and giving ample room for leeway. This was her position and direction just before the accident, for when the pilot observed her immediately before this he saw her over the starboard quarter of the tug. When he took down his glasses and looked at her he found that she was bearing off the port quarter, on the north side or beyond the north side of the channel, and then she got aground. How this occurred can only be conjectured. It may have been owing to the fact that by the raising of the foresail the schooner got improper leeway, or perhaps the rising sail obscured the vision of the master at the wheel, and so prevented him from keeping the schooner well up. Whatever may have been the cause, one thing seems most probable: that obedience to the order of the pilot did not cause it. It does not appear that the pilot is responsible in damages for the accident.

2. The conclusion reached on this first point renders any discussion of the liability of the Charleston Pilots' Association unnecessary. No opinion is expressed upon the nature of this association, whether it be a copartnership or not.

3. Did the tug contribute to the disaster? She was under the control and direction of the pilot, and obeyed all orders which he gave. Up to the moment of the disaster she had pulled the schooner successfully against a flood tide, and they had attained a speed of four miles an hour over the ground, both being completely under control. There could not have been displayed any want of power, as she was aided by the schooner under sail, in a breeze which could have carried her to sea without any aid of steam power. It must be noted that the schooner did not merely touch bottom in the channel, as vessels often do, and pass on. She struck a shoal outside of the channel. From the configuration of the bottom at that point this shoal descended abruptly to the channel, forming so to speak a bluff under water. When the schooner stranded on this shoal, the tug could not pull her off. And if she could have done so under ordinary circumstances, the master of the schooner made it impossible by hauling down his mainsail. The towage services ended at this juncture. If the tug had rendered any other service it would have been in the nature of salvage. No fault can be imputed to the tug.

The libel is dismissed.

THE JULIA.

BUTLER et al. v. THE JULIA.

SIX OTHER LIBELS v. SAME.

(District Court, E. D. South Carolina. July 12, 1893.)

1. MARITIME LIENS—PRIORITY—ORDER OF BRINGING SUIT IMMATERIAL.
The priority of maritime liens is determined according to their nature, and not according to the order in which suits are brought to enforce them.

2. ADMIRALTY—PRACTICE—INTERVENING LIBELS—ADVERTISEMENT.
When a vessel libeled by a material man has been taken possession of by the court, and advertisement has been made, other material men may

intervene by libel praying warrants of arrest in order to detain the property in case security be given for its release, but in such case further advertisement is unnecessary.

3. MARITIME LIENS — UNDER GEN. ST. S. C. § 2389 — DISTRIBUTION — SPECIAL PRIVILEGE TO LABORERS.
Under Gen. St. S. C. § 2389, etc., providing that, where the proceeds of a sale are insufficient to satisfy the claims of certain lien creditors, labor shall have a percentage one-third greater than material men, only laborers are entitled to such increased percentage. The privilege does not extend to money paid by a material man for labor in putting in materials.

4. ADMIRALTY—PROCTORS' COSTS.
Where a vessel is libeled by material men, and thereafter other material men file libels in the nature of interventions to be perfected if the vessel is released, otherwise to operate on the balance of the proceeds of the sale, proctors' costs should not be allowed on such subsequent suits.

In Admiralty. Libels by S. B. Butler, John F. Riley, William Johnson & Co., John Conroy & Co., the Steinmyer Lumber Company, Frederick Drews, and others against the steamer Julia for seamen's wages, and for materials. The vessel was sold, and seamen's wages and costs paid. Heard on exceptions by Butler and Riley to the master's report. Exceptions overruled.

C. B. Northrop, for exceptors.

SIMONTON, District Judge. This case comes up on exceptions to the report of the special master.

The steamer Julia was engaged in trading between the city of Charleston and the adjacent waters, carrying freight. She was libeled and arrested at the suit for wages of certain of her crew. She was also libeled by two material men, S. B. Butler and John F. Riley, in separate libels, on each of which a warrant of arrest was issued. The same proctor represented the crew and these two material men, and, in advertising the warrant of arrest under admiralty rule No. 9, he inserted the libels of the latter also. A number of libels were then filed by material men, in each of which warrants of arrest were issued, but in no instance were any of these followed by publication. This is the home port of the Julia. The material men claim under a statute of the state of South Carolina, Gen. St. § 2389 et seq. This statute gives a lien to any person for labor performed, materials used, or labor and materials furnished in the construction of vessels, or for provisions, stores, or other articles furnished for or on account of any ship or vessel in this state, the lien to be next to seamen's wages. If the claims be held by more than one person, they are marshaled, and the proceeds of sale distributed without preference. If these proceeds be insufficient, the distribution is pro rata, except that labor shall have a percentage one-third greater than material men.

The Julia has been sold under order of this court in the libels for wages. After paying the wages and costs, the proceeds are largely insufficient to pay all the material men. The master has reported a taxation of the costs to be paid, allowing each material man proctors' costs. The remainder, he reports, should be distributed

pro rata. One of the libelants, Riley, is a master mechanic. In his bill for repairs he itemizes and charges so much for labor and so much for materials.

Butler and Riley except to the report. Both claim priority over all other material men, because they filed the first libels; because, also, they were the only libelants who advertised; and Riley insists that the master was wrong in not recognizing the preference claimed for the labor items in his bill.

No question has been made as to the constitutionality of the South Carolina statute. That question has not been considered, and is not now decided.

The first question is, have the material men who filed the first libels secured thereby priority of payment out of the proceeds in the hands of the court? This, as we have seen, is the home port of the Julia. But for the state statute these libelants would have no lien, (The Young Mechanic, 2 Curt. 405;) and the nature and extent of the lien is measured by the state statute, (The Mary Gratwick, 2 Sawy. 344.) It would seem, therefore, that if the state statute which creates the lien gives it to all material men alike, and puts them on an equal footing, this court, administering the lien, would do likewise. It is insisted, however, that, although the state statute creates the liens, when they come into this court they are treated and enforced as maritime liens, and that, with regard to maritime liens, the preference is under the rule prior petens,—first come, first served. There is respectable authority for this with regard to maritime liens. Ben. Adm. § 560; Cohen Adm. p. 197. But these writers are overruled by authority, as well as by reason. They do not state the law correctly. The true doctrine is that liens like these have equal rank, are not affected by the order in which the suits were brought, and share pro rata. The J. W. Tucker, 20 Fed. Rep. 129, in which all the cases are quoted and the rule stated; The Arcturus, 18 Fed. Rep. 743; The Grapeshot, 22 Fed. Rep. 123; Vandewater v. Mills, 19 How. 82. And Mr. Henry, in his Admiralty Jurisdiction, shows that this is the true doctrine. Indeed, the rule cannot be otherwise. A maritime lien is jus in re; a right in property in the res, enforceable against all the world. The suit in admiralty enforces this lien, which does not owe its origin to, or its existence because of, the suit, and therefore does not take rank from the suit. In this it differs from liens created by attachment. "Incumbrances created by attachment must take rank, in the absence of positive provisions of law to the contrary, according to the dates of such attachments; but incumbrances created by maritime liens are marshaled according to the causes from which such liens spring; that is, they subsist and bind the property, not in virtue of the legal process used to enforce them, but by operation of the law which creates them, and fixes them on the property the moment the debts are incurred." The Young Mechanic, 2 Curt. 413.

The next question is, are the other material men in court, none of them having advertised? The reason for the advertisement is

plain. In order to give the court complete jurisdiction, so that a decree for sale will secure clear title, the notice is given to all the world. In the present case the court took possession of the res, and this advertisement was necessary. Having been made, the jurisdiction was complete. No further advertisement was necessary,—indeed, we may say, would have been proper,—unless the claimant had under the first libels given security, and released the vessel. The libels filed after her arrest and the advertisement were interventions. They do not demand the redelivery of the vessel, and seek only the payment of a claim in the ultimate disposition of the case. The Two Marys, 12 Fed. Rep. 152. They were properly in the form of a libel, and properly prayed warrant of arrest, and as properly the warrants were in the hands of the marshal, not, however, to be acted upon immediately, but "for the purpose of securing the further detention of the property in case security be given for its release, under Act March 3, 1847, c. 55; or, in the event of its discharge from arrest in the mean time for the purpose of having it again arrested to answer this new demand." 2 Conk. Adm. 540.

The next question is as to the claim set up by Riley for increased percentage for his items of labor. Riley is a contractor, and in making out his bill, and in ascertaining its total, he charges in the sums paid by him for the labor in putting in the materials. The state statute gives the lien to any person, for labor performed, for materials used, or for labor and materials furnished. This clearly distinguishes the three classes,—the laborer, the party furnishing the materials to be used, and the person furnishing labor and materials. The increased percentage is given to those having liens in the first class, for labor; that is to say, the laborer.

The exceptions are overruled.

The special master has allowed costs of proctors in all the cases. With the exception of the claims of Butler and Riley, the subsequent proceedings were all interventions, inchoate suits, to be perfected in case the Julia was released, and if she be not released, but sold, then to operate upon the balance of the proceeds of sale. The parties themselves show their own construction of their action. No decree by default was taken in any case. They went at once into marshaling the remainder of the proceeds. No proctors' costs are allowed in the cases reported, except in the Butler and Riley claims.

Let the case go back to the special master, for the purpose of restating the division in accordance with this opinion.

MILBURN v. THIRTY-FIVE THOUSAND BOXES OF ORANGES AND LEMONS et al.

(Circuit Court of Appeals, Second Circuit. August 1, 1893.

1. DEMURRAGE—DELAY BY CONSIGNEE—CUSTOM OF PORT—COMMERCIAL USAGE.
In a charter party the words "to discharge with customary dispatch, * * * cargo to be * * * discharged according to the custom of the

port," do not include a custom whereby all cargoes of fruit are sold at auction by one firm, not more than one cargo being sold in one day, and no cargo being discharged until it has been thus sold, since such custom manifestly has its origin in the sale, and not in the discharging, of cargoes; and for demurrage caused by such a custom the cargo is liable.

2. SAME—LIQUIDATED DAMAGES.

Where a charter party provides for demurrage at a stipulated rate per day, payable day by day, and the master makes daily demand for the amount due, interest from the time of such demand should be included in an allowance for demurrage.

Appeal from the District Court of the United States for the Eastern District of New York.

In Admiralty. Libel by John D. Milburn, owner of the steamship Tiverton, against 35,000 boxes of oranges and lemons, Phelps Bros. & Co., claimants, for demurrage. The district court rendered a decree for libelant, but disallowed a claim for interest. Both parties appeal. Reversed.

Statement by LACOMBE, Circuit Judge:

The Tiverton, a British steamship, was chartered to the claimant's Liverpool firm, to carry a cargo of green fruit and other lawful merchandise from Mediterranean ports to New York, by a charter party dated October 16, 1890. The following provisions of the charter are relevant: "To discharge at charterers' covered wharf, * * * and there deliver the same, agreeably to bills of lading, and so end the voyage." "To discharge with customary dispatch." "The cargo * * * to be stowed and discharged according to the customs of the ports." "And shall pay demurrage at the rate of thirty pounds sterling per day, to be paid day by day, for each and every day said steamer is detained over the said time, as hereinbefore stated." "To be consigned at port of discharge to Messrs. Phelps Brothers & Co." A cargo consisting almost entirely of oranges and lemons was loaded aboard at Mediterranean ports, and bills of lading issued therefor, whereby, among other things, it was agreed: "Simultaneously with the ship being ready to unload, * * * the consignee of said goods is hereby bound to be ready to receive the same from the ship's side, * * * and, in default thereof, the master or agent of the ship * * * are hereby authorized to enter the said goods, * * * and land, warehouse, or place them in lighter, without notice to, and at the risk and expense of, the said consignee," etc.

The Tiverton arrived at New York on December 29th and notified Phelps Bros. & Co. the next day of her readiness to discharge. She was duly entered at the customhouse, and permits for discharge issued. The charterers thereupon ordered her to their Mediterranean piers, Brooklyn, where she was duly berthed at 3 P. M., December 30, 1890, on the south side of the northerly one of the two covered piers owned by the charterers, and was unobstructed. There was no other vessel on the opposite or northerly side of the pier where the Tiverton lay, but the steamer Thomas Melville lay at the southerly side of the charterers' southerly pier. The charterers assigned their regular stevedore to the discharge of the fruit, and he was present when the steamer was docked. Both of these piers were covered, and steamers lying at either had equal advantages for discharge, simultaneously, and without interfering with each other. By the custom of the port, January 1st was a holiday. The temperature was proper for the discharge of green fruit on January 2d and 3d, and the steamer Thomas Melville was discharged on those days. Although the Tiverton had equal facilities, and was in all respects ready to discharge, her cargo was left aboard, and received no attention. The weather after Saturday, January 3d, became cold, and the discharge of the Tiverton was not completed until January 13th, or nine days after the discharge of the Thomas Melville. During the winter fruit cargoes are discharged only when the thermometer indicates 28 degrees F., or over. Proof was made upon the trial of a custom in the fruit trade at this port,

which has existed for many years. All such cargoes are sold at auction, and by a single firm of auctioneers. As soon as the steamer arrives at Sandy Hook, the consignee reports her at the auctioneer's store, where a list is kept, and they put down the hour and minute of arrival. During the summer vessels discharge irrespective of the list. In the winter, however, a day is set for each vessel in turn. If when that day comes the thermometer indicates 28 degrees, the auctioneers sell the cargo of the vessel to which that day was assigned, the sale beginning at noon. Discharge commences in the morning of the day of sale, and proceeds, weather permitting, till completed. No other cargo is sold on that day. If the next day is favorable, the cargo of the next vessel is sold, whether the discharge of the one sold the day before is completed or not. No sales, however, are made on Saturday. By this method the consignee of the fruit turns it over from the ship to the buyer, without himself warehousing it. The ship holds it till a purchaser is found, acting as a temporary warehouse meanwhile, and the purchaser is not found, or even sought for, till the day comes, when the auctioneers, having at their convenience sold all earlier cargoes, one a day, are prepared to offer this one on the open market. The only reason why discharge of the Tiverton was not begun on January 2d was because the cargo of the Melville, which had arrived earlier, was offered for sale on that day. The only reason why discharge was not begun January 3d was because fruit cargoes are not sold on Saturdays.

The libelant filed his libel for demurrage at the charter rate of $150 per day for detention, making in all the sum of $1,350. Interest thereon was disallowed by the district court, and a partial appeal against such disallowance was taken by the libelant. The claimant has appealed from the decree in favor of the libelant.

Wm. H. Cochran, for appellant.

E. B. Convers, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge, (after stating the facts.) There is no question of fact in this case. The existence of the custom set up in defense is conceded, and the only point to be decided is whether it is imported into the contract between the parties by the language they have used. The learned district judge did not discuss this point in the brief memorandum he filed with his decision. He had precisely the same custom before him, however, in the case of Steam Co v. Suitter, 17 Fed. Rep. 698, and there held that the existence of such usage of trade did not affect the right of the shipowner to insist upon reasonable promptness in discharging; that it was "unreasonable, and contrary to public policy, to permit the time of discharging a ship of her cargo to depend upon the ability of a single auction house, in the accumulation of business and of other engagements, to effect a sale of such cargo for the owners thereof." The question whether a clause in the charter party providing for "discharge with customary dispatch" was affected by a substantially similar custom at the port of New Orleans, where it was the practice of fruit dealers to receive their fruit from the vessels no faster than they could sell it at the wharves, was also carefully considered by the district and circuit courts in the eastern district of Louisiana. Lindsay v. Cusimano, 10 Fed. Rep. 302, 12 Fed. Rep. 503, 505. It was therein held as follows:

"The obligations of the owners and charterers, where the charter party is silent as to time to be occupied in discharging, are reciprocal; each shall

use 'reasonable dispatch.' This obligation is here qualified by changing 'reasonable' into 'customary' dispatch. This enlarges the source of delay, and makes it include all those usages at the port of delivery which the carrier cannot control,—such as the working hours, the order in which vessels must come up to the wharf, the observance of holidays, the allowance of three days to obtain a berth, provided one cannot be sooner obtained; but here their force stops. They cannot be held to include any delay which is purely voluntary on the part of the charterers, although such delay is customary in the fruit trade. The phrase must be confined in its meaning to excuse the parties for want of opportunity by reason of the custom prevailing at the port. This is the substance of the decision in Kearon v. Pearson, 7 Hurl. & N. 386. There the question was as to the meaning of the words 'usual dispatch' as applied to loading. Martin, B., before whom the case was tried, whose ruling was affirmed by all the judges, says, page 387: 'They meant that the vessel should be loaded with the usual dispatch of persons who have a cargo ready at Liverpool for loading.' Here these words 'customary dispatch' meant the usual dispatch of persons who are ready to receive a cargo, and exclude all customs in accordance with which these charterers might claim the right to decline to receive, simply because it was more advantageous to postpone. * * * Delivery should take place with dispatch, limited or qualified by the customs prevailing at the port of delivery, which created barriers not under the control of the party who here urges them." 10 Fed. Rep. 303.

The distinction thus pointed out is a sound one. The custom here set up to sell only one fruit cargo a day, and none on Saturdays, is not an outgrowth of the business of discharging ships, but rather of the business of selling their cargoes. It is manifestly intended to prevent a glut in the market, to keep up prices by holding back newly-arrived fruit till the earlier arrivals have been absorbed by the consumer. It does not interfere with a discharge of the ship, as did the customs as to hours and times of labor, as to routine of access to a single elevator, as to a second change of berth,—which have been held applicable in the cases cited by the appellant. The consignee could have discharged this cargo in seasonable weather on January 2d and 3d, removed it from the dock and warehoused it; and, when the only excuse he gives for not doing so is that, by the custom of his trade, he could not sell it in the ordinary way to consumers until other fruit had been first so sold, he may not turn the ship into a temporary warehouse to hold his goods until he finds a market for them. We do not determine whether the custom of selling fruit by a single firm of auctioneers, and in restricted quantities, which seems to have existed many years, is or is not reasonable, but do hold it is not the kind of custom which the use of the phrase "customary dispatch in discharging" imports into the contract of affreightment between the parties, being concerned, not with the business of discharging, but with the business of selling, and not creating any impediment to a discharge with dispatch, which the charterer would not have overcome by the use of mere ordinary diligence.

Inasmuch as the charter party contains an express agreement to pay demurrage at the rate above named "in case the steamer is detained over the said time, as above stated," and the steamer was detained nine days over the time agreed upon for unloading, viz. such time as would be required for discharge with customary dis-

patch, the district court correctly awarded demurrage to the libelant.

Such award, however, was without interest, and the refusal to allow it is assigned as error by the libelant. Upon this point the decisions of the eastern and of the southern districts of New York are not harmonious. The Alexandria, 10 Ben. 101; Johanssen v. The Eloina, 4 Fed. Rep. 573; The J. A. Dumont, 34 Fed. Rep. 428. It is unnecessary to add anything to the discussion of the subject contained in those opinions. The amount of the demurrage is liquidated by the contract. Claimants stipulated to pay it day by day, in case they detained the vessel beyond the stipulated time. It was their duty to pay it when they so detained her, and to pay it day by day for each day of such detention, as they contracted to do. The master of the Tiverton demanded daily the amount due. In similar cases interest follows recovery, and there is no adequate reason why demurrage should be subject to any different rule.

The decree of the district court is reversed, and cause remanded, with instructions to decree in favor of the libelant for demurrage, as found by said court, with interest thereon from date of demand, and costs of the district court and of this court.

In re MYERS EXCURSION & NAVIGATION CO.

(District Court, E. D. New York. July 7, 1893.)

1. SHIPPING—LIMITATION OF LIABILITY—EXCURSION BARGE.
   A barge without motive power, which is used for transporting excursion parties on New York harbor and adjacent waters, is within the limited liability acts of the United States.
2. SAME—BARGE WITHOUT MOTIVE POWER — MAY BE SURRENDERED WITHOUT TUG.
   A barge without motive power, which is used for carrying excursion parties about New York harbor and adjacent waters, may be surrendered by her owners, under the limited liability acts of the United States, without the surrender of the tug towing the barge at the time of the loss, though the tug belongs to the same owners.
3. SAME—UNSEAWORTHINESS — CAPACITY TO WITHSTAND STORMS OF ORDINARY VIOLENCE.
   A barge used to carry excursion parties on New York harbor and neighboring waters is unseaworthy when not in a condition to withstand without serious injury to her passengers the violent thunderstorms which are of frequent occurrence in that locality.
4. SAME—OWNERS CHARGED WITH KNOWLEDGE—LIMITATION OF LIABILITY.
   Where the unseaworthy condition of an excursion barge would be shown by a proper examination, her owners are charged with knowledge thereof, and any injury to passengers resulting therefrom is not without the "privity or knowledge" of the owners so as to entitle them to the benefit of the limited liability acts of the United States.

In Admiralty. In the matter of the petition of the Myers Excursion & Navigation Company for limitation of liability as owners of the barge Republic. Petition dismissed.

Wing, Shoudy & Putnam, for petitioner.

Raphael J. Moses, Jr., Fernando Solinger, and George W. Cottrell, for respondents.