Peyroux Vs. Howard

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SooperKanoon Citation : sooperkanoon.com/79401

Court : US Supreme Court

Decided On : 1833

Appeal No. : 32 U.S. 324

Appellant : Peyroux

Respondent : Howard

Judgement :

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Peyroux v. Howard

32 U.S. (7 Pet.) 324

APPEAL FROM THE DISTRICT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF LOUISIANA

SYLLABUS

A libel was filed in the district Court of the United States for the Eastern District of Louisiana, against the steamboat *Planter,* by H. and V., citizens of New Orleans, for the recovery of a sum of money alleged to be due to them, as shipwrights for

work done and materials found in the repairs of the *Planter.* The libel asserts that, by the admiralty law and the laws of the State of Louisiana, they have a lien and privilege upon the boat, her tackle &c.;, for the payment of the sutras due for the repairs and materials, and prays admiralty process against the boat, &c.; The answer of the owners of the *Planter* avers that they are citizens of Louisiana residing in New Orleans; that the libellants are also citizens, and that the court had no jurisdiction of the cause. *Held* that this was a case of admiralty jurisdiction.

By the Civil Code of Louisiana, workmen employed in the construction or repairs of ships or boats enjoy the privilege of a lien on such ships or boats, without being bound to reduce their contracts to writing, whatever may be their amount, but this privilege ceases if they have allowed the ship or boat to depart without exercising their rights. The state law, therefore, gives a lien in this case.

In the case of *The General Smith,* 4 Wheat. 438, it is decided that the jurisdiction of the admiralty in cases where the repairs are upon a domestic vessel depend upon the local law of the state. Where the repairs have been made or necessaries furnished to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on ships as security, and the party may maintain a suit in the

admiralty to enforce his right. But as to repairs or necessaries in the port or state to which the ships belong, the case is governed altogether by the local law of the state, as no lien is implied unless it is recognized by that law. But if the local law gives the lien, it may be enforced in the admiralty.

The services in this case were performed in the port of New Orleans, and whether this was done within the jurisdiction of the admiralty or not depends on the fact whether the tide in the Mississippi ebbs and flows as high up the river as the port of New Orleans. The Court considered itself authorized judicially to notice the situation of New Orleans for the purpose of determining whether the tide ebbs and flows as high up the river as that place, and being satisfied that although the current of the Mississippi at New Orleans may be so strong as not to be turned backwards by the tide, yet the effect of the tide upon the current is so great as

occasions a regular rise and fall of the water; New Orleans may be

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properly said to be within the ebb and flow of the tide, and the jurisdiction of the admiralty prevails there.

In order to the decision whether the admiralty jurisdiction attaches to such services as those performed by the libellants, the material consideration is whether the service was essentially a maritime service, and to be performed substantially on the sea or tidewater. It is no objection to the jurisdiction of the admiralty in the case that the steamboat *Planter* was to be employed in navigating waters beyond the ebb and flow of the tide. In the case of the steamboat *Jefferson,* it was said by this Court that there is no doubt the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide.

Some of the older authorities seem to give countenance to the doctrine that an express contract operates as a waiver of the lien, but it is settled at the present day that an express contract for a stipulated sum is not of itself a waiver of a lien, but that to produce that effect the contract must contain some stipulations inconsistent with the continuance of such lien or from which a waiver may fairly be inferred.

In the district court, a libel was filed on 10 December, 1830, by Howard & Varion, shipwrights, residing in New Orleans, against the steamboat *Planter,* claiming the sum of $2,193.35, being the balance asserted to be due to them for the price of work, labor, materials furnished and repairs made on the said boat under contracts of 13 September and 19 October, 1830, and alleging that, by the admiralty law and the law of the State of Louisiana, they had a lien on the said boat for the payment of the same, and that she was about leaving the port of New Orleans, and praying process, &c.; The account for the work, materials, &c.;, was annexed to the libel.

The owners of the steamboat *Planter* filed a claim and plea setting forth that they were all citizens of Louisiana, all resided in the City of New Orleans, and that the

libellants were also citizens of that state, and that therefore the district court of the United States had not jurisdiction of the case. By a supplemental answer, the respondents denied all the facts set forth in the libel.

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The plea to the jurisdiction of the court was overruled and dismissed, and the parties proceeded to take the testimony of witnesses by depositions which were filed as part of the proceedings in the case. By the first contract, the shipwrights stipulated to do certain specified work and furnish certain materials, the same to be approved by "experts," for which they were to be paid the sum of $1,150. By the contract of 19 October, the *Planter* was to be hauled on shore, and in consideration of $475, of which $200 was to be paid in cash and $275 in one month after the boat should be launched and set afloat, certain other repairs were to be done to her, and she should be delivered and ready to receive a cargo by 20 November, under a penalty of $25 per day for each day her delivery should afterwards be retarded by the shipwrights. The evidence in the case is fully stated in the opinion of the Court.

The district court made the following decree:

"The libellants claim a balance due them of $2,193.35 for work and materials furnished in the repairs of the steamboat *Planter* at the request of the claimants and for which they have a lien by the local law. The claimants, in their first answer, deny the jurisdiction of the court on the ground that all the parties were citizens of the same state, to-wit, of Louisiana; that objection, however, was not insisted upon at the trial, and is not sustainable on the admiralty side of this court. In their supplemental answer, they deny generally the allegations of the libellants and pray for the dismissal of the libel and damages. The whole account of the libellants against the owners amounts to $3,693.35, including the amount of the written contracts entered into between the parties; of this sum they acknowledge the payment of $1,500, leaving, as they allege, a balance of $2,193.35 due

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them. By the first contract, made on 11 September, 1830 (the boat being then in the water), the libellants agreed, for the sum of $1,150, to make certain repairs on that part of the boat which was above water, from the wheelhouse to the bow, and it was further stipulated that if they made any other repairs by replacing unsound timbers in any other part of the boat above water not then discovered, they were to be paid separately for so much."

"After commencing the work, it was perceived, that the boat required repairs under the water as well as above, and in consequence of that discovery the claimants, through Captain Jarreau, master of the boat, and one of the owners, agreed to pay the libellants $475 for hauling out the boat and for launching her when she should be repaired, and as the quantity of work to be done was uncertain, it was stipulated that an account of it should be kept, and if approved by Captain Jarreau, under whose inspection the work was to be done, the claimants bound themselves to pay the amount thus to be ascertained; this latter contract was made on 19 October last. After the boat was hauled out, it appears the work under both contracts was carried on simultaneously. On a first view of the account current exhibited in this case, it would seem, from the dates, that at least a part of the work to be done under the first contract was again charged, but the subsequent testimony taken in this case shows that these charges were made on account of the extra repairs provided for under the first contract, and it further appears that all the charges made after 19 October have no relation to the first agreement, but all relate to the work contemplated by the second contract. From the complexion of the testimony taken by the complainants, their real defense seems to be that the prices of the work charged are greater than they should be, that it was not executed in a proper manner, and that the libellants have forfeited a considerable sum of money in consequence of not delivering the boat within the time stipulated in the contract. As to the first two objections, the evidence is conclusive in favor of the libellants; Captain Jarreau, himself, upon being shown the account, did not object to it; on the contrary, expressed himself satisfied with the work and said

he was 'not surprised at it, because there was a great deal more work done than he had any idea of;' with respect to the nondelivery of the boat at the time agreed upon, the fault chiefly attaches to Captain Jarreau, who in several instances retarded the work by opposing repairs which were proposed by the libellants, but which turned out to be indispensable, and were afterwards ordered by him to be made; besides, he promised them indemnity against their obligation to pay $25 a day for every day they were in default in delivering the boat, and gave as the reason that they had to do more work than was at first anticipated. The charge of $475, is for the specific service of hauling out and launching the boat, and must be allowed as such. On the whole, the evidence and exhibits in the case fully sustain the demand of the libellants; it is therefore ordered, adjudged and decreed that the claimants pay to them the said sum of $1,193.35, and costs of suit."

From this decree the owners of the *Planter* appealed to this Court.

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MR. JUSTICE THOMPSON delivered the opinion of the Court.

This case comes up from the District Court of the United

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states for the Eastern District of Louisiana. The proceedings in the court below were *in rem* against the steamboat *Planter,* to recover compensation for repairs made upon the boat.

The libel states that Howard & Varion, shipwrights, residing in the City of New Orleans, had found materials and performed certain work on the steamboat *Planter,* for which the said steamboat her owners were justly indebted to them in the sum of $2,193.35, and alleges that by the admiralty law and the laws of the State of Louisiana, they have a lien and privilege upon the boat, her tackle, apparel, and furniture for the payment of the same, and prays admiralty process against the boat and that the usual monition may issue. The appellants afterwards appeared in court and filed their claim and plea, alleging that they are citizens of

Louisiana and residing in the City of New Orleans, and that they are the sole and lawful owners of the steamboat *Planter,* and alleging further that the libellants are also citizens of the same state and that the court had no jurisdiction of the case. The plea to the jurisdiction of the court was overruled, and a supplemental and amended claim and answer filed denying all and singular the facts set forth in the libel, and by consent of parties, an order of court was entered that the testimony of the witnesses for the respective parties be taken before the clerk of the court and read in evidence upon the trial, subject to all legal exceptions, and upon the hearing of the cause, the court decreed that the claimants should pay to the libellants $2,193.35 and costs of suit. An appeal to this Court was prayed and allowed.

Upon the argument here, the following points have been made.

1. It does not appear upon the proceedings, that the court below had jurisdiction of the case.

2. That the libellants had waived any privilege or lien upon the steamboat under the law of Louisiana, and therefore proceedings *in rem* were improper.

3. If the court had jurisdiction, the decree is erroneous on the merits.

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The want of jurisdiction in the district court is not put on the ground set up in the plea in the court below that all the parties were citizens of the same state. This has been very properly abandoned here as entirely inapplicable to admiralty proceedings in the district court. But it is said that it does not appear upon the face of the proceedings that the cause of action properly belonged to admiralty jurisdiction. There can be no doubt that it must appear from the proceedings that the court had jurisdiction of the case. The proceeding is *in rem* against a steamboat for materials found and work performed in repairing the vessel in the port of New Orleans, as is alleged in the libel, under a contract entered into between the parties for that purpose. It is therefore a maritime contract, and if the

service was to be performed in a place within the jurisdiction of the admiralty, and the lien given by the local law of the State of Louisiana, it will bring the case within the jurisdiction of the court.

By the Civil Code of Louisiana, article 2748, workmen employed in the construction or repair of ships and boats enjoy the privilege established by the code, without being bound to reduce their contracts to writing, whatever may be their amount; but this privilege ceases if they have allowed the ship or boat to depart without exercising their right. The state law therefore gives a lien, in cases like the present. In the case of *The General Smith,* 4 Wheat. 438, it is decided that the jurisdiction of the admiralty in such cases, where the repairs are upon a domestic vessel, depends upon the local law of the state. Where the repairs have been made or necessaries furnished to a foreign ship or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on the ship as security, and the party may maintain a suit in the admiralty to enforce his right. But as to repairs or necessaries in the port or state to which the ship belongs, the case is governed altogether by the local law of the state, and no lien is implied unless it is recognized by that law. But if the local law gives the lien, it may be enforced in the admiralty.

It is said, however, that the place where these services were performed was not within the jurisdiction of the admiralty.

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The services in this case were performed in the port of New Orleans, and whether this was within the jurisdiction of the court or not will depend upon the fact whether the tide in the Mississippi ebbs and flows as high up the river as New Orleans. This is a question of fact, and it is not undeserving of notice that although there was a plea to the jurisdiction of the court interposed, the objection was not set up. Had it been put in issue, the evidence would probably have removed all doubt upon that question; not having been set up, it affords an inference that the objection could not have been sustained by proof.

But we think we are authorized judicially to notice the situation of New Orleans for the purpose of determining whether the tide ebbs and flows as high up the river as that place. In the case of *The Apollon,* 9 Wheat. 374, it is said by this Court that it has been very justly observed at the bar that the Court is bound to take notice of public facts and geographical positions, and in the case of *The Steamboat Thomas Jefferson,* the libel claimed wages earned on a voyage from Shippingport, in the State of Kentucky, up the river Missouri, and back again to the port of departure. And the Court said that the voyage, not only in its commencement and termination but in all its intermediate progress, was several hundred miles above the ebb and flow of the tide, and therefore in no just sense can the wages be considered as earned in a maritime employment. It is fairly to be inferred that the court judicially noticed the fact that the tide did not ebb and flow within the range of voyage upon which the services were rendered, as there is no intimation of any evidence before the court to establish the fact.

It cannot certainly be laid down as a universal or even as a general proposition that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions, of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice. Thus, in the case of *United States v. La Vengeance,* 3 Dall. 297, the Court judicially noticed the geographical position of Sandy

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Hook. And it may certainly take notice judicially of like notorious facts, as that the Bay of New York, for instance, is within the ebb and flow of the tide.

The appellants' counsel has referred the court to Stoddard's Louisiana, 164, for the purpose of showing that the tide does not ebb and flow at New Orleans, but we think it affords a contrary conclusion. The author says, "the tides have little effect upon the water at New Orleans; they sometimes cause it to swell, but never to slacken its current." No distinction has ever been attempted in settling the line between the admiralty and common law jurisdiction, growing out of the greater or

less influence of the tide. So far as that admiralty jurisdiction depends upon locality, it is bounded by the ebb and flow of the tide, and if the influence of the tide is at all felt, it must determine the question. No other certain and fixed rule can be adopted, and in determining this, we must look at the ordinary state of the water, uninfluenced by any extraordinary freshets. The authority of Mr. Stoddard goes to show that the tides have some effect upon the water at New Orleans; they cause it to swell, but not so much as to slacken the current. In the case of *Rex v. Smith,* 2 Doug. 441, it became a question whether the sea could properly be said to flow above London Bridge. It was contended that the tide beyond that limit was occasioned by the pressure and accumulation backwards of the river water. Lord Mansfield said a distinction between the case of the tide occasioned by the flux of sea water, or by the pressure backwards of the fresh water of a river, seemed entirely new. We think, that although the current in the Mississippi at New Orleans may be so strong as not to be turned backwards by the tide, yet if the effect of the tide upon the current is so great as to occasion a regular rise and fall of the water, it may properly be said to be within the ebb and flow of the tide.

It has been argued on the part of the appellant that the evidence shows that this steamboat was to be employed in navigating waters beyond the ebb and flow of the tide, and therefore not employed in the maritime service. In the case of *The Steamboat Jefferson,* the Court said there is no doubt the

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jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is whether the service is essentially a maritime service, and to be performed substantially on the sea or on tidewater. All the service in the case now before the Court was at New Orleans, and the first voyage, at all events, was to commence from that port. The objection, therefore, to the jurisdiction of the Court cannot be sustained.

2. The second exception is founded on a supposed waiver of any privilege or lien, and that the appellees trusted alone to the personal responsibility of the owners of

the steamboat. To determine this question, it becomes necessary to look at the contracts under which the repairs were made. The first bears date on 11 September, 1830, by which certain specified repairs were to be made, for which the appellants stipulated to pay $1,150. No time is fixed for the payment. The repairs contemplated by this contract were such only as could be made without hauling up the boat. In the progress of the work, however, it was discovered that more repairs were necessary than had been supposed, and which could not be made without hauling up the boat. And on 10 October, 1830, another contract was entered into by which the owners agreed to pay $475 for hauling up the boat, $200 of which was to be paid in cash, and the balance in one month after the boat shall be launched and set afloat. The boat was then to be repaired under the instruction of Captain Jarreau, the work to be paid for, when the account shall be approved by Captain Jarreau. The boat to be repaired and delivered afloat by 20 November, ready to receive a cargo; the appellees were to allow $25 a day for each day they retarded the delivery.

An express contract having been entered into between the parties, under which these repairs were made, is no waiver of the lien unless such contract contains stipulations inconsistent with the lien and from which it may fairly be inferred that a waiver was intended and the personal responsibility of the party only relied upon. Express contracts are generally made

for freight and seamen's wages, but this has never been supposed to operate as a waiver of a lien on the vessel for the same. There are certainly some of the older authorities which would seem to give countenance to the doctrine that an express contract operated as a waiver of the lien, but whatever may have been the old rule on the subject, it is settled at the present day that an express contract for a specific sum is not, of itself, a waiver of the lien, but that to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien or from which a waiver may fairly be inferred. *Hutton v. Bragg,* 2 Marsh. 339; 4 Camp. 145, and the cases cited in note.

Applying these rules to the case before us, we can discover nothing (except as to $275, the balance for hauling out the boat, which will be noticed hereafter) inconsistent with the right of a lien or indicating any intention to waive it. In the first contract, no time is fixed for the payment of the $1,150; it became payable, therefore, as soon as the work was completed. And the repairs under the second contract were to be paid for as soon as the account was approved by Captain Jarreau. There is nothing, therefore, from which it can be inferred that any time of credit was to be allowed. The balance of $275 for hauling out the steamboat stands upon a footing a little different. That was to be paid in one month after the boat was launched and set afloat. A credit was here given, and a credit, too, beyond the time when, in all probability, the boat would have left the port of New Orleans, for it can hardly be supposed, that it would have taken thirty days to load her. And by the Civil Code of Louisiana, Art. 2748, the privilege ceases if the ship or boat is allowed to depart without exercising the right. As to this sum, therefore, the decree is erroneous.

3. The principal ground of complaint under the third point made at the bar is that the appellants have been made to pay twice for some part of the work. That is that part of the work which was to be done under the first contract, and for which they were to pay $1,150, has

been charged under the second contract. There is certainly some confusion growing out of the manner in which this work was carried on under the different contracts. The work which was to be performed under the first was not completed when the second was entered into, and both being carried on at the same time, might very easily occasion some mistake. And in addition to this there was, under the first contract, some extra work to be done and paid for over and above the stipulated sum of $1,150, which rendered it still more difficult to keep the accounts for materials and labor under the different contracts separate and distinct. The evidence was taken in writing, out of court, and no opportunity afforded for explanation upon these points. The district judge, feeling the difficulties growing out of these circumstances, ordered Wilson, one of the witnesses whose

deposition had been taken and read in evidence, to appear and answer in open court. He was the clerk of the appellees, who had kept an account of the timber used and work performed, and on his examination he swore that all the charges and items for work done in the account of the libellants were over and above the work done under the first contract for $1,150. That the libellants had hands at work at the repairs under the contract and the extra work at the same time. That there is not a day's work, nor a foot of plank, charged in the account which was to be done under the first contract. This testimony leaves no reasonable doubt of the correctness of the account. By the second contract, payment was to be made when the account was approved by Captain Jarreau; no formal approval appears to have been made, but he was a part owner, and superintended the repairs, and one of the witnesses says, he was present when the account was presented to Captain Jarreau, who said he was not surprised at it because there was a great deal more work than he had any idea of, and that he did not think at first that she required so much. This, although not a direct, was an implied approval of the account.

The delay in not delivering the boat to the appellants by the time specified in the contract was occasioned by her unexpected state and condition and the extent of repairs required.

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And besides, the delivery at the time mentioned in the contract was dispensed with by Captain Jarreau.

Upon the whole, we are of opinion that the decree of the district court, as to the $275, must be

Reversed, and in all other respects affirmed.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel, on consideration whereof it is the opinion of this Court that the decree of the said district court as to the $275 is erroneous and should be reversed, and that

in all other respects the said decree should be affirmed, whereupon it is ordered, adjudged, and decreed by this Court that the decree of the said district court in this cause as to the balance of $275 for hauling out the steamboat be and the same is hereby reversed, and that the said decree in all other respects be and the same is hereby affirmed, and it is further ordered that each party pay his own costs in this Court.