

ray contributed to bring about this collision, then, as to the owner of the cargo of the *Canisteo*, or this insurance company, who represents the rights of the owner of the cargo, the Murray is a *tort-feasor*, although there may have also been contributory fault on the part of the *Canisteo*. But I do not find in this proof, when fairly considered, any contributory fault on the part of the schooner. The testimony of Bracken, as to the repeated changes of course by the schooner, is not supported by the other witnesses called by the insurance company from the crew of the steamer or of the schooner; but, on the contrary, all the witnesses on the schooner who should best know what was done on board of her concur that there was but one change of course by the schooner from the time the vessels sighted each other when four or five miles apart, and after the schooner had passed through the straits, and shaped her course for the Manitous, and that this change of course was made at the moment of extreme peril, and when allowable as an act *in extremis*, even when, if it had not been made, perhaps there might have been no collision.

Some stress was laid at the argument upon the fact that the answer of Mr. Egan to the petition of the insurance company does not charge the fault of the collision upon the steamer, and exonerate the schooner from fault. It is evident that the proof has been taken without objection, so far as shown by the record, for the purpose of ascertaining who was at fault for the collision, and if the allegations in any of the pleadings are not broad enough to admit the proofs, they may be amended before the decree is entered.

The exceptions to the commissioner's report are overruled, the report confirmed, and petition of insurance company dismissed, at petitioner's cost.

## THE GRAPESHOT, etc., and Six Other Cases.

(District Court, S. D. New York. October 20, 1884.)

### 1. MARITIME AND STATUTORY LIENS — REPAIRS AND SUPPLIES — ORDER OF DISTRIBUTION.

Claims for ordinary repairs and supplies, furnished upon running accounts, to a tug running about the harbor of New York, that are contemporaneous, or nearly so, and overlap each other, should be paid *pro rata*, in case of an insufficiency. No distinction will be made between strictly maritime liens for supplies in foreign ports, and statutory liens given for similar supplies in a home port.

### 2. SAME—DAMAGE CLAIM ON TOWAGE.

The lien for a claim of damage upon a contract of towage, for negligently running a tow aground, charges the vessel as she was at the time she caused the injury; that is, subject to the liens already existing for previous supplies. *Held*, therefore, that a rest should be made in the various running accounts for supplies at the date when the damage lien accrued; and that the claims up to that date were entitled first to be paid in full, as against the damage claim, but without preference among themselves; and that any surplus should

be next applied upon the damage claim, as ascertained, and such surplus, if any, retained in the registry to await the decision of the damage suit.

3. SAME—SUPPLIES FURNISHED PENDENTE LITE POSTPONED.

For supplies and repairs furnished in a foreign port, after the arrest of the tug by the marshal of this district and while he permitted her to be navigated, no lien allowed as against prior claims in suit.

4. SAME—LIBEL FOR WAGES—COSTS.

In a suit for wages, entitled to be first paid in full, under which, also, the vessel was seized and sold, the costs should also be paid in full.

5. SAME—COSTS IN OTHER CASES.

The costs upon all the other necessary libels directed to be taxed and added to the respective claims, and paid with them *pro rata*.

In Admiralty.

*Alexander & Ash*; for Coffey and others.

*Owen & Gray*, for Coffin and others.

*Thomas M. F. Randolph*, for Communipaw Coal Co.

BROWN, J. The tug-boat Grapeshot, having been libeled upon various claims for wages, for repairs and supplies, and for damages, has been sold, and the net proceeds, amounting to \$1,058, have been paid into the registry of the court. She was first seized under a libel filed by James Coffey and others for wages. Four other libels, filed shortly afterwards, were all for repairs and supplies furnished to the tug, each consisting of various items furnished at different times. They all overlap one another, and cover a period extending from about March 1 to July 16, 1884. The libel of Richard Coffin was filed to recover damages sustained by the schooner Velma, which was in tow of the Grapeshot, and is alleged to have been run aground on July 5, 1884, through the negligence of the tug. This was the earliest libel filed, though not the first under which the Grapeshot was arrested. The liability of the tug for these damages is denied, and the suit has not yet been brought to trial. In all the other cases judgments have been recovered. The last libel filed was for coal supplied by the Communipaw Coal Company to the amount of \$34.38, between July 18 and July 22, 1884, after the arrest of the vessel by the marshal, and while she was in his custody and was apparently permitted by him to be run by the owners. The amount in the registry being insufficient to pay all the various claims, the parties have submitted to the court the question of their respective priorities, as well as their right to costs.

I do not find upon the facts any such laches in regard to any of the claims as should debar them from their proper order of privilege. The claims for wages must, therefore, be paid in full, and the proctors in that case should be allowed one full bill of costs, as the vessel was seized and sold in their suit. *The Samuel J. Christian*, 16 FED. REP. 796; *The J. W. Tucker*, 20 FED. REP. 134.

The lien claimed by the Communipaw Coal Company for coal supplied to the vessel while she was in the lawful custody of the marshal must be postponed to all other claims. The company had already libeled the vessel for previous supplies to a considerable amount. It

cannot be allowed that the claims of libelants shall be prejudiced by any supplies subsequently furnished while the vessel is legally in the custody of the court, through the possession of the marshal, in consequence of any consent that he may have given to her further navigation. *The Aline*, 1 Wm. Rob. 112, 122.

The four other libels for repairs and supplies embrace, as I have said, numerous items extending over a period of about four months, and overlapping one another. They are, each of them, brought upon running bills of account with the steam-tug, which was employed entirely about the harbor in making short trips daily, or several trips a day. It is impracticable to regard each of such trips by this tug as a separate voyage, or to base any priorities upon the order of such trips. It would be almost equally impracticable to adjust the priorities of these various overlapping items of supplies in the inverse order of their dates; and such a mode of distribution, if practicable, can hardly be supposed to accord with the intention or the expectation, as to security, of those who furnished the supplies upon such running bills of account. I am satisfied that, in these cases of harbor navigation, where the accounts are of the same rank, and are partly contemporaneous and overlapping, or, if not overlapping, are nearly contemporaneous, and consist of only the ordinary repairs and supplies incident to the usual course of navigation, the rule most equitable in itself, and that which will effectuate most nearly the understanding and expectation of the various parties that furnish such supplies, will be that of a *pro rata* distribution, as in the cases referred to in *The J. W. Tucker*, 20 FED. REP. 134. The divisions of time cannot, indeed, here be made by open seasons of navigation, because navigation here is open the year round. But I think the same considerations there stated apply equally within the period of a reasonable diligence for the enforcement of the earliest of the liens presented. Those which exceed that period should be postponed; those that do not should share *pro rata*. Where the repairs are of an extraordinary or exceptional character, such as might be consequent upon extensive damage by collision, for instance, they might not, perhaps, be properly brought under this *pro rata* distribution. At present, I decide only as to ordinary repairs and supplies.

The damage claim in the suit of Richard Coffin arose out of a contract of towage. If the libelants substantiate their claim, inasmuch as their libel was filed very shortly after the injury to the *Velma*, and no laches are imputable to them, they would seem to be entitled to the benefit of the security of the vessel for the performance of her maritime obligation according to the condition in which she stood at the time when the towage services were undertaken by her, and contracted for by the libelants, namely, on the fifth day of July; *i. e.*, subject to all liens on her then existing, and to none subsequently arising. Upon the principle of the decision of the recent case of *The Frank G. Fowler*, 17 FED. REP. 653, and that of *The Samuel J. Chris*

*tian, ut supra*, it would seem that the lien and security of the owners of the *Velma* could not be supplanted by that of the subsequent material-men. The principle of *The Aline*, 1 Wm. Rob. 111, is not applicable to the *Velma*, since her relation to the *Grapeshot* is not wholly involuntary, as in cases of torts by collision. Here the *Velma* voluntarily contracted for the services of the *Grapeshot*, and she can justly claim no security beyond her situation as she then was. A rest should therefore be made in the bills up to July 5th, and such items as were furnished after that date must be postponed to the damage claim as the same may be hereafter established.

The claims for wages, with the costs of that suit, should, therefore, be first paid in full. Upon the other claims of the same rank, the costs of all necessary libels are to be added to the claims, respectively, and each claim up to July 5th, with its costs, is to be paid *pro rata*, except the claim of the Communipaw Coal Company for \$34.38. If, after the above payments, there shall be any residue, it must remain in the registry and be applied upon whatever is recovered in the suit of the *Velma*, in preference to the claims for supplies furnished after the damage.

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### THE ARCTIC. (Nine Cases.)

(District Court, S. D. New York. October 22, 1884.)

#### 1. LIENS MARITIME AND STATUTORY—DEPARTURE—SWORN SPECIFICATIONS.

Under the statute of New York a lien is given for supplies to domestic vessels if a specification of the claim is filed within 12 days after she shall leave the port where the debt was contracted.

#### 2. SAME—SUPPLIES, WHEN FURNISHED.

The tug *A.*, being proved to have been frequently at Jersey City and Hoboken at certain dates, *held*, that all claims for supplies furnished more than 12 days prior to such dates, without notice filed, were cut off.

#### 3. SAME—VERIFICATION OF SPECIFICATION.

The statute requiring the specification to be "sworn to," *held*, that the absence of a venue to the jurat was immaterial, the specification appearing to be "sworn to" before a notary public of New York county, and proof being given that it was, in fact, "sworn to" within this county.

#### 4. SAME—ITEMS IN SPECIFICATION.

Where the specification contained numerous items, the first item of which was, "To amount of contract, as agreed, \$250," the other items being for extra work, all being stated to be for extra repairs, etc., *held*, a sufficient bill of particulars under the statute to include the contract work.

#### 5. SAME—PRIORITY OF LIENS.

Maritime and statutory liens for supplies hold the same rank. Ordinary repairs and supplies that are contemporaneous, or nearly so, and all recent, treated as contemporaneous, as in the case of *The Grapeshot*, *ante*, 123, and the costs of the necessary libels share in the fund *pro rata*.

In Admiralty.

BROWN, J. Nine libels were filed against the steam-tug Arctic to enforce the payment of alleged liens for repairs and supplies. Upon the return of process, default being made, the cases were all referred to a commissioner to report the amount due on each. The vessel in the mean time was sold. Out of the proceeds of sale, after paying the expenses and the undisputed sums due to seamen for wages, there remains in the registry of the court only the sum of \$413.50,—much less than the liens claimed. The contest is among the lienors themselves. Upon three of the claims the repairs and supplies were furnished at Jersey City and Hoboken, foreign ports as respects this vessel, whose owners resided in New York. Upon these claims the commissioner has reported \$584 due to the Communipaw Coal Company for coal furnished between December 11, 1883, and May 12, 1884; \$16.40 due to William Horre for repairs done between January 25 and March 5, 1884; and \$28.13 due to Edward P. De Mott for repairs between January 1 and February 1, 1884. In the other six cases the repairs and supplies were furnished in this city and in Brooklyn, and the liens can be sustained only under the state statute. This statute provides (Laws 1862, c. 482) that "in all cases such debts shall cease to be a lien \* \* \* whenever such ship or vessel shall leave the port at which such debt was contracted, unless the person having such lien shall, within 12 days after such departure, cause to be drawn up and filed specifications of such liens, which may consist either of a bill of particulars of the demand, or a copy of any written contract under which the work may be done, with a statement of the amounts claimed to be due by such vessel, the correctness of which shall be sworn to by such person." Upon these five domestic liens no specification was filed except in the cases of Sullivan and Gladwish.

The proof shows that during the period when their supplies were furnished the tug was frequently at Jersey City and Hoboken, and took in coal there. As this was evidently in the line of her business, there must have been as frequent departures from this port, within the meaning of the statute, according to the decisions in *Hancox v. Dunning*, 6 Hill, 494, and *The Jenny Lind*, 3 Blatchf. 513. As more than 12 days elapsed after such departures, the lien was lost in all cases in which no specification was filed. The same consideration cuts off all of Gladwish's bill, excepting the last item of \$14.40.

Further objection is made to the specification in Gladwish's case that no venue was attached to his affidavit, and the case of *Cook v. Staats*, 18 Barb. 407, is cited to the effect that an affidavit without a venue is a nullity. The state statute, however, does not in this case require a technical affidavit, but only that the "statement of the amounts claimed to be due from such vessels shall be sworn to by such persons." The specification in this case is sworn to by Gladwish before a notary public who signs himself, "Notary Public N. Y. Co.," and the proof shows that the verification was, in fact, made

within the notary's jurisdiction. I shall hold this to be a compliance with the statute.

The claim of Sullivan was for repairs furnished between November 14 and December 7, 1883, amounting to \$364.97, \$250 of which was for repairs done pursuant to a parol contract to do the repairs specified for that sum; the balance of his bill was for extra work. The specification was filed by Sullivan on the eighteenth of December, in less than 12 days after the first departure of the vessel. His specification states that \$364.97 is due to him on account of work done and materials, and for articles furnished towards the building, repairing, fitting, furnishing, and equipping said vessel, of which a correct bill of particulars is annexed, the first item of which is, "To amount contract, as agreed, \$250;" then follow some 30 other items of extra work. The proof shows that all the work was for repairs. Objection is made that the first item is not a bill of particulars. It is, however, a part of the bill of particulars. It is only written contracts of which a copy is required to be filed. The only additional particulars which could be given of the contract work would be the particular nature of it. No further specification of the value of each item could be given. Its general nature is already stated in the previous part of the specifications, in compliance with the statute. No question is raised as to the fact of the work being done. Most of the other items are general in their character, such as fitting, plumbing, lead-work, caulking, etc.

Upon the whole, I do not perceive any essential purpose that the bill of particulars, as it stands, does not sufficiently disclose for the information of persons dealing with the vessel. The time is stated from November 14th to December 6th, and the amount \$250; and I therefore allow the lien, as filed, for the sum of \$364.97, with interest.

The claims of the other libelants are disallowed. After payment of seamen's wages the residue of the fund will be insufficient to pay in full the claims here allowed. All of these claims are maritime in their nature, and they are of the same rank, being all for repairs and supplies, unless distinction be made between such as are strictly maritime liens arising in foreign ports, and those which arise under the state law in the vessel's home port. Upon this point I shall follow the decision of Mr. Justice MATTHEWS in the case of *The Guiding Star*, 18 FED. REP. 263, and *The J. W. Tucker*, 20 FED. REP. 134.

Treating all the claims here allowed as of the same rank, inasmuch as they are all recent, and are all embraced within nearly the same period, several of them more or less overlapping one another, they should be paid *pro rata*, as directed in the recent case of *The Grape-shot*, ante, 123. The costs of each necessary libel are to be added to the claims, respectively, and the fund then divided *pro rata* between them.

## MELENDY v. CURRIER.

(Circuit Court, D. Vermont. October 31, 1884.)

## 1. REMOVAL OF CAUSE—REV. ST. § 639, SUBD. 3.

Subdivision 3 of section 639 of the Revised Statutes was not repealed by the act of 1875, (18 St. at Large, 471.)

## 2. SAME—TIME OF APPLICATION—NEW TRIAL—LOCAL PREJUDICE.

A case may be removed from the state court after reversal of the judgment of the trial court by the supreme court of the state, and pending the second trial, on affidavit of local prejudice, under subdivision 3 of section 639 of the Revised Statutes.

## Motion to Remand Cause.

*L. H. Thompson*, for plaintiff.

*Heman S. Royce* and *John Young*, for defendant.

WHEELER, J. This cause was begun in the state court, was tried there, and a verdict and judgment for the defendant had. This judgment was reversed on exceptions, and a new trial granted. Then it was removed into this court, on an affidavit of local prejudice, under the act of 1867, now subdivision 3 of section 639 of the Revised Statutes. It has now been heard on a motion to remand. It is argued that this part of the act of 1867 was repealed by the act of 1875, (18 St. at Large, 471,) and that, if not, the time of removal is revised and regulated by the latter act, and must be as early as the term at which the cause would first stand for trial. That this part of the act of 1867 was not repealed by the act of 1875 has been repeatedly decided. *Cooke v. Ford*, 16 Amer. Law Reg. 417; *Sims v. Sims*, 17 Blatchf. 369. It is treated as in full force, notwithstanding the act of 1875, in *Bible Society v. Grove*, 101 U. S. 610.

In speaking of the provision prescribing in what cases a removal may be had, it is said by Mr. Chief Justice WAITE, in the latter case, that "the act of March 3, 1875, (18 St. 470,) has not changed this provision of the Revised Statutes." This seems to settle the question as to the repeal of the act of 1867. The act of 1875 is broad enough to include within its terms any case removable under the act of 1867, and any such case might be removed, without an affidavit of local prejudice, by complying with the terms of the act of 1875. For this reason it is said that it must govern as to the time of applying for removal. But, as the right to remove on account of local prejudice is left undisturbed by that act, the means by which the removal may be had are left as incidents to the right. There is no doubt but that a revision of the whole subject-matter of a statute repeals it, and leaves the revising statute only in force; but this latter act does not revise the whole of the subject-matter of the former; it leaves a part of it in force, and that part is in force according to its own terms. The act of 1875 does not purport to prescribe the means for removal of causes, except those removable under that act. It in terms pre