GARDNER ET AL. v. THE NEW JERSEY.

Case No. 5,233.
{1 Pet. Adm. 223.}

District Court, D. Pennsylvania. 1806.

SEAMEN'S WAGES—FOOD ALLOWANCE—SURPLUS FROM SALE OF VESSEL—LIENS ON SAME—MASTER'S WAGES—PHYSICIAN'S WAGES—JURISDICTION OF COURT OF ADMIRALTY OVER FUND.

{1. A seaman engaged at a foreign port on the homeward voyage has the same rights as to wages and food allowance as one shipping at the point of original departure.}

{2. The navy ration is the measurement of a food allowance on a merchant vessel.}

{Cited in The Mary, Case No. 9,191.}

{3. A surplus fund in a court of admiralty arising from the sale of a vessel is subject to the same trusts and liens as the vessel itself was subject to.}

{Cited in Phillips v. The Thomas Scatter-good, Case No. 11,106; Ramsay v. Allegre, 12 Wheat. (25 U. S.) 633; Brackett v. The Hercules, Case No. 1,762; The Panama, Id. 10,703; The Rodney, Id. 11,993. Applied in Harper v. New Brig, Id. 6,090; The Boston, Id. 1,669; Leland v. The Medora, Id. 8,237; The Velocity, Id. 16,911; Ex parte Lewis, Id. 8,310; Ex parte Easton, 95 U. S. 76; Gilbert Hubbard & Co. v. Roach, 2 Fed. 394.}

{4. The sums advanced by a master during a voyage for necessaries supplied to a vessel, for claims of material-men, or for pilotage are liens upon the fund before a court of admiralty.}

{Cited in The Jerusalem, Case No. 7,294; The Packet, Id. 10,654; Westcot v. Bradford, Id. 17,429; Zane v. The President, Id. 18,201; The Santa Anna, Id. 12,325; The Stephen Allen, Id. 13,361; Bains v. The James & Catherine, Id. 756; The Calisto, Id.,2,316; New Jersey Steam Nav. Co. v. Merchants' Bank of Boston, 6 How. (47 U. S.) 390; The Richard Busteed. Case No. 11,764; The Scotia, 35 Fed. 908.}

{5. As the laws of the state of Pennsylvania provide for shipwrights and material men at the port of outfit, and also regulate domestic pilotage, a court of admiralty will not take cognizance of these matters.}

{Cited in Cunningham v. Hall, Case No. 3,481; The Kate Tremaine, Id. 7,622.}

{6. The contracts of the master and physician of a vessel are purely personal, and their wages are not liens upon the fund.}

{Cited in The Eolian, Case No. 4,504; Whitney v. The Mary Gratwick, Id. 17,591; Drink water v. The Spartan, Id. 4,085; Ex parte Clark. Id. 2,796; Packard v. The Louisa, Id. 10,652. Disapproved in The Larch, Id. 8,085.}

{7. A court of admiralty will not favor an indirect lien upon the fund in hand by those claimants who cannot sue originally in such court, especially where there are adverse interests.}

{Cited in Gates v. Johnson, Case No. 5,268; Zane v. The President, Id. 18,201; Wilson v. Bell, 20 Wall. (87 U. S.) 224.}

Mariners' wages and claim for short allowance. Also petitions of the master

{Cooper} and physician for payment out of remnants and surplus. The voyage was from Philadelphia to Canton, and back to Philadelphia, with liberty to go to other intermediate ports. A suit was commenced for mariners' wages, in which sundry disputes arose, of no general importance. The wages were decreed, and the vessel directed to be sold for their amount, together with a sum adjudged to the seamen for 26 days short allowance of provisions, at one day's pay to each mariner for every day full allowance was not served out. It was contended that, with respect to some of the mariners shipped in foreign ports, the voyage should be considered, so far as they were concerned, as commencing at the ports of shipping then respectively. And as the act of congress only contemplated voyages from the United States, the case of a seaman engaged in a foreign port was not within its purview. But this objection was overruled for the following reasons. The voyage was entire, and commenced at Philadelphia, and there ended. The intermediate circumstances became engrafted into the entire voyage, and this rode over all subordinate considerations. There could be no subdivisions, or apportionments, except as to the time of service of the respective individuals, which determined the amount severally due to them. Endless confusion and difficulties would arise, from such distinctions among the crew, each of whom participated in the general contract, and had the same rights to any benefits, as they shared in all disadvantages, arising out of that contract. The deficiencies of provisions accrued on the home passage, in which all the mariners were alike engaged. The decision in the case of Mariners v. The Washington {Case No. 9,086}, was taken as the" guide to determine the quantity and species of provisions required on a voyage from China; and the navy ration, the rule by which the allowance was adjusted. Substitutes for articles enumerated in the law on this subject, were allowed. The livestock, though legally excluded, was, by consent counted in, and yet there was a large deficit on the whole. The payment for the short allowance, at the rate directed by law, was therefore decreed. The ship was sold by the marshal, under the decree; and the monies arising from the sale, were brought into court. There remained a surplus or remnant, after payment of all sums adjudged to be paid, and the costs and charges, accruing in the suit, and on the sale. A petition of James Cooper, the master, was presented, stating, that he had expended, during the voyage, for pilotage, mariners' wages, and other charges necessary for the use of the ship, $257, which remained unpaid. And that there were due to him, for wages as master, $827.60. Another petition, from William Baldwin, was also presented, stating, that he was employed as physician in and for the ship, on her voyage from Philadelphia to Antwerp, Canton, and back to Philadelphia. And that there remained due to him for his services on board, $167. The petitioners prayed that the sums due to them respectively, should be paid out of the surplus monies, remaining in court, after payment of all sums decreed, and the costs and charges thereon. The claim for payment to the petitioners was insisted on, under the authority of a dictum of Sir William Scott, in the case of The Favourite,

which it was alleged, justified a payment to the master. 2 Bob. Adm. Cas. (Phila. Ed.) 197. The justice of his claim was farther enforced, by the reasoning in 2 Browne, Civ. & Adm. Law, 95, where the propriety of the master suing in the admiralty is advocated, though it is admitted not to be practised. Abb. Shipp. 94, was cited to shew, that money, paid by the master on a foreign voyage, was a lien on the ship. The general doctrine, that whatever court had possession of the principal, had power over all incidents, was relied on, to support the claim of the physician.

BY THE COURT. When I first came into this court, I made, in several instances, distribution of surplus monies, under the idea, that I had the power so to do, agreeably to the doctrine now stated, to justify me in granting the prayers of the petitions. But on experience, I found myself involved in many difficulties and mistakes, in the application of this doctrine. It was one among the mass of irregularities I had to encounter, before I established, by frequent decisions, and with much consideration, the general principles which now prevail. I found it best and safest, to fix some general rules, applicable to most cases, though at times, some anomalous instances should occur, inducing particular hardships. The rule, by which I have governed myself for several years past, is, that it shall appear, that a sum claimed out of the surplus or remnant, is either of itself, or in its origin, a lien on the ship, or other thing out of which the monies were produced. This rule is not only justified by the practice of the civil law, but in the English chancery, and even in their courts of common law, wherein they are governed, when the case requires, by the principles of other courts, having concurrent cognizance of the subject matter, either incidental, or in chief. Many authorities may be produced to support this position. In chancery, the monies arising from sales of lands, are distributed as liable to the same trusts or liens, to which the land itself was subjected; and so of the produce of any subject or thing, originating the suit, or matter, under the cognizance or the enquiry of the court Whensoever the courts of common law have occasion to determine questions of admiralty jurisdiction or cognizance, the principles of decisions in the admiralty courts are pursued. Their strict adherence to preferences, given by liens at common law,

is invariable. But it is rare indeed, if at all to be discovered, that liens on monies or other subjects, are attached by considerations not originally subsisting, or exclusively fixed.

With respect to the claim of the master, for sums paid abroad to mariners, or even here, I think, on principle, these, as well as monies advanced in foreign ports for necessaries, supplied to the ship on her voyage, (however it may be at the port of outfit, or where the owners reside) are liens, and the ship was hypothecated therefor. Claims of material men, for supplies afforded to a ship, are with, in the jurisdiction of the admiralty, and suable there, in England, as well as in other states. Pilotage is a necessary expenditure on a voyage. If a master pays demands for these claims, he represents the claimants, and the lien continues on the monies produced by the sale of the ship.[2] As to pilotage, the master is bound by the laws of Oleron, and other maritime' laws, to pay it, for the safety of the ship and goods. In England a shipwright may sue in the admiralty, for building a ship for navigation on the sea (Rolle, Abr. 534), and for repairing a ship. Cro. Car. 296; cited in 2 Bac. Abr. (5th Ed.) 180. But as the laws of this state provide for shipwrights and material men at the port of outfit, and also regulate domestic pilotage, and the sums due and recoverable here, on that account I have generally referred parties exhibiting such claims, to the state jurisdictions; wishing to avoid all collisions and conflicts in such cases. I have confined this to domestic supplies and pilotage. Those furnished, or paid, in foreign ports, or here, on ships on their voyage, and not at a port of outfit, the owners being resident here, I have reimbursed, or distributed, out of surplus monies, where liens or hypothecations have appeared to me to have attached. I have also directed a surplus to be paid over to a master, where the owner or his authorized attorney or agent, did not appear. But this has been done with great caution. Wharfage has been allowed out of proceeds, as the wharfinger might detain the ship until payment.

I do not find any precedent or authority to warrant my granting the prayer of the master's petition, in the ease before me, for his wages. His contract is clearly personal, and made with and on the credit of the owners resident here, and not on that of the ship. He is the owner's agent, and responsible to him for his acts, particularly those relating to mariners' contracts, and other transactions in the affairs of the ship. If in any thing he has done wrong, the owners may retain; and the contest is cognizable in another jurisdiction. If he is also answerable to those furnishing supplies by his order, and to the officers and mariners of the ship, he is indemnified by such claims being attached as liens on the ship, or the monies produced on sale, in addition to the owner's responsibility. He has a farther security in the right to collect the freight, and possess the fund out of which wages are payable. So that the law clearly distinguishes his ease, as it respects wages, from those usually entitled to liens. I have paid out of surplus, the wages due to masters of Spanish ships, because the laws of Spain entitle them thereto: and I always am regulated, in the

affairs of foreign ships, by the laws of the country to which they belong. I could discover no precedent for this in the laws of any other country.

The maritime laws of England,[3] existing before our Revolution, and consistent with our situation, are yet our laws. It is but recently that admiralty cases have been published. We have, therefore, unavoidably, recourse to their common law books, for authorities. These invariably shew, that the master "cannot sue in the admiralty court, for his contract is on the credit of the owners, and not, like that of the mariners, on the credit of the ship." 2 Rob. Adm. Cas. 196. These authorities, as well as the few maritime cases published, also point out what parties may sue in admiralty courts. See 2 Bac. Abr. (5th Ed.) 181, and authorities cited.

As to the reasonings and opinions of an elementary writer, (2 Browne, Civ. & Adm. Law, 95), whatever weight may be attached to them, as theories to shew what the law ought to be, I think it safest to be guided by what it is. I have had occasion to discuss, in several cases, the subjects of maritime jurisdiction. It will be found that I have endeavoured to establish it on similar principles, where from necessity I was compelled to reason, without a precedent to direct me. It is certainly founded, for the most part on the subject matter, and not solely on the place of making the contract. But I do not wish to wander into theories, where respectable precedents can be found. All these are opposed to this writer's doctrine.

The authority of Sir William Scott, whose opinions I highly respect, where no diplomatic direction gives a bias to the judgment, is more to tie depended upon. He seems to hold, that surplus and remnants have been distributed to the master; or rather, that "upon enquiry, no instance has been found, in which a master has been permitted to sue against proceeds in the registry, except in cases of mere remnants and surplus; and not even then, if there have been any adverse interests opposing it" I have a similar wish to that expressed by Sir W. Scott, to aid an unfortunate suitor. In that case, the bottomry creditor alone, appeared as adverse; and his lien reached the remnants and surplus.—So that Sir W. Scott was not under the necessity of explaining what he meant by "adverse interests," or whether he distinguished them, by such as were accompanied by liens, or general interests, without such preference. In the case under consideration, I am given to understand, that there are creditors of insolvent part owners, whose interests are adverse to the master's claim; and who certainly deem themselves equally entitled to payment; beside, if the master can obtain his object in this mode, it will establish a precedent for such applications in all future cases, wherein monies arising from sales of ships for wages, or other causes, are ordered into court Thus a lien will be created; and, though not originally attaching directly, will be fixed by circuitous and indirect means. I shall continue to adhere to the principles I have endeavoured to establish, not to admit the distribution or payment of surplus, to others than those who originally had liens, or legal appropriations, on the object from which the monies in court were raised.

From what has been stated it appears, that there is no foundation for the claim of the physician. It is true that a court having possession of the principal, has power over its incidents. But these incidents must rise out of the principal, or be in connexion with it, or flow consequentially from it Thus, if the original cause arises at sea, and matters happen on land dependent upon it, the admiralty has still jurisdiction. So of goods taken piratically, or as prize, at sea, and brought to land—sails, or other apparel or furniture, taken from a ship under cognizance of the admiralty, and brought to land. So of all questions consequential to that of prize, &c. See authorities cited, 2 Bac. Abr. 178-180. Thus if claims, or liens, are legally attached to things, or monies under the cognizance, or within the juris-

diction of the admiralty, this court has power to decide respecting them. But it does not follow, that claims independent of such things, or monies produced from them, and mere personal demands on their owners, are within the reason of, or entitled to the remedy, prescribed by this principle; and I deem it an exclusion from a distribution, or a claim to a surplus, unless a lien or appropriation is precedently and legally fixed, that those who claim such distribution, could not sue in the admiralty for their demands. There is no doubt that the physician has no capacity, as such, to bring a suit in the admiralty court for his demand, which is merely personal, on the owner, or owners of the ship. The amount of the master's claim for 8257, as stated in his petition, for monies expended during the voyage, for the purchase of necessaries required in the service of the ship, and wages paid to mariners, is directed to be paid. The claim for his wages is disallowed; and the prayer of the petition of Dr. Baldwin cannot legally be granted.

I have gone so much at large into this subject, that the principles established in its discussion, may regulate future claims to monies brought into court, under similar circumstances.

[2] Although, in strictness, it might be contended that the lien was discharged, by payment to those who only held it until satisfaction was made; I have thought myself authorized to give more latitude, from equitable considerations, in such, cases, than the inflexibility of rigid legal rules would, perhaps, in general permit These rules I venerate too much to take unwarrantable liberties with them. The allowance to the master in this case, was not opposed. He had the power to hypothecate the ship for necessaries, in a foreign port; and was under no obligation to advance his own money. Wherever these advances are made, every security for repayment should be encouraged.

[3] The maritime laws, when clearly adopted and settled, became part of the English common law, which is retained by us to this day, in all eases permitted by the principles of our government. In a former note on this subject,—Thompson v. The Catharina {Case No. 13,949},—I have either expressed myself improperly, or there was some mistake in copying. The words (after "the feudal parts of this law") "and such as are," should be struck out, so that it read, "the feudal parts of this law inconsistent with the principles," &c. So it may be said of any other parts of the common law, if such there be. But I do not mean to enter into any controversy, as to what parts, or in what cases, the common law is obligatory and directory in the courts of the United States, having on these subjects often declared my opinion. Whatever difference of sentiment there may exist, as to its being granted by the people—delegated to the federal courts—or it being required that so it should be—it must be indisputably known, to all who are well informed, that without the rules and provisions as settled and made by the common law, the courts would be inoperative. The parties having the privilege of suing therein, or those compelled to become suitors there, would find themselves in a destitute and hopeless condition. Proceedings must

be new-modelled, and remedies defined and made efficient. Even crimes (as to the jurisdiction over which there is the most discontent and controversy) could not be described, prosecuted or punished, according to any other law now extant. Some of the highest, and most of the inferior crimes and offences, are undefined by any law of the United States. For what depends then on any other provision, they may be committed with impunity, if common law designations and definitions, and the forms of process, and modes of proceeding are rejected. We have experience sufficient to convince us of the inefficiency, and often mischief, apparent in attempts to substitute alterations, or supposed amendments, for the rules and principles of the common law. It would be more than human, if it were entirely perfect. If experience and change of circumstances suggest alterations, they are but few. In attempting reform in these, if we shake the whole fabric, it were better to suffer it to remain undisturbed. In another note on the same case—Thompson v. The Catharina [supra],—I have been also careless or unfortunate, in expressing myself, on another part of the subject The two last sentences of the last paragraph of the first note should read thus—"an agreement not to bring a suit to enforce performance of a contract, if made for a time limited, is well; but if made posterior to the bond, contract, or agreement, indefinitely, it amounts to a general release." See Carth. 64; Comb. 123, 4.