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PRIVILEGED DEBTS.

In the case of *Kearsarge*, 2 Curtis' Rep. 423–5, it was decided that the statute of Maine, giving to material men, and mechanics and laborers, a privileged lien on the vessel for their security for materials furnished and labor performed in building or repairing a vessel, did not extend to materials and labor furnished for two vessels, the language of the statute being any vessel, in the singular number. It is obvious that the reason for allowing the privilege, or preference, is the same in one case as the other; and in the District Court it was allowed on this ground: Ware's Rep. 536, 2d edit. The law was considered to be a remedial law, and as such should receive a liberal construction in furtherance of the general policy of the law makers. In the Circuit Court the decree was reversed, and it was held that the statute should receive a strict construction on the ground that the preference given to material men and mechanics operated to the prejudice of the general creditors of the owner. The general principle on which the Circuit Court decided, was affirmed by the Supreme Court in the case of *Vandeventer* vs. *The Yankee Blade*, 19 How. 29, that such lien was to be held to a strict construction in favor of general creditors.

The first inquiry suggested by the question is, whether these privileged liens granted by a State statute are to be considered and

treated as maritime liens. That they are so is not now open to controversy. It has been so often decided by all the maritime courts in the United States, that they may be enforced by a Court of Admiralty, that it seems unnecessary to refer to more than the single case of *Peroux* vs. *Howard*, 7 Pet. 502, in which it was first established by the Supreme Court. Now, it is only on the ground that they are maritime liens that a Court of Admiralty has jurisdiction to enforce them.

The first observation to which the reasoning, both of the Circuit and Supreme Court is open is, that in these privileged maritime liens, the thing itself against which they exist, is considered as a principal debtor, in the old maritime law as *the* principal debtor. They always include a tacit hypothecation of the thing. *Emerigon Contrats a la Grosse*, ch. 12, § 1 and 2. Being privileged, they are preferred to all preceding liens on the thing, (not having a like or superior privilege,) and *a fortiori* to all the personal creditors of the owner. Against the thing, the lien creditors right is a *jus in re*. The general creditors right is personal against the owner. He has a *jus ad rem* against the ship precisely as he has against all the owner's other property. So far as the privileged creditors' materials and labor have contributed to make the ship, it is considered as his property, which he has not parted with until the price is paid, unless he has agreed to trust to the personal credit of the owner: *Domat Lois Civile*, Lib. 3, Tit. 1, § 4, No. 6. In the case of the Rebecca, Ware's Rep. 127, the old law on this subject was fully examined. See also the *Phoebe*, *Ib.* 265, and the *Paragon*, *Ib.* 326. In this view his lien prejudices nobody; he merely reclaims his own, *sa propre chose*, says Domat, as the vendor does when he reclaims or retakes the thing sold for the unpaid price. Such is the general nature of these privileged maritime liens.

But the question in this case was not directly in regard to the nature and quality of the lien. It was when such a lien is given by a State statute, whether the law ought to receive a favorable or a restrictive construction. The quality of the lien is of no other importance than as it has a bearing on this question. The reason given for a restrictive construction is that the preference of the lien

creditor operates to the prejudice of the general creditors of the owner. The authorities relied upon for this interpretation are *Emerigon, Contrat a la Grosse*, Ch. 12; Boulay Paty, Droit Maritime, vol. 1, p. 36; Pardessus, vol. 3, p. 597, 598, and they are entitled to the more consideration as they apply to maritime liens. They satisfactorily show, that by the law of France, liens or privileges are *stricti juris*, and not to be extended by analogy. There can be no privilege without an express law authorizing it, or an express stipulation for one. But in what precise sense French legists are to be understood when they say that privileges are never to be implied or extended, by parity of reason from one creditor to another is, I think, not very clear. The general doctrine is declared on terms sufficiently broad and comprehensive, but a considerable latitude is apparently allowed in the application of it.

We have a somewhat striking instance in Valin. In the Ordonance de la Marine, Liv. 1, Tit. 14, art. 16, there is an enumeration of privileges against a vessel sold after a voyage, with an arrangement of the order of preference. In the first rank are placed the seamen for their wages. 2. Money lent for the necessities of the ship during the voyage. 3. Money lent for the outfit of the ship. 4. Merchant shippers. There are but two cases, says Valin, in which merchant shippers can have a privilege against the vessel. 1st—Where their goods are not delivered by the master. 2d—When they are averaged (damaged) by the fault of the master or mariners. Valin, in his commentary, says: "it does not follow that there are not other privileged creditors not named, nor that these are in the first rank; and he proceeds to name *six* not mentioned in the article:

1. The expenses of justice.
2. The expenses of seizure.
3. The wages of the ship-keeper, both before and after the seizure.
4. Storage of the rigging.
5. Repairs of the sails and rigging, when they have been repaired, because their value is thereby increased.
6. Wharfage.

Shippers, says Valin, whose goods are sold for the necessities of the ship during the voyage, though not named in the article, have a concurrent privilege with those who lend money for the same cause; such a sale is considered as a forced loan.

To the lenders of money for the outfit of the ship, who are placed in the third rank, are to be added boarding-house keepers, who, by order of the master and consent of the owner, have boarded the crew, as well as the vendor, for the price. The privileges of these, says Valin, must rank in this class; because, without these, the ship could not have made the voyage. The insurer, for the same reason, for his premium, if not paid ought to be ranked with the lender on bottomry, before the departure of the ship from her home port. See Em. Ch. 12, section 4; also,

Notwithstanding the comprehensive terms in which the doctrine is expressed by Emerigon, it seems to me very clear that Valin does reason from analogy, and extends the privilege from person to person on the equitable principle of interpreting laws, that where the reason is the same the law is the same. Indeed, it is evident that Emerigon does himself. He says that he was consulted on this question, whether material men who furnished cordage and timber had the same lien as the lender of money to pay for them, and he answered that they had, though it is the lender only that is named in the law. He says it is immaterial whether the money or materials are furnished. This explanation, he says, is not *extensiva* but *intellectiva*: Ch. 12, sect. 4. That is, one stands on the same reason as the other.

I think it may safely be taken for granted that there is no specific law by which boarding-house keepers are made privileged creditors against a vessel, or for allowing a ship-keeper a privilege for his wages, both before and after the seizure. On what ground, then, does Valin concede to these creditors a privilege and place them in the same rank with bottomry holders for money lent for the outfit of the ship, and with material men for repairs? It is because the board of a crew is just as necessary to enable the ship to perform the voyage as the bottomry money or repairs. Why have the expenses of seizure and the keepers' wages privileges

which precede that of the seamen's wages for the last voyage? It is because the services of these creditors were necessary for the preservation of the common pledge for all. It is for the same reason that the lender of money for repairs is preferred to the vender for the price. It is their money that has preserved the ship.

In what sense is Emerigon to be understood when he says that privileges are *stricti juris*, and not to be extended by analogy *de re in rem* nor *de persona in personam?* *New* privileges cannot be created but by law: that is, a new *title or cause* of privilege. But the law having established a title of privilege founded on a general cause or consideration, all persons and all cases that come within the reason of the law are entitled to the privilege. The law, by enumerating certain persons and cases, does not exclude others that come within the reason of the law, from the common privilege, unless such appears to be clearly the intention of the law makers. The cases and persons enumerated are to be considered as named by way of example and not of limitation. This is the rule for the interpretation of such statutes given by Voet ad Pandectas, Lib. 20, No. 26. And that such was the reasoning of Emerigon himself, is we think evident from Ch. 3, Sect. 9, Assurances. The ordonance supposes that the premium will be paid down in ready money, and is therefore not enumerated among privileged debts. But if not, is it thereby excluded? By no means. It is part of the cost of outfit, and, with them, takes its privilege by identity of reason.

The whole of this doctrine of privilege is derived into the laws of Europe from the jurisprudence of Rome; and the general character and principle, the *indoles* of the law, if I may be allowed the expression, will be best understood by remounting to its source, and studying it there. It may not be out of place here to make one observation, which may, perhaps, serve to explain some ambiguities in the language of juris consults on this subject. *Priveligia*, in the Roman law, are of two kinds, privileges, properly so called, and *priveligia creditorum.* There is a broad distinction between them. The first were special favors granted by the sovereign. They owed their origin to positive law, and ordinarily, though not uni-

versally, received a strict construction: *Voet ad Pand.* Lib. 1, 4-16. The second, the privileges of creditors, were principally, but with some exception, deduced by reasoning of the juris consults from the principles of universal law and *natural justice.* They received a favorable construction, and were familiarly extended by analogy *de re ad rem* and *de persona ad personam.*

The subject of the privileges of creditors is treated by the sage, Domat, who has been described as the restorer of reason to the science of jurisprudence, in his *Lois Civiles*, Lib. 3, Tit. 1, sect. 5, under the title of Hypothiques. In his manner of expounding the law there is nothing to indicate that, in his mind, these privileges were odious as infringing the equal rights of others; but he gives to the principle of the law of privilege the same free operation and expansion as to any other remedial and beneficial law, having its foundation in natural justice and public utility. An instance occurs in No. 9 of this section. The text of the digest gives to those, who loan money for the repair of a ship or house, a privilege against the thing for the repayment of the money: Dig. 12, 1, 25; Dig. 42, 5, 26; Dig. 42, 5, 24, 51. So, adds Domat, for a stronger reason is the privilege allowed to the mechanics and laborers by whom the work is done, and Emerigon reasons, as we have seen, in the same way on the same case, though the mechanics are not mentioned in the law.

The general doctrine of the privileges of such creditors rests in the Roman law on one of the first laws of property; that what is mine cannot be transferred to another without my consent. *Id, quod nostrum est, sine nostro facto ad alium transferri non potest:* Dig. 50, 17, 11. This is the general foundation of the law, which applies to the great mass, for the greatest proportion of these privileged creditors. They did not owe their existence to any special law, nor even to a pretorian edict, but were a natural and logical deduction from one of the great laws of property. There are exceptions, it is true, of privilege given by positive law, as the privileges of the *fiscus*, the privilege of the widow for her dower, the privilege of funeral expenses, and some others. Such exceptional privileges granted to favored persons in every cultivated system of

jurisprudence would generally be held to be *stricti juris.* Yet, in the interpretation of these, the juris consults carried them out by analogical reasoning, to their just and proper extent. A privilege was allowed against the estate of the deceased for funeral expenses. What was included in funeral expenses? did they extend to the mourning dresses of the widow? It was held that they did, as constituting part of the funeral honors of the deceased. In France, where this law was adopted, the period of mourning was held to be a year; and some of the provinces extended the privilege of mourning dresses for the full year, provided the widow continued a blameless widowhood so long, and gave to her a *hypoteque* on her deceased husband's estate for her mourning habits for the whole year: Toullier Droit Civil Francais, Vol. 13, No. 265-274.

Domat, in treating this subject, commences with the privilege of the vendor for the price of the thing sold. There is a tacit condition in every contract of sale that the right of property shall not pass to the purchaser until the price is paid. *Quod vendidi, non aliter fit accipientis, quam si aut pretium solutum sit, aut satis eo nomine factum, aut etiam fidem habueriumus emptori sine ulla satisfactione:* Dig. 18, 1, 19. The vendors privilege, a lien, is founded on his right of property, with which he has not parted. A creditor who has loaned the money by which the price is paid, is subrogated to the vendor's right. The law, by an equitable construction of the acts of the parties, considers him who pays the price as acquiring the vendor's rights in the property held, and he has a lien upon it for his security before any other creditor of the purchaser. But if a surety is given, and he is obliged to pay the price he will have no lien, because the right of property passes to the buyer, the giving a surety being equivalent to payment: Dig. 18, 1, 53.

One who furnishes materials, or performs labor for the repairs of a ship or a house, is supposed to render this service on the tacit condition that the materials furnished and the product of the labor shall become the property of the owner of the ship only when the price is paid. And he has a privilege against the whole ship, because his services are supposed to have preserved the pledge for

all who have an interest in it: *solvam fecit totius pignoris causam.* A creditor who loans money to pay for these repairs, takes his place and privilege, as one who lends for the payment of the price to the vendor. In fact, the privilege seems to have been first established in the jurisprudence of Rome in favor of the lender, as he is the creditor who is always mentioned: Dig. 42, 5, 26; Dig. 21, 1, 25; Dig. 42, 5, 34; Dig. 42, 3, 1.

There is another class of creditors mentioned by Domat in Nos. 7 and 8 of this section, whose lien illustrates the nature and quality of this privilege. Those who loan money for the melioration or improvement of an estate have a privilege against these improvements. It is their money which made them, and they stand in the place and have all the equity of the vendor for the price. But their lien does not extend like that of the lender for repairs to the whole thing. If these improvements are destroyed, their lien is gone. The privilege of this creditor is not mentioned in any law of the Digest. It is drawn by Domat from the general analogy of the law, and limited by its reason. The only text quoted is, (Dig. 19, 1, 13, § 2,) *Venditor enim quasi pignus retinere potest cum numquam venditit.* These words, which apply to the vendor, may also, says Domat, apply for this article, for he who makes the melioration in relation to this holds the place of the vendor.

The owner of a farm has a privilege against the fruits of the farm for his rent. The rent is the price of those fruits, and until that is paid they remain, says Domat, his property, *sa propre chose:* Liv. 1, Tit. 1, sect. 5, No. 12. *In prædiis rusticis fructus qui ibi nascuntur tacite intelliguntur pignori esse domino fundi locati, etiamsi nominatim id non conveniat:* Dig. 22, 2, 7. It is a natural lien implied by the nature of the contract, and need not be named in it.

A carrier has a lien on the merchandise for the cost of transportation and for the duties he has paid; and Domat adds, this privilege is acquired by all those whose money has been employed for expenses of a like necessity, as for the keeping and feed of teams: Liv. 3, 1, 5, No. 11. This example shows how easily this lien was extended, by analogy, to all persons and cases that came

within the principle of the privilege without any special provision of law or particular stipulation of the contract.

These examples are principally taken from Domat, and they very clearly show that he, as well as Valin, in his interpretation and application of the law, reasoned from analogy, extending the privilege from person to person and from case to case, as they would any other remedial law. I think it equally clear that the Roman jurisconsults expounded and applied the principle of these natural privileges in the same way.

The Roman law of hypothecation, or mortgage, followed the obvious rule of natural justice by giving the preference to the older creditor. *Qui prior est in tempore potior est in jure.* But with privileges it was otherwise. Another rule of preference was established, founded on the nature of the cause or consideration. *Priviligia non extempore aestimantur, sed ex causa; et si ejusdem tituli fuerint concurrunt, licet diversitates temporis in his fuerint:* Dig. 42, 5, 32. This inversion of the natural order was not established by positive law. It was a rule of jurisprudence, deduced by the jurisconsults from the principles of natural justice and consideration of public utility. It rests, for its authority, on what the civilians call the celebrated law *Interdum* taken into the Digest from the Disputations of Ulpian; this is, I believe, the only text of the Digest where the general doctrine is stated. *Interdum posterior potior est priori; ut puta, si in rem istam conservandam impensum est, quod, sequens credidit; veluti si navis fuit obligata, et ad emandam eam rem vel reficiendam ego credidero:* Dig. 20, 4, 5. In this law we have the rule, and the next the reason of this preference of the later to the earlier lien. It is not because it is established by positive law, but because *hujus enim pecunia salvam fecit totius pignorius causam;* that is, the money loaned for equipment and repairs. And he proceeds, reasoning from analogy, to extend the lien to a loan for payment for the provision of the crew, *quod quis poterit admittem si in cibaria nautarum fuerit creditum sine quibus, navis salva pervenire non poterat.* And further in §§ 1, 2:—If one lends money on goods already hypothecated *ut salvæ fiunt, vel ut naulum exsolvatur, potentior erit, licet posterior sit; nam ipsum naulum potentius*

est. Salvage and freight are preferred to a prior hypothecation, and the lender to pay is subrogated to the right of the salvors and carriers. And § 2 gives us another analogy:—*Tantundem dicetur et si merces horreorum, vel arcae vel vecturae jumentorum debetur; nam et hic potentior erit.* The warehouse rent and truckage are preferred to the mortgagee.

If I am not mistaken, the whole of this class of privileges, which have their origin in natural rights and public utility, grew up as a part of the unwritten and customary law of Rome; they were sanctioned by the courts of justice, as cases were presented for adjudication and moulded and fashioned by the jurisconsults, with all that legal acumen and logical precision which so eminently distinguish the great masters of Roman jurisprudence, to meet at once the demands of justice and the exigencies of business in a highly cultivated society. The examples and illustrations have, perhaps, been multiplied beyond necessity; but the object of them is, in the first place, to show the nature and reason of privilege, and the second, to show the degree of favor with which it was entertained. And I think it is apparent that neither in the Roman law, where these privileges have their source, nor in that of France, which adopted them, were they narrowed by a jealous and restrictive construction; they were familiarly extended to all cases that came within the principle of the law. The same principles of analogical reasoning were applied to this title of privilege as to other remedial laws in furtherance of right and justice—*ubi idem ratio idem est jus.*

How, then, shall we explain the language of Emerigon that privileges are *stricti juris*, and never to be extended by analogy to cases not mentioned by the law.

Besides these natural privileges, which I have been considering, constituting part of the common unwritten law of Rome, *moribus et consuetudine introductam:* Dig. 1, 3, 32, there were others introduced by positive law in the interest of particular classes of favored creditors; as that of the widow for her dower, that of the *fiscus* that of minors against the estate of their tutors and curators, and some others. These were of strict construction. They were conceded by special laws, and were confined to persons and cases expressed by

the law. The privilege of the widow for her dower could not, by parity of reason, be extended to a minor against the estate of his tutor; nor could her privilege for her dower be extended to embrace any other claim she might have against her deceased husband's estate. The extent of the privilege was measured by the words of the law. It could not be extended to include other persons or causes by analogy. To these the rule of construction applied. *Quod vero contra rationem juris receptum est, non est producendum ad consequentias:* Dig. 1, 3, 14. But privileges established by custom, and having their foundation in natural justice, in the laws of property and considerations of public utility, were liberally interpreted and applied by analogy to all persons and cases that came within the reason of the law. Such are liens of material men and mechanics against vessels for materials and labor in building and repairing them.

Why, then, should a State statute granting these privileges receive, in our jurisprudence, a narrow construction, confining them to the *ipsissimis verbis* of the law? Voet, as has before been seen, gives the opposite rule for the interpretation of such statutes. He says, when, in a statute, there is an enumeration of privileged persons or causes that they ought not to be ranked in the precise order in which they are named, nor are others to be excluded from the privilege who are not enumerated if they are privileged by common law *injurii communi*, or, as I would say, by the nature of the debt, unless that is the manifest intention of the Legislature. Otherwise it ought to be presumed that there are mentioned, merely as examples, *causa exempli ad Pand.:* Lib. 20, 4, 26. The principle to be applied to this statute of Maine is one of increasing importance in this country. Most of our maritime States, as well as those bordering on the great lakes, have statutes of a similar character, giving a privileged lien against vessels for materials, labor, and supplies. The difference between a narrow and liberal construction of these statutes will make a sensible difference in the extent of the remedies they will afford.

W.