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Priorities Puzzle under Ship Moorage Act

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PRIORITIES PUZZLE UNDER SHIP MORTGAGE ACT—The Ship Mortgage Act[1] provides that a preferred ship mortgage, that is one which complies with the requirements of the act, shall have priority over all except "preferred maritime liens." It then proceeds to define preferred maritime liens as those liens arising before the recording and indorsement of the preferred mortgage in question, and also those liens arising from damages resulting from torts, those arising for wages of a stevedore when employed directly by the owner or operator, master, ship's husband or agent of the vessel, and those arising for the wages of the crew, for general average and for salvage.

It will be noticed that this enumeration does not include many maritime liens, arising either by virtue of the general maritime law or of the Maritime Lien Act.[2] The consequence would seem to be that where there existed against a ship one or more of each class of lien the claims secured by them should be satisfied in the following order: (1) preferred liens, (2) ship mortgage, (3) non-preferred liens. This

[1] Supp. U. S. Comp. Stat. '23, § 8146¼ nnn; Fed. Stat. Ann., 1920 Supp. 255. The following discussion assumes the constitutionality of the Act, which has been sustained by three decisions in the district courts of the United States, *The Oconee,* 280 Fed. 927 (1921); *The Nanking,* 292 Fed. 642 (1923); *The Lincoln Land,* 295 Fed. 358 (1923); but which reason must make doubtful until the most authoritative determination is had. cf. *The Belfast,* 7 Wall. 624-640, 19 L. ed. 266 (1869).

[2] Supp. U. S. Comp. Stat. '23, § 8146¼ ooo; Fed. Stat. Ann., 1920 Supp. 257.

would be simple enough if those liens denominated "preferred" by the Act were, by the general maritime law, always superior to other maritime liens. But unfortunately for the cause of simplicity this is not so.

Ever since the *John G Stevens*[3] the general rule has undoubtedly been that each lien being a special property in the ship, it was subject to further incumbrance in the shape of subsequent liens, in the same manner as was the general property of the owner.[4] Consequently, the claims secured by maritime liens should be satisfied inversely to the order of their creation.[5] But to this general rule there are so many exceptions that there are few actual cases for its application. These exceptions generally arise from the classification of maritime liens into various ranks. Liens of superior rank, such as for tort claims or seamen s wages, take precedence over liens of inferior rank,[6] such as those for repairs or supplies. This doctrine is itself subject to the qualifications imposed by the theory of "stale claims," which in effect is that a superior lien is postponed to an inferior one if the holder of it has not used due diligence to enforce it, and has thereby misled others who have furnished services or supplies on the credit of the ship.[7]

Such being the general maritime law, it is entirely clear that those liens denominated "preferred" by the Act of 1920[8] might be postponed to later liens not so denominated. Let us suppose such a case and consider the effect of an intervening ship mortgage under the terms of the Act.

A tort lien is a preferred maritime lien. If one accrues, and subsequently[9] a ship mortgage is executed and enrolled with the necessary formalities, the tort lien would have priority as between it and the mortgage. But the tort claimant may fail to exercise due diligence to enforce his claim, and thereby allow it to become stale. If a supply-

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[3] 170 U. S. 113, 18 Sup. Ct. 544, 42 L. ed. 969 (1898).

[4] See *The America*, 168 Fed. 424 (1909) 22 COL. L. REV. 490 (1922).

[5] In the case of ordinary contract liens this principle is not strictly applied, since all claims arising within a given period, which differ in various ports and with different classes of vessels, are treated as if they arose at the same time. *The Interstate No. 1*, 290 Fed. 926 (C. C. A. 2d 1923) 38 C. J. 1239. The principle should be strictly applied between other liens of the same rank. See cases cited on p. 216 of LORD & SPRAGUE'S CASES ON ADMIRALTY. It should be applied in cases of torts (*The America*, note 4, *supra*), though that has sometimes been doubted, as in *The Frank Fowler* 17 Fed. 653 (1883). It was from early time the rule with regard to the lien of bottomry bonds. *The Priscilla*, 5 Jur. (N. S.) 1421 (1859). See in general, HUGHES, *ADMIRALTY*, Chap. 17. See also John K. Beach, *Relative Priority of Maritime Liens*, 33 YALE L. J. 841 (1925).

[6] *The Samuel Little*, 221 Fed. 308 (C. C. A. 2d 1915) HUGHES, ADMIRALTY, §§ 176, 183.

[7] *The Nebraska*, 69 Fed. 1009 (C. C. A. 7th 1895) *Norfolk Sand & Gravel Co. v. Owen*, 110 Fed. 778 (C. C. A. 4th 1902). See notes on page 203 of AMES' CASES ON ADMIRALTY. *The John T. Williams*, 107 Fed. 750 (1901) *The Amos D Carver* 35 Fed. 665 (1888).

[8] See note 1, *supra*. Even aside from the Act, these liens are of high rank.

[9] Under the terms of the Act, note 1, *supra*, it is immaterial whether the tort precedes or follows the mortgage, but for the sake of clarity it is better to suppose the tort as prior in time.

man's lien now arose, the tort lienor would be barred by his laches from claiming priority over the supplyman's lien.[10] Yet there is no reason to suppose that his priority over the mortgage would be lost, because at the time the mortgage was given the claim was not yet stale.[11] It is very clear from the terms of the act, however, that the mortgage would have priority over the supply lien.[12] The result would be that the supply lien ranked the tort lien, while the tort lien ranked the mortgage, which in turn ranked the supply lien.

When such a case arises the court may squarely face that conundrum, or it may avoid it in either of two ways. First, it may entirely ignore the maritime doctrine of stale claims on the ground that it is superseded under such a state of facts by the Ship Mortgage Act. The ranking then would be: (1) tort lien, (2) mortgage, and (3) supply lien. The second possible solution is to interpret the Act's definition of preferred maritime liens as including only those which are pursued with proper diligence. Under such a holding the ranking would be: (1) mortgage, (2) supply lien, and (3) stale tort lien.

The first of these rankings is peculiarly inequitable and not to be adopted unless necessary. Moreover it assumes that the terms of the Act cannot be complied with without abandoning the well settled maritime doctrine of stale claims, which it would seem, it is by no means necessary to do. The second ranking is achieved by a most liberal stretching of the statute. Indeed it almost seems directly inconsistent with the act when it is recalled that the doctrine of laches only applies in favor of those who have in some way changed their position, so that the delay would react to their disadvantage.[13] The main advantage of either solution is that it affords relief from the necessity of squarely facing the puzzling three-cornered priority mentioned above.

Strictly analogous questions have arisen in courts of equity in connection with priority of claims against land, and in a few cases the apparently hopeless task of allotting A priority over B, B over C, and C over A has been assumed. It must be confessed that there is no harmony in the decisions, and that there is material for endless debate.[14] The cases, however, in general espouse two outstanding theories.

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[10] See note 7, *supra*.

[11] See *The Key City*, 14 Wall. 653, 20 L. ed. 896 (1872), to the effect that a lien is not barred as against one who was not misled, though it might be as against those who had been. See *The John T. Williams*, note 7, *supra*, to the effect that a lien may be of no avail against one whose claim was innocently acquired after the occurrence of laches, and yet not be barred as against other claims to the ship.

[12] Supp. U. S. Comp. Stat. '23, § 8146¼ nnn; Fed. Stat. Ann., 1920 Supp. 255.

[13] See note 11, *supra*.

[14] See 8 VA. L. REV. 550 (1922), and the cases there cited. The question may arise under the recording acts in circumstances more or less as follows: A holds a mortgage, B takes a mortgage on the same land without actual or constructive notice of A's mortgage. C then takes a mortgage with notice of A's mortgage but without notice of B's.

By the first theory[15] the ship mortgage would be satisfied if possible out of the balance of the sum representing the ship after deduction of the amount of the tort claim. For example, if the ship brought $5000, the tort claim being $4000 and the mortgage and supply claims $3000 each, then the mortgagee would get $1000. This is just what he would have gotten if the supply claim had never arisen, for against him it is given no effect. The balance of the whole sum left after paying the amount so found due to the mortgagee is then still subject to the supply lien and the tort lien. The former having priority over the latter, is satisfied first, the remainder, if any, going to the tort claimant. The result, in the case supposed, would be that the $4000 left after paying the mortgagee would go $3000 to the supply man and $1000 to the tort claimant.

According to the second theory,[16] the mortgage, being inferior to the tort lien alone, should be satisfied as far as possible out of the whole sum less the amount of the tort claim. In the case supposed, the mortgagee would receive $1000. The supplyman's lien, being inferior to the mortgage, should be satisfied, if possible, out of the whole sum less the amount of mortgage, which would be $2000. After paying out these there would be left $2000, which should be paid to the tort claimant.

It will be noticed that the practical difference in the result of the two theories is that by the first one the tort claimant gets $1000 and the supplyman $3000, while by the second they each received $2000. There are two objections to the first theory It gives the supplyman a lien to the extent of $3000 when all he could expect at the time he furnished the supplies was a lien to the amount of the value of the ship less the amount of the mortgage of which he had notice. The impropriety of giving him more than this out of the proceeds of the vessel is manifest when it is recalled that the very basis of his superiority over the tort claimant is his reliance on the credit of the vessel, induced by the tort claimant's inactivity An equally strong objection occurs in that the result will vary according to whether one by chance begins this process of reasoning with one or the other of the parties to this three-cornered situation.

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[15] This seems to be the doctrine of the majority in *Hoag v. Sayre*, 33 N. J. Eq. 552 (1881), though expressed in different manner. It has the approval of the writer in 8 VA. L. REV. 550, cited note 14, *supra*. There are several other cases, as pointed out in that article, in which no attempt is made to preserve each claimant's priority, but one is arbitrarily selected to be the last in the line. Cf. *Ingram v. Pelham*, 1 Ambl. 153, 27 Eng. Reprint 102 (1752).

[16] This is the doctrine of Dixon, J., in *Hoag v. Sayre*, note 15, *supra*. It was applied in *Day v. Munson*, 14 Oh. St. 488 (1863). The Ohio court failed to apply the doctrine in *Campbell v. Sidwell*, 61 Oh. St. 179, 55 N. E. 609 (1899), being doubtless influenced to discriminate against a vendor's lien in that case, by the same considerations which led the Supreme Court of Washington to entirely disavow that doubtful equity.

The second theory is very satisfactory in the case supposed,[17] but if the figures had been tort claim $3000, mortgage $4000 and supply claim $1000, then the second objection to the first theory would apply also to the latter; for while it is true that the mortgagee and supplyman have no just claim upon the fund in excess of the difference between the whole sum and the claim which is superior to each of their respective claims, yet the same is true of the tort claimant, as would appear if by chance we had begun our reasoning with him.

It is submitted that the true solution is that the tort claim being inferior to the supply claim alone is entitled to $3000 in the case last supposed. By the same process of reasoning the mortgage is entitled to $2000 and the supply claim to $1000. Since all these may not be paid out of a $5000 fund, it should be divided in the proportion of 3000 to 2000 to 1000. The tort claimant would then receive one-half, the mortgagee one-third, and the supplyman one-sixth of the total sum. If the authorities do not sustain this last method of distribution they are at least not so far committed to any other theory as to refuse it consideration.[18] Orlo B. Kellogg.

INHERITANCE BY A MURDERER FROM HIS VICTIM—The question whether a murderer can inherit from his victim, except in the case of life insurance, is usually answered in the affirmative. The rule is well settled that if the beneficiary under a life insurance policy murders the insured, neither he nor his heirs or representatives can collect the policy.[1] But in cases where a devisee or heir has murdered his testator or ancester, the courts are divided, the majority[2] holding that

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[17] That is, the result would be the same where the sums were as first stated, whether this method of computation or the one which the writer considers correct, is used.

[18] Supp. U. S. Comp. Stat. '23, § 8146¼ ppp; Fed. Stat. Ann., 1920 Supp. 257, provides that nothing in the Ship Mortgage Act shall be construed to affect the "rank of preferred maritime liens among themselves." This note has been concerned with discussing the effect of the Act on the relative ranking of preferred maritime liens as compared with non-preferred liens, so the latter section has no application. Nevertheless it might add still further complication if, instead of being as we supposed, there had been two preferred liens, one of which was subordinated to the supply claim by its holder's laches, while the other was not.

[1] *N. Y Mutual Life Ins. Co. v. Armstrong,* 117 U. S. 591, 29 L. ed. 997 (1886), *Cleaver v. Mutual Reserve Fund Life Assn.,* 1 Q. B. 147 (1892), *Johnston v. Metropolitan Life Ins. Co.,* 83 W Va. 70, 100 S. E. 865, 7 A. L. R. 823 (1919). But see *Murchison v. Murchison,* 203 S. W (Tex. Civ. App.) 423 (1918).

[2] *In re Kirby's Estate,* 162 Cal. 91, 121 Pac. 370, 39 L. R. A. (N. S.) 1088 (1912), *Hagen v. Cone,* 21 Ga. App. 416, 94 S. E. 602 (1917) *Wall v. Pfanschmidt,* 265 Ill. 180, 106 N. E. 785, L. R. A. 1915C, 328 (1914), *McAllister v. Fair,* 72 Kan. 533, 84 Pac. 112, 3 L. R. A. (N. S.) 726, 115 Am. St. Rep. 233, 7 Ann. Cas. 973 (1906), *Eversole v. Eversole,* 169 Ky. 793, 185 S. W 487, L. R. A. 1916E, 593 (1916), *In re Gollnik's Estate,* 112 Minn. 349, 128 N. W 292 (1910), *Shellenberger v. Ransom,* 41 Neb. 631, 59 N. W 935, 25 L. R. A. 564 (1894), overruling *Shellenberger v. Ransom,* 31 Neb. 61, 47 N. W 700, 10 L. R. A. 810, 28 Am. St. Rep. 500 (1891), *Owens v. Owens,* 100 N. C. 240, 6 S. E. 794 (1888) *Deem v. Milliken,* 53 Oh. St. 668, 44 N. E. 1134 (1895), affirming 6 Ohio C. C. 357, *Holloway v. McCormick,* 41 Okla. 1, 136 Pac. 1111, 50 L. R. A.