THE FERAX.

Case No. 4,737.

{1 Spr. 180;[1] 12 Law Rep. 183.}

District Court, D. Massachusetts. March, 1849.

LIEN FOR ALTERATION OF VESSEL—STATE LAW.

1. St. Mass. 1848, c. 290, gives a lien for alterations of vessels.

{Cited in Donnell v. The Starlight, 103 Mass. 232.}

2. Where a sale of a vessel was made on a condition, upon the non-performance of which she was to revert to the original owners, and the purchaser took possession, and made alterations necessary for the voyage which he contemplated; and subsequently, by the non-performance of the condition, the vessel reverted to the original owners: *Held,* that the carpenter who made the alterations, and was ignorant of any condition in the sale, had a lien upon the vessel.

The claimants, Thacher' Sears, were owners of the Ferax, and in January last, made a written contract with Anthony Brackett, therein agreeing to sell him said ship, to be paid for by instalments. The contract further provided, that in case of failure to complete the payments before May 1st, the previous payments should be forfeited, and the title revert to the claimants; but that after the first payment, Brackett should take possession of the ship, with liberty to "make such repairs as he may wish, to load the ship, or secure passengers for her, provided nothing is done to injure the vessel." The first instalment was paid, and the vessel delivered into Brackett's possession, who immediately advertised her for a California voyage, and fitted her up with accommodations for passengers in the steerage. For this purpose he employed the libellant {Joseph Gould}, who worked on board about a fortnight, putting up berths, bulkheads, tables, &c., and setting a number of deck lights in the deck, for the state-rooms. Brackett failed to make his payment of May 1st, the vessel reverted to the claimants, who altered her destination, removed the work put in by the libellant, and sent the vessel on a freighting voyage. The libellant not succeeding in getting his pay of Brackett, brought this libel to enforce his lien under St. Mass. 1848, c. 290. The statute provides as follows: "Whenever a debt is contracted for labor performed, or materials used in the construction or repair of, or for provisions and stores or other articles furnished for, or on account of, any ship or vessel within this commonwealth, such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariners' wages."

It appeared that the libellant knew nothing of the contract between Brackett and the claimants; that the vessel, while these alterations were in progress, lay at the wharf on which the claimants' counting-room stood; and that the counting-rooms of Brackett and of the claimants were within two doors of one another. It was admitted, that the libellant's charges were reasonable, and that the work done was proper and suitable for a vessel

bound on a long voyage, with numerous passengers, but unsuitable for freighting purposes.

R. H. Dana, Jr., for libellant.

Ch. T. Russell, for claimants.

SPRAGUE, District Judge, delivered his opinion substantially as follows:

This is an important question. It depends mainly upon the meaning of the term "construction" in the statute; for the libellant's work, being in the nature of alteration, cannot well be treated as "repair," which is restoration. The statute is recent, and the word has been the subject of no legal determination. We must look to the intention of the legislature. The reason of the statute would make it apply to alterations and reconstructions, as well as to the original construction; and if the latter only had been intended, the word "building" would seem to have been more natural. Suppose a vessel is changed from a brig into a bark, or internal alterations made to fit a merchantman for a whaleman; or suppose a vessel be coppered for the first time, on a change of her destination; the reason of the act would apply to these changes, as much as to repairs, or to the original building. It is not desirable, on practical subjects and among practical men, to create nice distinctions, where there is no distinction in the reason of the statute.

The next point made by the claimants is, that Brackett had not such authority over the ship as to bind her by this lien. By his contract, he is the purchaser, under certain conditions; is to have possession and control, to engage passengers, and make repairs, provided he does not injure the vessel. No personal liability of the claimants is here contended for, but only a lien in rem. The term "injure," must mean something which makes the vessel less valuable to the owners. The true meaning of the contract is, that Brackett may fit the vessel for such purpose as he shall destine her for, making the appropriate changes, with a guard against waste, or such alteration as would diminish the value of the vessel. But, beyond all this, the libellant made his contract with a person placed by the claimants in possession and apparent ownership-of the vessel; the alterations which he made were proper for the projected voyage, were nautical in their character, and he acted in good faith, and in ignorance of any contract between the parties.

But supposing that, by the contract between

Brackett and the claimants, the latter had the right to interfere to prevent the alterations being made. They did not interfere. From the circumstances proved, the advertisements, the situation of the vessel and the counting-rooms, the reference to passengers in the contract, and the great remaining interest which the claimants bad in the vessel, I should, if the case depended on this point, require strong evidence to contradict the violent improbability of their being either ignorant, or dissatisfied, with what was going on. It is not necessary to decide what would have been the effect, in case they had given the libellant notice.

Decree for the amount of the libellant's bill, $233.87, and costs.

[1] {Reported by Hon. William Cranch, Chief Judge.}