

to inspect continually, it seems more reasonable to rest his liability for whatever injury may be done upon the mistake he made in preparing the compartment for the voyage. There is some force, I think, in the suggestion that such a mistake cannot properly be called a fault or error in navigation or management that had not then been begun. It might, perhaps, be said that the law regards such a mistake as repeated during every moment of the voyage; but I think this would be a subtlety of legal fiction, not necessary for the accomplishment of justice. It is no doubt true that it is not always easy to draw a line between defects that may properly be said to constitute unseaworthiness, and omissions or acts that may be more properly described as faults or errors of navigation or management. Failure to provide a compass, for example, might fall into either class; and so with other instances that might be specified. But this would only be to say again, what courts are continually saying, that no rule could be laid down for all cases, and for that reason I should prefer to confine my attention to the particular question before the court in a given case.

While the foregoing is perhaps a sufficient indication of the reasons that appeal to my judgment in behalf of the disputed conclusion, nevertheless I must admit that further consideration has convinced me that I am not at liberty to allow them to control the decision. Some of the cases cited by the respondent can be distinguished without difficulty, and some are not of binding authority; but I am unable to avoid the effect of the decision in *The Sylvia*, 171 U. S. 462, 19 Sup. Ct. 7. I am afraid that I somewhat more than half shut my eyes to the facts of that case. They are strikingly like the facts in the present controversy; so like, indeed, that I feel myself bound to accept the conclusions drawn from them by the supreme court. I obey the authority of that tribunal, therefore, and now hold that the condition of the porthole when the *Indiana* left Liverpool did not render the vessel unseaworthy. It follows that failure to close the port was a fault or error in management, committed during the voyage, and that the act of 1893 relieves the respondent from liability for such a fault. A decree will be entered dismissing the libel, with costs.

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#### THE EVANGELA

(District Court, D. Washington, N. D. May 26, 1899.)

##### 1. MARITIME LIENS—MONEY SUPPLIED TO VESSEL.

The maritime law gives a lien for money supplied for the use of a ship and necessary to enable her to proceed on her voyage similar in all its essential features to maritime liens for other kinds of necessary supplies.<sup>1</sup>

##### 2. SAME—EFFECT OF SALE OF VESSEL IN ADMIRALTY.

All liens upon a vessel, whether impressed by general maritime law or local statutes, or created by bonds or mortgages, are completely and finally extinguished by a sale of the vessel pursuant to an admiralty decree in rem, and no lien for a pre-existing debt can thereafter be created or re-

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<sup>1</sup> For maritime liens for supplies and services, see note to *The George Du-mois*, 15 C. C. A. 679.

vived, so as to become enforceable against the fund produced by the sale, to the exclusion of creditors whose liens were fixed before the sale.<sup>2</sup>

3. SAME—SURETY ON RELEASE BOND—SUBROGATION.

The effect of a bond given for the release of a vessel after its seizure by a court of admiralty in a suit in rem is to extinguish the lien of the libellant on the vessel, and a surety on such bond who pays the claim of the libellant after the vessel has been sold in subsequent proceedings to enforce other liens does not by such payment become subrogated to any right in the fund produced by the sale.

In Admiralty.

The steamer *Evangel* having been sold under a decree in admiralty to satisfy maritime liens, and said liens having been paid from the proceeds of the sale without exhausting the fund, the case came on to be heard upon questions as to the disposition to be made of the surplus and remnants.

Will H. Morris, for intervener United States Fidelity & Guaranty Co.

Morris B. Sachs, for intervener First Nat. Bank of Port Townsend.  
A. W. Buddress, for interveners Fowler and Katz.

HANFORD, District Judge. This is a suit in rem, against the steamer *Evangel*, to enforce a maritime lien for wages. The steamer, having been arrested under a writ of attachment according to the usual course in such cases, was released upon a bond given pursuant to section 941, Rev. St. U. S.; the United States Fidelity & Guaranty Company, one of the above-named interveners, being the sole surety upon said bond. After being so released, she was retaken by the marshal under other writs sued out by intervening libellants claiming to have liens for wages and for supplies and materials furnished, and, after being released in a similar manner the second and third time, and again rearrested under similar process sued out by other intervening libellants, she was, pursuant to a decree of this court, sold to satisfy the demands of the intervening libellants who were adjudged to have valid maritime and statutory liens. The court also rendered a decree against the claimant and said surety company for the amounts adjudged to be due to the original libellant and each of the intervening libellants to whom security was given as above stated. After paying all costs, and the several amounts due to the intervening libellants in whose favor the decree was rendered for sale of the vessel, there remains in the registry of the court a balance of several hundred dollars of the proceeds of the sale to be disbursed. Since the sale of the vessel, the above-named surety company has paid the sums decreed against it in full, aggregating an amount exceeding the balance in the registry, and it is now before the court asking for said balance. The argument made in its behalf is founded upon the theory that, having secured the release of the vessel, and afterwards paying demands which were originally enforceable by process in rem, it is, according to principles of equity, entitled to be subrogated to the rights of the original creditors as lienholders,

<sup>2</sup> For extinguishment of lien by judicial sale, see note to *The Nebraska*, 17 C. C. A. 102.

and to claim the money in the registry in lieu of the liens upon the ship which were displaced by giving the several release bonds above mentioned. Each of the other interveners above named is the owner of a mortgage upon the vessel, given prior to the commencement of this suit, and they claim that the remnant of the fund should be paid to them in satisfaction pro tanto of the debts secured by their mortgages.

Whether or not the equitable doctrine of subrogation has any place in admiralty practice is not a question which must necessarily be decided in this case, because the surety company in whose behalf the doctrine is invoked will not present itself in a more favorable attitude for the purpose of claiming the fund in court, if the doctrine of subrogation shall be applied in this case, than it will otherwise occupy. According to the rule in equity, payment of the debt of another who is primarily liable under force of necessity, or compulsion, is essential to the right of subrogation, and a person, by his own voluntary act in becoming surety for a debtor, does not become subrogated to the rights of the creditor. The only change effected by the giving of the release bonds was to extinguish the creditors' liens upon the ship, and to substitute in place of the ship the personal security of the bonds. Subrogation could only take place when the surety company paid the amounts due to the creditors, and it could only acquire the rights of the creditors existing at the time of the payments; that is, the personal obligation of the signers of the bond.

The maritime law, as understood and administered by the courts in this country, gives a lien for money supplied for the use of a ship and necessary to enable her to proceed upon her voyage. *Thomas v. Osborn*, 19 How. 22-56; *The Grapeshot*, 9 Wall. 129-145. The lien for money advanced is similar in all of its essential features to maritime liens for other kinds of necessary supplies. *Davis v. Child*, Fed. Cas. No. 3,628. However, all liens upon a vessel, of every description, whether impressed by the general maritime law or local statutes, or created by bonds or mortgages, are completely and finally extinguished by a sale of the vessel pursuant to the decree of a court of admiralty in a suit in rem. In this case the rights of the parties now before the court became definitely fixed by the sale of the vessel. After the sale, no lien for a pre-existing debt could be transferred to the surety company, or revived, or enforced. The case may be summarized thus: The fund in court stands in place of the ship. It is insufficient to pay in full the debts for which liens attached to the ship before the sale. Therefore it all belongs to lien creditors. The liens in favor of those creditors who were paid by the surety company were displaced by the release bonds given for that purpose by the surety company. No lien in favor of the surety company for money advanced to pay lien creditors ever attached to the ship, because the money was not advanced until after the ship was sold. The mortgage liens were existing before and at the time of the sale. Therefore the mortgagees are entitled to the balance in the registry.

I have considered the following cases cited by counsel for the surety company: *The Tangier*, Fed. Cas. No. 13,744, *The J. A. Brown*, Fed.

Cas. No. 7,118, and *Carroll v. The T. P. Leathers*, Fed. Cas. No. 2,455. These decisions favor the application of the equitable doctrine of subrogation in admiralty practice, as do many others, but they do not give any countenance to a claim of the right to be subrogated by one who merely aided the owner of a vessel to extinguish liens by becoming a surety, and who did not pay any debt until after all liens for previously existing debts had been completely destroyed by an admiralty sale. The principle which must govern the decision of this case, and the reasons therefor, are concisely and strongly stated in the opinion by Mr. Justice Bradley in the case of *Roberts v. The Huntsville*, Fed. Cas. No. 11,904, and the authority of that case is supported by the decision of Judge Dyer in the case of *The Robertson*, Fed. Cas. No. 11,923, and the decision of Judge Toulmin in *The Madgie*, 31 Fed. 926.

Ordered that the balance in the registry be paid to the above-named mortgagees.

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THE JENNIE MIDDLETON.

(District Court, D. New Jersey. May 23, 1899.)

1. MARITIME LIENS—REPAIRS IN FOREIGN PORT.

Where repairs are made in a foreign port by order of the managing owners, the presumption is against the existence of a maritime lien.<sup>1</sup>

2. SAME—EVIDENCE.

The refusal of the managing owners to pledge their personal credit for repairs does not justify an inference of the existence of a maritime lien, where the repairer agrees to accept payment out of the earnings of the vessel as they accrue.

Joseph H. Brinton, for libelant.

Flanders & Pugh, for claimants.

KIRKPATRICK, District Judge. The libel in this case was filed to recover a balance due for repairs on the schooner *Jennie Middleton* incurred under the following circumstances; In March, 1898, the schooner *Jennie Middleton* was in the yard of the libelants at Camden, N. J., in need of repairs. The captain did not feel authorized to determine the extent of these repairs, and the shipwrights were referred by him to Messrs. Bartlett & Sheppard, of Philadelphia, who were the managing owners of the schooner, for orders respecting the same. Subsequently Mr. Mathis, one of the libelants, and Mr. Bartlett, one of the managing owners, met at the office of Bartlett & Sheppard, and discussed the matter of the extent of the repairs to the schooner, when Mr. Bartlett directed Mr. Mathis to make only such repairs as he might deem necessary. Mr. Mathis then asked if Messrs. Bartlett & Sheppard would personally guaranty the bill for the repairs, to which they replied, "No." It is asserted by Mr. Bartlett and by Mr. G. W. Sheppard, Jr., who was present at the interview, that Bartlett said to Mathis that, if he (Mathis) took the

<sup>1</sup> As to maritime liens for supplies and services, see note to *The George Du-mois*, 15 C. C. A. 679.