

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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DENNIS MATHESON,  
Appellant / Plaintiff

v.

CITY OF HOQUIAM and ITS  
AGENTS or ASSIGNS



Eric Dickman  
Attorney for Appellant

And

The STATE OF WASHINGTON and  
the WASHINGTON STATE DEPARTMENT  
OF NATURAL RESOURCES

Appellees / Defendants

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**APPELLANT'S OPENING BRIEF**

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## **Introduction**

Appellant, Mr. Dennis Matheson, operated a maritime salvage business. As part of his business, Mr. Matheson employed three vessels: the MAMULA, the HALLELUJAH, and the NORTHERN RETRIEVER. The City of Hoquiam originally tried to seize all three of Mr. Matheson's workboats. However, all claims by the City of Hoquiam and the Department of Natural Resources (hereinafter "state") against the MAMULA and the HALLELUJAH have been dropped, and are not part of this appeal.

At some point the City of Hoquiam claims to have mailed Mr. Matheson copies of the "Notice of Intent to Obtain Custody" and placed three copies of it on board the NORTHERN RETRIEVER. CP page 61. "The Notice of Intent to Obtain Custody" is not dated. And it does not name Mr. Matheson, although he is the named owner of the NORTHERN RETRIEVER.

However, the "Notice of Intent to Obtain Custody" claims the City of Hoquiam would take custody of the NORTHERN RETRIEVER on June 16, 2008. CP page 61. Once the NORTHERN RETRIEVER is in custody, the City of Hoquiam claims to have the right to use the vessel and/or destroy it. CP page 61.

Mr. Matheson was given the option to file suit in the superior court in the county in which the NORTHERN RETRIEVER was located after it was seized.

Prior to or at about the time the City of Hoquiam seized the NORTHERN RETRIEVER, Mr. Matheson moved the vessel to a place where he could continue his salvage operation. Mr. Matheson had a contract with the U.S. Army Corp of Engineers to salvage a wreck, the SIERRA, that was hindering navigation. Mr. Matheson filed suit in the Superior Court for Grays Harbor County. The Department of Natural Resources intervened in Mr. Matheson's lawsuit. CP pages 56-63. The trial court granted a number of orders regarding the NORTHERN RETRIEVER. CP pages 6-10, 11-18, 20-24, 224-226, 279-80, 281-82.

Ultimately, the trial court allowed the state to destroy the NORTHERN RETRIEVER by cutting her up for scrap. However, only an in rem action under federal maritime law can decide the rights to the res against everyone in the world. By destroying the res without using the well-known procedures of federal maritime law to give notice to the world and to foreclose on the maritime lien(s) as used in the federal courts, the trial court interfered with any maritime lien claims being brought against the NORTHERN RETRIEVER.

A maritime lien holder would look for notice in federal court – not in the courts of every state, and in this case every city in the world. The state’s destroying the vessel changes the lay of maritime law in a way that is unacceptable. Once the res is lost, the lien is lost.

Once the state destroyed the NORTHERN RETRIEVER, Mr. Matheson was charged for the cost of destroying the NORTHERN RETRIEVER less the money from the sale of the scrap metal, Mr. Matheson was ordered to pay \$834,643.95. CP page 11-18 and 20-24.

Mr. Matheson timely appealed all of the orders from the superior court. (CP pages 27-55)

The state superior court was the inappropriate forum in which to bring the action against the NORTHERN RETRIEVER, and the procedures used in state court were equally inappropriate.

### **Standard of Review**

[A] party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, . . . .

RAP 2.5(a)

The standard of review for whether the trial court has subject matter jurisdiction, as with questions of law, is de novo. *Spokane Airports v. RMA, Inc.*, 149 Wn.App. 930, ¶ 25, 206 P.3d 364, 369 (2009).

It bears repeating that once a procedural requirement is transformed into an element of subject matter jurisdiction, a party's violation of the requirement becomes a defect that can be raised at any time. This is so because no objection is necessary to preserve an objection to lack of subject matter jurisdiction, RAP 2.5(a), and a judgment entered without subject matter jurisdiction is void. *In re Marriage of Ortiz*, 108 Wn.2d 643, 649-50, 740 P.2d 843 (1987). A void judgment must be vacated even if the moving party actively participated in the lawsuit, because lack of subject matter jurisdiction is not subject to waiver. *Skagit Surveyors & Eng'rs, LLC*, 135 Wn.2d at 556, 958 P.2d at 962.

*Sprint Spectrum. LP v. State of Washington Dept. of Revenue*, 156 Wn.App. 949, ¶ 51, 235 P.3d 849 (2010)(emphasis added); *accord, Harbor Enterprises, Inc. v. Gudjonsson*, 116 Wn.2d 283, 803 P.2d 798 (Wash. 1991), *reconsideration denied*, 1991 Wash.LEXIS 323 (1991).

The standard of review for the grant of summary judgment is de novo.

In reviewing a summary judgment order, this court engages in the same inquiry as did the superior court. *Atherton Condo. Apartment-Owners Ass'n Bd. v. Blume Dev. Co.*, 115 Wn.2d 506, 515-16, 799 P.2d 250 (1990). Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law.’ CR 56(c). The burden is on the moving party to establish its right to judgment as a matter of law, and facts and reasonable inferences from the facts are considered in favor of the nonmoving party. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

*Goad v. Hambridge*, 85 Wn. App. 98, 102, 931 P.2d 200 review denied 132 Wn.2d 1010, 940 P.2d 654 (1997).

In ruling on a motion for judgment as a matter of law, the trial court must view the evidence in the light most favorable to the nonmoving party. If there is any justifiable evidence from which reasonable minds might find for the nonmoving party, the issue must go to the jury.

*Miller v. Artic Alaska Fisheries*, 133 Wn.2d 250, 265, 944 P.2d 1005 (1997).

### **Assignment of Error**

The trial court erred in granting the rulings against Mr. Matheson regarding the disposition of the NORTHERN RETRIEVER. (CP pages 6-10, 11-18, 20-24, 224-224, 279-80, 281-82)

### **Issues Pertaining to Assignment of Error**

- (1) As applied to the NORTHERN RETRIEVER, was the procedure the state used to enforce RCW 79.100 an action in rem against the vessel and beyond the subject matter jurisdiction of the Superior Court?

- (2) As applied to the NORTHERN RETRIEVER, did the superior court act without subject matter jurisdiction when it allowed for the destruction of the NORTHERN RETRIEVER without following the notice and legal process required under the Supplemental Rules For Admiralty or Maritime Claims and Asset Forfeiture Actions in federal court?

### **Statement of the Case**

Pursuant to RCW 79.100 et al. the City of Hoquiam claims to have mailed and served copies of the Notice of Intent to Obtain Custody to Mr. Matheson and the NORTHERN RETRIEVER. (CP page 61) The Notice of Intent to Obtain Custody claims the City of Hoquiam was going to obtain custody of the NORTHERN RETRIEVER on June 16, 2008. CP page 61.

On July 3, 2008, Mr. Matheson brought an action in the Grays Harbor Superior Court to assert his claim to the NORTHERN RETRIEVER. CP pages 56-63.

The Department of Natural Resources joined the lawsuit as an intervener. CP pages 54.

The trial court granted summary judgment against Mr. Matheson and allowed the NORTHERN RETRIEVER to be scrapped. CP pages 6-10.

Subsequently, the state destroyed the NORTHERN RETRIEVER. The state took the NORTHERN RETRIEVER and cut

the vessel up and sold her for scrap. The state then applied to the trial court for an order requiring Mr. Matheson to pay \$834,643.95, the cost of scrapping the NORTHERN RETRIEVER less the value of the metal scrap. (CP pages 11 – 18 and 20-28.)

Mr. Matheson filed a timely appeal of all orders. (CP pages 27-55)

### Argument

A. As applied to the NORTHERN RETRIEVER, the procedure the state used to enforce RCW 79.100 was an action in rem against the vessel and beyond the subject matter jurisdiction of the Superior Court.

The state's action in using RCW 79.100 to destroy the NORTHERN RETRIEVER acted in every important respect as though it was foreclosing on an in rem lien. The state took control of the NORTHERN RETRIEVER and destroyed the vessel, thereby ending the res. Clearly, this was an action against the res. Foreclosing a maritime lien against the res is beyond the trial court's subject matter jurisdiction and for that reason the decisions of the court (CP pages 6-10, 11-18, 20-24, 224-26, 279-80, and 281-82) should be found to be void.

In *Pasternack v. Lubetich*, 11 Wn.App. 265, 522 P.2d 867, 1974 AMC 1464 (1974), the court said:

The foundation of jurisdiction In rem is the taking of the vessel into the custody of the court and the characteristic virtue of a proceeding In rem is that it operates directly upon the Res as the titular respondent in the suit and that the actual subject-matter of the jurisdiction and not, as at common law, mediately through the right, title or interest of a party brought before the court as defendant through personal service or the mere attachment of property as his with a view to subjecting his interest therein to the satisfaction of the judgment.

*Pasternack*, 11 Wn.App. at 267-68.

As the posting placed on the NORTHERN RETRIEVER that triggered the proceedings in the Superior Court said:

CITY OF HOQUIAM

NOTICE OF INTENT TO OBTAIN CUSTODY

VESSEL "NORTHERN RETRIEVER VIN ...

CITY OF HOQUIAM, acting as an authorized public entity with the authority granted in RCW 79.100, intends to take custody of the vessel *Northern Retriever, Vin ...*, on June 16, 2008. ... Once custody is obtained, CITY OF HOQUIAM is authorized to use or dispose of [the vessel] in any appropriate and environmentally sound manner without further notice to the owner.

CP page 61.

This is surely taking the vessel into custody and operating directly upon the res. The federal court's jurisdiction is "exclusive" as to those maritime causes of action where the thing itself is treated as the offender and made defendant by name or description to enforce a right.

The fact the City of Hoquiam required Mr. Matheson to file suit to attempt to recover his vessel, instead of the City of

Hoquiam going to court first to enforce its claimed right to take possession of the NORTHERN RETRIEVER and destroy the NORTHERN RETRIEVER does not change the fact the City's action is a procedure in rem. The notice posted on the NORTHERN RETRIEVER named the vessel. Mr. Matheson's name is not mentioned anywhere on the notice. No in personam claim is made against Mr. Matheson, but the notice makes clear the NORTHERN RETRIEVER will be "dispose[d] of [ ] in any appropriate and environmentally sound manner without further notice to the owner."

The court should not let a party use the form of the proceeding to supersede the substance of what is really happening. Regardless of how this case was pled it is really an in rem action. In *Farwest Steel Corp. v. DeSantis*, 102 Wn.2d 487, 687 P.2d, 1985 AMC 412 (1984), the Washington Supreme Court put function ahead of form to find that RCW 60.36.010 et seq. created an in rem claim that could not be enforced in State Court:

Call the action what we may – quasi in rem, if that be the proper designation of an action in which both the person and the rem itself are proceeded against – it cannot be denied that, since by such action it is sought to make the property or thing itself liable for the debt growing out of a contract for the repair thereof, the action involves a proceeding in rem ....

*Farwest Steel Corp.*, 102 Wn.2d at 490(holding RCW 60.36.010 created a maritime lien in rem unenforceable in State Court).

With the NORTHERN RETRIEVER Mr. Matheson was required to bring an action in superior court to claim his vessel. (CP pages 56-63) However, the fact the statutes required Mr. Matheson to be the plaintiff against the City of Hoquiam and then the Department of Natural Resources, does not change the fact that, as applied here, RCW 79.100 was used to bring the res, the NORTHERN RETRIEVER, into the court's jurisdiction so that the state's alleged right to destroy the vessel as a derelict could be foreclosed upon. RCW 79.100 created a maritime lien that was attempted to be foreclosed upon in state court, even though this is beyond the superior court's subject matter jurisdiction.

What happened to the NORTHERN RETRIEVER has much in common with the BESSIE MAC. The BESSIE MAC was taken by the Washington State Department of Fisheries because the crew of the vessel had been fishing illegally. The federal court found that Washington State could not hold the vessel, because the state was asserting a maritime lien claim beyond the state court's subject matter jurisdiction.

The proceeding is not against a person or entity to enforce a lien incidental to a claim against such person or entity. I do not have doubt but that admiralty has exclusive jurisdiction.

*The Bessie Mac*, 21 F.Supp. 220, 223, 1938 AMC 77 (W.D. Wa. 1937)(citations omitted).

As to the right of the Department of Natural Resources to hold the NORTHERN RETRIEVER until such time as she was destroyed or Mr. Matheson could bring a claim in the state superior court, the *Bessie Mac* court rejected this type of procedure to take possession of a res as beyond the subject matter jurisdiction of the superior court.

The contention of the respondent State that the vessel and seine net were in 'Custody of Law' is not well founded. The director of fisheries can in no sense be construed as an officer of the court holding the property under fictitious process to be ripened into a right in the future upon institution of forfeiture proceedings. He merely held the vessel and net, etc., solely for the purpose of instituting a plenary action. The vessel and seine were not held for judicial execution necessary pursuant to execution of a legal writ.

*The Bessie Mac*, 21 F.Supp. at 223.

Similarly:

But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be used and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar in substance to a libel. That after notice in the nature of a monition, the vessel may be condemned and an order made for sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the Western States.

*The Hine v. Trevor*, 71 U.S. 555, 571, 18 L.Ed. 451, 2009 AMC 263 (1866).

RCW 79.100.040(1) provides, “the authorized public entity must first obtain custody of the vessel.” This is done without a proceeding against the owner.

RCW 79.100.040(2) provides:

All notices sent, posted, or published in accordance with this section must, at a minimum, explain the intent of the authorized public entity to take custody of the vessel, the rights of the authorized public entity after taking custody of the vessel as provided in RCW 79.100.030, the procedures the owner must follow in order to avoid custody being taken by the authorized public entity, the procedures the owner must follow in order to reclaim possession after custody is taken by the authorized public entity, and the financial liabilities that the owner may incur as provided for in RCW 79.100.060.

This posting under RCW 79.100.040(2) is in the nature of a libel used in admiralty law to “arrest” or seize the defendant vessel.

RCW 79.100.050 provides:

After taking custody of a vessel, the authorized public entity may use or dispose of the vessel in any appropriate and environmentally sound manner without further notice to any owners.

This is the state’s claim of right to condemn and destroy the vessel under state law.

As seen, RCW 79.100 et al. has all of the characteristics discussed in *The Hine v. Trevor*, supra., that led that court to find the process was beyond the subject matter jurisdiction of the state court.

Foreclosing on a maritime lien as provided for in RCW 79.100 et al. is beyond the Superior Court's subject matter jurisdiction. Therefore, the orders appealed from (CP pages 6-10, 11-18, 20-24, 224-26, 279-80, and 281-82) should be found to be void.

B. As applied to the NORTHERN RETRIEVER, the superior court acted without subject matter jurisdiction when it allowed for the destruction of the NORTHERN RETRIEVER without following the notice and legal process required under the Supplemental Rules For Admiralty or Maritime Claims and Asset Forfeiture Actions in federal court.

Alternatively, as applied against the NORTHERN RETRIEVER, the state's actions worked a material prejudice to the characteristic features of the general maritime law. The state's activities interfered with the proper harmony and uniformity of the maritime law to such an extent they were impermissible under the subject matter jurisdiction of the superior court.

In *Pasternack*, supra., "the court quieted title to the boat in Pasternack, ordered Lubetich to return the boat to Pasternack, and awarded damages against Lubetich...." *Pasternack*, 11 Wn.App. at 268. The decision only affected the two parties who claimed ownership of the vessel.

With the NORTHERN RETRIEVER all of the vessel's maritime lien holders were denied their right to pursue their claim, because the state did not follow the procedures for notification of maritime lien holders as set out in the federal rules of civil procedure. See Supplemental Rules For Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule C, In the NORTHERN RETRIEVER's case, shortly after, Mr. Matheson filed in superior court against the City of Hoquiam and later the Department of Natural Resources, to assert his claim to his vessel (CP pages 56-63) the NORTHERN RETRIEVER, the res, was destroyed. By destroying the NORTHERN RETRIEVER without using the process required under federal maritime law to give notice and allow the maritime lien holders to make a claim against the vessel as provided in the Supplemental Rules For Admiralty or Maritime Claims and Asset Forfeiture Actions, Rule C, the state worked a material prejudice to the characteristic features of the general maritime law. It interfered with the proper harmony and uniformity of the maritime law. It acted beyond its subject matter jurisdictional limits.

To see how the trial court, by ordering the destruction of the NORTHERN RETRIEVER without giving proper notice to potential maritime lien holders under the process in federal court

the trial court, acted without subject matter jurisdiction, we must review a little about maritime liens.

Historically, the purpose of the maritime lien arose from the fact the providers of goods and services necessary for the continuance of voyages of vessels trading away from their homeports were understandably reluctant to provide credit to vessel operators about whom they knew nothing. Commercial necessity required that masters could pledge their vessels as security for the debts of the vessel necessary for the vessel's continued operation. The purpose of recognizing maritime liens is to encourage the provision of necessities and supplies to ships whose operators are unable to make contemporaneous payment. *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries, Co.*, 254 U.S. 1, 41 S.Ct. 1, 65 L.Ed. 97, 2001 AMC 2692 (1920).

A maritime lien is a non-possessory property right of a non-owner in a vessel, its earned freight, or cargo giving the maritime lien holder the right in admiralty to have the property sold and the proceeds distributed to the lien holder(s) to satisfy an in rem debt of the property.

In the case of *THE YANKEE BLADE* (at December term, 1856) the nature of a maritime lien was clearly and exactly defined by Mr. Justice Grier, speaking for this court as follows: 'The maritime 'privilege' or lien is adopted from

the civil law, and imports a tacit hypothecation of the subject of it. It is a 'jus in re,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law, and peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed 'proceedings in rem,' are evidently not within the category." [*THE YANKEE BLADE*, 60 U.S. 82, ]19 How. 82, 89[15 L.Ed. 554 (1856)].

*The GLIDE*, 167 U.S. 606, 612, 17 S.Ct. 930, 42 L.Ed. 296 (1897).

The theory of law recognizing maritime liens is that providers of goods and services to a vessel benefit the vessel and all who have claims upon her in that subsequent services enable the vessel to continue its voyages to generate income to pay the vessel's debts. "[I]n every case the last lien given will supersede the preceding. ... The vessel must get on: this is the consideration that controls every other." *The St. Jago de Cuba*, 22 U.S. 409, 416, 6 L.Ed. 122, 9 Wheat. 409 (1824).

*The St. Jago de Cuba* court also explains another important point. The ST. JAGO DE CUBA underwent a governmental forfeit due to violating the Slave Trade Act . That governmental forfeiture, unlike what the state did to the NORTHERN RETRIEVER, was not to enforce a maritime lien: Instead it was a common law forfeiture. Therefore the forfeiture of the ST. JAGO DE CUBA did not displace the maritime liens

held for the wages of the seamen and the material men for supplies, where the lien holders were innocent of the violation of the Slave Trade Act. *The St. Jago de Cuba*, 22 U.S. at 417. These maritime liens were subsequently asserted and paid.

Maritime liens do not require filing or recording to be valid and enforceable. *U.S. v. Z.P. Chandon*, 889 F.2d 233, 237 (9th Cir. 1989). For example, the Uniform Commercial Code does not apply to maritime liens and, therefore, the lien need not be filed to be valid and enforceable. *In Re Pacific Caribbean Shipping (U.S.A.), Inc.* 789 F.2d 1406, 1407-08, 1986 AMC 2308 (1986).

In the leading treatise on maritime law, it is pointed out that maritime liens have extraordinarily little in common with land liens, including consensual security interests. G. Gilmore & C. Black, *The Law of Admiralty* 586-89 (2d ed. 1975). Land liens and maritime liens are “two unlike things ... called by the same name.” *Id.* at 589. In particular, it is well-established that maritime liens are secret and unrecorded, that is, they are valid without possession or filing, while Article 9 security interests do require filing or possession. *Id.* at 586-89. Furthermore, maritime liens generally have priority in *reverse* chronological order, while Article 9 security interests generally have priority in normal chronological order. *Id.*

*In Re Pacific Caribbean Shipping (U.S.A.), Inc.* 789 F.2d at 1407.

The secret nature of maritime liens is one of the reasons that the state saying it notified people with recorded liens on the NORTHERN RETRIEVER was all but meaningless. Instead of waiting to be notified by a smaller city, those with a maritime lien look to the nation’s federal courts. If a vessel is seized and

brought into federal court for lien foreclosure, the word goes out quickly and everyone wishing to assert their lien against a vessel will file in one court. If the amount of liens is more than can be paid, the vessel is condemned and the proceeds of that sale pay as many liens as possible in a predetermined set order. However, no one was looking at Grays Harbor Superior Court to see if a vessel was seized. And when the state destroyed the res, anyone with a lien against that vessel lost the lien without proper notice or even a chance to make their claim against the proceeds of the vessel. Destruction of the res ends the liens on the res.

Only a federal court in an action in rem can wipe off maritime liens. Therefore, a lien holder need not keep track of actions brought by the City of Hoquiam or other cities in state municipal courts or even claims defended by the Department of Natural Resources in superior court to protect its lien claim.

The United States Constitution clearly distinguishes cases in law and equity from cases involving admiralty and maritime jurisdiction. Long ago, in 1828 the Supreme Court explained this distinction in *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 7 L.Ed. 242 (1828), in the following words:

The constitution and laws of the United States give jurisdiction to the district courts over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. We are, therefore, to inquire, whether cases in admiralty, and cases arising under the laws and constitution of the United States, are identical. If we have recourse to that pure fountain from which all the jurisdiction of the federal courts is derived, we find language employed which cannot well be misunderstood. The constitution declares, that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and

treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." The constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself; and the law of admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise.

*Id.*, 26 U.S. at 545-46.

*U.S. v. Z.P. Chandon*, 889 F.2d 233, 236-37 (9th Cir. 1989).

The Washington Supreme Court has said:

The maritime law being part of the law of the United States, the legislature of a state has no power to modify or abrogate it. *Workman v. New York City*, 179 U.S. 552[, 179 U.S. 552, 21 S.Ct. 212, 45 L.Ed. 314 (1900)].

*State v. Daggett*, 87 Wash. 253, 257, 151 P. 648 (1915).

Maritime law has a long history.

The origins of admiralty regulations of navigation and commerce was with power over the admiral. Anciently, he was a great officer, governed the Navy, and adjudicated all maritime matters, and his power in navigation and commerce extended over the navigable waters of all parts of the world. The origin is in doubt, probably Asiatic, unknown in Europe before the time of the Holy Wars. The admiral judged all matters relative to merchants and mariners pursuant to the law of Oleron, which was taken, so far as it was available, from the Rhodian law, which was

promulgated about seventy years after the reign of Solomon, King of Israel.

*The Bessie Mac*, 21 F.Supp. 222.

Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from the laws of the several states-not derived from or dependant on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

'One thing, however is unquestionable: the Constitution must have referred to a system of laws coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' *The Lottawanna*, 21 Wall, 558, 574-75, 22 L.Ed 654.

*Kickerbocker Ice, Co. v. Stewart*, 253 U.S. 149, 160-61, 30 S.Ct. 438, 64 L.Ed 834 (1920).

The longstanding and developed rules of notice, practice and procedure of the federal maritime law cannot be broken at will without disrupting the commercial character affecting the intercourse of the states with each other or with foreign states. The laws relating to vessels and lien foreclosure must be uniform throughout the many states or the consequent chaos will lead to a breakdown of the maritime lien system and ships will be unable

to get the credit necessary to obtain the necessities for their voyages. Commerce will be disrupted.

How common are maritime liens?

Under maritime law, a maritime lien is created in a large number of circumstances. For example:

Seamen's claims for wages are generally deemed "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." G. Gilmore & C. Black, *supra*, at 627 (citing *The John G. Stevens*, 170 U.S. 113, 18 S.Ct. 544, 42 L.Ed. 969 (1898)).

*U.S. v. Z.P. Chandon*, 889 F.2d 233, 237 (9th Cir. 1989).

Personal injuries create a maritime lien. *See Complaint of McLinn*, 744 F.2d 677, 685, 1985 AMC 2339 (1984).

A maritime lien for a necessity has been recognized both historically, *see e.g. The General Smith*, 17 US (4 Wheaton) 438, 422, 4 L.Ed. 609 (1819), and by statute, 46 USC §§ 31301(4) and (5) and 31341-31343. "Necessities" generally means "any item which is reasonably needed for the venture in which the ship is engaged." *Foss Launch & Tug v. Char Ching Shipping, U.S.A.*, 808 F.2d 697, 1987 AMC 913 (9th Cir. 1987). The term has been given a broad interpretation. *Venture Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 2002 AMC 2248 (9th Cir. 2002).

A few more examples of necessities that give rise to a maritime lien include:

- Repairs to vessels. *Boat La Sambra v. Lewis*, 321 F.2d 29, 1966 AMC 691 (9th Cir. 1963).
- Wharfage to vessels. *Ex parte Easton*, 95 U.S. 68, 5 Otto 68, 24 L.Ed. 373 (1877)(wharfage contract may be enforced by a proceeding in rem against the vessel, or by a suit in personam against the owner).
- Airfare of crewmembers being transported to a vessel. *Carl Ent. v. Barge Hudson Handler*, 475 F.Supp. 42, 1980 AMC 1759 (S.D. Al. 1979).
- Services of a surveyor relative to supervising repairs. *Savas v. Maria Trading Corp.*, 285 F.2d 336, 1961 AMC 260 (4th Cir. 1960).
- Taxi fare for transporting provisions or crew to a vessel. *Jacobs v. The Artemis*, 53 F.2d 672, 1932 AMC 195 (S.D.N.Y. 1931).
- Ship husbandry services. *See Exxon v. Central Gulf Lines, Inc.*, 500 U.S. 603, 500 U.S. 603, 111 S.Ct. 2071, 114 L.Ed.2d 649, 1991 AMC 1817 (1991)(supplying fuel to vessel in Saudi Arabia through a third party).

- Clerical fees related to vessel documentation. *Security Pacific Bank of Washington v. September Morn*, 754 F.Supp. 813, 1991 AMC 1780 (1991)(Judge Rothstein).
- Pollution damage caused by the vessel. *State of Cal. By and Through Dept. of Fish and Game v. S.S. Bournemouth*, 307 F.Supp. 922, 1970 AMC 642 (D.C. C.D. Cal. 1969).

Needless to say, maritime liens are very common and rarely can a vessel operate over time without having one or more maritime liens attach to the vessel. Creditors world wide rely on maritime liens to conduct their business. They also rely upon the fact that their liens can only be removed by the action of a federal court sitting in admiralty. This is fundamental to maritime commerce continuing uninterrupted on a global scale. The state's actions of taking the NORTHERN RETRIEVER and destroying her without using the accepted maritime process for giving notice to all possible lien holders worked a material prejudice to the characteristic features of the general maritime law. The state's actions interfered with the proper harmony and uniformity of the maritime law to such an extent that they were impermissible under the subject matter jurisdiction of the superior court.

Therefore, the orders at CP pages 6-10, 11-18, 20-24, 224-26, 279-80, and 281-26 should be found to be void.

## **CONCLUSION**

Mr. Matheson appeals the orders entered against the NORTHERN RETRIEVER and himself. CP pages 6-10, 11-18, 20-24, 224-26, 279-80, and 281-82.

RCW 79.100 et al creates a maritime lien that is beyond the subject matter jurisdiction of the superior court to enforce.

In the alternative, what RCW 79.100 et al. does is adversely affect the operation of general maritime law and creates havoc in the uniform federal maritime law. The maritime law must be uniform throughout the states for the good of national and international commerce. One need not look further than the U.S. stock market to see what uncertainty does to markets. If every state or city handles vessel and the condemnation of vessels differently, confusion will reign.

The solution was quite simple. All the City of Hoquiam had to do was go to federal court and use its admiralty notice and process to foreclose on the NORTHERN RETRIEVER, and the proper harmony and uniformity of the maritime law would have been protected.

Therefore, Mr. Matheson respectfully requests that the Orders found at CP 6-10, 11-18, 20-24, 224-26, 279-80, and 281-82, be reversed and this matter be remanded for additional proceedings.

DATED this 8 day of August 2011.

A handwritten signature in black ink, appearing to read "Eric Dickman", written over a horizontal line.

Eric Dickman, LLC,  
attorney for appellant Mr. Dennis Matheson  
Alaska Bar Number 9406019  
Oregon Bar Number 02194  
Washington Bar Number 14317  
Also admitted in New York

## APPENDIX

### RCW 79.100.040

Obtaining custody of vessel.

(1) Prior to exercising the authority granted in RCW 79.100.030, the authorized public entity must first obtain custody of the vessel. To do so, the authorized public entity must:

(a) Mail notice of its intent to obtain custody, at least twenty days prior to taking custody, to the last known address of the previous owner to register the vessel in any state or with the federal government and to any lien holders or secured interests on record. A notice need not be sent to the purported owner or any other person whose interest in the vessel is not recorded with a state or federal agency;

(b) Post notice of its intent clearly on the vessel for thirty days and publish its intent at least once, more than ten days but less than twenty days prior to taking custody, in a newspaper of general circulation for the county in which the vessel is located; and

(c) Post notice of its intent on the department's internet web site on a page specifically designated for such notices. If the authorized public entity is not the department, the department must facilitate the internet posting.

(2) All notices sent, posted, or published in accordance with this section must, at a minimum, explain the intent of the authorized public entity to take custody of the vessel, the rights of the authorized public entity after taking custody of the vessel as provided in RCW 79.100.030, the procedures the owner must follow in order to avoid custody being taken by the authorized public entity, the procedures the owner must follow in order to reclaim possession after custody is taken by the authorized public entity, and the financial liabilities that the owner may incur as provided for in RCW 79.100.060.

(3) (a) If a vessel is: (i) In immediate danger of sinking, breaking up, or blocking navigational channels; or (ii) poses a reasonably imminent threat to human health or safety, including a threat of environmental contamination; and (iii) the owner of the vessel cannot be located or is unwilling or unable to assume immediate responsibility for the vessel, any authorized public entity may tow, beach, or otherwise take temporary possession of the vessel.

(b) Before taking temporary possession of the vessel, the authorized public entity must make reasonable attempts to consult with the department or the United States coast guard to ensure that other remedies are not available. The basis for taking temporary possession of the vessel must be set out in writing by the authorized public entity within seven days of taking action and be submitted to the owner, if known, as soon thereafter as is reasonable. If the authorized public entity has not already provided the required notice, immediately after taking possession of the vessel, the authorized public entity must initiate the notice provisions in subsection (1) of this section. The authorized public entity must complete the notice requirements of subsection (1) of this section before using or disposing of the vessel as authorized in RCW 79.100.050.

**RCW 79.100.050**

Use or disposal of vessel.

(1) After taking custody of a vessel, the authorized public entity may use or dispose of the vessel in any appropriate and environmentally sound manner without further notice to any owners, but must give preference to uses that derive some monetary benefit from the vessel, either in whole or in scrap. If no value can be derived from the vessel, the authorized public entity must give preference to the least costly, environmentally sound, reasonable disposal option. Any disposal operations must be consistent with the state solid waste disposal provisions provided for in chapter 70.95 RCW.

(2) If the authorized public entity chooses to offer the vessel at a public auction, either a minimum bid may be set or a letter of credit may be required, or both, to discourage future reabandonment of the vessel.

(3) Proceeds derived from the sale of the vessel must first be applied to any administrative costs that are incurred by the authorized public entity during the notification procedures set forth in RCW 79.100.040, removal and disposal costs, and costs associated with environmental damages directly or indirectly caused by the vessel. If the proceeds derived from the vessel exceed all administrative costs, removal and disposal costs, and costs associated with environmental damages directly or indirectly caused by the vessel, the remaining moneys must be applied to satisfying any liens registered against the vessel.

(4) Any value derived from a vessel greater than all liens and costs incurred reverts to the derelict vessel removal account established in RCW 79.100.100.

**RCW 79.100.120**

Contesting an authorized public entity's decision to take temporary custody or possession of a vessel — Contesting the amount of reimbursement.

(1) A person seeking to contest an authorized public entity's decision to take temporary possession or custody of a vessel under this chapter, or to contest the amount of reimbursement owed to an authorized public entity under this chapter, may request a hearing in accordance with this section.

(2)(a) If the contested decision or action was undertaken by a state agency, a written request for a hearing related to the decision or action must be filed with the pollution control hearings board and served on the state agency in accordance with RCW 43.21B.230 (2) and (3) within thirty days of the date the authorized public entity acquires custody of the vessel under RCW 79.100.040, or if the vessel is redeemed before the authorized public entity acquires custody, the date of redemption, or the right to a hearing is deemed waived and the vessel's owner is liable for any costs owed the authorized public entity. In the event of litigation, the prevailing party is entitled to reasonable attorneys' fees and costs.

(b) Upon receipt of a timely hearing request, the pollution control hearings board shall proceed to hear and determine the validity of the decision to take the vessel into temporary possession or custody and the reasonableness of any towing, storage, or other charges permitted under this chapter. Within five business days after the request for a hearing is filed, the pollution control hearings board shall notify the vessel owner requesting the hearing and the authorized public entity of the date, time, and location for the hearing. Unless the vessel is redeemed before the request for hearing is filed, the pollution control hearings board shall set the hearing on a date that is within ten business days of the filing of the request for hearing. If the vessel is redeemed before the request for a hearing is filed, the pollution control hearings board shall set the hearing on a date that is within sixty days of the filing of the request for hearing. A proceeding brought under this subsection may be heard by one member of the pollution control hearings board, whose decision is the final decision of the board.

(3)(a) If the contested decision or action was undertaken by a metropolitan park district, port district, city, town, or county, which has adopted rules or procedures for contesting decisions or actions pertaining to derelict or abandoned vessels, those rules or procedures must be followed in order to contest a decision to take temporary possession or custody of a vessel, or to contest the amount of reimbursement owed.

(b) If the metropolitan park district, port district, city, town, or county has not adopted rules or procedures for contesting decisions or actions pertaining to derelict or abandoned vessels, then a person requesting a hearing under this section must follow the procedure established in RCW 53.08.320(5) for contesting the decisions or actions of moorage facility operators.

### **Federal Rule of Civil Procedure Rule C. - Actions in Rem: Special Provisions**

#### **(1) When Available.**

An action in rem may be brought:

- (a) To enforce any maritime lien;
- (b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

#### **(2) Complaint.**

In an action in rem the complaint must:

- (a) be verified;
- (b) describe with reasonable particularity the property that is the subject of the action; and

(c) state that the property is within the district or will be within the district while the action is pending.

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) The court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(ii) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) Service.

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or, (D) in an action brought by the United States, any officer or employee of the United States.

(c) Deposit in Court.

If the property that is the subject of the action consists in whole or in part of freight, the proceeds of property sold, or other intangible property, the clerk must issue - in addition to the warrant - a summons directing any person controlling the property to show cause why it should not be deposited in court to abide the judgment.

(d) Supplemental Process.

The clerk may upon application issue supplemental process to enforce the court's order without further court order.

(4) Notice.

No notice other than execution of process is required when the property that is the subject of the action has been released under Rule E(5). If the property is not released within 14 days after execution, the plaintiff must promptly - or within the time that the court allows - give public notice of the action and arrest in a newspaper designated by court order and having general circulation in the district, but publication may be terminated if the property is released before publication is completed. The notice must specify the time under Rule C(6) to file a statement of interest in or right against the seized property and to answer. This rule does not affect the notice requirements in an action to foreclose a preferred ship mortgage under 46 U.S.C. 31301 et seq., as amended.

(5) Ancillary Process.

In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) Responsive Pleading; Interrogatories.

(a) Maritime Arrests and Other Proceedings.

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 14 days after the execution of process, or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 21 days after filing the statement of interest or right.

(b) Interrogatories.

Interrogatories may be served with the complaint in an in rem action without leave of court. Answers to the interrogatories must be served with the answer to the complaint.

**PROOF OF SERVICE**

**CERTIFICATE OF DELIVERY**

I, the undersigned, certify under the penalty of perjury in the State of Washington that on the \_\_\_\_ day of August 2011, I had a copy of this document mailed to the attorney of record for the appellee/defendant, first class postage pre-paid to:

Mr. Steve Johnson  
City Attorney  
City of Hoquiam  
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Ms. Martha Wehling  
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Olympia, WA 98504-0100



Eric Dickman  
Signed at Seattle, Washington.  
No Notary was readily available.