

in equity or admiralty a docket fee of \$20 may be allowed. Costs in the admiralty are wholly within the control of the court, and are allowed or denied upon equitable considerations. They are sometimes denied to one who recovers his demand, and are sometimes given to a libellant who fails to recover anything, if he was led to commence suit by the act of the other party; and in prize and salvage cases the property is sometimes acquitted on payment of the costs by the claimant. The general rule is that costs follow decree, but circumstances of equity, of hardship, of oppression, or of negligence induce the court to depart from the rule in many cases. Ben. Adm. § 549. The court below manifestly proceeded upon the ground that each party was absolutely entitled to the statutory docket fee, and seems not to have exercised its discretion in the matter. We think it would be oppressive in this case to sustain this allowance of docket fees. The total damages awarded amount to about \$2,700, and the total proctors' fees to \$800, or nearly 30 per cent. of the total damages. To sustain such taxation is to sanction the filing of separate claims and demands which could be, and should properly be, united, and when, as in this case, the cause of action of each claimant is proven by the same witnesses in single depositions. These parties all appeared by the same attorneys. The causes in fact proceeded as one, and were covered by one final decree. That separate claims were filed, when they could have been and ought to have been presented in one claim, might warrant the suspicion that this unnecessary procedure was taken to improperly multiply the costs taxable in the suit. We think that the court below was in error in allowing more than one proctor's fee upon final decree for the claimants.

It is objected that the clerk improperly taxed an item of \$27.29 for receiving, keeping, and paying out the amount awarded the claimants, when that amount had not been paid to the clerk, and that the same is not properly taxable until the clerk has at least received the amount. This objection may be well taken, but it was not specified in the motion to retax costs, nor in the assignment of errors, and cannot therefore be considered. The decree will be reversed and the cause remanded, with directions to the court below to enter a decree for the damages heretofore found, and for proper costs, which shall include but one proctor's fee of \$20.

THE WESTOVER.

LOGEMANN et al. v. THE WESTOVER.

(District Court, E. D. Wisconsin. August 20, 1896.)

MARITIME LIENS—STATE STATUTES.

Liens created by state statutes for repairs or supplies to a vessel at her home port merely operate to render rebuttable the presumption imposed by maritime law that credit is given to the owner personally. This lien is not implied, but must rest upon a mutual contract which contemplates a credit upon the res. Express terms to that effect are not in all cases essential, but may be implied, when clearly pointed out by circumstances.

This is a libel in rem for a boiler and other repairs furnished at the home port of the steamer, and heard upon exceptions filed by the claimant.

The grounds of exception are insufficiency of facts stated to constitute a lien or confer jurisdiction. The substance of the allegations in question is as follows: The steamer Westover is a vessel of over 10 tons burden, "duly licensed and enrolled, and employed in the business of commerce and navigation upon the lakes and navigable waters of the United States," and lying at and "hailing from the port of Milwaukee," in this district. The libelants, Logemann Bros., are machinists and boiler makers at Milwaukee, and upon request of one H. J. Pauly, who represented himself "to be the real owner of the said steamer Westover, and to all intents and purposes the ostensible owner of said steamer," for which a marine boiler was required, and in the belief that such representations were true, made a written proposal, dated January 31, 1895, addressed to said H. J. Pauly, to build for him a marine boiler and fittings and fixtures described, to be delivered on the street at their shop by April 1, 1895, "for \$2,400 balance, and your [his] 2 horizontal rigs of engines and boilers; payable \$800 April 15, '95, \$800 Oct. 15, '95, \$800 April 15, '96." This was accepted by a letter to them of the same date, and signed "H. J. P." Neither letter mentions the steamer Westover, nor the purpose of the work. Delivery was made about June 1, 1895, in accordance with extension of time, at the place stated, "to be placed on board said steamer," and the boiler was subsequently so placed. The property to be received in exchange was delivered, but no money has been paid. The libelants further performed extra work, in May, 1895, and September, 1895, about the construction of the boiler of said steamer, at the request of the owner, to the amount of \$826.17; also unpaid. It is further alleged that the libelants, at the time of making the contract and performing the work, believed the representations of H. J. Pauly that he was the owner of the steamer, but that the fact is that his father, John H. Pauly (who now appears as claimant), was and is the owner, and said H. J. Pauly was his duly-authorized agent in ordering the said repairs; that the libelants furnished the boiler and all the work "with the understanding that the same was to be placed in and on board said steamer"; that all the same was necessary to make the vessel seaworthy, and enable her to engage in commerce and navigation; that in such performance libelants "relied upon the credit of H. J. Pauly," supposing his representations of ownership to be true, and would not have given him credit except as actual owner; but that no exclusive credit was given to him as such supposed owner; but "these libelants relied as well upon the credit of said steamer Westover"; and all the work was furnished "both upon the credit of said steamer Westover, which received the benefit of said work, as well as upon the credit of her actual owner." Thereupon a lien is asserted under section 3348 of the Revised Statutes of Wisconsin. The claim and exceptions are filed by said John H. Pauly, as sole owner of the steamer, and there are no other claimants or interveners.

M. C. Krause, for libelants.

Van Dyke, Van Dyke & Carter, for claimant.

SEAMAN, District Judge (after stating the facts as above). The facts stated in this libel would clearly present a case for personal recovery against the owner at common law. Whether they are sufficient—aside from technical objections which may be cured by amendment—to sustain a libel in rem is a question of considerable interest, and in some of its features not directly met by any of the authorities which have come to my attention. It relates solely to the existence of a lien attaching to the res or vessel itself, and not to the interest of any particular owners. It is also squarely raised between the material man and the owner as contracting parties, and

is, therefore, relieved of any question of injury to third parties through a secret lien, or of the creation of a lien for supplies ordered by a charterer, as discussed instructively in several recent cases. The maritime lien or privilege for services, repairs, and supplies furnished to a vessel is founded upon the fact of their necessity for the prosecution of her voyage or service, and upon the presumption that they cannot be obtained on the personal credit of the owner, when remote from his residence, and that they are furnished upon the credit of the vessel. Therefore the doctrine is established in the admiralty law that the privilege is applicable only for such services or supplies furnished at foreign ports, and that no maritime lien exists when they are furnished at the home port of the vessel, as the law then infers the presence of the owner, and that credit is given upon his ordinary responsibility. *The St. Jago de Cuba*, 9 Wheat. 409; *The Lottawana*, 21 Wall. 558. But it is also well settled that liens upon vessels may be created by state legislation, so long as congress does not interpose to regulate the subject, their enforcement being exclusively in the admiralty jurisdiction of the courts of the United States, and through this method liens declared by a state statute for repairs or supplies to a vessel at her home port obtain recognition in the admiralty. *The Lottawana*, supra; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498; *The Samuel Marshall*, 6 U. S. App. 389, 4 C. C. A. 385, and 54 Fed. 396; *The Electron*, 74 Fed. 689. This enforcement is, however, strictly limited to contracts or claims which are clearly maritime. There must be presented all the "characteristics of a maritime lien," which include the indispensable requirement that the supplies were furnished on the credit of the vessel. *The Samuel Marshall*, 6 U. S. App. 389, 4 C. C. A. 385, and 54 Fed. 396; *Lighters Nos. 27 and 28*, 15 U. S. App. 236, 6 C. C. A. 493, and 57 Fed. 664; *The Electron*, supra. The Wisconsin statute in this regard (section 3348, Rev. St.) declares the liability of every vessel "navigating the waters of this state" for "debts contracted by the master, owner, agent or consignee thereof * * * on account of labor done, or materials furnished * * * for * * * repairing, fitting out, * * * or equipping such ship, boat or vessel." The libel is defective, as it does not show that the steamer "is used in navigating the waters of this state," which is essential to invoke the application of the statute (*The Galena v. Beals*, 5 Wis. 91; *The James H. Prentice*, 36 Fed. 777), but this defect may be obviated by amendment. The objection is also urged that there is no allegation that the debt was contracted "on account of labor done or materials furnished" in and for the vessel, as demanded by the statute. It is true that the contract under which the boiler was made does not refer to the vessel, and provides for its delivery on land, and not on the vessel, which might raise a further question under this point were it not for the other claims clearly within the statutory description. But all the exceptions are general, and do not, therefore, present these objections.

The inquiry of main importance is this: Are facts stated in the libel which show a contract clearly made upon the credit of the vessel? The fact of such credit as foundation for the claim

is indispensable for its enforcement as a lien in admiralty, under the authorities above cited and the general current of later decisions. It must be a credit to the thing,—the res,—and not merely a credit to the owner because of his interest in the res. As the maritime law imposes the presumption that credit is given to the owner personally when present at a foreign port, and always at the home port, and as the statute operates to create a lien which is enforceable only according to the rules of admiralty, the effect is to make that presumption rebuttable, and thus place the domestic lien upon an equal footing with foreign liens, if the credit is so given in fact. This lien is not implied, but must rest upon a mutual contract which contemplates a credit upon the res. I am of opinion, however, that this understanding may be implied where it is clearly pointed out by circumstances, and that express terms to that effect in the contract are not in all cases essential to a lien, as counsel for claimant contends, and some of the authorities seem to indicate. In *The Kalorama*, 10 Wall. 204, it is declared that the presence of the owner will not destroy such credit to the vessel as may be necessary; and that agreement for such credit may be implied. See, also, *The James Guy*, 1 Ben. 112, Fed. Cas. No. 7,195, affirmed 5 Blatchf. 496, Fed. Cas. No. 7,196, and 9 Wall. 758; *The Eclipse*, 3 Biss. 99, Fed. Cas. No. 4,268; *The Robertson*, 8 Biss. 180, Fed. Cas. No. 11,923. I find no substantial fact alleged in this libel tending to show that the credit of the boat was contemplated by the parties in their contract, unless it can be implied from the representations by the agent of his ownership; and, in the absence of circumstances or statements pointing in that direction, such fact may be equally consistent with a personal credit out of reliance upon such interest. Indeed, the latter inference is strongly suggested by the other allegations. Clearly, this fact alone is insufficient to overcome the presumptions raised by the maritime law, supplemented by the silence of the written contract. The statement that the libelants intended and gave credit to the vessel is their mere conclusion is one-sided, and is of no value for determining what was the contract. As remarked in *The Columbus*, 14 C. C. A. 524, 67 Fed. 555, referring to a similar allegation: "The material inquiry is, not whether the libellant himself may have contemplated a claim of lien, but whether a lien was created by or resulted from the mutual understanding of the parties, and the services rendered in pursuance of it."

I am therefore constrained to sustain the exceptions. The meritorious character of the claim as presented, aside from these technical features, cannot be allowed to establish a lien contrary to the settled requirements of maritime law. But, as there may be facts not stated through which the lien may be preserved, leave will be given to amend within 20 days, if so advised; otherwise the libel to stand dismissed, without costs.

THIRD NAT. BANK OF PITTSBURG v. MYLIN, Auditor General, et al.
(Circuit Court, E. D. Pennsylvania. September 4, 1896.)

No. 12, September Term, 1896.

FEDERAL JURISDICTION—STATE TAXATION OF NATIONAL BANK STOCK—INJUNCTION.

A federal court has jurisdiction of a suit to enjoin state taxing officers from enforcing collection of a tax upon shares of stock in a national bank, where the protection sought is based upon the ground that the state statute under which such officers are proceeding in making their assessment is in violation of the fourteenth amendment to the constitution, and of Rev. St. § 5219.

Bill in equity by the Third National Bank of Pittsburg against Amos H. Mylin, auditor general, and Samuel M. Jackson, treasurer, of the commonwealth of Pennsylvania. Defendants interposed a plea to the jurisdiction of the court.

The Third National Bank of Pittsburg was organized June 3, 1864. Amos H. Mylin, auditor general, and Samuel M. Jackson, treasurer, of Pennsylvania, under the provisions of the act of June 8, 1891 (P. L. 242), of the general assembly of the state, demanded from the bank a report of the actual market value of its stock, for the purpose of assessing same for the state tax for the year ending June 20, 1895. The bank reported the value as \$125 per share. Defendants increased it to \$144.60 per share, assessed four mills tax, and notified the bank to pay the same within 30 days under the penalty provided in the act. The bank brought suit, praying that defendants be enjoined from collecting the tax, and that the assessment be declared illegal and void. Defendants filed a plea to the jurisdiction, averring, in substance, that "these proceedings make, form, and constitute an interference with the policy of the revenue laws of the commonwealth of Pennsylvania," and that under the act of 13th of March, 1811 (P. L. 145), the plaintiff has a remedy in the court of Dauphin county at Harrisburg. To this plea the bank filed a replication taking issue, and upon this only was the case argued.

John Wilson and Wm. M. Hall, Jr., for complainant.

John P. Elkin and Henry C. McCormick, for defendants.

ACHESON, Circuit Judge. It is hardly necessary to say that the merits of this controversy are not now to be considered. The plea goes only to the jurisdiction of the court. In disposing of it little need be said beyond a mere reference to some authorities, which, I think, are decisive against the plea. Undoubtedly the suit arises under the constitution and laws of the United States, for the plaintiff's alleged rights for which protection is here sought are based upon the fourteenth amendment to the constitution, and upon section 5219 of the Revised Statutes of the United States.¹ The construction and application of both are involved here. Most stress is laid upon the objection that this suit is really against the state of Pennsylvania, while

¹ Rev. St. U. S. § 5219, referred to in the opinion, provides that the legislature of any state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere.