

Case No. 7,294.  
[2 Gall. 345.]<sup>1</sup>

THE JERUSALEM.

Circuit Court, D. Massachusetts.

May Term, 1815.

MARITIME LIENS—MATERIAL MEN—PREFERENCE—COSTS.

1. The admiralty has jurisdiction of suits in favor of material men.

[Cited in *Zane v. The President*, Case No. 18,201; *Steele v. Thacher*, Id. 13,348; *The Stephen Allen*, Id. 13,361; *The Wave*, Id. 17,297; *Davis v. New Brig*, Id. 3,643; *Thackarey v. The Farmer of Salem*, Id. 13,852; *Phillips v. The Thomas Scattergood*, Id. 11,106; *The Calisto*, Id. 2,316; *Brown v. Noyes*, Id. 2,023; *U. S. v. New Bedford Bridge*, Id. 15,867; *Ludington v. The Nucleus*, Id. 8,598; *The Celestine*, Id. 2,541; *Pamlee v. The Charles Mears*, Id. 10,766; *The Richard Busted*, Id. 11,764; *The Hendrik Hudson*, Id. 6,358; *The Champion*, Id. 2,583.]

See *Bulgin v. The Rainbow* [Case No. 2,116]; *The Charles Carter*, 4 Cranch [8 U. S.] 332. See, also, *Stevens v. The Sandwich* [Case No. 13,409]; *North v. The Eagle* [Id. 10,309]; *Clinton v. The Hannah* [Id. 2,898]; *Shrewsbury v. The Two Friends* [Id. 12,819]; *The Aurora*, 1 Wheat. [14 U. S.] 105; *The General Smith*, 4 Wheat. [17 U. S.] 438; *The Robert Fulton* [Case No. 11,890]; *Woodruff v. The Levi Dearborne* [Id. 17,988]; *Peyroux v. Howard*, 7 Pet. [32 U. S.] 341; *The St. Jago de Cuba*, 4 Wheat. [17 U. S.] 409; *The Nestor* [Case No. 10,126].

2. A tradesman has a lien on a foreign ship, lying in a port of the United States, for repairs made by him on board, and such lien will be preferred, in point of right, to a bottomry interest, which is prior in point of time, if it appear that the repairs were indispensable.

[Cited in *Ex parte Lewis*, Case No. 8,310; *Zane v. The President*, Id. 18,201; *The Mary*, Id. 9,187; *The Gold Hunter*, Id. 5,513; *Davis v. Child*, Id. 3,628; *The Alida*, Id. 199; *The Washington Irving*, Id. 17,244; *The Dan Brown*, Id. 3,556; *The Rapid Transit*, 11 Fed. 322; *The J. W. Tucker*, 20 Fed. 133; *The Scotia*, 35 Fed. 908.]

3. Practice, as to taxation of costs, in case of a claim on proceeds, where other parties are interested.

[Cited in *Westcot v. Bradford*, Case No. 17,429; *The J. W. Tucker*, 20 Fed. 135.]

The Greek ship *Jerusalem* having been libelled in a case of bottomry, and sold under an interlocutory order of this court [Case No. 7,293], an act on petition was interposed on behalf of Henry Dewhurst, praying an allowance out of the proceeds, in preference to the bottomry interest, of a sum due him for repairs of the ship since her arrival in the port of Boston. The circumstances attending the voyage of this ship will be found detailed in the case of *Kleine v. Catara* [Case No. 7,869].

A. W. Fuller, for libellant.

This case is to be distinguished from the ordinary cases, in which the lien for repairs is lost by parting with the possession of the thing repaired. The libellant never had possession or control of the ship. He merely went on board, and made some necessary repairs of the pumps. It was impossible for him to remain on board until he was paid. He has not, therefore, voluntarily relinquished his lien. The lien for repairs must take precedence of the bottomry bond. The repairs were necessary to preserve the ship, even if she were to remain in the harbor till she could be sold. It must be presumed that the ship was

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actually sold, in consequence of the repairs, for as much more as would pay for them. It has been holden, that the lender on bottomry is liable

to general average (Marsh. Ins. 760), and entitled to salvage (Id. 764). This may be considered a continuation of the original voyage. *Hernaman v. Bawden*, 3 Burrows, 1844; 1 Ld. Raym. 397, 632. But if the court should be of opinion, that this is not a continuation of the original voyage, and that the bottomry bond was forfeited, the lender on bottomry is nevertheless interested in the preservation of the ship. He may have no other means of securing his money; for it is to be presumed, that the borrower on bottomry would not pay marine interest, if he were responsible enough to obtain money on his personal security alone. Again, freight earned in a subsequent voyage is holden to pay the bottomry bond of a former voyage. *The Barbara*, 4 C. Rob. Adm. 1; *The Jacob*, Id. 245, 250. There is a distinction between repairs made on a ship in the place where the owner resides, and those made on a foreign ship. In the first case, the repairs are made on the credit of the owner, and there is no lien on the ship. In the latter case, the credit is given to the ship alone, and the mechanic has a specific lien on the ship for payment *Abb. Shipp.* 115, 95, 149, 160; *Watkinson v. Bernadiston*, 2 P. Wms. 367; *Ex parte Shank*, 1 Atk. 234; *Lister v. Baxter*, 2 Strange, 695; *The John*, 3 C. Rob. Adm. 288; *Buxton v. Snee*, 1 Ves. Sr. 154; *Farmer v. Davies*, 1 Term R. 109; *Westerdell v. Dale*, 7 Term R. 312; *Rich v. Coe*, *Cowp.* 636; *Hussey v. Allen*, 6 Mass. 165; *Gardner v. The New Jersey* [Case No. 5,233]; *Stevens v. The Sandwich* [Id. 13,409]. In some of the United States, legislative provision has been made, to secure the mechanic, and in other states the courts have intimated their intention to support so equitable a lien. *Woodruff v. The Levi Dear-borne* [Case No. 17,988].

On the part of the respondent, the cause was submitted without argument.

STORY, Circuit Justice. The question here does not singly depend upon the right of the admiralty to entertain suits in favor of material men. If there be any persons, who doubt that jurisdiction, I beg not to be comprehended in the number. In my judgment, and I speak after having given the subject a very grave consideration, the admiralty has always rightfully possessed jurisdiction over all maritime contracts; and the decisions of the courts of common law, prohibiting its exercise, are neither consistent in themselves, nor reconcilable with principle. In the struggle between the courts of common law and the admiralty, which originated in the same spirit, that attempted to break down the whole system of equity, it cannot be denied, that the former have manifested a great degree of jealousy, and hostility, fostered by strong prejudice and a very imperfect knowledge of the subject. It is not, therefore, to be wondered at, that in such an unequal contest where the power was all on one side, the admiralty should have lost many of its inherent rights. In more modern times, when the jurisdiction of the admiralty has been better understood, a more liberal policy has been pursued, and, where they have not been fettered by authority, judges have been more indulgent in allowing its exercise. The true doctrine was always asserted by the learned judges of the admiralty, and has been recently recognized by Mr.

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Justice Buller; that the jurisdiction as to contracts depends not upon the locality, but upon the subject matter, of the contract. *Menetone v. Gibbons*, 3 Term R. 267. And I have not the slightest hesitation in holding, that the admiralty has perfect jurisdiction over all maritime contracts. The decisions at common law, on the subject of its jurisdiction, have nothing to recommend them, and certainly are not binding on us. The constitution and laws of the United States have confided to the courts of the United States cognizance of “all civil causes of admiralty and maritime jurisdiction,” and what is the true limit of this jurisdiction must be judged of, not by hasty decisions upon prohibitions, but by the history, practice and law; of the admiralty, as it is found expounded, with admirable learning and sagacity, by the judges who have presided in that court.<sup>2</sup> In respect to material men, the jurisdiction has been enforced and exercised by Mr. Justice Winchester, than whom no man in the United States ever better understood the true principles and doctrine of the admiralty law. *Stevens v. The Sandwich* [Case No. 13,409]. Until I am taught a different rule by the highest tribunal, I shall continue to assert the original inherent powers of the admiralty in the full extent, in which they were recognised in England until the unhappy controversies with the courts of common law.

Admitting the jurisdiction, the next question is, whether the petitioner be entitled to the relief prayed for. This depends upon the consideration, whether he have a lien or not upon the ship for the repairs. It will be recollected that this is a foreign ship, and that by the general maritime law, every contract of the master for repairs and supplies imports an hypothecation. It has been supposed, that the rule of the common law is different. But it has never yet been extended to cases of repairs of foreign ships, or of ships in foreign ports. I hold, therefore, that the contract for repairs in this case, being of a foreign ship, is to be governed by the maritime law, and created a lien.<sup>3</sup> Whether, in

case of a domestic ship, material men have a lien for supplies and repairs furnished at the port where the owner resides, I give no opinion. There are great authorities on both sides of the question, though upon principle, independent of common law authorities, it does not seem to me, that there is much room for doubt. See *Woodruff v. The Levi Dear-borne* [Case No. 17,988]; *Stevens v. The Sandwich* [Id. 13,409]; *Gardner v. The New Jersey* [Id. 5,233]; *Hussey v. Christie*, 9 East, 426; *Abb. Shipp.* pt. 2, c. 3, § 9, etc.; *Rich v. Coe*, Cowp. 636; *Farmer v. Davies*, 1 Term R. 109; *The John*, 3 C. Rob. Adm. 288; *Pritchard v. The Lady Horatia* [Case No. 11,438]. Be this as it may, it cannot affect the jurisdiction of the admiralty in such cases, for that stands altogether independent of the doctrine of liens, and may be enforced as well by process in personam, as in rem. If then the repairs in this case were a lien on the ship, it remains to consider, whether they constitute a privileged lien, entitled to a preference over a bottomry interest; for the proceeds now in court are insufficient to answer both claims. In point of time the bottomry interest first attached, and the right became absolute by a completion of the voyage, before the repairs were made. Upon general principles, then, the rule would seem to apply, “qui prior est tempore, potior est jure.” But it is to be considered, that the repairs were indispensable for the security of the ship, and actually increased her value. They are, therefore, not like a dry lien by way of mortgage or other collateral title. The case is more analogous to that of a second bottomry bond, or the lien of seamen’s wages, which have always been held to have a priority of claim, although posterior in time, to the first bottomry bond. Let a decree be entered for payment of the sum claimed by the petitioner out of the proceeds of the sale.

After the decree was pronounced, Mr. Fuller moved the court for a direction to the clerk, as to the costs to be taxed in this case.

BY THE COURT. In a case, like this, of a claim on proceeds in the custody of the court, where other parties are entitled, nothing can be allowed beyond that, for which there is a specific lien, and the actual charges of court No attorney’s fee can be allowed.

<sup>1</sup> [Reported by John Gallison, Esq.]

<sup>2</sup> See *Exton*, *Godolphin*, *Zouch*, and *Jenkins*, on the admiralty jurisdiction, *passim*.

<sup>3</sup> *The John*, 3 C. Rob. Adm. 288; *North v. The Eagle* [Case No. 10,309]. The supreme court of the United States have recently held that material men have a lien on a foreign ship for repairs done. *The Aurora*, 1 Wheat. [14 U. S.] 96, 103; *Hussey v. Christie*, 13 Ves. 594; *contra*, *Id.*, 9 East, 426; *Ace. Ex parte Halkett*, 3 Ves. & B. 135; *De Lovio v. Boit* [Case No. 3,776]; 2 P. Wms. 367.