

Case No. 4,340.  
[2 Ben. 31.]<sup>1</sup>

THE ELEDONA.

District Court, S. D. New York.

Dec., 1867.<sup>2</sup>

MATERIAL MAN—LIEN—NECESSITY FOR CREDIT.

1. Where the libellant furnished a mast for a foreign vessel in the port of New York, supposing that the master of the vessel was ordering it for the vessel, and rendered a bill against the vessel and owners on the same day that he furnished it, but had made no inquiry, and received no information, as to whether the vessel needed the mast, or as to whether the master had means or credit, or as to whether it was necessary for him to obtain it on the credit of the vessel; and where it appeared that the master had at the time means to pay for the mast, and had contracted with parties other than the libellant to furnish the mast, and actually paid them for it on the day it was put into the vessel: *Held*, that there was neither a real, nor an apparent, necessity for pledging the credit of the vessel, and that the libellant, therefore, had no lien on the vessel.

[Cited in *The Suliote*, 23 Fed. 923. Distinguished in *Hardy v. The Ruggles*, Case No. 6,062.]

2. The twelfth admiralty rule of the supreme court was only intended to regulate the practice of joining ship, freight, owner, and master in one suit; and that the question of the right to sue ship, or freight, or master, or owner, for supplies or repairs, does not depend on the twelfth rule, but on the general admiralty and maritime law.
3. The cases of *Thomas v. Osborn*, 19 How. [60 U. S.] 22, and *Pratt v. Reed*, Id. 359, discussed.

This was a libel [in admiralty] by David J. Taff, against the brig *Eledona*, a British vessel, belonging to the port of Halifax, in Nova Scotia, to recover the sum of one hundred and fifty dollars, as the value of a main-mast, which he alleged he furnished to the vessel, at New York, on the 30th of August, 1867. The libel alleged that the vessel was in need of the mast, and that the libellant furnished it, at the request of the master or agent of the vessel, and on the credit of the vessel. It did not allege that the master or owners were without credit or means, or that the mast could be obtained only on the credit of the vessel, or that such credit was necessary; and the answer excepted to the libel for the want of these averments. The answer set up, as a defense, that, the vessel being at New York, and the master and owners having abundant credit and means, certain persons, of whom the libellant was not one, contracted to do certain repairs on the vessel, including the furnishing of the mast in question, and that those persons furnished the mast, and that, if the libellant ever owned the mast, it was sold to those parties.

It appeared by the evidence, that, on the 22d of August, 1867, the master of the *Eledona* entered into a written contract, at New York, where the vessel then was, with the firm of Clickener & Fowler, shipwrights, caulkers, and spar-makers, to make sundry repairs to the vessel, including the furnishing of a new main-mast, and the taking out of the old main-mast, and the putting in of a new one, for the sum of two hundred and twenty-five dollars. The master testified that the vessel needed the mast; that he paid Clickener

## The ELEDONA.

ℰ Fowler for the mast on the 30th of August, 1867, the day it was put into the vessel; that such payment was made with his own money; and that he required no credit for the mast, having the money to pay for it. The mast was procured from the libellant but it did not appear that the libellant knew anything about the contract between the master and Clickener & Fowler, or knew that Clickener & Fowler had anything to do with furnishing or putting in the mast. The libellant supposed that he was furnishing the mast on the order of the master of the vessel, and he made out a bill for it against the vessel and her owners, on the 30th of August 1867, the same day that the mast was furnished by him, but he suffered the mast to leave his premises and control before presenting the bill at the vessel. The libellant before furnishing the mast made no inquiry, and received no information, as to whether the vessel needed the mast or as to whether the master had means or credit or as to whether it was necessary for the master to obtain the mast on the credit of the vessel, but was satisfied to deliver the mast upon the simple fact that he supposed the master was ordering it for the vessel.

A. F. Smith, for libellant.

C. Donohue, for claimant.

BLATCHFORD, District Judge. On the facts in this ease, the libellant claims a lien on the vessel, for the value of the mast—one hundred and fifty dollars. It is urged, on his part, that, in order to give a lien on a vessel to a material man, for supplies or repairs furnished or made to the vessel, it is only requisite to show that a necessity existed for the supplies or repairs, and that they were furnished or made to the vessel in a foreign port; and it is claimed that the cases of *Thomas v. Osborn*, 19 How. [60 U. S.] 22, and *Pratt v. Reed*, Id. 359, decided at the December term, 1856, so far as they established a different rule, were a departure from prior well established principles, and have been since overruled by the reenactment by the supreme court, at the December term, 1858, of so much of the twelfth rule in admiralty as relates to suits by material men for supplies or repairs or other necessaries for a foreign ship, or for a ship in a foreign port, and by the decision in the case of *The St. Lawrence*, 1 Black [66 U. S.] 522. It is also

urged, that Mr. Justice Nelson, who delivered the opinion of the court in *Pratt v. Reed*, has since, in cases adjudged by him, given to the decision in that case a construction which will admit of the existence of a lien on the vessel in this case in favor of the libellant, on the facts in proof. The claim on the part of the libellant comes to this, that, inasmuch as the contract in this case under which he furnished the mast was a maritime contract, and the mast was furnished for a foreign vessel, and was in fact necessary for her, he has a right, under the twelfth rule in admiralty, to proceed against the vessel in rem, to recover the value of the mast.

There was nothing new in the decisions in *Thomas v. Osborn* and *Pratt v. Reed* [supra]. They merely applied and enforced the well settled principles of admiralty and maritime law, established for the protection of ship-owners whose vessels are found in foreign ports, as well as for the security of parties furnishing necessaries to such vessels. In *Thomas v. Osborn*, it was held, that the master of a vessel has power, in a foreign port, to hypothecate the vessel for necessary supplies and repairs furnished and made to her, either by an express hypothecation of her, as by a bottomry bond, or by an implied hypothecation of her, by obtaining such supplies and repairs on her credit, in a case of necessity; but that his authority so to hypothecate her is limited to cases where there is a necessity for obtaining the supplies or repairs on her credit, as well as a necessity for having them at all; that the person furnishing the supplies or repairs must see to it that apparently such necessities, both of them, exist, before he can claim that the vessel is hypothecated to him; and that this limitation on the authority of the master, and this duty imposed on the furnisher, are as ancient and well established as such authority itself. It was also held, in that case, that, to constitute a case of apparent necessity, not only must the supplies and repairs be needful, but it must be apparently necessary for the master to have a credit to procure them; that if the master has funds which he ought to apply to pay for the supplies and repairs, then no case of actual necessity for a credit exists; and that, if the furnisher knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the vessel. The case of *Pratt v. Reed* only enforced the decision in *Thomas v. Osborn*, by holding again, that to create an implied hypothecation of a vessel for supplies furnished to her in a foreign port, not only must a real or apparent necessity exist, at the time, for the supplies, but a real or apparent necessity must also exist, at the time, for giving a credit upon the vessel in order to procure them.

So much of the twelfth rule in admiralty as is invoked in behalf of the libellant was in force in the same language, when these decisions were made, that is found in the twelfth rule, as amended at the December term, 1858. That rule, in saying that, "in all suits by material men for supplies or repairs, or other necessaries, for a foreign ship, or for a ship

## The ELEDONA.

in a foreign port, the libellant may proceed against the ship and freight in rem, or against the master or owner alone in personam," only means, that, where a material man has a right to sue for supplies, repairs, or necessaries for such a ship, he may, if he has a right to sue the ship in rem, and the freight in rem, join them in one suit in rem, but that he cannot join the master and the owner, or either of them, as a respondent, in personam, in the same suit with such" proceedings in rem; and that, if he has a right to sue the master in personam, and the owner in personam, he cannot sue them both in one suit in personam, but may sue either of them in personam. But the question of the right to sue ship, or freight, or master, or owner, in a court of admiralty, for the particular supplies, repairs, or necessaries, does not depend at all on the twelfth rule, but depends on the general admiralty and maritime law.

Nor has the ancient rule been at all relaxed since the decisions in *Thomas v. Osborn* and *Pratt v. Reed*. The case of *The St. Lawrence*, 1 Black [66 U. S.] 522 contains nothing to affect those decisions; and, in the circuit courts within the second circuit, their authority has been upheld and applied, in very recent cases, by Mr. Justice Nelson. In the case of *Youngfall v. The James Guy* [Case No. 18,181], in the circuit court for the eastern district of New York, on appeal (Sept 1867), Judge Nelson upholds the soundness of the decision in *Pratt v. Reed*, as above defined, and holds that, in every case the question of the necessity for the repairs or supplies, as well as the question of the necessity for creating a lien on the vessel for them, must depend on the facts and circumstances of the case. Again, in the case of *Ross v. The Neversink* [Id. 12,079], in the circuit court for this district, on appeal (Nov. 1867), Judge Nelson refers to the cases of *Thomas v. Osborn* and *Pratt v. Reed*, and says, in regard to those cases, that the decisions in them were placed upon ancient and settled authority; that those decisions extend no rule beyond its ancient strictness, and lay down the principles which are to govern cases of the kind; that no fixed rule can be laid down in advance as to what will be sufficient proof of an apparent necessity for giving credit to a vessel, but the question must rest in the sound judgment of the tribunal before which the proof is presented; that good faith and fair dealing must be exacted, in every case, on the part of the person furnishing the supplies or repairs; and that the absent owner ought to be guarded against any collusion of the master

with the material man or the furnisher of supplies, and against an unnecessary tacit incumbrance upon his vessel. In that case, Judge Nelson upheld the lien on the vessel, because the supplies were furnished at a place where the owners of the vessel were not present, and, in the sense of the maritime law, in a foreign jurisdiction, and because the master had no means wherewith to pay for the supplies. He held, therefore, that there was an apparent necessity for a credit to the vessel. In the case of *Bickford v. The Caroline* [Id. 1,385], in the district court for the district of Massachusetts (Nov. 1867), it was held, by Judge Lowell, on the authority of *Pratt v. Reed*, that the material man had no lien on the vessel for the supplies, the evidence being, that the supplies were furnished to her at Boston, she being a foreign vessel, on the order of her master, who was also her owner, under circumstances not sufficient to satisfy the court that the supplies could be obtained only upon a pledge of the credit of the vessel.

Now, in the present case, the mast was necessary for the vessel, but there was clearly no real necessity, and not even an apparent necessity, for pledging the credit of the vessel to procure the mast. The master had the money to pay for the mast, and did pay for it. On the evidence, he paid the party who furnished it to him, and, although the libellant has not been paid for the mast, yet his own negligence is the cause. He could have learned, by the exercise of due diligence, that the master had the means of paying for the mast, and that there was no necessity for pledging the credit of the vessel to pay for it. But he made no inquiry on that subject. It may be that the conduct and language of the master were such, on his interview with the libellant, as to make the master personally liable to the libellant for the value of the mast; but neither the owner nor the vessel is liable. This case is one fully illustrating the propriety of adhering strictly to the rule laid down in *Thomas v. Osborn* and in *Pratt v. Reed*. The master had the money to pay for the mast and did pay for it to the party with whom he contracted for it, and who procured it from the libellant; and, although it may have been furnished by the libellant, under circumstances which led him to suppose that he was furnishing it to the vessel on the direct order of the master to him for it, yet no facts existed which authorized the master to pledge the credit of the vessel to the libellant for the mast. To allow the lien in this case would be to create an unnecessary incumbrance on the vessel, and to open the door for collusion between masters and material men—evils which the law, as expounded in the cases referred to, aims to cure.

The libel must be dismissed, with costs.

[NOTE. This decree was subsequently affirmed by the circuit court in Case No. 4,341, following.]

<sup>1</sup> [Reported by Robert D. Benedict, Esq., and here reprinted by permission.]

<sup>2</sup> [Affirmed in Case No. 4,341.]