FRANCIS ET AL. V. THE HARRISON.

Case No. 5,038.

[1 Sawy. 353; 2 Abb. (U. S.) 74.][1]

District Court, D. California. Sept. 26, 1870.

SHIPPING—LIENS UNDERSTATE LAWS.

1. A state statute, such as chapter 6 of the practice act of California, declaring vessels subject to liens for materials or supplies furnished towards their construction, repair, or equipment, and directing that demands secured by such liens shall have preference in order of payment over other demands, is valid and operative, even in its application to a domestic vessel supplied in her home port, so far as to entitle the holder of a demand within the statute to payment out of surplus proceeds remaining in the registry, after the satisfaction of maritime liens, in preference to a mortgagee of the vessel.

[Cited in The Augusta, Case No. 647; The William T. Graves, Id. 17,758; The Theodore Perry, Id. 13,879; The Columbus, Id. 3,044; The E. A. Barnard, 2 Fed. 722; The Canada, 7 Fed. 732; The City of Salem, 10 Fed. 845.]

[Cited in Atlantic Works v. The Glide, 157 Mass. 528, 33 N. E. 164.]

2. The successive decisions of the supreme court abrogating the practice of enforcing such liens by proceedings in rem, reviewed and explained.

[Cited in The Kate Tremaine, Case No. 7,622; Wilson v. Bell, 20 Wall. (87 U. S.) 219.]

[This was a suit in admiralty by John Francis and others against the bark Harrison (John Kentfield and others, interveners).]

Milton Andros, for interveners.

W. W. Cope, for mortgagee.

HOFFMAN, District Judge. The question presented in this case is whether a material man claiming a lien under the laws of this state upon a domestic vessel, is entitled to payment out of the surplus proceeds in the registry, in preference to a mortgagee of the vessel.

By the sixth chapter of the practice act of California, it is provided that all steamers, vessels, etc., "shall be liable for supplies furnished for their use at the request of their respective owners, masters, agents and consignees, and for materials furnished for their construction, repair or equipment."

The act further provides, "that said several causes of action shall constitute liens upon all steamers, vessels and boats, and have priority of payment in their order herein enumerated, and shall have preference over all other demands; provided, such liens shall only continue in force for the period of one year from the time the cause of action occurred."

If this statute be constitutional and operative, it is evident that the material man has by law a lien and right to priority of payment in preference to all other demands; and that this right must be recognized by the court which has in its possession the surplus proceeds which remain after satisfying the maritime liens on the vessel.

From the time of the decision in the case of The General Smith, 4 Wheat [17 U. S.] 438, the supreme court has held in numerous cases that no lien was created by the maritime law in favor of material men supplying domestic ships in their home ports.

In respect to demands of this description, "the case is governed," says the supreme court "altogether by the municipal law of the state, and no lien is implied unless it is recognized by that law." The General Smith [supra]; Peyroux v. Howard, 7 Pet. [32 U. S.] 324. It was further held that when such liens were recognized by the state law, they might be enforced in the district courts, according to the course of the admiralty.

The twelfth rule in admiralty, adopted by the supreme court in 1844, expressly provides "that proceedings in rem shall apply to cases of domestic ships where by the local

law a lien is given to material men for repairs, supplies, and other necessaries." No recognition could therefore he more emphatic of the constitutionality of state laws creating liens of this description, and of the jurisdiction of the national courts to enforce them.

The distinction too, between the rights created by the state law, and the remedy afforded by it, was also recognized—for the national courts enforced the right by an admiralty proceeding, in the usual form, and not in the manner prescribed by the state law.

In 1858, the twelfth rule was repealed, and proceedings in rem, in cases of domestic ships for supplies, repairs, or other necessaries, were prohibited. The reasons for the repeal of the rule are given by the court in the case of The St. Lawrence, 1 Black [66 U. S.] 522. The court says: "The state lien was however, enforced, not as a right which the court was bound to carry into execution upon the application of the party, but as a discretionary power which the court might lawfully exercise for the purpose of justice, when it did not involve controversies beyond the limits of admiralty jurisdiction."

The court, after referring to the inconveniences of enforcing such liens in the admiralty, says: "Such duties and powers are appropriate to the courts of the state which created the lien, and are entirely alien to the purposes for which the admiralty power was created, and form no part of the code of laws which :It was established to administer." Id. 531.

We have here a distinct recognition of the right of the states to create liens on domestic vessels in cases where none exists by maritime law, and to enforce them by appropriate proceeding.

In the case of The Belfast, 7 Wall. [74 U. S.] 645, which is the latest decision on the subject, it is held that the states "may create these liens, and enact reasonable rules and regulations for their enforcement."

It is apparent therefore: 1st. That the contract of a domestic material man is a maratime contract, and of admiralty jurisdiction. 2d. That it may still be enforced in the admiralty by a suit in personam; and might constitutionally be enforced by a proceeding in rem, where a lien has been by the state law engrafted on the contract. But that on grounds of convenience this proceeding has been prohibited. 3d. That liens created in such cases by state laws are valid, and the states may provide reasonable rules and regulations for their enforcement in their own courts.

It is contended that, as a necessary consequence of these propositions, the state legislatures have the right to authorize a proceeding in rem to enforce liens created by state laws, and not existing under the maritime law.

In support of this view, various authorities are cited: The Circassian, 50 Barb. 490; Id. 501; 4 Ill. 504; 4 Mo. 244; 41 Mo. 491; 2 Pars. Adm. §§ 154, 155; The Maggie Hammond [9 Wall. (76 U. S.) 435].

It is urged that in the cases of The Moses Taylor, 4 Wall. [71 U. S.] 411, and Hine v. Trevor, Id. 555, where a contrary doctrine is supposed to have been held, the liens

attempted to be enforced in the state courts by a proceeding in rem, were not liens owing their existence solely to the state law, but were liens created by the general law maritime. That the question before the court was as to the validity of a pretension avowedly set up by the state courts to exercise general admiralty jurisdiction concurrently with the United States courts of admiralty. That the right of the states to authorize proceedings in rem to enforce liens created by state laws, was not in question; and that the language of the court must be construed with reference to the circumstances of the cases presented. That in subsequent cases the supreme court has explicitly declared the power and duty to enforce liens of this class, to be appropriate to the courts of the state which created the lien (The St Lawrence, ubi supra), and that the states may provide for their enforcement, "by reasonable rules and regulations" (The Belfast, ubi supra). That the proceeding in rem is the most speedy, appropriate and effectual, if not the only practical, means of giving effect to these liens. That to deny the right of the material man to avail himself of that proceeding in a state court, and at the same time to decline to enforce his lien in the admiralty, is to leave him without a remedy, and to reduce the declaration of the validity of his lien to the announcement of a barren proposition, unaccompanied by any substantial right, or available means of enforcing it.

The force of these suggestions is admitted. It has been recognized in the cases above cited. But in my opinion the answer to them is conclusive. In the cases of The Moses Taylor and Hine v. Trevor, the general principle is established that "whenever the district courts of the United States have original cognizance of admiralty causes by virtue of the act of 1789 {1 Stat 73}, that cognizance is exclusive, and no other court, state or federal, can exercise it, with the exception always of such concurrent remedy as is given by the common law." "This," it is announced in Hine v. Trevor, "must be taken as the settled law of the court."

It is also in those cases explicitly declared that a proceeding in rem is not a remedy afforded by the common law, and therefore not within the exception which saves to suitors such concurrent remedy as is given by the common law.

We have already seen that the contract of the domestic material man is of original admiralty cognizance in the district courts of the United States. The case therefore clearly falls within the principle laid down by the supreme court To interpolate into the doctrine

as announced by the court, the exception in favor of proceedings in rem to enforce liens, attached by state laws to a certain class of maritime contracts, would not only be inconsistent with the language of the supreme court, and with the principles on which the decision rests, but would give rise to great embarrassments and perplexities.

If proceedings in rem are allowed in the state courts, to enforce the liens in question, all holders of maritime liens should be allowed to intervene and establish and enforce their claims according to their respective priorities. If the state courts proceed to adjudicate upon these claims, they will unquestionably be exercising admiralty jurisdiction, and might do so to any extent under cover of a proceeding initiated by the domestic lien holder. If they decline to entertain such claims, how can justice be done?

Again.—If the holder of the maritime lien should resort to the court of admiralty, a conflict of jurisdiction would ensue, for another tribunal, authorized to exercise jurisdiction in rem, would be already in possession of the vessel.

The state courts are necessarily bound to pursue exactly the provisions of the statutes under which they acquire jurisdiction. In the California act, six classes of cases are enumerated, in which alone liens are to be enforced, or, it would seem, recognized: (1) For services rendered on board vessels. (2) For supplies furnished to them. (3) For materials furnished in their construction, repairs, etc. (4) For wharfage and anchorage within the state. (5) For non-performance or mal-performance of any contract for the transportation of property or persons. (6) For injuries committed by them to persons or property.

These liens are declared to have priority in the order in which they are enumerated, and the provisions of the law embrace "all steamers, boats and vessels"—foreign as well as domestic.

When judgment is obtained against any vessel, the sheriff is directed to apply the proceeds of the sale—1st. To the payment of the wages of mariners, boatmen, etc. 2d. To the payment of the judgment and costs. 3d. To pay over any balance to the owner, master, agent or consignee, who may have appeared in the action.

The rights of salvors, the holders of bottomry bonds, and perhaps of those who have advanced moneys to the master, seem thus to be wholly ignored, while an attempt is made to fix the respective rank of liens, some of which are confessedly maritime.

The sheriff is directed in all cases, after paying any claims for wages, to apply the proceeds to the satisfaction of the judgment—that is, the payment of the particular lien on which suit is brought. The balance he is to pay to the owner of the vessel. Neither the bottomry bondholder or the salvor is authorized to intervene in the suit; nor is either allowed by the statute to attach the vessel to enforce his demand.

No provision is made for any proclamation, publication, or other notice to parties interested in the vessel, except that a summons is to be served on the master, mate, or other person in charge. The vessel is seized under a process of attachment, and the other pro-

ceedings are to be conducted in the same manner as in actions against individuals. When judgment is recovered, the vessel is sold under an execution issued to the sheriff, and the proceeds are distributed as already stated.

The supreme court in The Moses Taylor considered the action authorized by the statute of California, "a proceeding in the nature and with the incidents of a suit in admiralty," and observes, that "the jurisdiction of the courts of California is maintained on the assumed ground, that the cognizance by the national courts of civil causes of admiralty and maritime jurisdiction is not exclusive, as declared by the ninth section of the judiciary act of 1789." It was to this claim, on the part of the states, to concurrent jurisdiction on admiralty causes, that its attention was chiefly directed.

It is unnecessary to consider whether the proceeding under the statute of California has all the incidents of a suit in rem in the admiralty, or to inquire what is the nature of the title obtained by the purchaser under an execution issued in such a proceeding.

It is decided "that the statute of California, to the extent to which it authorizes actions in rem against vessels for causes of action cognizable in the admiralty, invests her courts with admiralty jurisdiction," and is therefore unconstitutional. The statute has been referred to in this opinion to illustrate the difficulties which attend the exercise by state tribunals of any jurisdiction in rem or quasi in rem in cases of admiralty cognizance, and the reasonableness as well as policy of the simple and clear principle announced by the supreme court, that in all such cases the jurisdiction of the courts of admiralty is exclusive, except so far as a concurrent remedy exists at common law, and that a proceeding in rem, authorized by a state statute, is not such a concurrent remedy.

Nor is it true that if the right to proceed in rem in the state courts be denied to the material man, he is left wholly without remedy. His lien may be enforced like any other mortgage, by appropriate proceedings.

The right of prior satisfaction out of the proceeds of the sale on execution against the owner of any vessel may be conferred, on the material man, by law, and his lien may be recognized and enforced in the distribution of estates of deceased persons, or of bankrupts. It may also be recognized by courts of admiralty, when disposing of remnants and surplus proceeds in the registry. In these and other ways, the lien created by

state laws may become effectual. And it is to be supposed that it was to provisions of this character that the supreme court referred when it observed that the states might enact reasonable rules and regulations for their enforcement.

This construction of the language of the opinion in The Belfast is more reasonable than to suppose that the court referred to proceedings in rem, and thus overruled the doctrine clearly announced in The Moses Taylor and Hine v. Trevor, that such a proceeding in a state court was inadmissible in any case of which the district courts of the United States have original cognizance, as an admiralty cause.

From the foregoing, it results that the state law is invalid only so far as it attempts to authorize actions in rem, against vessels for causes of action cognizable in the admiralty; but the validity of the lien itself, especially when given by the state law in general terms, without specific conditions and limitations, inconsistent with the rules and principles which govern implied admiralty liens, is, as is said in the case of the St Lawrence, "undoubted."

It is urged, that inasmuch as the remedy, by a proceeding in rem, afforded by the statute, is unconstitutional, the right is totally lost, and the lien created must be treated as nonexistent But we have seen that the lien is created by the California statute in general terms: "The said several causes of action shall constitute liens upon all steamers, vessels," etc. A mode of enforcing these liens is provided, but it is not declared that this remedy shall be exclusive, nor that the courts shall refuse to recognize the liens except in the proceeding authorized by the statute.

It is probable that in all the cases where, under the former twelfth rule, liens conferred by state laws were enforced by the admiralty courts, those laws authorized a proceeding in rem in the state courts—or a suit against the vessel by name—but this circumstance did not impair the validity of the liens, nor affect the right of the admiralty courts to enforce them. A right which they still retain, though its exercise has been prohibited on grounds of expediency.

The New York statute, under which the supreme court held that an "undoubted lien" was acquired, provided, like the California statute, for an action against the vessel by name, and authorized a proceeding much more closely resembling a suit in admiralty. It results, that the states have clearly the power to engraft upon such causes of action cognizable in the admiralty, liens which, although they cannot be enforced in the state courts, by a suit in admiralty, or a proceeding in rem, are nevertheless valid, and should be recognized by this court in the distribution of surplus proceeds of any vessel sold to satisfy a maritime lien, or, by parity of reasoning, which have Come into its possession under a proceeding in bankruptcy.

No question was raised at the hearing, as to the respective priorities of persons claiming liens under the state laws, and the holders of a prior mortgage recorded under the

laws of the United States—for the claims of material men which accrued prior to the date of the mortgage, are sufficient to absorb all the surplus proceeds in the registry.

The fund in court, must, therefore, be applied: First, to the satisfaction of any maritime lien which has been proved. Second, to the payment pro rata of the claims of material men entitled to liens under the state law. An order to this effect will be entered.

Since the above was written, the supreme court of this state has decided that a state law authorizing a proceeding in rem by a domestic material man for supplies furnished in the home port of a vessel, is unconstitutional.

NOTE.—The foregoing decision, which seems to be the necessary result of the principles established by the supreme court, involves the anomaly of admitting the validity of a lien created by state laws, and at the same time denying the right to enforce it by the most appropriate and effectual means, viz.: a proceeding in rem. This, and other difficulties which beset the subject, owe their origin to early decisions of the supreme court, rendered at a time when the nature and extent of the grant of admiralty and maritime jurisdiction had been imperfectly investigated, and when the more liberal views with regard to the powers and duties of American courts of admiralty, which have since been adopted, had hardly been suggested.

In The General Smith it was held that no lien is implied by the maritime law in favor of persons furnishing repairs and necessaries to a vessel in a port of a state to which she belongs.

The operation of the principle thus announced, was in some degree mitigated by subsequent decisions, which held that even in the case of domestic vessels, a lien created by state laws might be enforced in the admiralty.

This remedy being now prohibited, while the power of the states to authorize a proceeding in rem in their own courts, is at the same time denied, it seems not improper to revisit the foundations of the doctrine which has produced this anomalous result, and to inquire how far it is reconcilable with the maritime law and the recent and more liberal principles established by the supreme court.[2]

"It is," Mr. J. Ware observes, "a general principle of law extending to a great variety of cases, that a person who has by his own labor added a new value to a specific article, has a lien on that article for the value of his service. It is a right consonant to all ideas of natural equity, and is highly favored by law. 2 Kent, Comm. 490. The mechanic is considered as gaining a qualified property in the article when he has incorporated into it his own skill, care and labor.

"Another general principle is, that when this sort of confusion of goods is produced at the request of the general owner, he that has given the last increment of value to the article is entitled to be first satisfied out of the common stock. In the nature and reason of the thing, there is no difference in this respect between the mechanic and the carrier." Poland v. The Spartan {Case No. 11,246}.

This right is recognized by the common law wherever the person claiming it is in possession of the article with which his labor and materials have been incorporated, and by the maritime law as giving rise to a privilege or right of prior satisfaction out of the thing itself, except where that privilege has been voluntarily renounced by an agreement incompatible with its exercise, or an exclusively personal credit has been given.

"There is nothing," says Emerigon, "which is regarded with so much favor as debts for work and labor furnished to a vessel. Commerce and the country at large are interested in them. It is right that workmen and material men should enjoy the real lien, which is given them by the 'Ordonnance de la Marine. They cannot be deprived of it, unless it is proved that they contracted on the faith of the person and not of the thing." Emerig. Cont. Grosse, c. 12, § 3. In most of the states, the defects of the common law have been supplied by statutes. The law of California gives to artisans, machinists, builders, mecftanies, material men, laborers, miners, etc., liens upon buildings, wharves, bridges, ditches, flumes, tunnels, sluices, machinery, aqueducts, etc., for which they have furnished materials or labor, and to enforce these liens, remedies partaking of the nature of a proceeding in rem have been provided. The decision in the case of The General Smith has also given rise to the statutes, by which the rights of those who supply or repair vessels have received similar protection, and the supposed defect of the maritime law has been supplied.

But this attempt to enforce rights so agreeable to our ideas of natural justice has proved in a great measure abortive. For the admiralty courts, though retaining jurisdiction of the contract in personam, decline to enforce the lien, and the state courts are without power to resort to a proceeding in rem.

That material men, that is, those who furnish material or labor in building or repairing vessels, or necessary supplies for their outfit, have, by the general maritime law, a lien on the vessel for their security, cannot be disputed.

Article 16, liv. 1, tit. 14, of the Marine Ordonnance, places the lien of material men who have furnished supplies, etc., before the departure of the vessel, in the third rank,

postponing their claims only to those of mariners for wages, and those who have furnished money for the necessities of the ship during her last voyage. The ordonnance itself is said to have been "formed on the general jurisprudence of Europe, and for this purpose information was sought, at enormnous expense, in all the ports of the continent." Preface to valin's Comm. on Ordonnance de la Marine, p. 4.

"It was at once adopted by foreign nations." says Valin, "as an eternal monument of wisdom and intelligence, and it has ever since commanded the admiration of all civilians and lawyers, and has obtained the respect of every maritime state." It, therefore, affords the highest evidence of the general maritime law as administered in the admiralty tribunals of Europe, and derived from the ancient laws of the sea. See Append. 2 Pet. Adm. p. 1; The Calisto {Case No. 2,316}.

It is said by Mr. J. Ware (The Calisto; ubi supra) that this principle of maritime law is not acknowledged by the common law, and has never been received by the commercial jurisprudence of England.

Undoubtedly the English common law courts hold that although by the maritime law every contract with the master of a ship implies an hypothecation, yet that it is otherwise by the law of England, unless expressly so agreed; and this doctrine has not only been recognized by the courts of chancery, and in the distribution of bankrupts' estates, but prohibitions have been granted to the court of admiralty to stay proceedings in rem to enforce the lien given by the maritime law. Abb. Shipp. 143 et seq.

But it is not true that the principles of the maritime law, with respect to these liens, were never adopted into the jurisprudence of England, or that the court of admiralty was always forbidden to enforce them.

In the articles drawn up in the reign of Charles I. to accommodate the differences between his majesty's courts of Westminster and his court of admiralty, which were debated in the presence of the king and all the lords of his council, twenty-three in number, and which were agreed to by the judges of the courts at Westminster, and by the judge of the court of admiralty, it is provided:

"3d. If suit shall be in the court of admiralty for building, amending, saving or necessary victualing of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself a party, no prohibition is to be granted, though this be done within the realm." Cited in Ben. Adm. p. 51; also in De Lovio v. Boit {Case No. 3,776} in note.

In 1648, disputes having arisen between the courts of common law and the courts of admiralty, an ordinance was passed by the lords and commons assembled in parliament, defining the jurisdiction of the court of admiralty. It provided that the court of admiralty shall have cognizance and jurisdiction against the ship or vessel, with the tackle, apparel and furniture thereof, in all causes which concern the repairing, victualing and furnishing

provisions for the setting of such ships or vessels to sea." This ordinance ceased to be in force at the restoration. Prohibitions were again issued by the common law judges, and the admiralty, weary of the struggle, appears to have abandoned all further efforts to retain its ancient authority. Ben. Adm. p. 58.

Although the common law courts have thus finally succeeded in preventing the incorporation into the jurisprudence of England of the just and rational principles of the maritime law with respect to the liens of material men, yet it clearly appears that those principles were zealously maintained by some of her ablest lawyers, and even for a considerable time adopted and enforced by the court of admiralty, with the sanction of the king's council, and of all the judges, and subsequently under an act of parliament

The admiralty courts of America have long ceased to be governed by the arbitrary and

irrational restrictions imposed by the common law courts of England upon the admiralty court of that country.

The maritime jurisdiction of the admiralty courts of the United States is. "that jurisdiction which commercial convenience, public policy and national rights have contributed to establish with slight deficiency over all Europe—that jurisdiction which, under the name of 'consular courts,' first established itself on the shores of the Mediterranean, and from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse and the warfare of mankind." De Lovio v. Boit {supra}.

The American courts of admiralty freely recognize and enforce the liens created by the maritime law in favor of shippers of goods, and of material men who supply foreign ships.

In matters of tort, the jurisdiction is determined by locality, and in those of contract by the subject matter; and it embraces torts committed upon, and contracts relating to the trade, business and navigation of not merely the sea or tide waters, but of our inland lakes, and great navigable rivers.

In the exercise of this jurisdiction, our admiralty courts are governed, not by the common law of England, but by the principles of the general law maritime, as embodied in the ancient laws of the sea, as expounded by the great jurisconsults of Europe, and illustrated and adorned by the genius and learning of the English admiralty judges in those cases in which the bigotry of the courts of common law has suffered them to retain admiralty jurisdiction, and to apply the principles of the maritime law.

But the progress towards these enlarged and liberal ideas has been slow, and marked with occasional hesitation and inconsistencies. The influence of the decisions of the common law judges of England is still discernible in this branch of our jurisprudence. We adopt the principle of the maritime law which gives to the material man a lien upon a foreign ship, and for this purpose we regard as foreign, ships, the owners of which reside in another state; but we refuse to recognize the lien of the builder or furnisher of a domestic vessel, although that lien is unquestionably allowed by" the maritime law.

The received doctrine involves an even greater departure from the rules of that law—for it not only refuses to adopt them in the case of domestic material men, but by admitting a liability in personam, enforceable in the admiralty against the owners, it violates, its fundamental principles and analogies.

In the infancy of modern commerce the master of a vessel was regarded as the gerant, or active partner of a societe en commandite. His contracts bound himself, and operated a tacit hypothecation of the vessel. He could bind the property committed to his charge, but he had no power to engage the private fortunes of the owners, unless under a special

authority for the purpose. The creditor being thus restricted to a particular fund, the maritime law permitted him to proceed directly against it in specie, and gave him a privilege of jus in re in it as against the general creditors of, or purchasers from, the owner.

This principle, which appears to have been highly favored, and to have been recognized by nearly all the maritime codes of the middle ages, does not, says Mr. J. Ware,—The Rebecca {Case No. 11,619},—seem to have reached England, or at least was not adopted there as a general commercial custom; but its justice and policy have been recognized in recent statutes of Great Britain and the United States by which the liability of owners is restricted in certain cases to the value of their interest in the vessel and freight. The liability, therefore, of the owner on the contracts of the master was, as observed by Emerigon, real rather than, personal.

Article 2, tit. 8, liv. 2, of the Ordonnance de la Marine, adopted in article 216 of the Code de Commerce, was variously interpreted by the commentators and the courts. Yalin held that the owner‘s right to be discharged from the obligations of the master, by giving up the vessel and freight, applied only to the obligations arising from his negligence or torts. Emerigon and Pothier maintained that it embraced all obligations ex contractu as well as ex delicto. This question after much discussion, was finally settled in France, in accordance with the unanimous demand of the commercial interests, and with the approval of all the courts, by the adoption, in 1841, of the amended article 216 of the Codede Commerce. By this article, the proprietor of a ship is made civilly responsible for all the acts of the master, and for the obligations contracted by him relative to the ship or the adventure. But he may in all cases discharge himself from these obligations by abandoning the ship and freight Rogron‘s Code de Com., liv. 2, tit 3, art 216.

This recent legislative interpretation in France of the provisions of the marine ordinance, is not cited as authority. But its unanimous approval by the French courts and jurisconsults, so thoroughly versed in the rules, and profoundly imbued with the principles of the maritime law, may be received as high evidence of what that law is. And it serves to show how repugnant it would be to its fundamental principles to hold that the master may bind his owners personally by his contracts, to the whole extent of their private fortunes, or their "land goods," without binding the ship or creating any hen upon her.

It has been suggested that the lien of the domestic material man is denied because he is presumed to have contracted on the personal credit of the owner. This is obviously not a reason, but merely a mode of stating the proposition. The presumption of an exclusive personal credit is, in the case of supplies furnished to coasters and the small craft which navigate our inland waters, in most instances, untrue in point of fact; nor can I perceive how such a presumption can now be indulged, for the supreme court in the case of The Belfast has decided that a maritime lien exists in favor of the shipper of goods, although

the voyage is to he performed wholly within the limits of the state of which all the parties are residents.

If the freighter of goods on one of our river steamers, or the deck-hand, is not deemed to have contracted on the personal credit of the wealthy corporation which owns the line, with what reason can the mechanic who has repaired a steamer be presumed to have done so? The same remark may be applied to cases" of pilotage and towage, which are generally admitted to give rise to a maritime lien irrespective of the residence of the owners of the vessel.

The attempt to mitigate the effects of the doctrine we are considering by treating the states as foreign to each other, and regarding vessels as "domestic," only when in the ports of the state where their owners reside, will be found, not only to give rise to insuperable difficulties, and to lead to absurd consequences, but to rest on very unsatisfactory grounds.

A few illustrations will expose its practical operation. If, for example, a person who resides in New York, where his business and credit are established, sends a vessel to be repaired in Jersey City, the mechanic will be allowed a lien, while if he sends her to Brooklyn no lien will be implied. But if the same person should in the succeeding year fix his residence in Jersey City, though he still carries on his business in New York, the case will be precisely reversed.

So if one own a vessel navigating the lakes, the mechanic will be denied a lien for repairs made at Buffalo, if the owner resides anywhere in the state of New York, while the lien will tie allowed if the repairs are made at Jersey City on the order of any New York owner, no matter though he be the wealthiest and best known merchant or corporation of the city.

So, if a vessel be owned by two persons, one of whom resides at New Orleans and the other at St. Louis, between which ports the vessel plies, and at each of which the resident owner conducts her business, is the vessel to be deemed to "belong" to Missouri or Louisiana? At which of the termini of the voyage is the mechanic who repairs her to be allowed a lien? At both, or at neither?

In truth, the notion that vessels belong to the state where the owners happen to reside, or that they are to be treated when in a port of that state as "domestic vessels," seems to have been adopted on insufficient consideration. All registered and enrolled vessels, are vessels of the United States, and whether navigating the ocean, the lakes, or the great rivers of the country, are subject to admiralty jurisdiction, both in matters of tort and contract. Congress has regulated not only their registry and enrollment, and the mode in which they may be transferred and mortgaged, but has also, especially in the case of steamers, prescribed rules for their equipment and furniture, and for the transportation of passengers, and has subjected them to inspection by United States officers, and provided for the licensing of the pilots and xsxsengineers. They are thus, vessels of the United States, and are all domestic vessels, belonging to citizens of the United States.

The classification, therefore, of vessels as domestic and foreign, or quasi-foreign, according to the residence of the owner within or without the state, at a port of which they have been repaired or spplied, seems arbitrary and unsound. Especially when this classification is resorted to in but a single case, and for the purpose of excluding a lien allowed by the maritime law, and which has the most solid foundation in natural justice. Ben. Adm. § 273; The St. Iago de Cuba [9 Wheat (22 U. S.) 409]; 5 Pet. Cond. R. 630.

Our attention has thus far been confined to the broad doctrine that no lien is implied by the maritime law in favor of domestic material men, although the supplies have been ordered by the master with the owner's consent, or by the owner himself—and when the personal liability of the owner is admitted. It may be said, however, that the master's authority ceases on his arrival at the port of his owner's residence, and that unless expressly empowered by the latter, his contracts ought not to bind the vessel.

But this restriction upon the master's authority could, at most, be imposed only when the vessel is in the place where her owner resides—her home port. "An epithet which," says Mr. Chief Justice Marshall, "has no necessary reference to state or 'other limits.'" The St. Iago de Cuba, ubi supra. On principle, the determination of the master's agency should depend on the readiness with which the owner may be consulted, the urgency of

the necessity for repairs or supplies, the authority, real or apparent, which the owner may have held him out as possessing, and the means which third persons may have possessed of ascertaining the extent of the powers confided to him.

In this view, the mechanic, who by the master's order, repairs, in Jersey City, a vessel belonging to a wealthy and well-known merchant, or corporation of New York, should not be entitled to recourse against the vessel, or her owners, any more than he who makes like repairs in Brooklyn, while conversely, the New York mechanic should, under certain circumstances, have both remedies, notwithstanding that the owner may reside in a remote part of the same state.

The taking of goods on freight the shipping of a crew, the procuring supplies for them and the vessel, as well as the making of ordinary repairs, are within the usual scope of the master's duty arid authority. See Curt. Merch. Seam. p. 172. On general principles of agency, the owner and a fortiori the ship, should be bound by his contracts, unless notice, actual or constructive, be clearly brought home to the person with whom he deals, that he is exceeding the limits of his authority. And on the principles of the maritime law, the liability of the vessel, at least, for the contracts of the master, would seem unquestionable. In article 216 of the Code de Commerce, which, as before stated, was taken from the Marine Ordonnance, the liability of every owner for the obligations of the master, up to the value of the vessel and freight is established. Under this article it is held that the ship is liable, even though the proprietor or general owner is not armateur or owner for the voyage. Bogron, Code de Comm. art. 216.

And so is our own law. For the vessel is liable in rem to seamen, freighters, etc., on the contracts of the master, although she may have been demised or chartered to one who appoints the master, or whose agent he exclusively is.

Article 232 of the Code de Commerce provides for the very case we are considering. This article, which is taken from article 17, liv. 2, tit. 1, of the Ordonnance, enacts that the captain shall not in the place of residence (dans le lieu de la demeure) of the owners or their agent, without special authorization, cause repairs to be made, buy sails, cordage, etc., or take up money for the purpose. Under this article it is held that if the captain should violate it, the proprietors would nevertheless be bound under article 216, to the extent of their interest in the vessel, i. e. the vessel would be liable, except for money taken up on bottomry.

The remedy of the owner is against the master for violation of the article, but even this, says Valin, should be subject to his right to be allowed for absolutely necessary supplies, obtained for a reasonable price, however blame-able he may be for having acted without authority. Valin's Comm. torn. 1, p. 440. The fifty-fourth chapter of the Consolato del Mare, and the observations of Valin and Emerigon upon it (Valin's Comm. torn. 1, p.

369; Emerig. Cont Grosse, Hall's Translation, p. 227) illustrate the favor with which the maritime law regards debts due for work and materials furnished to a vessel.

Both of these great jurisconsults agree that workmen employed by a master-carpenter or caulker, who has contracted with the owner, shall have a lien on the vessel for the sums due them, unless ther have received actual notice of the arrangement between the owner and contractor.

On this, which is an admitted exception to the ordinary principle of domino non mandante, Emerigon observes: "The carpenters, caulkers and other workmen employed in building, together with the creditors for the timber, cordage and other articles furnished, ought to enjoy the privilege allowed to them, unless they have been warned in due time that if they do not secure the payment of their claims against the contractor, they shall have no lien on the ship. And I do not believe that a simple registry of the contracts would be considered as a notification, within the meaning of the consolato, which requires that notice should be given to the workmen and other material men, in order that they may not be deceived. Emerig. Cont. Grosse, p. 229.

If the ship is thus liable to workmen employed by a contractor, and not by the owner or master, unless warned by the latter, a fortiori should she be liable to workmen employed by the master, unless affected by a similar notice. See cc. 32, 33, Consulat de la Mer par Boucher, torn. 11, pp. 38, 39.

It is thus evident that by the principles and

analogies of the maritime law, and the "good customs of the sea," ("les bonnes coutumes de la nier," as they are called in the consolato), and on grounds of equity and natural justice, the lien of the material man who has constructed, repaired or supplied a Tessel, ought to be recognized and enforced as a maritime lien by courts of admiralty. And this whether the work has been done in a port of the state in which the owner resides, or elsewhere; and whether upon the employment of the master or of the owner, or of his agent—excepting in those cases where the lien has been clearly waived, or "notice has been given to the workmen and other material men, in order that they may not be deceived."

The lien laws of the states, hitherto deemed necessary to obviate the consequences of the decision in the case of The General Smith, would seldom or never be resorted to, and the anomalous consequences of the adjudications with regard to them would disappear if it were established "that it is the ship, and not the ship of a particular owner, nor the ship of a particular flag, or national character; not a domestic ship, nor a foreign ship; not a ship in a port of a state to which she does not belong, or in which the owner does not reside, but a ship—every ship—that is bound for the bill of lading, the charter party, the wages of the seamen, repairs, supplies, materials and maritime loans." The Circassian {Case No. 2,721}.

[1] {Reported by L. S. B. Sawyer, Esq., and by Benjamin Vaughan Abbott, Esq., and here compiled and reprinted by permission. The syllabus is from 2 Abb. (U. S.) 74, and the opinion is from 1 Sawy. 353.}

[2] By the Roman law, the privilege of those who lent money to purchase, build or repair a ship, was exclusively personal. It had no effect against those who were secured by express hypothecations. By the maritime law, every privilege imparted a tacit hypothecation or lien, which differs from an ordinary hypothecation in this, that the latter is governed by the date of the contract, while the privilege of the former is regulated by the degree of favor due to the particular claim. See The Young Mechanic {Case No. 18,180}. The liens for Seamen's wages for moneys advanced on bottomry bonds, for repairs and necessities in the course of the voyage, are, therefore, preferred to that of a mortgagee prior in date. If it be admitted that the domestic material man has no maritime lien, and if the states have no power to create new maritime liens or affect their priorities, the liens under the state laws will be regulated by their date and not by the favor due them And thus in the distribution of surplus proceeds in the registry, the court might be compelled to accord to a mortgagee recorded under the laws of the United States, a preference over the claims of a material man, who might subsequently to the mortgage, have by his labor imparted a greatly increased value to the ship. See In re Scott {Id. 12,517}.

This volume of American Law was transcribed for use on the Internet

through a contribution from Google.