

Edwards Vs. Elliott

Edwards Vs. Elliott

SooperKanoon Citation : sooperkanoon.com/82669

Court : US Supreme Court

Decided On : 1874

Appeal No. : 88 U.S. 532

Appellant : Edwards

Respondent : Elliott

Judgement :

Edwards v. Elliott - 88 U.S. 532 (1874)

U.S. Supreme Court Edwards v. Elliott, 88 U.S. 21 Wall. 532 532 (1874)

Edwards v. Elliott

88 U.S. (21 Wall.) 532

ERROR TO THE COURT OF ERRORS AND

APPEALS OF THE STATE OF NEW JERSEY

SYLLABUS

1. Where the record before the court on a case from a state court shows a declaration, pleas to it, issue on them, verdict on those issues, and judgment on the verdict, without allusion to any demurrer, the court will not refer to opinions in

books of printed reports of the state court to contradict the record and to show that there was a demurrer to the declaration and that judgment overruling the demurrer was given. [It was stated in this case by counsel that the demurrer after judgment against it had been withdrawn.]

2. Where a record brought regularly to this Court on a writ of error and appeal bond which operate as a supersedeas shows a judgment quite intelligible and possible, and where a return to a certiorari issued, without prejudice, long after the transcript was filed here and not long before the case was heard, showed that that judgment had been set aside as improvidently entered and that one with alterations of a very material character had been substituted for it, this Court held "under the circumstances" that the first judgment was the one which it was called on to reexamine.

3. An assignment of error in the highest court of a state to the decision of an inferior state court that the latter had decided a particular state statute "valid and constitutional," and a judgment entry by the latter court that the statute was not "in any respect repugnant to the Constitution of the United States," is not specific enough to give jurisdiction to the Supreme Court of the United States under section 709 of the Revised Statutes, there being nothing else anywhere in the record to show to which provision of the Constitution of the United States the statute was alleged to be repugnant.

4. However, where the record showed that the case was one of the assertion of a lien under a state statute for building a vessel at a town on what the Court might perhaps judicially notice was an estuary of the sea, and where the entry of judgment showed also that the court had adjudged

"that the contract for building the vessel in question was not a *maritime* contract, and that the remedy given by the *lien* law of the state did not conflict with the Constitution or laws of the United States,"

the Court held that the latter statement, in view of the whole record, was sufficient to give this Court jurisdiction.

5. A maritime lien does not arise on a contract to furnish materials for the purpose of building a ship, and in respect to such contracts, it is competent for the states to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement if not inconsistent with the exclusive jurisdiction of the admiralty courts.

6. The provision of the Seventh Amendment to the Constitution which secures

Page 88 U. S. 533

to every party the right to trial by jury where the amount in controversy exceeds \$20 does not apply to trials in state courts.

7. Matters not presented to nor decided by the court below are not assignable for error here.

The Constitution ordains that:

"The judicial power [of the United States] shall extend to all cases of admiralty and maritime jurisdiction."

And the Judiciary Act enacts:

"SECTION 9. That the district courts [of the United States] shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

These provisions of organic and federal statutory law being in force, an act of the Legislature of New Jersey "for the collection of demands against ships, steamboats, and other vessels," [[Footnote 1](#)] approved March 20, 1857, enacted that whenever a debt shall be contracted by the *master, owner, agent, or consignee* of any ship or vessel within the state on account of any work done or materials furnished in this state for or towards the *building, repairing, furnishing, or equipping* such ship or vessel, such debt shall be and continue a lien on the

vessel for nine months, and that any person having such claim over \$20 may apply to the proper officer for a warrant to enforce his lien; that the officer receiving the warrant may seize the vessel and give the prescribed notice; that any other person having such lien may make proper demand and proof and be admitted as an attaching creditor; that the owner or any party may at any time before sale apply for her discharge upon giving bond to pay such claims as shall be established to have been subsisting liens under the act; that upon such bond's being given, the vessel shall be discharged, and the creditors may sue

Page 88 U. S. 534

upon the bond alleging their claims and averring them to be subsisting liens; and that if no such bond is given, proceedings may be taken as provided in the act for the sale of the vessel, or such part of her tackle &c., as shall be sufficient to pay the claims.

This statute of New Jersey being on its statute book, an article of agreement was made November 3, 1866, between Henry Jeroleman of the first part, and a certain Hasbrook, and several others of the second, for *building* a schooner of specified dimensions for the consideration of \$54 per ton, the builder to furnish all labor and materials and deliver the vessel. The whole price, at the said rate per ton, was to be about \$21,000, and the payments were to be made by Hasbrook and the others at stated times during the progress of the work, as \$2,500 when the keel was laid, \$3,000 when the frame was up, \$3,500 when ceiled, and decks laid; \$3500 when outside planks were on and squared off; \$3,500 when the poop deck was on, \$2,000 when ready for launching, and the balance when delivered according to contract. And it was agreed that *as the said several installments were paid, the schooner, so far as then constructed, and the materials therein inserted, should be and become the property of Hasbrook and the others.*

The schooner was built at East Newark, New Jersey. Two persons, one named Elliott and the other Ripley, furnished timber for the vessel, and on the 19th of June, 1867, alleging that they had not been paid for their timber, they caused her to be seized by the sheriff under the already quoted statute of New Jersey, the

vessel, at the time of this seizure, being unfinished, on the stocks, and neither named, enrolled, licensed, or provided with a crew or master. Elliott had furnished his timber in November, 1866, and Ripley his between January 15 and May 10, 1867.

On the 24th of June, 1867 -- and therefore after Elliott and Ripley had furnished the timber to Jeroleman -- Jeroleman assigned the contract giving him the right to build the vessel to one Edwards, by whom the vessel was finished.

On the 2d of July, 1867, Edwards, the new owner, gave

Page 88 U. S. 535

bond to Elliott and Ripley, in the manner prescribed by the New Jersey statute when a liberation of a vessel from seizure is desired, and the vessel was discharged from the seizure.

Jeroleman had been paid more than the original contract price, but *the time when* any payments had been made to him did not appear, nor any fact upon which an appropriation of payment could be founded.

The vessel being discharged from the seizures, Elliott and Ripley brought suit in the Supreme Court of New Jersey against Edwards on the bond, the declaration alleging that the debt was contracted in *building* the vessel, and that the lien was put upon her while she was yet on the stocks unfinished. The action was debt, and the declaration was in the usual form.

As was stated by counsel in this Court and as is also stated in reports of the case in the Supreme Court of New Jersey, [[Footnote 2](#)] the defendants demurred to the declaration and insisted that the statute of the state, by attempting to create a lien on ships, under state law, assumed a control of a subject in its nature maritime, and one, therefore, over which under the already quoted clauses of the federal Constitution and of the statutes of the United States, the federal courts alone had cognizance, and therefore that the state statute was void. The New Jersey Reports further state that the demurrer was overruled, the court in its

judgment overruling it admitting that if the lien sought to be enforced, had been for materials used in *repairing* a vessel which had been finished, launched, and enrolled, it could not have been enforced, and that so far as the statute was designed to aid in the enforcement of a maritime contract for which the admiralty might proceed *in rem*, it was void under the objection stated, but holding that the lien set up having been for materials used in *building* a vessel -- a matter done on land, entirely under state control, and payment for which might be enforced by a common law remedy or by

Page 88 U. S. 536

any new remedy which the legislature might provide -- the statute was *pro tanto* valid.

The counsel in this Court stated that after this opinion, the demurrer was withdrawn.

However, *in the transcript of the record sent here, nothing whatever about any demurrer appeared.* All that appeared was that to the declaration abovementioned several special pleas were filed, among them these:

"1. *Nil debet* generally."

"2. *Nil debet* as to Elliott."

"3. *Nil debet* as to Ripley."

"4. Claim of Elliott not a subsisting lien."

"5. Claim of Ripley not a subsisting lien."

"6. That Jeroleman, who built the vessel, was not owner or agent."

"7. That the debts were not contracted by any owner, agent, or consignee."

And that on issues to these pleas the case was tried.

The facts of the case, as already given, were found by a special verdict.

One question in the case obviously was the question, much agitated in England and here -- namely whether in the case of an executory contract to build a vessel to be paid for by installments as the work progresses, the title remains in the builder until the work is completed and delivered, or whether the title passes to the person for whom the vessel is to be built; in other words, whether in such a case the contract is one for work and materials or one for sale.

A second question also obviously was (admitting that, as a general principle, the contract is in such a case one leaving the title in the builder until the work is completed and delivered) what was the effect of the final clause of the particular contract under consideration, the part on page 88 U. S. 534 , italicized, in changing this general rule? If it did change what was assumed to be the general rule, then, if the payments were made before the materials were furnished, the title was divested out of Jeroleman, since he, then, though builder, could not be "owner" of the vessel when the materials

Page 88 U. S. 537

were furnished, and, therefore, was not competent to charge it with liens; and consequently the defendants were not liable on their bond, which took the vessel's place.

The Supreme Court was of the opinion that the builder was, on general principles, to be regarded as owner; that the final clause divested his title, on the payments of the money; that the burden lay upon the claimants of the vessel -- who were the obligors in the bond -- to show the time of these payments or some fact upon which an appropriation of payment could be founded, and as they had not shown either, that therefore, in law, the builder (Jeroleman) was to be regarded as the owner when the materials were delivered, and accordingly that debts contracted by him did become liens.

Judgment accordingly went for the plaintiffs, and the case was taken by the defendants from the Supreme Court of New Jersey to what in that state is a still

higher court, the Court of Errors and Appeals.

The errors there assigned were:

"1. That the Supreme Court held the Act of March 20, 1857, valid and constitutional."

"2. That the said court decided that Jeroleman, the builder of said vessel, was the owner thereof and competent to charge it with liens."

"3. That the said court adjudged that the respective claims of the plaintiffs were subsisting liens, under the laws of the State of New Jersey, on the vessel, at the time of exhibiting the same."

On the 20th of August, 1872, the Court of Errors and Appeals affirmed the judgment of the Supreme Court. The entry of affirmance, or "rule to affirm," as in the transcript it was called, as the same came here in the transcript, was dated August 20, 1872, and was thus:

"This case coming on to be heard in the Court of Errors and Appeals, and the said court being of opinion:"

"That the Act of the legislature of the State of New Jersey entitled: 'An act for the collection of demands against ships,

Page 88 U. S. 538

steamboats, and other vessels,' approved March 20, 1857, is not *in any respect repugnant to the Constitution or laws of the United States*, as contended for by the plaintiffs in error, but is in every respect valid and constitutional, and,"

"That Henry Jeroleman, the builder of the said vessel, was the owner thereof and competent to charge it with liens, and,"

"That the respective claims of the defendants in error were subsisting liens under the laws of the State of New Jersey on the said vessel, and"

"That the contract for building said vessel is not a maritime contract, and the statutory remedy thereon, to-wit, the aforementioned act, does not conflict with the Constitution or laws of the United States, and,"

"That the said act does not violate the right of trial by jury, nor conflict *with the Constitution of the State of New Jersey in that behalf*, and that there is no error in the proceedings of the Supreme Court herein, and their judgment in the same,"

"It is thereupon, on this 20th day of August, A.D. 1872, adjudged by the Court here that the said act of the Legislature of the State of New Jersey is not in any respect repugnant to the Constitution or laws of the United States, and that the judgment of the Supreme Court be in all things affirmed."

A writ of error was immediately taken to this Court, and within ten days an appeal bond with good, sufficient security given that the plaintiff in error should prosecute his writ to effect and answer all damages and costs if he failed to make his plea good. Due service was also made within ten days of the writ in the mode prescribed by the Judiciary Act in order to make the writ a supersedeas. The transcript was filed here, December 6, 1872.

The case was brought here under the assumption that it came within section seven hundred and nine of the Revised Statutes. [[Footnote 3](#)]

The record being in this Court with the entry of judgment or "rule to affirm," as just given, a suggestion was made here by counsel, May 25, 1874, that the above-quoted "rule to affirm" had been vacated and set aside by the

Page 88 U. S. 539

Court of Errors and Appeals, and an amended "rule" substituted therefor since the filing of said transcript, and a certiorari was issued, without prejudice, on the 25th of May, 1874, to bring up any rule entered by the Court of Errors and Appeals in the suit subsequent to the entering of the "rule to affirm," by which the said rule to affirm had been corrected or vacated, and to bring up also any rule which has been substituted for the said rule to affirm.

A return to the certiorari filed in this Court August 6, 1874, showed that it appearing to that Court that the "rule to affirm" had been erroneously entered by the attorney of the plaintiffs in error, and did not correctly express the judgment of this Court as set forth in the opinion of the court delivered in the cause, it was ordered, on the 1st day of April, 1874, that the said rule to affirm be annulled and stricken from the minutes, and that a rule to affirm the said judgment of the Supreme Court be entered in conformity with the decision of the court on the questions before it.

The following new rule to affirm was accordingly entered *nunc pro tunc* on the record and sent here as part of the return to the certiorari:

"This cause coming on to be heard &c.;, and the court being of opinion that Henry Jeroleman, the builder of the vessel in the declaration of the plaintiffs below mentioned, was the owner of the said vessel at the time when the materials were furnished by said plaintiffs within the meaning of the Act of the Legislature of New Jersey entitled, 'An act for the collection of demands against ships, steamboats, and other vessels,' and as such owners were competent to charge it with liens for such materials, and that the respective claims of the defendants in error were subsisting liens upon said vessel under the said act, and that the said act does not conflict with the Constitution of the State of New Jersey by violating the right of trial by jury. It is thereupon, on this 20th day of August, 1872, ordered, adjudged, and determined by the court here that the judgment of the Supreme Court be affirmed and that the defendants in error do recover their costs in this Court to be taxed."

The case came on for argument, November 24, 1874.

Page 88 U. S. 549

MR. JUSTICE CLIFFORD delivered the opinion of the Court.

Nothing appears in the record to warrant the conclusion that any question reexaminable here was presented in the court of original jurisdiction, whether the proposition is tested by the declaration, the pleas filed by the defendant, the

special verdict, or by the judgment, as all alike tend to show that the questions presented, examined, and decided were questions of local law. Every suggestion of that kind therefore may be dismissed without further remark, as they are utterly destitute of support.

Opposed to that statement is the suggestion in argument that the presiding justice overruled the demurrer to the declaration, but it is a sufficient answer to that suggestion to say that this Court cannot go out of the record to reexamine any question under a writ of error to a state court.

Suppose that is so, still it is contended that the defect is supplied by what occurred in the Court of Errors and Appeals. Tested %alone by the errors assigned in that court, it is quite clear that the jurisdiction of this Court could not be sustained, as the errors assigned in that court do not show with sufficient definiteness that any question cognizable here under a writ of error to a state court was presented to the state Court of Errors for decision. Complaint, it is true, is made that the subordinate court improperly decided that the lien law of the state is valid and constitutional, but it is not alleged that the law is repugnant to any particular provision of the Constitution of the United States, nor that the court of original jurisdiction rendered any decision upon that subject. [[Footnote 4](#)]

Page 88 U. S. 550

Something more must be set forth in such a pleading, to raise a federal question, than the mere allegation that the law is invalid and unconstitutional, as such an assignment is satisfied if held to refer to the Constitution of the state, in which event the question raised is not one cognizable here under a writ of error to a state court. [[Footnote 5](#)]

If the case stopped there, it would be clear that the writ of error must be dismissed for the want of jurisdiction, but it does not stop there, as plainly appears by the judgment of affirmance rendered in the Court of Errors, which shows that the state court of last resort determined, among other things, the following propositions:

(1) That the lien law of the state is not in any respect repugnant to the Constitution of the United States, as contended by the original defendants.

(2) That the contract for building the vessel in question is not a maritime contract, and that the remedy given by the lien law of the state does not conflict with the Constitution or laws of the United States.

(3) That the said lien law does not violate the right of trial by jury nor conflict with the Constitution of the state.

Like every other pleading, an assignment of error is subject to a reasonable construction. Reasonably constructed it cannot be held that the first proposition of the judgment of affirmance involves a comparison of the state lien law with every separate provision of the federal Constitution, and if not with everyone, it is impossible to determine with which one, as there is nothing in the judgment or any other part of the record pointing to any particular part of the Constitution, except what is contained in the second proposition of the judgment, which, in view of the whole record, must be regarded as a more complete specification of what is meant by the first proposition.

Viewed in the light of these suggestions it must be understood from the two propositions that the state Court of Errors decided that the contract in this case for the building

Page 88 U. S. 551

of the schooner was not a maritime contract, and that the law of the state giving the remedy which was pursued by the plaintiffs does not conflict with the federal Constitution or with federal laws. Such an allegation in the judgment of the state court is sufficient to give this Court jurisdiction under the writ of error to reexamine that question. Well-founded doubt upon that subject cannot be entertained, unless it be assumed, as contended by the plaintiffs, that the copy of the judgment embodied in the transcript is not correct.

Due entry of the writ of error to the state court was made here the sixth of December, 1872, and on the first of April, 1874, the Court of Errors decided that the judgment of affirmance, entered there in the case under date of the twentieth of August, 1872, did not correctly express the judgment of the court; and after hearing argument the court ordered that it be wholly annulled, and that it be stricken from the minutes, and that the judgment exhibited in the supplemental record be entered *nunc pro tunc* in lieu thereof.

Alterations of a very material character are made in the substituted judgment, as compared with the judgment originally entered, and which remained unchallenged at the time the writ of error was sued out and when the supersedeas bond was filed. Such alterations, it is insisted by the defendants, could not properly be made at that stage of the litigation, as the writ of error from this Court to the Court of Errors brought up the judgment first mentioned as a part of the transcript annexed to the return made, to the writ of error, by the Court of Errors, to which it was addressed.

Exceptions may arise to that proposition, as broadly stated, but it is not necessary in this case to examine the question in so general an aspect, as whatever may be the power of the Court of Errors to change or amend such a judgment for the purposes of any proceeding under it in the exercise of their own appellate functions, we are, nevertheless, of the opinion that the judgment brought here as part of the return

Page 88 U. S. 552

to the writ of error from this Court must, under the circumstances, remain as the judgment which this Court is called upon to reexamine and review. [[Footnote 6](#)]

Enough has already been remarked to show that the judgment of affirmance first rendered raises the question whether the contract under which the vessel was built is a maritime contract, and whether the law of the state which gives the remedy pursued by the plaintiffs is in conflict with the federal Constitution. Beyond all doubt, that question was presented to the state Court of Errors, and was

decided by that court adversely to the defense set up by the defendants in the court of appellate jurisdiction. [[Footnote 7](#)]

Materials were furnished by the plaintiffs to the persons who contracted to build the schooner, during the progress of the work. Payment for the materials being refused, they instituted the described proceedings to enforce the lien given them by the state law, in such a case, against the vessel for which the materials had been contracted.

When the proceedings were commenced the schooner was only partially constructed and was resting on her original stocks, having never been launched into the water. She was without a name and had never been registered or enrolled, nor had she ever been licensed or surveyed, and she was without a master or crew, and the record shows she had never had a commander.

Concede all that and still the defendants contend that the plaintiffs, as the furnishers of the materials, had a maritime lien for their respective claims which may be enforced in the admiralty, and that the state law giving the remedy which the plaintiffs pursued is in conflict with that clause of the federal Constitution which provides that the judicial

Page 88 U. S. 553

power of the United States shall extend to all cases of admiralty and maritime jurisdiction. They admit, in effect, that to maintain that proposition it is necessary to show that a contract to furnish materials for the construction of a ship is a maritime contract, and they accordingly submit the affirmative of that proposition and insist that all such contracts are maritime, if it appears that the vessel to be constructed is designed for use upon navigable waters.

Maritime contracts are such as relate to commerce and navigation, and unless a contract to build a ship is to be regarded as a maritime contract, it will hardly be contended that a contract to furnish the materials to be used in accomplishing that object can fall within that category, as the latter is more strictly a contract made on land, and to be performed on land, than the former, and is certainly one stage

further removed from any immediate and direct relation to commerce and navigation.

Building materials for such a purpose come very largely from the forest and mines, but if it be admitted that a contract to build a ship is a maritime contract it is difficult to affirm that a contract to furnish the materials for the same is not of the same character, although its breach and even its performance may involve judicial inquiries into the business transactions of men, as well in the forests and mines as in the manufactories and workshops of the whole civilized world. Wherever the question, therefore, involved in the present assignment of error, has been considered, the decision has uniformly turned upon the solution of the inquiry whether a contract for building a ship is or is not a maritime contract. Unless the contract to build a ship is a maritime contract, no one, it is presumed, would contend that the furnishers of the materials for such a purpose can successfully support such a claim; and if it be admitted that the builders of a ship may enforce the payment of the contract price in the admiralty, it would be difficult to maintain that the furnishers of the materials for the purpose are not entitled to pursue their remedy to enforce payment in the same jurisdiction.

Page 88 U. S. 554

Shipbuilding is an occupation requiring experience and skill, and, as ordinarily conducted, is an employment on land, as much as any other mechanical employment, and men engage in the business for a livelihood just as they do in other mechanical pursuits and for the same purpose. Shipwrights, unlike the seamen, have their homes on the land, and not on the seas, and they are seldom shipowners, and not more frequently interested in commerce and navigation than other mechanics. Ships are bought and sold in the market just as ship timber, engines, anchors, or chronometers are bought and sold, even before they are fully constructed and before they are equipped for navigation, and no reason is perceived why a contract to build a ship, any more than a contract for the materials of which a ship is composed, or for the instruments or appurtenances to manage or propel the ship, should be regarded as maritime.

Attempt is made in vain to point out any distinction in principle between a contract to build a ship and a contract for the materials, as the latter are included in the former, and both fall within the same category under the rules of the civil law. Every one who had built, repaired, or fitted out a ship, whether at home or abroad, or lent money to be employed in those services, had by the civil law a privilege or right of payment, in preference to other creditors, upon the ship itself, without any instrument of hypothecation, or any express contract or agreement subjecting the ship to any such claim, and that privilege still exists in all those countries which have adopted the civil law as the basis of their jurisprudence.

Authorities to support that proposition are unnecessary, as the proposition is conceded by both parties in this controversy, but that rule was never adopted in England, and the reverse of it is the settled rule in our jurisprudence in respect to the question under consideration. Conclusive support to that proposition is found in the case of *The Jefferson*, [[Footnote 8](#)] in which the opinion of the court is given by Mr. Justice

Page 88 U. S. 555

Catron. By the statement of the case it appears that it was a libel filed by the assignees of the builders against a new steam ferryboat for a balance due to the builders on account of work done and materials furnished in constructing the hull of the ferry boat. They claimed a lien for the unpaid balance of the price, and the decree was in their favor in the circuit court, but the claimants appealed to this Court. When the cause came up for argument the first point made for the claimants was that a contract to build a ship is not one within the jurisdiction of the admiralty courts, even though it be intended to employ the vessel in ocean navigation. Sufficient appears in the report of the case to show that the libellants took direct issue upon that proposition, and the court said, in disposing of it, that the only matter in controversy is whether the district courts have jurisdiction in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends.

Neither shipbuilders nor furnishers of materials for shipbuilding had any lien at that date under the state law, but the court unanimously decided that the admiralty jurisdiction was limited to contracts, claims, and services which were purely maritime, and to such as had respect to rights and duties appertaining to commerce and navigation. Applying that rule to the case then under consideration the court say:

"So far from the contract being purely maritime and touching rights and duties appertaining to navigation, it is a contract made on land to be performed on land."

Convinced or not, every candid inquirer must admit that this Court did decide in that case that neither a contract to build a ship or to furnish materials for the purpose is a maritime contract. Nor does that decision stand alone, as the same question since that time has more than once come before the court and been decided in the same way. Such was the view of the court in the case of *Roach v. Chapman*, [[Footnote 9](#)] in

Page 88 U. S. 556

which the opinion of the Court was given by Mr. Justice Grier.

Proceedings in that case had been instituted in the district court against a steamer to enforce a lien for a part of the price of the engine and boiler, which had been furnished to the builders in another state, where the steamer was built. Process was served and the claimants appeared and filed a plea to the jurisdiction of the court, which was sustained by the circuit court, and the libellants appealed to this Court. Able counsel appeared for appellants, but this Court decided that a contract for building a ship or for supplying engines, timber, or other materials for her construction is clearly not a maritime contract, and the court remarked that any former *dicta* or decisions which seem to favor a contrary doctrine were overruled. [[Footnote 10](#)]

During the same session of the Court the same question was again presented, and was again decided in the same way. [[Footnote 11](#)]

Express reference is there made to the case of *The Jefferson*, and the remark of the Court is that the court there decided that a contract to build a ship is not a maritime contract; that in this country such contracts are purely local and are governed by state laws, and should be enforced by the state tribunals. Decisions to the same effect have been made in the circuit courts, of which the following are examples: *Cunningham v. Hall*, [[Footnote 12](#)] *The Orpheus*. [[Footnote 13](#)]

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding *in rem*, as practiced in the admiralty courts. [[Footnote 14](#)]

Other support to that proposition than the Act of Congress is not needed, as the provision is to the effect that the district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, except

Page 88 U. S. 557

where the common law is competent to give to suitors a common law remedy. Common law remedies are not applicable to enforce a maritime lien by a proceeding *in rem*, and consequently the original jurisdiction to enforce such a lien by that mode of proceeding is exclusive in the district courts. [[Footnote 15](#)]

Taken together and properly construed those provisions warrant the conclusion that such a party wishing to enforce such a lien may proceed *in rem* in the admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all and may resort to his common law remedy in the state courts, or in the circuit court of the United States, if he can make proper parties to give that court jurisdiction of the case. But a maritime lien does not arise in a contract to build a ship or in a contract to furnish materials for that purpose; and in respect to such contracts it is competent for the states, under the decisions of this Court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement, if not inconsistent with the exclusive jurisdiction of the admiralty courts. [[Footnote 16](#)]

Objection is also taken to the validity of the state law upon the ground that it is in conflict with the provision of the federal Constitution which secures to every party, where the value in controversy exceeds twenty dollars, the right of trial by jury.

Two answers may be made to that objection, either of which is decisive:

(1) That it does not apply to trials in the state courts. [[Footnote 17](#)]

(2) That no such error was assigned in

Page 88 U. S. 558

the Court of Errors, and that the question was not presented to, nor was it decided by, the Court of Errors.

Jurisdiction is not shown unless it appears that someone of the specified questions did arise in the state court and that the question was decided adversely to the party assigning error in this Court. [[Footnote 18](#)]

Judgment affirmed with costs.

[[Footnote 1](#)]

Nixon's Digest 576.

[[Footnote 2](#)]

5 Vroom 96; 7 *id.* 449; 6 *id.* 265. The counsel also exhibited a certified copy of the opinion of the court in the cases from the proper repository.

[[Footnote 3](#)]

See Appendix.

[[Footnote 4](#)]

Messenger v. Mason, 10 *id.* 509; [Bridge Proprietors v. Hoboken Co.](#), 1 Wall. 16; [Furman v. Nicholl](#), 8 Wall. 44; [Maxwell v. Newbold](#), 18 How. 516.

[[Footnote 5](#)]

[Farney v. Towle](#), 1 Black 351; [Hoyt v. Sheldon](#), 1 Black 521; [Railroad Co. v. Rock](#), 4 Wall. 180.

[[Footnote 6](#)]

[Generes v. Bonnemer](#), 7 Wall. 564; [Avendano v. Gay](#), 8 Wall. 376; [Flanders v. Tweed](#), 9 Wall. 431; [Hozey v. Buchanan](#), 16 Pet. 215; [Albers v. Whitney](#), 1 Story 310; [Brush v. Robbins](#), 3 McLean 486; [Medford v. Dorsey](#), 2 Washington's Circuit Court 433; [Kanouse v. Martin](#), 15 How. 210; [Cheang-Kee v. United States](#), 3 Wall. 326; [Noonan v. Bradley](#), 12 Wall. 129.

[[Footnote 7](#)]

[Elliott v. Edwards](#), 6 Vroom 266; [Edwards v. Elliott](#), 5 *id.* 96.

[[Footnote 8](#)]

[87 U. S. 20](#) How. 393.

[[Footnote 9](#)]

[63 U. S. 22](#) How. 129.

[[Footnote 10](#)]

[The Jefferson](#), 20 How. 400.

[[Footnote 11](#)]

[Morewood v. Enequist](#), 23 How. 494.

[[Footnote 12](#)]

1 Clifford 45.

[[Footnote 13](#)]

2 *id.* 35.

[[Footnote 14](#)]

[The Belfast](#), 7 Wall. 644; [The Moses Taylor](#), 4 Wall. 411; [Hine v. Trevor](#), 4 Wall. 555.

[[Footnote 15](#)]

Brookman v. Hamill, 43 N.Y. 554; *The Josephine*, 39 *id.* 19.

[[Footnote 16](#)]

[The Belfast](#), 7 Wall. 645; *Sheppard v. Steele*, 43 N.Y. 55; *Ferran v. Hosford*, 54 Barbour 208.

[[Footnote 17](#)]

[Barron v. Baltimore](#), 7 Pet. 247; [Twitchell v. Commonwealth](#), 7 Wall. 326; [Livingston v. Moore](#), 7 Pet. 551; [Fox v. Ohio](#), 5 How. 434; [Smith v. Maryland](#), 18 How. 76; Cooley on Constitutional Limitations, 2d ed. 19.

[[Footnote 18](#)]

[Crowell v. Randell](#), 10 Pet. 392; [Suydam v. Williamson](#), 20 How. 440.

|88 U.S. appx|

APPENDIX

SECTION 709 of the Revised Statutes of the United States (in its main provisions, the same as the twenty-fifth section of the Judiciary Act of 1789 and the second section of the act of 1867, much similar to it) being referred to in the body of this book more than once, is here given below. The section, for convenience of reference, is broken up by the reporter into paragraphs.

"SECTION 709. A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had,"

"Where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity,"

"OR where is drawn in question the validity of a statute of or an authority exercised under any state on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity,"

"OR where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority,"

"May be reexamined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States, and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case and award execution or remand the same to the court from which it was so removed."

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com