

Case No. 8,604.

THE LULU.

[1 Abb. (U. S.) 191; Chase, 162; 1 Am. Law T. Rep. U. S. Cts. 103; 1 Balt. Law
Trans. 52.]¹

Circuit Court, D. Maryland.

April Term, 1868.²

“FOREIGN PORT”—MARITIME LIEN FOR SUPPLIES.

1. A port in another state from that in which a vessel is enrolled and registered, is deemed, in the absence of special facts controlling the question, a “foreign” port, within the rule which confines the maritime lien for supplies to cases of supplies furnished in a foreign port.
2. To entitle a material-man to claim a maritime lien upon a vessel for supplies furnished to

The LULU.

her in a foreign port, upon the order of the master, he must show that the supplies in question were necessary to the vessel, and also that some special exigency or necessity existed to require the master to obtain them upon the credit of the vessel. To show only that the supplies were needed, is not enough.

{See note at end of case.}

{Appeal from the district court of the United States for the district of Maryland.}

Hearing upon several libels for repairs and supplies. The principal suit was brought by the persons composing the firm of Skinner & Forsyth, for repairs made upon the steamer Lulu. It was heard with other suits for supplies.

CHASE, Circuit Justice. This is a suit in admiralty to enforce a lien claimed upon the steamer Lulu, for repairs made upon her by the libelants at the request of the master. It is consolidated with other suits, all brought by material-men for supplies or repairs to the vessel. The Lulu was a steamer owned in New York, which was her home port, but employed in the trade between Baltimore, in Maryland, and Charleston, in South Carolina. When the libel was filed she had been in the trade about eleven months—from April, 1866, to March, 1867. The repairs and supplies for which satisfaction is sought, were furnished in Baltimore, during and after July, 1866; but chiefly in November and afterwards. They were furnished at fair prices, and were proper and necessary.

In each suit the New York Guaranty & Indemnity Company has filed a claim and answer, asserting a prior right to satisfaction out of the proceeds of the steamer; which has been sold under an order of the court. The claim of this respondent is founded upon a bill of sale made to the company on August 24, 1866, by the former owners of the Lulu, in consideration of twelve thousand dollars. This bill of sale, though in form absolute, was intended as a mortgage to secure repayment of the advance, in six months from the date; but no part of it has been repaid.

The only question in this cause is, whether the material-men, under the circumstances of the case, had a lien for their repairs and supplies; for if they had, this lien is superior to that created by the bill of sale or mortgage, whether prior or posterior in time. It was insisted on the argument, that Baltimore was the real home port of the Lulu, and that there could be no lien for repairs and supplies furnished in the home port; and this might be a material circumstance in the decision of the case, if it appeared that the Lulu was chartered to citizens of Baltimore, for the Charleston trade. Such a charter might be considered as transferring her home port from New York to Baltimore; especially when taken in connection with the proved facts of the case, which show that Baltimore might very fairly be called the actual home of the Lulu, during the time of the transactions in controversy. But there is no evidence of such a charter; and it is clear that under the American decisions, Baltimore, being in another state than that in which the vessel was owned and enrolled, must be regarded as a foreign port; and that, in a proper case, material-men would be entitled to a lien for supplies there furnished.

The question then occurs: "Were the repairs and supplies in question furnished under such circumstances as would entitle the material-men to the liens which they claim?" The general rule applicable to this class of cases was first laid down in *The General Smith*, 4 Wheat. [17 U. S.] 443, as follows: "When repairs have been made or necessaries have been furnished to a ship in a port of a state to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security, and he may well maintain a suit in rem in the admiralty to enforce his right." The same rule, in substance, was affirmed in *Peyroux v. Howard*, 7 Pet. [32 U. S.] 324; in *The Nestor* [Case No. 10,126]; and in several other cases. The nature and degree of necessity essential to the creation of a lien for repairs and supplies was much considered in the case of *The Laura*, or *Thomas v. Osborn*, 19 How. [60 U. S.] 28, 35. The court then said, in substance, that it is only in case of necessity that the master can hypothecate the vessel by a bottomry bond or other express obligation, or create a lien by obtaining repairs and supplies on her credit (page 30), and that, to constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them (page 31). If the master has funds which he ought to apply in payment, but does not, and the furnisher knows this fact, or has the means by due diligence to ascertain it, then no case of actual necessity to have a credit exists, and no maritime lien is created by furnishing repairs and supplies. The rule on this point was stated by Chief Justice Taney, who, with Justices McLean and Wayne, dissented from the judgment of the majority, somewhat less stringently, as follows: "That repairs and supplies in a foreign port, if necessary to enable a vessel to proceed, are presumed to have been furnished and made on the credit of the vessel, unless the contrary appears, as well as on that of the master and owners; and creates a lien which may be enforced in admiralty." Page 38. The difference between the court and the dissenting justices on this point was that the former held that, in order to the creation of the lien, there must be a necessity for the credit as well as a necessity for the supplies, while the latter seem to have thought that if the supplies were necessary the credit may be presumed.

The same subject was further considered

The LULU.

at the same term in the case of *The Sultana*, or *Pratt v. Reed*, 19 How. [60 U. S.] 359. That case was in its general features much like the cases now under consideration. It was a libel against the steamer *Sultana* for supplies of coal furnished from time to time, from June, 1852, to May, 1854, and the lien for supplies was contested by the answer, which set up a claim under a prior mortgage on the steamer, dated October 31, 1863. The court held that the material-man had no lien, and decreed the proceeds to the mortgagees. The court stated the rule thus: The proof of a necessity at the time of procuring a supply for a credit on the vessel. * * * "is as essential as that of the necessity of the article itself." It is only under very special circumstances and in an unforeseen and unexpected emergency that an implied maritime hypothecation can be created.

The decision of the case was not put upon the ground that the supplies were unnecessary, but upon the ground that there was no sufficient proof of a necessity for the implied hypothecation of the vessel, or of any unexpected or unforeseen exigency that required it.

A distinction between the cases now to be adjudged and the cases thus decided was attempted in the argument; but I find myself unable to make any which has substance. That decision was by a unanimous court, and was on the very point which must govern these cases; namely, the necessity of the credit; and I am unable to discover any very special circumstances, any very unexpected and unforeseen emergency in these cases which will take them out of the application of the rule which the decision cited establishes. The repairs and supplies in all of the cases now presented were furnished in the ordinary course of trade, and under ordinary circumstances. There is no proof whatever of any unusual exigency. Except in the case of *Coleman v. Bailey* [Case No. 2,981a], there is no averment of the necessity of a credit to the steamer.

It was contended also that the rule goes beyond any that has heretofore been applied to material-men by the courts; and I must admit, that I have found no other case in which proof so stringent as that required by it has been held essential to a lien for repairs and supplies. But the rule established by the unanimous judgment of the supreme court is not on that account the less binding upon me.

I am constrained, therefore, to hold that the furnishing of the repairs and supplies set forth in the several libels did not create a maritime lien in favor of the libelants; and that the respondents are entitled to the proceeds in the registry after payment of costs.

Decree accordingly.

[NOTE. Dissatisfied with this decree reversing the sentence of the district court, the libelants appealed to the supreme court. Mr. Justice Clifford delivered the opinion of the court. As it was not shown that the master had funds, or that the owners had sufficient credit, or that there were any circumstances or reasons sufficient to put the repairers and furnishers upon their inquiry as to those facts, the court would presume a necessity for credit, since it appeared from the testimony that the repairs and supplies ordered by the

YesWeScan: The FEDERAL CASES

master were necessary for the vessel. The decree of the circuit court was accordingly declared erroneous, and the cause remanded, with instructions to enter a decree affirming the decree of the district court. 10 Wall. (77 U. S.) 192.]

¹ [Reported by Benjamin Vauchan Abbott, Esq., and by Bradley T. Johnson, Esq., and here compiled and reprinted by permission.]

² [Reversed in 10 Wall. (77 U. S.) 192.]