern it: *Davis v. New Brig*, Gilp. 473; *Boon v. Hornet*, Crabbe's R. 426; *In re Indiana*, Id. 479; and though the liens given by state laws may be enforced in districts which are without the state, the order of priority given by the statute will be disregarded if in conflict with liens having

priority by the maritime law: *Underwriters' Co. v. Katie*, 3 Wood's R. 182.

What vessels are to be accounted foreign and what domestic: Foreign vessels are divisible into two classes, one in which the vessel is foreign, as evidenced by her flag and enrolment, the other in which she is foreign by reason of her having her home port in another state. In the first class of cases, the question of nationality is in issue; in the second, the nationality is not in dispute, but the inquiry is in what state do her actual owners reside, or, in other words, where is her veritable home port.

If a vessel fly a foreign flag, have on her stern a foreign name, and is registered as belonging to a foreigner, there can be no doubt that, *prima facie*, she is what she purports to be, foreign. Suppose, however, that the actual ownership and the apparent ownership be different, not from inadvertence or neglect, but by design. Suppose, for example, she is actually owned by an American citizen, but that she is commanded by a foreigner, or that she was built in a foreign country, or that she took refuge under foreign colors during our civil war, or is for any other cause debarred from claiming American registry.

It is plain that in such a case the legal and equitable ownership are purposely kept apart; that the legal owner is a man of straw, a citizen of the flag under which she sails, and that the actual owner is the mortgagee, who is unable to procure an American register. In cases of this character, what is the position of the material-man dealing with the vessel when she is at the residence of her equitable owner?

The cases naturally divide themselves into two classes, viz., those in which he was aware of her history, and those in which he was ignorant of it.

In the first class of cases, though the authorities are not entirely harmonious, the more general opinion would seem to be, that if the vessel be at the time at the residence of her *actual* owner, and this circumstance be known to the material-man, he will be concluded thereby, and that as to him, she will be domestic even though she fly a foreign flag, and her legal ownership, as evidenced by her enrollment, be likewise foreign: *The E. A. Bernard*, 2 Fed. Rep. 712; *The Alice Tainter*, 5 Benedict 391; see *contra*, *The Geo. T. Kemp*, 2 Lowell 478. But if, on the other hand, the material-man be ignorant of the fact, the rule is otherwise, or, in other

words, her equitable owner having held her out to the world as foreign, will be estopped from denying her national character: *The Walkrien*, 3 Benedict 394; *The St. Iago de Cuba*, 9 Wheat. 409.

When the *nationality* of the vessel is not involved, the question may arise in this way: The citizen of one state may make a sale of her to the citizen of another, but from inadvertence or neglect the change of ownership may not appear on her register. *Prima facie*, the home port of the vessel is the port of her enrolment, but when the port of her enrolment and the residence of her actual owner are different, the rule is that the material-man dealing with her at the residence of the true owners, knowing them to be owners, cannot claim that the vessel was foreign because she is registered in another state: *Hill v. The Golden Gate*, 1 Newberry 308; *The Plymouth Rock*, 13 Blatch. 505. Though the lien given by the general maritime law and that given by the municipal law are both enforced in the same forum—the former, by reason of its characteristics, universality and the ease with which it is enforced, is in general preferable, and this is especially true when, by reason of numerous libels filed in the cause, the question of priority becomes important.

The general principle which governs in determining the question of precedence between lien claimants claiming under pure maritime law liens, is, that he whose service or expenditure has preserved the vessel as a security for a pre-existing debt has priority; so that, practically, the last service performed or advance made takes precedence over all previous ones.

The services performed at the latest hour are most efficacious in bringing the vessel and her freightage to their final destination, each foregoing encumbrance therefore is actually benefited by means of the succeeding encumbrance, and a court of admiralty as a court of equity in adjudicating cases of conflicting liens of this nature takes this as the principle of its decisions: 49 London Law Mag. 146.

It is obvious that in the application of this principle, the very nature of some liens will often secure to them priority over others. The wages of the mariners earned by bringing the ship to her destined port have insured the eventual value of all services previously rendered, and therefore obtain priority over all other liens *ex contractu*, or *quasi ex contractu*, as for salvage, pilotage, towage

or bottomry.¹ Wages antecedently earned, as in an outward or divided voyage, or due under contract at the expiration of stipulated terms, without reference to the ship's arrival at the port of destination, will be postponed to subsequent salvage, but no such distinction will give bottomry bonds precedence over them: *The Constancia*, 4 Weekly Notes of Cases 68. Bottomry bonds have precedence over prior salvage, and give way to subsequent salvage, pilotage and towage.

The lien for damages, originating in the wrong of the master and crew of the vessel in fault, and founded on consideration of public policy for the prevention of careless navigation, takes precedence of all liens *ex contractu*, and in the event of the vessel proving insufficient to meet all the demands, the liens of wages, towage, pilotage and bottomry will be absorbed: *The Benares*, 7 Weekly Notes of Cases 54; *The Enterprise*, 1 Lowell 455. A maritime lien accrues from the instant of the happening of the circumstance which creates it, and not from the intervention of the court; the latter is but a process to render perfect an inchoate right: *The Pacific*, L. R., 32 Ad. 120. From this it follows that the mere circumstance of prior seizure, or a prior decree obtained by superior diligence, will not affect the order of priority, when all the claims are pending together: *The Brig E. A. Bernard*, 2 Fed. Rep. 712. But see *contra*, *The General Burnside*, 3 Fed. Rep. 228; *The Schooner De Wolf*, Id. 236.

As between material-men claiming under the general maritime law and others claiming under the quasi maritime lien accorded to them by state legislatures, the better opinion is that the former have priority, even though their service be anterior in time: *The E. A. Bernard*, cited *supra*; *The John T. Moore*, 3 Wood's R. 61. See, *contra*, *The Daniel Brown*, 9 Benedict 309; and also *The General Burnside*, 3 Fed. Rep. 228; *The De Wolf*, Id. 236. As between various material-men claiming under a quasi maritime lien, the rule of priority, given by the admiralty law, will govern, notwithstanding the provisions of the state act; *Underwriters'*

¹ Abbott on Shipping, 12th ed., p. 596, and note. But the lien for salvage will take precedence over claims for wages earned before the accident, and it would seem that though the lien for wages earned prior to the accident is not absolutely extinguished, it continues subject to the salvor's lien. The lien for salvage takes precedence over that for general average: *The Spaulding*, 1 Brown's Ad. R. 310; *Collins v. The Fort Wayne*, 1 Bond 476; *The Fanny*, 2 Lowell 508.