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Maritime Lien Priority

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THE QUESTION OF PRIORITIES among maritime liens arises whenever the proceeds of sale of a ship are insufficient to satisfy all claims. The court must then proceed to the ranking of the claims to determine those which should be satisfied. Unfortunately, the law of maritime lien property is much like the sea itself in that it seldom appears the same twice. No doubt the confusion and uncertainty surrounding the topic are occasioned in part by the fact that the Supreme Court of the United States has had less to say about lien priorities than any other subject within the entire range of admiralty law. Its most recent decision on lien priorities was rendered in 1898.[1]

Lien Priority Based on Time of Accrual

The first of the two general rules which appear to be at the root of all decisions dealing with the subject is that maritime liens rank in inverse order to the order of their creation.[2] Thus, the last lien to attach in point of time has the highest priority. Unfortunately, at least for the reader searching for an inflexible principle, complete reliance on this doctrine is hazardous. Justice Coleman commenting on the doctrine exaggerated only slightly when he observed that the law of maritime liens is composed of exceptions to this general rule.[3]

Notwithstanding the impressive array of exceptions, the general rule must be astonishing to the dry land attorney whose experience with priority among non-maritime liens has been governed by the maxim "first in time, first in right." [4]

There are two theories behind this preference given in admiralty to subsequent lienors: the proprietary interest theory and the beneficial service theory. Under the former, it is theorized that the owner of a lien becomes the part owner of the

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[1] The John G. Stevens, 170 U. S. 113, 18 S. Ct. 544 (1898).

[2] The St. Jago de Cuba, 22 U. S. (9 Wheat.) 409, 416; 6 L. ed. 122 (1824); The Commack, 1925 A. M. C. 1640, 8 F. 2d 151 (S. D. Fla. 1925).

[3] The William Leishear, 21 F. 2d 862, 1927 A. M. C. 1770 (D. C. Md. 1927).

[4] Howard v. Milwaukee & St. P. R. Co., 101 U. S. 837, 2 L. ed. 1081 (1879); Rankin v. Scott, 12 Wheat. (U. S.) 177, 6 L. ed. 592 (1827); Jones v. Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231 (1896).

property to which the lien attaches, and as such should have the risk of loss which might follow. Further, it is reasoned that since the party first injured has the right to arrest the vessel and satisfy his lien, failure to do so forbids him from claiming that his charge against the vessel is paramount to that of one who later furnishes goods or services without notice of the prior lien.

The beneficial service theory holds that the last to contribute to the preservation of the vessel has a claim superior to all others on the ground that were the last service not performed, the vessel might be lost. At a glance, this theory is compelling since repairmen, seamen and the like would be hesitant to contribute services to a vessel with the realization that their lien would be paid only after all prior lienors had been satisfied. Supporters of the beneficial service theory argue that prior lienholders cannot complain of this doctrine since, if the services rendered enable the vessel to be brought safely to port, the value of earlier liens is actually preserved.

Both theories suffer under closer examination. The proprietary interest principle is based upon the equitable concept that a secret lien should not be preferred over subsequent lien holders without notice;[5] however, it is unrealistic to suppose that seamen who contract for wages look to the credit of the vessel or that liens arising out of collision, other torts or salvage are acquired out of reliance upon the vessel's freedom from debt. In analysis of the beneficial service theory, it cannot be argued strenuously that ship barbers, bartenders, and entertainers, all of whom are classified as seamen, have much to do with bringing a ship in peril safely to port. Also, it is clearly fictitious to assume that lien claimants charging tortious conduct benefit or preserve the vessel.

Lien Priority Based on Classification

A second rule of maritime lien priority is that classes of liens are ranked as to one another. Thus, liens of the same nature are considered as a group having a certain priority preference. Although it has been observed that as to the specific schedule of priority among lien classes, each court is a law unto itself,[6] the order set forth below is generally followed:

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[5] The John G. Stevens (1898) 170 U. S. 113, 4 L. ed. 969, 18 S. Ct. 544.

[6] J. Brown, The City of Tawas, 3 F. 170, 172 (E. D. Mich. 1880).

1. *Seaman's wage liens*

In a leading American text, it is said that courts of admiralty have from time immemorial favored and protected the men who have dared to venture forth on the "sea of darkness." [7] To put it less romantically, seamen's wage liens outrank all other liens and are generally entitled to be paid first. The rationale for the preferential treatment afforded seamen is that the seamen, by bringing the ship safely to port, have given to all persons the means of asserting their claims which otherwise they would not have had.[8] An obvious exception to the rule occurs in cases in which valid tort liens against a vessel are occasioned by the seamen's negligence; then wage claims lose their priority.[9]

2. *Salvage liens*

The high priority given salvage liens is also motivated by the theory that whoever preserves the property for the benefit of others should be rewarded.

3. *Collision and tort liens*

Historically, liens *ex delicto* have been held to outrank liens *ex contractu*.[10] In justification of this rule, it is said the liens growing out of tort are preferred over contract liens on the ground that the former arise out of a duty imposed by law and independently of any contract or consideration.[11] And in a leading English text, it is stated that the motivation for this doctrine of lien priority is to encourage the prevention of careless navigation.[12]

Although the rule is well recognized, the basis for the rule is not, at least to the writer. The mere fact that one lien arises out of a legally created duty and another has as its origin a contractual obligation does not seem to warrant significance in the area of priority preference. And surely, penalizing the contract lien holder would not have an effect on the safety of navigation.

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[7] Robinson on Admiralty 429 (1st Ed. 1939). J. Gray, in The John G. Stevens, *supra* note 5, described Seaman's Wage Liens as "sacred liens, and so long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages."

[8] The Alcalde, 132 F. 576 (D. C. Wash. 1904); The St. Jago de Cuba, *supra* note 2; The Samuel J. Christian, 16 F. 796 (D. C. N. Y. 1883).

[9] The C. J. Saxe, 145 F. 749 (D. C. N. Y. 1906).

[10] The Benares (1850) 7 N. of C. Supp. 54; The M. Vandercook, 24 F. 472 (D. C. N. J. 1885).

[11] Stevens v. The White City, 285 U. S. 195, 202, 52 S. Ct. 347, 350, 1932 A. M. C. 468, 472 (1932).

[12] Abbott on Shipping 1026 (14th Ed. 1901).

It would appear that the true reason for preferring the tort claimant is that courts are more sympathetic toward the indigent lien holder than the prosperous one. Since recipients of tortious conduct are quite often destitute and suppliers of goods and services are quite often relatively wealthy, the former have been favored. As proof of this observation, the rule preferring tort liens over contract liens is disregarded when wage claims are considered.

4. Preferred mortgages

The Ship Mortgage Act of 1920 (46 U. S. C. A. Section 911 et seq.[13]) gave ship mortgages maritime character and assigned a rank or priority to them. The background behind this legislative Act is quite detailed but in essence the Act was passed to induce private lenders to invest in vessels so that, as a matter of "national defense and for the proper growth of . . . foreign and domestic commerce," the United States could have a merchant marine other than at public cost. The Act imposes many conditions which must be met in order to qualify a mortgage as preferred,[14] but if the provisions are complied with, the preferred mortgage lien has preference over subsequent liens except those for tort, for wages of a stevedore employed by the ship, for wages of the crew, for general average[15] and for salvage.

In cases in which the ship mortgage does not meet the requirements of the Act, it loses the status conferred and becomes a non-maritime lien;[16] as such is considered only after all maritime liens have been satisfied.

5. Liens for repairs and supplies, etc.

This group of liens is responsible for the largest percentage of litigation. Included within the classification are liens for pilotage, stevedoring, towage, watchman wharfage, and liens for "other necessaries." [17] As has been stated previously, the ranking of these liens below tort claims is predicated on the rule that liens *ex delicto* outrank liens *ex contractu.*[18]

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[13] Act of June 5, 1920, C. 250, § 30, 41 Stat. 1000; 46 U. S. C. A. §§ 911-984.

[14] § 924.

[15] Sharpe, Contribution to General Average, 21 L. Q. Rev. 155 (1905).

[16] The Ulrica, 224 F. 140 (D. C. N. J. 1915); The Guiding Star, 18 F. 263 (C. C. Ohio 1883).

[17] Robinson on Admiralty, *supra* note 7, at 430.

[18] See *supra* note 10.

Conclusion

Obviously there is a conflict between the two general principles reviewed. Should a lien for repairs subsequent in time to one for wages be given priority since it has a preferred classification? Or should the wage lien be satisfied first on the theory that it arose later? The majority of courts have resolved this conflict by applying the time of accrual test to liens within a group only. In other words, the rank assigned to the character of a lien is generally controlling and the time of accrual of a lien is material only to determine preference among liens within a classification.[19]

Because of the relative lack of authoritative case decisions and the absence of legislation dealing with the subject, the fog encompassing the law of maritime lien priority is on the increase rather than the wane. Consequently, it is the hope of this writer that a loud and clear bell from our Legislature or Judiciary is heard before our faint glimpse is totally obscured.

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[19] Norris, The Law of Seamen 477 (1958 Reprint).