DEPARTMENT OF ADMIRALTY.

EDITOR-IN-CHIEF,
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Assisted by
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DISTRICT COURT OF THE UNITED STATES, DISTRICT OF DELAWARE. "THE NOW THEN."[1]

Lien—Supplies—Work Done.—When supplies are furnished to a vessel in a foreign port by order of her master a lien is implied, but for work by order of the owner no lien will be held to exist unless proved by the agreement of the parties.

MARITIME LIEN FOR REPAIRS AND SUPPLIES TO A SHIP.

When, in the early stages of the development of our system of maritime law, the question of the existence of a maritime lien for necessary repairs and supplies to a ship, came before the courts for consideration, they rejected the English law, which held that no such lien existed, on the ground that the non-existence of such a lien in England was due alone to the lack of jurisdiction of the courts of admiralty, by reason of the prohibition of the courts of common law. The Supreme Court having previously decided that the grant of admiralty and maritime jurisdiction in the Constitution was not a grant of the limited jurisdiction of the admiralty courts of England, no similar objection to the jurisdiction of the Federal courts could be made, and it was held, following the civil law, that one who furnished necessary supplies had a lien upon the ship itself for his security, which could be enforced by an action *in rem*: "The Aurora," 1 Wheat., 96. It cannot, however, be truly said that the civil law was followed, as our courts being influenced by the common law repugnance to secret liens did not adopt the broad principle of the implied hypothec of the civil law, but based the existence of the maritime lien for supplies upon the necessity for credit to the ship. As a ship is constructed for action rather than inaction, or as has been said, that "a ship is made to plow the seas and not to rot by the walls," the courts were compelled by the necessities of commerce and trade to hold that where, in order to prevent a defeat of that purpose, credit to the ship was necessary, that the law would imply that an hypothecation had been made, *i. e.*, that a maritime lien existed.

The theory of the courts that in cases only of a necessity for credit to the ship would a maritime lien exist, greatly affected the subsequent development of the law, and has created many points of difference from the civil law.

The first point of difference ef-

[1] Reported in 50 Fed. Rep., 914. Decided June 2, 1892.

fected arose in "The Gen'l Smith," 4 Wheat., 438 (1819), where it was held that if supplies were furnished to a ship in the port or State to which she belonged, that the maritime law would imply no lien, and that none existed unless given by the local municipal law. Under these circumstances the owner being present, or presumptively present, the presumption is that his personal credit will suffice to obtain supplies, and the law will not encourage secret liens by implying one, but will recognize an express lien by way of bottomry alone.

The tendency at first was to confine these liens within the strictest limits. Thus, in "The St. Jago dé Cuba," 9 Wheat., 409 (1824), JOHNSON, J., said, in delivering the opinion of the Court: "It is not in the power of anyone but the shipmaster, not the owner himself, to give these implied liens upon the vessel. The law marine attaches the power of pledging or subjecting the vessel to material men, to the office of *shipmaster*. The necessities of commerce require that when remote from the owner he shall be able to subject the owner's property to that liability, without which it is reasonable to believe he will not be able to pursue his owner's interests. When the owner is present the reason ceases, and the contract is inferred to be with the owner himself, on his own responsibility, without a view to the vessel."

But the same necessities of commerce which led the courts to recognize these liens led to a modification of the doctrine pronounced in this *dictum*.

In Thomas *v.* Osborn, 19 How., 22 at page 38, TANEY, C. J., says: 'Now, if Leach is to be regarded as owner for the time when he was sailing "The Laura" under the agreement, then by the maritime law the repairs and supplies furnished at his request are presumed to have been furnished upon his personal credit, *unless the contrary appears*."

In 1869 the question came before the Supreme Court in "The Kalorama," 10 Wall., 204, and it was then held that it was no objection to the assertion in the admiralty of a maritime lien against a vessel for necessary repairs made and supplies furnished to her in a foreign port that the owner was there and gave directions in person for them, the same having been made expressly on the credit of the vessel. In delivering the opinion of the Court, CLIFFORD, J., said: "Implied liens, it is said, can be created only by the master, but if it is meant by that proposition that the owner or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the Court cannot assent to the proposition, as the practice is constantly otherwise. Undoubtedly, the presence of the owner defeats the implied authority of the master, but the presence of the owner would not destroy such credit as is necessary to furnish food to the mariners and save the vessel and cargo from the perils of the sea."

In "The Guy," 1 Ben., 112; 9 Wall., 758, it was held that a maritime lien existed for supplies furnished to the owner upon his order, the Court finding that "there was an agreement based upon the credit of the vessel," and that "the responsibility of the boat for the bill was a feature in the transaction, recognized by both parties at the time of the contracting of the debt."

The rule, deducible from these cases, is that where the owner is present in a foreign port and supplies are furnished to a ship, that the presumption is that they are furnished upon his personal credit, but the presumption is not a conclusive one, and may be rebutted by evidence that the personal credit of the owner in the foreign port is not sufficient to supply the wants of the ship, and that the credit of the latter is actually relied upon.

Notwithstanding these decisions, however, the later cases are not harmonious, owing to the use of certain expressions by the Court in "The Kalorama."

In Stevenson *v.* "The Francis," 21 Fed. Rep., 715 (1883), it was held by BROWN, J. (S. D. of N. Y.), that where a known owner obtaining supplies on his personal order in a foreign port, not being master ("The Mary Bell," 1 Sawy., 135), that he deals presumptively on his personal credit only, and no lien will be implied unless the libellant satisfies the Court, from the negotiations or circumstances, that there was a common understanding to bind the ship.

The Court said: "In a foreign port when the owner is present and procures the supplies in person, not being master, in the absence of any express reference to the ship as a source of credit, the same presumption as to the owner's means and as to his intention exists *prima facie;* but this presumption is not conclusive, as in the home port, and may be repelled by proof drawn either from the express language of the parties or from any other circumstances satisfactorily showing that a credit of the ship was within the common intention, and when this intention appears the lien will be sustained. This is allowed because even an owner in a foreign port may be without the means, reputation or credit, and hence may be under the same necessity as the master for making use of the credit of the ship. But as I have said, this necessity in the case of the owner is not presumed. It must appear in proof, either from the circumstances or from the terms of the negotiation, which may afford conclusive evidence both of the *intent* and of the *necessity*. . . . In all the reported decisions where a lien has been sustained for supplies furnished by an owner in person in a foreign port, the Court has found an *intent* by both parties that the ship should be charged, and has placed the decision directly upon that ground."

To the same effect are "The Union Express," 1 Brown Adm., 537; "The Sarah Harris," 7 Ben., 177; "The Rapid Transit," 11 Fed., 329. It is questionable whether the *dictum* o BROWN, J., in "The Frances," *supra*, to the effect that to create a maritime lien for supplies furnished in a foreign port, that evidence of both necessity of credit to the ship and a common intent to burden the ship is correct, in view of the reason laid down for the existence of such liens. Whether or not the parties *intend* to hypothecate the ship is immaterial, as no verbal hypothecation is known to our law, the only species known being by express hypothecation in the nature of bottomry, or the hypothecation which the law implies where from the circumstances the credit to the ship is necessary. The intention of the parties is immaterial. The question is whether the situation of the ship is such that the law will infer that credit to her was neces-

sary, which establishes the maritime lien.

In "The Scotia," 35 Fed. Rep., 907, BROWN, J. reached a different conclusion in reference to supplies ordered by the master, holding that the implied lien for supplies furnished to a foreign vessel is created, where it exists at all, by the maritime law, and *not the master's will.*

In "The Mary Morgan," 28 Fed. Rep., 196, the Court seems to have been of opinion that no *implied* lien exists for supplies furnished to the owner in a foreign port, and that only an *express* lien would be upheld.

The Court said: "The notion of extending it (implied liens) to debts contracted to the *owner* is of recent origin. The wisdom of so extending it is certainly open to grave doubt. Why should it be thus extended? The owner being present may authorize an express lien. He is hampered by no question of authority. If he is willing to hypothecate his vessel, he can agree to do so. Such an agreement removes all room for speculation and uncertainty. If the creditor does not require this, why allow him to set up an implied hypothecation, a pledge to be implied or not, as the Court may understand and construe the circumstances." Just what is meant by an *express lien* is not clear, as our law recognizes none but in the nature of bottomry; but that is evidently not the sense in which it is here used, as reference is made to the finding of the Court in "The Kalorama," *supra*, that the supplies were furnished in that case with the *express understanding* that they were furnished upon the credit of the ship, as being consistent with the idea of an *express lien.* If the Court meant an express hypothecation of the vessel, the conclusion is certainly questionable, as even when there is an express reference to the ship as a source of credit the lien is not an *express* one but an *implied* one. The difficulty seems to originate in the use of the word "implied" in connection with these liens. By our law where credit to the ship is necessary the law will hold that there is a maritime lien, *i. e.*, will *imply* that an hypothecation of the vessel has been made. Under certain circumstances the law will *imply* or *infer* that the credit of the ship has been relied upon, and consequently that there is an *implied* lien.

In "The George L. Kemp," 2 Low., 477, it is held that there may be an implied or maritime lien for supplies furnished to the owner. To the same effect see "Maritime Liens," by T. M. Etting, Esq., AMERICAN LAW REGISTER, N. S., Vol. XXI, § 85.

A logical conclusion from the decisions of the Supreme Court would seem to be that the existence of a maritime lien in such cases depends upon whether the circumstances show a *necessity of credit to the ship*, and that the intention of the parties has no other effect than as a fact showing that the personal credit of the owner is not sufficient to supply the necessities of the vessel.

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