

U. S.]

IN RE "TRENTON."

[U. S.]

the cargo is brought into England or Wales and no owner is domiciled therein. It may be added that the English Admiralty has jurisdiction of accounts between part owners, and may decree the sale of a share or shares in the ship, while we can only take cognizance of such disputes incidentally to the distribution of the proceeds.

Now, if the theory of the libellant be correct, a judicial sale of a vessel in one country would free her from none of the liens which the courts of that country were enabled to enforce. A sale under such circumstances would be utterly destructive of the interests of owners and a complete sacrifice of the vessel. No one could possibly know the value of his purchase, for no one could foresee the amount of claims that might be made against the vessel in other countries. It would also compel us to inquire in each case whether such foreign court could have taken cognizance of the claim, either by original proceeding or by petition against the proceeds of sale, and, as the foreign law in each case must be proved as a question of fact, the errors and confusion into which we should fall will be readily appreciated.

The truth is, that all these liens are inchoate rights, subject to the contingency of loss in case of disaster to the vessel necessitating a sale by the master, or in case judicial proceedings are taken against her in a foreign country to subject her to claims recognized by the law of such country. The recognition of liens and the order in which they shall be marshalled and paid, pertain to the remedy, and are administered according to the *lex fori*, when the courts of such country have obtained jurisdiction of the *res* by actual seizure, they have full power to dispose of the property and to transfer the title, and such transfer will ordinarily be respected in every other country. Nor is this power limited to the final determination of the case. The title to property sold *pendente lite* will be respected in another country, though the proceedings upon which the property was originally seized, fail: *Stringer v. Marine Insurance Company*, L. R., 4 Q. B., 676.

In these cases of judicial sales *in rem*, the liens of creditors are not extinguished, but are merely transferred from the *res* itself to the fund in court. The decree of the maritime court deprived the libellant in this case of no right of property. It was merely adjudged that

his claim was not of that character which entitled him to set the machinery of the court in motion. It does not follow that the court would not have entertained a petition by the libellant for payment from the proceeds of sale, after the satisfaction of what under the laws of Canada are maritime liens, upon proof that by the *lex loci contractus* he was entitled to a lien. It is a constant practice in our courts of admiralty to decree the payment of surplus proceeds to mortgagees and others having liens which are not enforceable by original proceedings. As Mr. Justice Story observes (*Conflict of Laws*, sec. 322, b) "where the lien or privilege is created by the *lex loci contractus*, it will generally, though not universally, be respected and enforced in all places where the property is found or where the right can be beneficially enforced by the *lex fori*. And on the other hand, where the lien or privilege does not exist in the place of the contract, it will not be allowed in another country, although the local law where the suit is brought would otherwise sustain it." Sec. 323—"But the recognition of the existence and validity of such liens by foreign countries, is not to be confounded with the giving them a superiority or priority over all other liens and rights justly acquired in such foreign countries under their own laws, merely because the former liens in the country where they first attached, had there by law, or by custom, such a superiority or priority." In *Harrison v. Sterry*, 5 Cranch, 289, Chief Justice Marshall used the following language: "The law of the place where the contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. It is extrinsic, and rather a personal privilege, dependent upon the place where the property lies, and where the court sits, which is to decide the cause."

It is believed to be the rule of the English as well as American courts of Admiralty, after the payment of maritime liens to direct the surplus proceeds to be paid over to any one who may have a lien upon such proceeds by the law of the place where the contract, from which the lien arose, is made; or at least to retain the fund in court until the court of chancery shall have made an order for its distribution: *The Flora*, 1 Hagg, 298. *The Harmonia*, 1 St. Rob. 178. *The Nordstjeruen*, Swab. 260. *The Gustaf*, 6 L. T. (U. S.) 660. But even if the foreign