Thomas Vs. Osborn

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Appellant : Thomas

Respondent : Osborn

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Thomas v. Osborn

60 U.S. (19 How.) 22

APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF MARYLAND

SYLLABUS

The master of a vessel has power to create a lien upon it for repairs and supplies obtained in a foreign port in a case of necessity, and he does so without a bottomry bond, when he obtains them, in a case of necessity, on the credit of the

vessel.

It is not material whether the implied hypothecation is made directly to the furnishers of repairs and supplies or to one who lends money, on the credit of the vessel, in a case of necessity, to pay such furnishers.

This power of the master extends to a case where he is charterer and special owner *pro hac vice.*

But this authority only exists in cases of necessity, and it is the duty of the lender to see that a case of apparent necessity for a loan exists.

Hence, where the master had received freight money and, with the assistance of the libellants, invested it in a series of adventures as a merchant, partly carried on by means of the vessel, the command of which he had deserted for the purpose of conducting these adventures, and money was advanced by the libellants to enable the master to repair and supply the vessel and purchase a cargo to be transported and sold in the course of such private adventures, and the freight money earned by the vessel was sufficient to pay for the repairs and supplies, and might have been commanded for that use if it had not been wrongfully diverted from it by the master, with the assistance of the libellants, it was *held* that the latter had no lien on the vessel for their advances.

This was a libel filed in the district court by James W. Osborn, of the City of Baltimore, against the barque *Laura,* her tackle, apparel, and furniture, Osborn being the assignee of Loring & Co., merchants in Valparaiso. The barque *Laura* belonged to Plymouth, in Massachusetts, and the lien claimed was for supplies and repairs furnished to the vessel at Valparaiso. The district court decreed that there was due to the libellant the sum of $2,910.23, with interest from the 1st of April, 1852, which decree was affirmed in the circuit court.

The case was argued at the preceding term, and held under a *curia advisare vult* until the present.

The circumstances of the case are set forth with great particularity in the opinion of the Court, and need not be repeated.

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MR. JUSTICE CURTIS delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court of the United States for the District of Maryland, sitting in admiralty. A libel was filed in the district court by the appellee, as assignee of Loring & Co., merchants in Valparaiso, asserting a lien on the barque *Laura,* of Plymouth, in the State of Massachusetts, for the cost of repairs and supplies furnished to that vessel at Valparaiso. The district court decreed for the lien, the circuit court affirmed that decree, and the claimants have brought the cause here by appeal.

It appears that in January, 1849, Phineas Leach, who had previously been in command of the barque, contracted with her owners to take her on what is termed "a lay." There does not appear to have been any written contract of affreightment

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between them, nor are the terms of their agreement fully described by any witness. But this mode of employing vessels is so common, and its terms and legal effect so well settled by long usage, it has been so often before the courts and the subject of adjudication, that no embarrassment is felt by us concerning the terms and conditions on which Leach took the vessel.

We understand from his testimony, as well as from known usage, ascertained and adjudicated on in the courts, that the master had the entire possession, command, and navigation of the vessel; that he was to employ her in such freighting voyages as he saw fit; that he was to victual and man the vessel at his own expense; that the owners were to keep the vessel in repair; that from the gross earnings were to be deducted all port charges, and the residue was to be divided into two equal parts, one of which was to belong to the owners, the other to the master; and that this agreement could be terminated by the restoration of the vessel to owners by

the master, or by their intervention to displace him, at the end of any voyage, but not while conducting anyone which he had undertaken.

Having possession and command of the vessel under such a contract, Leach sailed from New Orleans in January, 1849, and after making a voyage to Rio de Janeiro, he sailed for and arrived at Valparaiso in November, 1849.

It is necessary to state with some particularity the voyages made after his arrival at Valparaiso. He sailed thence in December, 1849, with a cargo of Chili produce, on a freight amounting to about $7,000, for San Francisco, where he arrived and delivered the cargo. He went thence to Talcuhana in ballast; and, having an intention to by a cargo there on his own account, he wrote to Loring & Co., from San Francisco, to obtain from them a credit, on which to raise money to pay for the balance of the cost of this cargo, after appropriating towards it the freight money in his hands. Loring & Co. granted him a credit for $3,000, to be reimbursed by Leach's draft on himself at San Francisco, at five percent premium. At Talcuhana, Leach drew on Loring & Co. for $7,000, and bought doubloons, but, not being able to procure a cargo there or at Maule, he sailed to Valparaiso, where he arrived in July, 1850. He handed over to Loring & Co. the doubloons and the proceeds of his freight money, which was in gold dust, and they supplied the vessel and purchased a cargo for Leach's account, charging a guaranty commission of five percent on their advances and also a commission of two and a half percent on their purchases. They rendered Leach

an account, in which he is charged with the supplies of the barque and the cost of the cargo, and their commissions, and credited with the moneys received from him.

Leach carried this cargo to San Francisco and, having sold it, made an arrangement with the mercantile house of Flint, Peabody & Co., established at San Francisco, that he would go to Valparaiso and ship cargoes thence to them on their and his joint account, drawing on them for the cost. This arrangement was

not limited to cargoes by the *Laura,* but was to extend to such other vessels as Leach might take up for the purpose.

From San Francisco, Leach sailed in the *Laura* to Talcuhana, where he saw one of the firm of Loring & Co., who gave him a credit for $10,000 to buy a cargo there. He purchased part of a cargo, but, not being able to complete it, went to Valparaiso, where he arrived in May, 1851. He then informed Loring & Co. of his arrangement with Flint, Peabody & Co., and they agreed to advance him funds to enable him to carry the arrangement into effect -- to be reimbursed by remittances from San Francisco, with five percent commission and one percent a month for interest. He accordingly left the vessel, putting Easton, his mate, in command, and Loring & Co. purchased the residue of the cargo for the *Laura,* charging its cost to the joint account of Leach, and Flint, Peabody & Co., and the *Laura* sailed in May, 1851, for San Francisco. She returned in ballast to Valparaiso in March, 1852, and at that time the principal bills for repairs and supplies, claimed in this case, were incurred. In March, 1852, the *Laura* again sailed, under Easton's command, for San Francisco via Peyta, where she touched to complete her cargo, and Easton there drew a bill on Loring & Co. to reimburse advances made to him in that port -- partly to pay for cargo purchased there and partly to pay for supplies and port charges.

The *Laura* returned to San Francisco in September, 1852, where she was taken possession of by Captain Weston, who had been sent there by the owners to bring her home. The owners gave no consent to the above-described proceedings of Leach in respect to the use and employment of the barque. From the time when Leach left the command of the *Laura* in May, 1851, he remained in Valparaiso, and by means of funds furnished by Loring & Co., and with their assistance, he purchased and made six shipments of cargoes by vessels other than the *Laura* under his arrangement with Flint, Peabody & Co., and Loring & Co. He had a desk in the counting house of Loring & Co., and there transacted his business.

Setting aside all the special facts of this case and viewing it

only as an ordinary transaction by which the master of an American vessel procured repairs and supplies and advances of money to pay for repairs and supplies in a foreign port, the first question which arises is whether he had power to hypothecate the vessel as a security for their payment otherwise than by a bottomry bond, which must make the payment dependent on the arrival of the vessel and creates no personal liability of the owners.

We understand it to be definitely settled by the cases of *Stainbank v. Fleming,* 6 Eng.L. & Eq. 412, decided by the Court of Common Pleas in 1851, and *Stainbank v. Shephard,* 20 Eng.L. & Eq. 547, on writ of error in the Exchequer Chamber, so late as 1853, that by the law of England the master of a ship has not power to create a lien on the vessel as security for the payment for repairs and supplies obtained in a foreign port, save by a bottomry bond; that he can only pledge his own credit and that of his owners, but cannot, by any act of his, give the creditor security on the vessel, while at the same time the personal liability of the owners continues. Neither of those learned courts considered -- perhaps there was no occasion for them to consider (*Pope v. Nickerson,* 3 Story 465) -- what should be the effect in an English tribunal of the law of the place where the repairs and supplies were obtained if that law tacitly created a lien on the vessel. *See* Story's Con. of laws, 322 b, 401-403. These decisions rest merely upon the want of authority in the master, according to the law of England, to create by his own act an absolute hypothecation of the vessel as security for a loan. But the maritime law of the United States is settled otherwise -- in harmony with the ancient and general maritime law of the commercial world. The master of a vessel of the United States, being in a foreign port, has power, in a case of necessity, to hypothecate the vessel and also to bind himself and the owners personally for repairs and supplies, and he does so without any express hypothecation when, in a case of necessity, he obtains them on the credit of the vessel without a bottomry bond. *The Ship General Smith,* 4 Wheat. 488; *Peyroux v. Howard,* 7 Pet. 324, 32 U. S. 341 ; *The Virgin,* 8 Pet. 538; *The Nestor,* 1 Story 73; *The Chusan,* 2 Story 455; *The Phoebe,* Ware 263; *Davis v. Child,* Daveis 12, 71; *The William and Emeline,* 1 Blatch. & How. 66; *Davis v. A New Brig,* Gilpin's 487; *Sarchet v. Davis,* Carabbe 185.

It is not material whether the hypothecation is made directly to the furnishers of repairs and supplies or to one who lends money on the credit of the vessel, in a case of necessity, to pay such furnishers. "Through all time," says Valin,

"by the

use and custom of the seas it has been allowable for the master to borrow money, on bottomry or otherwise, upon the hull and keel of the vessel for repairs, provisions, and other necessaries, to enable him to continue the voyage,"

Com. on Art. 19, Ord. of 1681, and this assertion rests upon sufficient authority. The Roman law, *de exercitoria actione,* D. 14, 1, authorized a simple loan, and does not confine the master to borrow on bottomry. The Consulat del Mare, ch. 104, 105, 236, the laws of Wisby, art. 13, the laws of Oleron, art. 1, Le Guidon, ch. v, art. 33, the French ordinance of 1681, art. 19, as well as the present French code de commerce, art. 234, concur in allowing the master to contract a simple loan, in a case of necessity, binding on the vessel. A difference of opinion exists between Valin and Emerigon concerning the power of the master also to bind the owner to accept bills of exchange for the sum borrowed, but they concur in opinion that the master has power to contract a loan to pay for repairs and supplies, and to give what we term a lien on the ship as security in a case of necessity. *See* Valin's Com., art. 19; Emerigon's Con. a la Grope, ch. 4, sec. 11; vol. 2, 484 &c.; In another place, ch. 12, sec. 4, Emerigon observes, "It matters little whether one has lent money or furnished materials." The older as well as the more recent commentators are of the same opinion. Kuricke 765; Loccenius, lib. 3, ch. 7, n. 6; Stypmannus, 417, n. 107; Boulay Paty Cours de Droit, Com. tit. 1, sec. 2, vol. 1, 39, and tit. 4, sec. 14, vol. 1, 151-153; Pardessus Droit Com., vol. 3, n. 631, 644, 660; Pardessus Col., vol. 2, 225, note. The subject has been elaborately examined by Judge Ware in *Davis v. Child,* Daveis 75, and we are satisfied he arrived at the correct result.

Nor do we think the fact that the master was charterer and owner *pro hac vice* necessarily deprived him of this power. It is true it does not exist in a place where the owner is present. *The St. Jago de Cuba,* 9 Wheat. 409. But this doctrine cannot be safely extended to the case of an owner *pro hac vice* in command of the vessel. Practically this special ownership leaves the enterprise subject to the same necessities as if the master were master merely, and not charterer, and the maritime law gives him the same power to borrow to meet that necessity as if he were not charterer. The Consulat de la Mer, ch. 289, 2 Par. Col., 337, has provided for the very case, for it makes the interest of the general owner responsible for the contracts of the master who has received the vessel *"en commande,"* and one species of this contract was what we should term "a lay" -- that is, a participation in profits. *Vide*

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2 Par.Col., 186, note 3; 52, note 1; 49, note 4, and the chapters there referred to.

It is true the master cannot bind the general owners personally for supplies which he, as charterer, was to furnish. *Webb v. Pierce,* 1 Curtis 110. Neither could he bind them beyond the value of their shares in the vessel under the ancient maritime law. Consulat, ch. 34, 239, and Pardessus' note, vol. 2, 225. Emerigon is of opinion that the effect of the French ordinance is the same. Con. a la Grope, ch. 4, sec. 11. In our law, if the master is the agent of the owners, his contracts are obligatory on them personally. When he acts on his own account, he does not create any obligation on them. But it does not follow that he may not bind the vessel. In *Hickox v. Buckingham,* 18 How. 182, it was held that contracts of affreightment entered into by the master within the scope of his apparent authority as master bind the vessel to the merchandise for the performance of such contracts wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or special owner -- and this upon the principle that the general owner must be presumed to consent, when he lets the vessel, that the master may make such contracts, which operate as a tacit hypothecation of the vessel. And so in this case, we think, the general owners must be taken to have consented that if a case of necessity should arise in the course of any

voyages which the master was carrying on for the joint benefit of themselves and himself, he might obtain on the credit of the vessel such supplies and repairs as should be needful to enable him to continue the joint adventure. This presumption of consent by the general owner is entertained by the law from the actual circumstances of the case and from considerations of the convenience and necessities of the commercial world.

But the limitation of the authority of the master to cases of necessity, not only of repairs and supplies but of credit to obtain them, and the requirement that the lender or furnisher should see to it, that apparently such a case of necessity exists are as ancient and well established as the authority itself.

In some of the old sea laws, they are declared in express terms, as they were in the Roman law: *aliquam diligentiam in ea re creditorem debere preaestare,* D. 14, 1, 7; *navis in ea causa fuisset ut refici deberet,* D. 14, 1, 7. And in the Consulat del Mare, ch. 107, "But the merchant should assure himself that what he lends is destined for the use of the ship, and that it is necessary for that object."

A reference to the other codes cited above will show that a case of necessity was uniformly required, and the commentators

all agree that if one lend money to a master knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the owner. Valin, art. 19; Emerigon, Con. a la Grope, ch. 4, sec. 8; and the older commentators cited by him. Boulay Paty Cours de Droit Com., tit. I, sec. 2, tit. IV, sec. 14; *and see* the authorities cited by him in note 1, 153.

To constitute a case of apparent necessity, not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them. If the master has funds of his own which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender

known these facts or has the means by the use of due diligence to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel.

We now come to the application of these principles to the case at bar.

The freight money earned by the *Laura* was applicable and ought to have been applied by the master to the necessities of the vessel, the one-half, after deducting port charges, which belonged to himself should have been applied to pay the wages of the crew and obtain supplies for the vessel -- the other half, which belonged to the owners, to paying for necessary repairs.

The amount of this freight money actually earned and received was about $12,000. Besides this, the *Laura* had made two voyages to San Francisco, with cargoes belonging to Leach and to him and Flint, Peabody & Co., before the bills now in question were incurred. We hesitate to declare that a master who takes a vessel on "a lay" can use it to carry cargoes of his own. The practical difference to the owners is that there can be no agreed rates of freight and no such security on the cargo for its payment as the marine law ordinarily provides and as the owners may be reasonably considered to contemplate when they let the vessel. *Gracie v. Palmer,* 8 Wheat. 605. But this point has not been adjudicated on by the courts, nor does this case furnish any evidence of what the usage is in this particular. Waiving a decision of this question, it is at all events clear the vessel earns for the owners a reasonable freight by carrying cargo of the master, and, according to the evidence in this case, that reasonable freight must have been

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set down for each of the two voyages on which the cargo of the master was carried, at the sum of $7,000, that being the sum earned on the preceding voyage between the same ports and there being no evidence before us of a change in the price of freights in the intermediate periods, so that when these expenses now in question were incurred, the master had received in money, as freight, $12,000,

and must be taken to have received, in the enhanced value of his own merchandise, through its carriage to San Francisco, $14,000 more. The amount previously expended by him for repairs and supplies at Valparaiso does not appear to have exceeded $3,000. The amount expended at San Francisco does not appear, but there is no reason to suppose it was considerable.

In July, 1850, Loring & Co. received from Leach his funds, supplied him with credit and purchased a cargo for him. In May, 1851, they made themselves parties to an arrangement under which Leach was to quit the command of the vessel and become a merchant resident at Valparaiso. Whether they did or did not know Leach had the vessel on a lay, this was obviously wrong as respected the owners, for though, under a lay, the master is owner *pro hac vice,* yet there is a personal confidence reposed in him as master which he cannot delegate to another except in case of necessity. Before the credit now in question was given by Loring & Co., they not only had notice that Leach had wrongfully deserted the command of the vessel, and had diverted the freight which the vessel had earned and ought to have earned into his business as a merchant, but they had actually assisted him to do so by receiving freight money and mingling it with other funds in their hands, out of which and their own funds they made advances to enable him to pay for cargoes, and they acted as his agents in their purchase, and they had, moreover, profited largely by so doing, charging high rates of interest as well as commissions.

It should be added that the owners have received nothing for their part of the earnings of their vessel during all these voyages, for though, since his return to this country, Leach has rendered his accounts to the owners, they refused to settle them as rendered, and Leach testifies he has not the means to pay any balance due to them.

In such a state of facts, we are of opinion Loring & Co. had no right to lend Leach money or furnish him with supplies on the credit of the ship, and cannot be taken to have done so.

Our opinion is that inasmuch as the freight money earned by the vessel was sufficient to pay for all the needful repairs and supplies, and might have been commanded for that use if they had not been wrongfully diverted, no case of actual

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necessity to encumber the vessel existed, and as Loring & Co. not only knew this, but aided Leach to divert the freight money to other objects, they obtained no lien on the vessel for their advances.

The cause must be remanded with directions to dismiss the libel with costs.

MR. CHIEF JUSTICE TANEY, MR. JUSTICE Mc LEAN, and MR. JUSTICE WAYNE dissented, and MR. JUSTICE Mc LEAN and Mr. MR. JUSTICE WAYNE concurred with THE CHIEF JUSTICE in the following dissenting opinion.

MR. CHIEF JUSTICE TANEY dissenting.

I dissent from the judgment of the Court in this case, and adhere to the opinion I gave at the circuit.

The principal question is whether certain repairs and supplies furnished to the barque *Laura,* of Plymouth, in the State of Massachusetts, while she was in the port of Valparaiso, in Chili, in February and March, 1852, are a lien upon the vessel.

The appellants are citizens of Massachusetts, and at the time of making and furnishing these repairs and supplies and until and after this libel was filed, were the owners of the barque. She was built for them at Newburyport, under the superintendence of a certain Phineas Leach, who was by profession a mariner. After the vessel was completed, she was placed under his command as master, and in the year 1847 he and the appellants agreed that he should sail the vessel on what, in the New England ship-owning states, is familiarly called "a lay" -- that is to say, he was to victual and man her, pay one-half the port charges, and be entitled to one-half of the freights or earnings. This is the contract, as stated by Leach in his testimony. No written contract is produced. Indeed, contracts of this

description, it would seem, are so well known and understood in the states above mentioned that they are often made orally, and not in writing. And when the owners agree with a mariner that he shall sail the vessel on "a lay," both parties understand that the mariner is to take the command of her as master, to victual and man her and pay half the port charges, the owner to keep the vessel in repair and the freight and earnings to be equally divided between them. Upon a contract of this kind, the vessel, during its continuance, is under the exclusive control of the master as respects her voyages and employment. He alone has the right to determine what voyages he will undertake, what cargo he will carry, upon what terms, and to

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what ports he will sail in search of freight. His share of the earnings of the vessel are his wages, and he receives no other compensation for his services as master.

Before I proceed to state the facts out of which this controversy has arisen, it is proper to say that Leach states in his testimony that, in addition to the contract above mentioned, it was agreed between the appellants and himself that he should have the right to become a part owner of the vessel to the amount of one-eighth whenever he paid for it. But he never paid anything on this account, and never, therefore, had any interest as part owner, and, upon his return to Plymouth in 1852, as hereinafter mentioned, when his connection with the *Laura* ceased, this contract was cancelled. It was a written contract, but whether it was a part of his contract to sail the vessel upon "a lay" is not stated in the testimony.

As Leach never became part owner, his authority over the vessel was derived altogether from his contract to sail her upon the terms above mentioned. That contract, as stated by him, was indefinite as to its duration. No particular time was fixed for its termination, nor the happening of any particular event. And it was during the continuance of this contract that the voyages were made and the acts done which have given rise to this controversy.

The material facts in the case are derived mainly from the testimony of Leach, who was produced as a witness by the owners, who are the appellants, and it requires a close and careful scrutiny to understand the bearing of different portions of his testimony upon the different points raised in the argument. The examination itself, under the commission to take testimony, which was executed at Boston, is singularly involved and confused, and the answers, I regret to say, often showing a disposition to prevaricate and a desire to make the best case the witness could for the owners, and against the libellants.

His testimony begins by describing several voyages which he made in the year 1849, which are not material to the matter in issue, until he comes to the one from Rio to Valparaiso. This was his first voyage to the Pacific, and he arrived at Valparaiso in November, 1849, with a cargo consigned to Loring & Co., the libellants. This company was composed of citizens of Massachusetts, domiciled at Valparaiso for the purposes of commerce. In December, 1849, he sailed from Valparaiso to San Francisco with a cargo on freight, the freight amounting to about seven thousand dollars. Being unable to procure a cargo on freight at San Francisco, he sailed for Talcahuana

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in ballast and, no freight offering at that place, he sailed for Maule in ballast, but was prevented from entering the port by bad weather and a bad bar, and proceeded to Valparaiso. He arrived there early in July, 1850. While there, he obtained advances from Loring & Co. which enabled him to purchase a cargo for the *Laura* on his own account, with which he sailed for San Francisco, where he arrived in November, 1850.

While he was in San Francisco, he made an arrangement with Flint, Peabody & Co., of that place, by which, upon his return to Chili, he was to purchase cargoes on joint account, and ship or consign them to that house at San Francisco. He was to purchase cargoes by means of bills drawn on them, and they were to honor his drafts. There was no limit as to the time, but this agreement was conditional, and was to depend upon the ability of Leach to make arrangements in Chili by which

he could raise money on those drafts to purchase the cargoes, and if he succeeded in making those arrangements, he was to remain in Chili to make the purchases. The arrangement was not confined to cargoes by the *Laura,* but he was to buy and ship according to his judgment.

When he left San Francisco, he again proceeded to Talcahuana in ballast, where he arrived in February, 1851. He met there Mr. Bowen, one of the firm of Loring & Co., and told him that he wanted another cargo but had not money to buy it, and Bowen thereupon gave him a letter of credit upon his house at Valparaiso by which he was authorized to draw on them for ten thousand dollars payable eight days after sight. Being unable to complete his cargo at Talcahuana, he proceeded to Valparaiso, where he arrived in the month of April or May following, and obtained the balance of his cargo by the aid of further advances from Loring & Co. He then mentioned to them his arrangement with Flint, Peabody & Co., and asked if Loring & Co. would give him facilities in the way of funds to carry out this arrangement. They agreed to advance the funds upon an interest account with him, charging five percent for advances and one percent a month for interest, and they were to be paid by remittances from San Francisco without drawing bills. Leach acceded to this arrangement and directed them to charge the cargo then on board the *Laura* at Valparaiso to the joint account of Flint, Peabody & Co., and himself, Leach. He then, as he says, "put the mate, Reuben S. Easton, in as master" and sent him to San Francisco, Leach remaining at Valparaiso. This was in May, 1851, and he remained there until March, 1852, carrying on and superintending those transactions.

During this period he engaged extensively in mercantile business, shipping cargoes by other vessels as well as the one by the *Laura* and obtaining the means of purchasing them by the arrangements he had made with Loring & Co., as hereinbefore stated, and he had a desk in their counting house at which he transacted his business.

The *Laura* did not return again to Valparaiso until February, 1852. It was then found that she needed repairs and supplies to a large amount to fit her for another voyage, and Leach also wanted funds to purchase another cargo for her. He had at that time, it seems, determined to return to Plymouth, but before he did so he wished to dispatch the *Laura,* under the command of Easton, on a voyage to Peyta and Panama with a cargo purchased on his own account. He had no funds for either purpose. He states that he had but $500, and this, it appears, he needed for his personal expenses, and the repairs were made and the supplies furnished for the vessel by Loring & Co. at his request to the amount of $2,707.69. Leach states that they were necessary, and made and furnished with economy; that he was himself on board, superintending and directing them; that Easton was also on board assisting him, but had nothing to do with ordering or directing them. He merely executed Leach's orders. The cargo was likewise purchased and paid for by Loring & Co. for Leach and at his request.

The repairs were made and the supplies furnished in the latter part of February and early part of March, 1852, and the cargo put on board immediately afterwards. The invoice is dated Valparaiso, March 18, and is headed

"Invoice of sundries purchased and shipped by Loring & Co., on board the barque *Laura,* for Peyta and Panama, on account and risk of Capt. Phineas Leach, consigned to his order, for sales and returns to Loring & Co.,"

the aggregate amount being $5,779.81. The vessel sailed, as soon as the cargo was on board, under the command of Easton. And on the 20th of March two accounts were stated by Loring & Co. -- one for the repairs and supplies to the *Laura* and the other their private or personal account against Leach, both of which were signed by Leach on that day with a written admission that they were correct.

The first mentioned of these accounts is headed, "Barque *Laura* and owners to Loring & Co., Dr.," and states the particular items of repairs and supplies, amounting, as before mentioned, in the aggregate, to $2,707.69. This account is the matter now in dispute. The other is headed, "Dr., Capt. P. Leach in account with Loring & Co. to 20th of March, 1852," showing a balance due from Leach of

$8,527.69. Among other

items, he is charged in this account with the amount of the account for repairs and supplies, and this item is charged thus -- " *our ac. with barque Laura* " -- and he is also charged with the amount of the invoice above mentioned thus -- "our invoice sundries for *Laura* due April 12, 1852" -- showing that the charge for the repairs and supplies was always kept separate and distinct from Leach's personal account.

On the day these two separate accounts were adjusted and signed by the parties or in a day or two afterwards, Leach left Valparaiso for Panama, and from thence proceeded home. He states that he arrived at Boston on the 20th of April following, and it appears by the documents in evidence that on the 9th of July next after his return, the appellants agreed with Francis H. Weston that he should proceed to Panama, or wherever the vessel was lying, and assume the command of her as master, and after fulfilling any engagement she might be under, should proceed with her for a load of guano on freight, or any other freight that could be obtained, to an Atlantic port. Weston proceeded accordingly, and arrived at Valparaiso in September. The *Laura* arrived there about a fortnight afterwards, when he assumed the command and Easton left her.

In the execution of his orders from the owners, Weston proceeded on the voyage directed by them, and then brought the vessel and cargo to Baltimore, where he arrived in June, 1853, and immediately after his arrival she was arrested upon the libel now under consideration.

This narrative of the facts in the case is necessary in order to understand how the questions discussed at the bar have arisen. There are other circumstances in evidence relating to different points which it will be material to advert to more particularly hereafter.

As I have already said, the principal matter is dispute is whether the repairs and supplies furnished to the barque in the port of Valparaiso, as hereinbefore

mentioned, in February and March, 1852, were a lien upon the vessel at the time this libel was filed.

In deciding this question, the first point to be considered is in what relation did Leach stand to the vessel while he was sailing her under this contract? Was he the owner for the time? And in determining the legal effect and operation of contracts made by him, are they to be regarded as the contracts of the owner or the contracts of the master?

This is a question of the highest importance to the commercial interests of this country. It is well known that almost the whole of our immense coasting trade is carried on by vessels owned in the northeastern states of the Union, and the far

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greater part of them are sailing under contracts like this. And upon our coast, stormy and dangerous as it is at certain seasons of the year, very serious damage is often sustained by these vessels, and heavy amounts frequently required and obtained in the ports of other states for repairs and supplies to enable them to proceed on their voyages.

Now if Leach is to be regarded as owner for the time when he was sailing the *Laura* under the agreement, then by the maritime law the repairs and supplies furnished at his request are presumed to have been furnished upon his personal credit, unless the contrary appears; and in that view of the subject, Loring & Co. have not, and never had, any lien upon the vessel; and the libel against her cannot be maintained. But if, on the contrary, Leach is to be regarded as master and as making the contract by virtue of his authority over the barque in that character, then these repairs and supplies in a foreign port, if necessary to enable the vessel to proceed, are presumed to have been made on the credit of the vessel, unless the contrary appears, as well as on the credit of the owners and Leach, and in this aspect of the case, Loring & Co. had a lien upon her which they may enforce in this proceeding unless it has been waived or discharged.

These are the established principles of maritime law in this country, as heretofore recognized and administered in the courts of the United States. And I do not deem it necessary to refer to English cases or to the decrees or doctrines in the different nations on the continent of Europe which have been cited in the argument, because I consider the rule as I have stated it to be conclusively settled in this country by an unbroken series of decisions in this Court and at the circuits. The case of *The General Smith,* 4 Wheat. 443; *The St. Jago de Cuba,* 9 Wheat. 416, and the case of *Ramsey v. Allegre,* 12 Wheat. 611, explained and commented on in the case of *Andrews v. Wall,* 3 How. 573, may be regarded as the leading cases on this subject.

The case before us is one of the more interest, because it is the first in which the construction and legal effect of these contracts for sailing on a "lay" has come up for decision in this Court. They are, as I have said, peculiar to a particular portion of the Union, and are scarcely ever to be found in the maritime contracts of any other part of the commercial world. They are also comparatively modern in their use. And if it is held that a person furnishing necessary repairs and supplies in a foreign port to a vessel sailing under a contract of this kind has not a remedy against the owner, and also a lien on the vessel for such provisions and supplies, as well as for repairs

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to the vessel -- although they are both furnished at the request of a master who is without funds, and has no other means of obtaining them -- then this class of cases will form an exception to the general maritime code of the United States, to which vessels belonging to the ports of other states, and sailing under the usual contract with the master, for certain wages, are subjected, and the parties making the repairs or furnishing the supplies will be deprived of the securities to which they have heretofore supposed themselves entitled and upon which they have mainly relied, for the personal responsibility of the master, after he is suffered to leave the port, is most commonly of very little value. And it would exempt the shipowners in one portion of the United States from the liabilities and burdens imposed upon those of other states merely upon the ground that in the one, the

owner compensates his captain by allowing him a share of the net amount of the freight earned by the vessel, and in the other by fixed and certain wages. For this, in truth, is the only difference between vessels sailing under a "lay" and those sailing under the usual and customary contract between the owner and master.

In making the inquiry whether Leach was owner while sailing under this contract, we shall find few if any cases in the English decisions to assist us. For contracts of this kind, as I have already said, are hardly if ever used there. And I can find no case where the question arose as to who was owner for voyage in which the contract is not clearly distinguishable from the one before us. And in all of the cases in which it has been held that the general owners were not responsible it will be found that, by the terms of the contract, the entire and exclusive possession and control of the vessel was transferred for a certain time, or a particular voyage or voyages, and where the general owner, during the time stipulated, had no right to exercise any act of ownership over her. In other words, they are cases in which the court held that the vessel was let or demised to the party for the time, so as to vest the right of property in the charterer, leaving in the general owners a reversionary interest, subject to the particular interest so let or demised. And whether this is the case or not, and whether there is a special and exclusive property in the charterer, does not depend upon any particular form of words or any particular facts. The general rule in relation to the construction of such contracts is laid down in Abb. on Ship. 61, 7th Am. Ed., in the following words, as the result of the various decisions to which he refers:

"From these cases he says it appears that the question whether or not the possession of a vessel passes out of the owner or charterer depends upon no single fact or

expression, but upon the whole of the language of the contract, as applicable to its attendant circumstances."

But although we find no case in the English reports that can be regarded as in point, contracts like the one before us, and indeed in the same words, have on several occasions been brought before the Circuit Court of the United States in the First Circuit, where they have been carefully and deliberately considered by the learned judge who recently presided in that circuit. And it has been uniformly held in that court by Mr. Justice Story that the master sailing a vessel under such a contract as this is not the exclusive owner for the voyage, and if regarded as owner at all, is a qualified and limited one; and his character and authority, and duty as master, is not merged in it, and that his contracts for repairs and supplies in a foreign port are made in that character, and are a lien upon the vessel.

One of these contracts came before him in the case of *The Nestor,* reported in 1 Sum. 73, and was decided in 1831. The claim was for a cable furnished to the vessel at Alexandria, in the District of Columbia, at the request of the master. The vessel belonged to Portland, in the State of Maine. And the court held that the vessel was liable unless it was shown that the credit was exclusively given to the master. It is true that the article furnished in that case was for the use of the brig, which the owner was bound to keep in repair. But the principle decided applies directly to the case before us -- that is, that the master, under one of these contracts, is not owner for the voyage so far as to exclude his character and authority as captain. And that his contracts for repairs and supplies are presumed to be made in the latter character and to create the usual maritime lien upon the vessel, and the usual liability of the owner, unless the presumption is repelled by proof that the credit was given to him. The whole subject is fully discussed in this case, and such will be found upon a careful examination the result of the opinion.

The case of *The Cassius,* 2 Story's 81, was a contract of the same description, between the master and owners, and in that case the rights of the master and the responsibility of the owners for his acts in a foreign port were fully considered, and the decision turned upon the question whether, under one of these contracts, the master was the owner for the time. And the learned judge, speaking of the case of *Taggart v. Loring,* 16 Mass. 336, says:

"That case is distinguishable in its actual circumstances from the present. The argument in that case does not appear from the statements of the report to have been identical with the present. And if it were, I must say that I should have some difficulty in acceding to the authority of that

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case, if it meant to establish that the master had an exclusive special ownership in the ship for the voyage. I should rather incline to the opinion that if he had any ownership at all for the voyage, it was in common with the general owners."

The contract in that case, upon which the libel was filed, was executed by him as master, and the court held that it bound the vessel.

Indeed, I do not see how, upon any fair interpretation of the terms of these contracts, a different construction could be given to them. There are no words in them which import that it is the intention of the owners to transfer the exclusive right of property in the vessel to the master for the time, nor anything in the character of the contract from which it can be implied -- on the contrary, the right of possession remains necessarily in the owners. For they are to keep the ship in repair, and the master is only to man and victual her. The owners have therefore the right, while the contract continues, to take exclusive possession of her, from time to time, for the purpose of putting her in proper repair and to have her properly equipped so that she may always be seaworthy and their property not be imprudently exposed to danger. And whatever Leach did or was authorized to do in this respect was necessarily done as master, holding the possession for the time the repairs were making -- not as owner of the vessel but as agent for the owners by virtue of his authority as master. And the owners, in a case like this, may, as in the case of an ordinary captain upon certain wages, displace him from the command whenever they think proper -- being bound, however, in like manner to fulfill the engagements into which he had lawfully entered.

Moreover he had no connection with the vessel except under his contract to sail her in the character of captain or master. He had no authority over her, nor any

right of possession, nor any power to direct her voyages or movements, except in this character. All of his rights were inseparably connected with his official relation to the vessel and depended upon it. The inducement to the contract was the confidence which the owners reposed in his seamanship, integrity, and capacity for business. It was a personal trust, which he could not delegate or assign to another. It was to be executed by himself, and the moment he ceased to be master, all right of possession and all right to control her voyages and movements ceased also. And if his right to the possession of the barque, and to man and victual her, and contract for freights, and to receive half her earnings, were all inseparably connected with his official relation to the vessel as master and dependent upon it, I cannot understand

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how his contract for repairs and supplies can be said to be made in any other character.

His relation to the vessel and his rights in and over her differ in no material respect, in a contract of this kind, from that of a master sailing in the ordinary mode upon fixed and certain wages from one port to another, under the direction of the owner, to carry or seek for freight. The only difference is that a larger discretion as to the voyages to be undertaken is given to the master, and he receives half the earnings instead of certain and fixed wages. And I cannot perceive how these two circumstances can give him any ownership of the vessel, or why the master's contracts for repairs and supplies in a foreign port shall be a lien upon the vessel in one case and not in the other. The fact that he is to victual and man the vessel cannot of itself give a right of property in her. It is undoubtedly a circumstance to be considered in expounding these contracts, but nothing more. For the exclusive right for the voyage may as well and legally be transferred where the owners man and victual her as where it is done by the charterer, provided the contract taken altogether shows that such was the intention of the parties. It does not, as I have already shown, depend upon any particular fact, but upon the entire agreement. And I can see nothing in agreements of this kind, as was said by Mr. Justice Story in the case of *The Cassius,* which indicates an intention to make

the master the exclusive owner during the voyages he might make, or that would justify the court in giving it such a construction.

I am aware that in some or all of the states where these contracts are usually made there are cases in the state courts in which it has been held that in these contracts, the master is the owner, and that his contracts made in the port of another state are made in the character of owner, and not of master, and that an action cannot be maintained upon them against the general owners.

I shall not stop to examine these cases, because the question here is not whether an action can be maintained against the owners for these repairs and supplies, but whether they were a lien upon the barque. I admit that I can perceive no distinction in principle between the personal liability of the general owners and the liability of the vessel. For whatever may be the rights and liabilities of the master and owners as between themselves upon their private contract, they cannot affect the rights of third parties dealing with him in his character of master and furnishing necessary repairs and supplies in a foreign port at his request. They know him only as master and deal with him in that character. And it is the rule of the

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maritime law, as settled in my judgment by the decisions in the courts of this country, that in a case of that kind, the owners personally, as well as the vessel, are liable for the amount. But if the owner is present and they are furnished to him, it is equally well established that the credit is presumed to have been given to him personally, and no lien on the vessel is implied. The decisions in the state courts cannot, therefore, it would seem, be reconciled to the decisions of the circuit court of the United States hereinbefore referred to.

But however this may be, the implied lien on the vessel in cases like the one before us has been maintained in the circuit court. And as the question of maritime lien, with which we are now dealing, belongs peculiarly to the admiralty courts, and the paramount jurisdiction in such cases is vested in them by the Constitution of the United States, it necessarily follows that it must rest with them to interpret the

contract and to determine whether it created a lien or not, and how, and when, and against whom, it can be enforced.

In the case of the barque *Chusan,* 2 Story 462, he says:

"The Constitution of the United States has declared that the judicial power of the national government shall extend to all cases of admiralty and maritime jurisdiction, and it is not competent for the states, by local legislation, to enlarge or limit or narrow it. In the exercise of this admiralty and maritime jurisdiction, the courts of the United States are exclusively governed by the legislation of Congress, and in the absence thereof by the general principles of maritime law. The states have no right to prescribe the rules by which the courts of the United States shall act, nor the jurisprudence which they shall administer."

The opinions of the state tribunals to which I have referred are certainly entitled to very high respect upon any question of law that may come before them; yet the question before us is not one of state law. It is a contract for maritime service, and belongs to the admiralty courts of the United States. And the state decisions, therefore, however highly we respect them, carry with them no binding judicial authority when in conflict with the decisions of the courts of the United States upon questions belonging to the federal courts. And I the more firmly adhere to the doctrines of the circuit court hereinbefore stated because, as I have already said, I can see nothing in the terms of the contract or in its character and objects that would justify a different construction. In my opinion, therefore, Leach had no ownership in the *Laura,* and in the contract in question exercised the powers of master, and nothing more.

Such being, in my judgment, the meaning and legal effect

of the contract between the owners and Leach, the next question to be considered is was he still master when these repairs and supplies were furnished?

The appellants contend that if he was not owner, but only master, while he was sailing the barque, he yet ceased to be master when he remained at Valparaiso and placed the vessel under the command of Easton, and that from that time Easton was the master, and the contract of Leach for repairs and supplies would therefore create no lien. Undoubtedly the conduct of Leach in this respect was a violation of his duty to the owners if he acted without their consent. He was to sail the vessel himself, and this personal trust and confidence could not be transferred by him to another. Such a transfer would be a breach of his contract and of his duty under it. But that is a question between him and owners, and they might displace him or not as they saw proper. The point here is did his official relation as master cease when he engaged in commercial pursuits and remained on shore at Valparaiso?

Certainly the misconduct of a captain while on a voyage or in a foreign port does not *ipso facto* deprive him of his office. It would be a sufficient reason for the owners to dismiss him, but in this case it is not pretended that he was dismissed or suspended by them. No other person was appointed to the command until after he had voluntarily surrendered it to the owners after his return to Massachusetts in the spring of 1852. And these supplies had been furnished, at his request, months before the new master was appointed.

Nor did he abandon his official relation to the vessel while he remained at Valparaiso, but, on the contrary, continued to hold possession in person or by his agent and to exercise the rights and authority of master according to the terms of his contract with the owners. He continued to man and victual her, direct her voyages, and receive the freights. Easton was paid by him, and not by the owners; he acted under the direction of Leach as his agent and subordinate, and not under the direction of the owners. He was not even allowed to receive the freight, and when the supplies in question were furnished, Leach was actually on board, in actual command and Easton acting as his subordinate, under his orders. And as Leach had no ownership whatever in the vessel, all of this must have been done by him as master, and could have been done in no other character, for if he had abandoned that official position, and Easton was master, he had no authority over

Easton, nor any more right to interfere with him on the vessel than any other stranger.

Nor is his absence from the vessel by any means incompatible

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with this official relation and authority. It is not necessary for the existence of such a relation and the exercise of such an authority that he should always be on her deck. He may be absent for a longer or shorter time and at a greater or lesser distance without forfeiting his authority, and when once appointed master by the owners, he continues master until displaced by them or he himself surrenders the office. As respects a dismissal by the owners, Mr. Justice Story says in the case of *The Tribune,* 3 Sum. 149,

"Being once master, he must be deemed still to continue to hold that character until some overt act or declaration of the owners displaced him from the station."

And certainly there was no such act or declaration while Leach continued in the counting house of Loring & Co. And as to Leach himself, it is obvious from the facts above stated that he had not resigned or surrendered the command.

It is said that Easton was master. By what authority was he master? He was not agent of the owners; he was not appointed by them, nor authorized by them to exercise any control over the ship. Nor would they have been bound by his contracts if he had made any, nor responsible for his acts. There were none of the relations and trusts which exist between owners and master, for they had not confided the ship to him and were not even responsible for his wages, and if Leach was not master and authorized to bind the vessel and owners by his contract, the vessel was sailing without one and without any lawful authority from those to whom she belonged. It is true, Leach says he appointed him master, but that does not clothe him with the authority which the maritime law annexes to that character unless Leach had lawful power to appoint him. He might, no doubt, have properly sent him on the voyage and placed the vessel under his command while he remained on shore if the interest of the owners required or would justify it. And

he might, if he pleased, call him master or captain; but by whatever name he chose to call him, he would be nothing more than his subordinate and agent. He would not, in respect to the owners or third persons, possess the authority of master.

The cases of *L'Arina v. Brig Exchange,* Bee's Reports 198, and *Same v. Manwaring,* 199, are directly in point on this head. There, the party was appointed by the master as captain and cleared the vessel as such at Havana, yet this appointment was held by the court not to give him the legal relation of captain to the vessel, nor displace the master appointed by the owners, and it was held that the contract of the latter, within the scope of his authority as master, was still binding upon the owners. The fact, therefore, that Leach remained

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on shore and sent the vessel upon different voyages under the command of an agent appointed by him did not of itself displace him; he was still master of the barque, with all the powers and responsibilities which are attached to that character. And if the fact that he remained on shore did not deprive him of his official character, the circumstance that he was engaged during that time in commercial pursuits cannot alter the case. It cannot make any difference in this respect whether he remained idle or employed himself in any particular pursuit.

But it is said that Leach was not only absent from the barque, but he was employing her in violation of the orders of the owners, who disapproved of his conduct and had directed him to bring the vessel home, and that Loring & Co. knew it, and yet encouraged and enabled him to go on in the violation of his duty, by large advances of money. And it is insisted that as Loring & Co. were aiding and encouraging him in this breach of duty, and the supplies in question were furnished to enable him to persevere in it, they were furnished in bad faith to the owners, and in a court of admiralty acting upon equitable principles can create no obligation upon them, nor any lien upon their vessel.

If the facts assumed were established by the testimony, I should not dispute the law as above stated. But I think the fact that the owners disapproved of his remaining on shore and engaging in mercantile pursuits is not only not established, but, on the contrary, the weight of the testimony is on the other side, and notwithstanding the evasive and ambiguous answers of Leach, tends strongly to prove that his conduct in this respect met their approbation.

In examining the testimony in relation to this question of fact, it is necessary, in order to see the force to which it is entitled, to state it more minutely than I have done in the preceding part of this opinion, and to note particularly the dates as given by the witness.

The disapproval of the appellants is brought out by the following question, put by the appellants, the owners:

"Was your remaining in the Pacific and trading with the *Laura* done with the consent and approval of the owners?"

To this question Leach simply answers, *"No, sir."*

Upon the cross-examination upon behalf of the libellants, the following interrogatories were put to him, to which he gave the following answers:

"Question. When was their (the owners') dissent made known to you? "

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"Answer. I think it was the second time I was at Valparaiso, which, I think, was in the latter part of 1849."

"Question. At what period did the owners take efficient steps to displace you? at any period before Captain Weston was sent out?"

"Answer. They did not take any efficient steps, any further than to request me to come home."

These answers constitute the entire proof of disapproval and dissent of the owners, of which so much has been said in the argument and which has been so confidently assumed as a fact proved.

It will be observed that the question put by the owners does not point, and clearly was not intended to point, to any disapproval on their part of his remaining on shore or engaging in trade at Valparaiso. It relates altogether to the employment of the barque in the Pacific, instead of the Atlantic. In fact, it could not have related to his remaining on shore or engaging in trade, because the notice of disapproval appears to have been given but once, and was given and received while Leach was still sailing the vessel under the "lay," and seeking and carrying freights, and before he had purchased a single cargo for himself or absented himself from her for a single voyage. It was never repeated, although he remained nearly two years afterwards, engaged in commerce, and on shore in the counting house of the libellants nearly half the time.

The fact is clearly established by Leach's answers to the cross-interrogatories above given. It will be observed that in these answers he says he thinks their disapprobation was made known to him the second time he was at Valparaiso, which he thinks was in the latter part of 1849. Now in the preceding part of his examination he had stated positively that he arrived at Valparaiso from Rio with a cargo on freight, consigned to Loring & Co., in November, 1849, and arrived there the second time in July, 1850. Without stopping to comment upon the hesitating language and the vagueness and uncertainty of his answer in relation to a fact which it is obvious, from the preceding part of his testimony, was perfectly in his recollection, it is sufficient to say that, give him either date, it is evident that the disapproval of the owners had no connection with his mercantile pursuits, and pointed merely to the employment of the *Laura* in freighting voyages on the Pacific, instead of the Atlantic, for if the notice was received by him in 1849, it was before he had engaged in that coasting trade, and must have been written by the owners in consequence of information given them by Leach from Rio concerning the freight he had obtained there for Valparaiso, and of his intention to seek

freights on that coast, for this was his first voyage in the *Laura* to the Pacific. He had not then engaged in the coasting trade on that ocean, and had done nothing in that respect for the owners to disapprove of. And if he did receive the notice, as he says, in 1849 upon his arrival at Valparaiso, it must have been a disapproval of what he informed them he proposed to do, not of what he was doing or had done. Certainly it had no relation to his trading on his own account, for there is not the slightest evidence that he had any such design at that time nor for nearly a year afterwards.

And if we take the other date the argument is equally strong, for if he received it on that occasion, it must have been written sometime before. And it was on his second visit to Valparaiso, in July, 1850, that he for the first time engaged in mercantile pursuits on his own account and obtained advances for that purpose from Loring & Co. If the notice reached him at that time, and before he commenced his commercial speculations, the dissent must have applied to the place at which he had been seeking freights, and not to his private speculations. Indeed, taking this as the date of the receipt of the notice, the inference is almost irresistible that the owners must have been apprised of his intention to purchase cargoes on his own account and approved of it, for he had been engaged, when he received this notice, in seeking freights in the Pacific for about nine months. He had not, it appears, been successful, and after his first cargo from Valparaiso to San Francisco, he sailed most commonly from port to port in ballast, or with very inconsiderable cargoes, and as Leach was in constant correspondence with the owners, they were of course apprised of his want of success, and would very naturally disapprove of his remaining in the Pacific, where the earnings of the vessel would give them very little for their share of the freights. But this notice, as I have said, does not appear to have been repeated. Leach does not pretend that any complaints of his conduct were subsequently made by the owners, and the natural inference is that having confidence in Leach's prudence and judgment, when in reply to this communication they were apprised by him of his determination to purchase cargoes on his own account for the *Laura,* and thus insure constant employment for her and full freights, they were willing he should remain and carry out his plan. And this conclusion is strengthened by the

circumstance that no measures were afterwards taken by the owners to compel or induce him to return, and that he remained without further complaint, engaged in these pursuits until he himself found them unprofitable and determined to return home.

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He is asked in one of the interrogatories: "At what period did the owners take efficient steps to displace you? at any period before Captain Weston was sent out?" And he answers: "They did not take any efficient steps, any further than to request me to come home." And in answer to another interrogatory, he says he did not yield to their wishes, because he thought he had a right to remain there if he chose. There was no order, therefore; no charge of misconduct; no notice that they would put an end to the contract; nothing more than a request which Leach did not comply with, because he thought that while the owners suffered the contract to continue, he had a right to select the theater of his operations and to act upon his own judgment. And undoubtedly he was right in this respect, unless the owners put an end to the contract, which they might have done at any moment if they supposed him to be no longer acting in the line of his duty. But whatever might have been their opinion as to the soundness of his judgment in selecting the Pacific instead of the Atlantic for the employment of the vessel, when they requested him to return, they undoubtedly acquiesced in his opinion when they received his answer declining to return, and continued for nearly two years afterwards to sanction his conduct by suffering him to remain there, receiving remittances from him and paying his drafts and settling his account without making the slightest objection to allow him one-half the freights, according to the contract, for his services as master. And the charge of taking the vessel to the Pacific and illegally detaining her there for his own benefit and advantage was never heard of until payment for the repairs and supplies furnished to their barque was made by the libellants. And if such a defense had been founded in fact, it would have been easy for the owners to prove it conclusively by producing the correspondence between them and Leach. But no part of it has been offered in evidence. The fair inference from the testimony, therefore, is that they assented to his proceedings

and approved of his remaining after receiving his answer to the request for his return.

But if the case were otherwise in this particular, and it had been proved that Leach illegally and against their orders detained the *Laura* in the Pacific, I do not see how that would affect the claim of the libellants unless in furnishing those supplies they knowingly aided and abetted him in his breach of duty to the owners. The argument is that they did knowingly aid and abet him. But it would be a sufficient answer to it to say that no such charge is made against them in the answer. It is made against Leach, but there is not the slightest intimation that Loring & Co. had any knowledge of it.

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And as this defense is not taken in the answer, it cannot be relied on here, even if there was evidence in the record which would justify it.

But there is not the slightest evidence to prove it. On the contrary, it appears by Leach's testimony that when he arrived at Valparaiso with the cargo consigned to Loring & Co., he told them upon what terms he was sailing the vessel and the deep interest he had in her earnings, and thinks it probable he mentioned the contingent right he had of purchasing one-eighth of the vessel, if he could raise the money to pay for it. The fact that he had been trusted with so much power over such a vessel as the *Laura,* and would even be received as a partner if he could raise the money, naturally induced Loring & Co. to think him worthy of confidence. And they appear to have aided him in procuring freights while he confined himself to that business. They evidently had no knowledge of any dissatisfaction on the part of the owners, for Leach states positively that nobody but himself knew of it. And when, therefore, he proposed to purchase cargoes on his own account, which would give the *Laura* constant employment and full freights, they could have had no reason to suppose that his owners disapproved of it. And when these supplies were furnished, they had strong grounds for believing that his conduct in this respect was known to the owners and met their approbation, for they had then seen him for nearly two years engaged in this business, during all that time in

correspondence with his owners and occasionally making remittances to them, and drawing bills on them, as Leach himself states, which appear to have been duly honored, and without the slightest token of disapproval as far as Loring & Co. had an opportunity of seeing. There was nothing to create suspicion or put them on inquiry. The advances made to him were made in the regular course of their business and at the usual rates for interest and commission in that quarter of the world, and they had every reason to believe that they were promoting the objects and advancing the interests of the owners, as the advances made to Leach enabled him to keep the *Laura* constantly employed with full cargoes, thereby earning large freights, of which the owners were entitled to the one-half. Loring & Co. had no knowledge of the state of his accounts with the owners, and no reason even for suspecting that he did not remit to them their share of the freights or that he improperly used or withheld it.

The case then upon the points already examined may be summed up as follows:

1st. At the time these repairs were made and supplies furnished,

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Leach was in full possession of the barque, exercising his authority as master under his contract with the owners hereinbefore stated. 2d. He was recognized and paid as such by the owners. 3d. He was dealt with as such by Loring & Co. in good faith, without the slightest grounds for suspecting that the owners disapproved of his conduct or had requested him to bring the vessel home. 4th. The repairs and supplies were necessary to enable her to go to sea, and she must have remained idle in the port if they had not been furnished, and they were made and furnished with prudence and economy, under Leach's own direction. 5th. He had no money except the five hundred dollars hereinbefore mentioned, which he needed for his personal expenses, and had no funds either of his own or the owners within his reach with which he could make these repairs or obtain the necessary supplies.

These facts appear to me to be conclusively established by Leach's own testimony. And as it is admitted on all hands that the repairs were made and the supplies furnished at his request and by his order, it follows, from the decisions in this Court and at the circuits to which I have already referred, that by the maritime code of the United States, Loring & Co. obtained an implied lien on the vessel for the amount, unless it can be shown that they were furnished on the personal credit of Leach or some other person.

An attempt has been made to offer such proof and to show that the supplies were furnished upon the personal credit of Leach. But it is an obvious failure. He is asked by them whether the repairs and supplies were furnished upon his responsibility or the credit of the vessel, or how otherwise. He answers, "I presume they were furnished on my responsibility." And this is the whole and only evidence offered by the appellants to show that they were furnished on the personal credit of Leach, and not on that of the vessel or owners. Certainly such evidence can hardly be sufficient to remove the implied lien given by law. Whether the credit was given to him was a question of fact. If the fact was so, he must have known it, and could have sworn to it in direct terms. But instead of this, he merely expresses an opinion in general terms, and gives no reason for that opinion, and states no fact from which it might be inferred that this opinion was well founded. The answer is -- in truth, no evidence; it is but the opinion or conjecture of the witness, and even if there was no evidence in the record to contradict it, would leave the case upon the implied lien which the law creates.

But it is directly in conflict with the written instruments signed by the witness himself at the time of the transaction.

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The account for those repairs and supplies is headed, as I have already said, "Barque *Laura* and owners, to Loring & Co., Dr." It is signed by Leach, and admitted by him, in writing, to be correct. He of course read the account, and was undoubtedly a man of sufficient intelligence to understand the meaning of words. And how could the barque and owners be debtors for those supplies if they were

furnished exclusively on the credit of Leach? How could they be debtors to Loring & Co., unless they were furnished on their credit?

It is true, Leach says he signed the account only for the purpose of verifying the items. But this is evidently an afterthought, for he admits by his signature not only the correctness of the items, but the account itself -- that is, the charge against the barque and owners, as well as the things charged.

Besides, if his signature was intended merely to verify the items, there was no necessity for this account. The items ought to have been inserted in the other account, signed by him at the same time, which contains the charges for which he was personally liable, and his admission of that account would have been quite sufficient to verify these items. And the fact that two accounts were stated, and signed and admitted by him on the same day, the one charging the repairs and supplies to the barque and owners and the other charging him, as "Captain Phineas Leach," for other articles properly chargeable to himself, shows that both parties understood what they were about, and, to avoid future cavil, stated their accounts against the respective debtors, according to their mutual understanding at the time. And the insertion of the aggregate amount for repairs and supplies in the account against Leach, coupled with the account against the barque and owners, proves conclusively that the parties intended to make no special contract with Leach for those repairs and supplies, nor to take any special hypothecation or bottomry on the vessel, but dealt with one another upon the established rules of maritime law, which, in the absence of any special contract, made the barque and owners, and Leach himself, responsible for the amount.

In order to give some color to his statement that he presumes they were furnished on his credit, he says that his credit was at that time good. If he had shown that it was in fact good, it would be no reason for presuming that Loring & Co. relied upon it and waived the other securities to which they were entitled. But the record shows that it was not good, and that Loring & Co., in the advances they made to him at the same time for the purchase of cargo on his private individual account, did not think it prudent to rely altogether upon

his credit. For the heading of the invoice of the cargo purchased upon that occasion, which I have already set forth in full, expressly required that the sales and returns should be made by the consignee to Loring & Co. And Leach admits that the cargo was to be insured, and the loss, if any, to be paid to Loring & Co. And from his own testimony, as well as the invoice, it is evident that it was understood by the parties that the proceeds of the cargo were to be remitted from Panama by the consignees to Loring & Co. For he is asked by the libellants, "Was there not an understanding that the proceeds should be remitted by your consignees to Loring & Co.?", and he answers, "I don't know that there was." But he is again pressed by the inquiry, "Will you reflect and see if you cannot answer that question directly that there was?", and he then answers, "There was no such understanding; it might be understood; there was nothing promised." I give the words of the witness, but I cannot be convinced by this nice casuistry of Captain Leach, in distinguishing an understanding between the parties from a promise, that his credit was still good with Loring & Co., notwithstanding the evidence to the contrary in the agreement in the heading of the invoice, and in the admitted agreement in relation to the insurance. It certainly does not prove it so high as to create a presumption that all other securities were waived, from their confidence in the personal responsibility of Leach; nor did his subsequent conduct show that he merited even the confidence they did repose in him. For he went to Panama and procured advances to himself, on account of the cargo, to the amount of $2,100, and authorized large disbursements to be made by his consignee to his agent, Easton, for the use of the *Laura,* and proceeds to Massachusetts without returning to Valparaiso, and after he came home, he drew on his consignees for $375 more to pay Weston's expenses, who was sent out by the owners, and during all that time rendered no account to Loring & Co., and left them under the impression that the proceeds would in good time be remitted to them. It seems they were not aware of the distinction which Leach took between the mutual understanding between them and an actual and formal promise.

The point, therefore, taken by the owners that the repairs and supplies were furnished on the personal credit of Leach cannot, in my judgment, be maintained. And undoubtedly the justice of the case is clearly with the libellants. The captain was without funds, and his owners had none in Valparaiso, and the barque must have remained in port a wasting hulk if the means had not been furnished by Loring & Co. which enabled

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her to sail. The owners have since received her, and now hold her in their possession, increased in value by those repairs, which enabled her to come home and which were made by the money of Loring & Co. And they have also received the freights which those repairs enabled her afterwards to earn under the command of Weston. Justice as well as the principles of the law would seem to require that those who have reaped the profit of the advances should repay the party to whom they are indebted for their gains.

It remains to inquire whether the lien has been waived by the delay in prosecuting it or the debt been satisfied in any other way.

I shall dispose of those questions very briefly. For I am sensible that the great importance and delicacy of the points hereinbefore discussed have compelled me to extend this discussion beyond the limits of an ordinary opinion in this Court.

In relation to the alleged waiver by the delay, the mere statement of the evidence is an answer to the objection, and the evidence is this: the repairs were made and the supplies furnished in the spring of 1852. The barque returned to Valparaiso in the November following, when Weston immediately assumed the command. He was ordered by the owners to procure, if he could, a cargo of guano and to bring the vessel to an Atlantic port. He did so, and he arrived in Baltimore in the June following, and the vessel was arrested on this libel a few days after her arrival.

The barque still belongs to the same owners. When Weston arrived at Valparaiso to take the command, he had no money, and was obliged to raise what he needed by a bill on his owners. At that time, Loring & Co. had no reason to suppose that

the owners would refuse to pay this claim, and if they had then arrested the vessel, it would have broken up the voyage upon which she was destined and subjected the owners to heavy losses by her detention. And it certainly ought not to be a matter of complaint on their part that under such circumstances he did not arrest her, and took no measures to enforce his claim, until he found that payment was refused, and it is unnecessary to cite cases to prove that the omission to arrest her at Valparaiso under such circumstances cannot be regarded as a waiver of their lien upon any principle of law. There was no unreasonable delay in notifying the owners of the claim nor in filing the libel when they disputed it. The *Laura* in the intervening time remained in the possession and employment of the owners; no third party had become interested, and the owners were greatly benefited

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by the omission to arrest her until she arrived in the United States.

It is said that Weston proves that nothing was said to him about their account, and hence it is inferred that nothing was due on it, or that it was not supposed by Loring & Co. to be a charge on the *Laura.* But it must be remembered that the house of Loring & Co., with whom Leach dealt, had dissolved partnership in the June preceding Weston's arrival, and a new one, with new partners in it, established under the same name. It is true that Mr. Atherton, a partner in the first firm, remained there and was attending to their business. But the transactions of Weston were with the new firm, and it would have been useless for Atherton to present this claim to Weston unless he had determined to libel the vessel. For as I have said, Weston had no money but what he obtained from the new house of Loring & Co. for his bill on his owners, and this Atherton knew. Besides, the proceeds of her cargo shipped to Peyta and Panama, as hereinbefore mentioned, at the time these repairs and supplies were furnished, were to be paid to Loring & Co., and when Weston was at Valparaiso, the account of these proceeds had not been received. It was most probably supposed by Loring & Co. that they might prove sufficient to pay their claim against Leach, including these supplies. And this, it appears, would have been the case if Leach had not improperly converted a

large portion of them to his own use and to satisfy the claims of his owners against him. Justice therefore required Loring & Co. to await the result. They did wait, and did receive some money from this source, but not enough to pay even the advances for the cargo itself.

This is admitted in the argument. But it is said the money received should be first applied to extinguish the lien, first because there was a security bound for that item -- that is, the vessel -- and secondly because it is the first item in the account.

Now the conclusive answer to this objection is that if no specific application was made by either party at the time of payment, the law appropriates it according to the principles of equity. And as the money received from Panama was the proceeds of goods purchased with the money advanced by Loring & Co. for that purpose, equity will apply it in the first place to the payment of that debt.

Indeed there is enough in the invoice and the testimony of Leach to show that the proceeds were to be so applied by the agreement between Leach and Loring & Co., when the advances were made. And they were accordingly so applied, as

far as they would go, when the money was received by them. The fact that the claim now in question was secured by a lien on the *Laura,* can surely be no reason for applying the money in the first place to discharge it. On the contrary, it would be a sufficient reason against such an application, and would be a good ground for postponing it until all the claims for which the creditor had no security were first satisfied.

I do not comprehend how the argument that it is the first item in the account can apply. In point of fact, however, it is not the first or oldest item in the account as I understand the transaction. And if the lien on the vessel was originally valid, it is evident that it had never been discharged or waived or forfeited by unreasonable delay.

Some other items for necessaries furnished at Peyta, on the last voyage of the *Laura* to that port, and also a small charge for bread at Valparaiso, and which are not included in the account signed by Leach, were allowed by the circuit court, and are included in the amount decreed. These items, the counsel for the respondents insist, ought not to be allowed even if those in the account are sustained. I think when the whole testimony is examined it will be evident that these charges stand on the same principles with those of which I have already spoken. But I forbear to extend this opinion by discussing that question because, as the Court has determined that the repairs and supplies furnished at the request of Leach are not a lien on the vessel, it is useless to examine particular items when the opinion of the Court goes to the whole.

From that opinion I respectfully dissent. And after carefully reviewing the case in all of its bearings and scrutinizing the evidence, I adhere to the opinion I held in the circuit court.