APPEAL FROM THE NOVA SCOTIA ADMIRALTY DISTRICT.

BETWEEN

THE BARGE "DAVID WALLACE"..APPELLANT; 1903

AND Mar. 9.

ALEXANDER BAIN (PLAINTIFF).....RESPONDENT.

Admiralty law—Foreign vessel—Necessaries—Charter-party — Authority of master—Liability of owner.

The action was brought by the plaintiff against a foreign vessel and owners for necessaries supplied on her account at a Canadian port. At the time the necessaries were supplied the vessel was under charter, the owner having by the charter-party transferred to the charterers the possession and control of the vessel. The charterers appointed the master, and he, for them engaged the crew. The charterers paid the wages of the master and crew and the running and other expenses of the vessel. The plaintiff knew that the vessel was under charter; but he did not know the terms of the charter-party. On the trial there was a conflict of testimony between the plaintiff on the one hand, and the master of the vessel, and the port captain or agent of the charterers on the other hand as to whether or not the necessaries were supplied on the order of the master on the credit of the vessel and owners, or on his order or that of the port captain on the credit of the charterers. The learned judge by whom the case was tried found that the necessaries were supplied on the order of the master and the credit of the vessel and owners, and he held the vessel liable therefor.

Held, on appeal, that the plaintiff ought under the circumstances to have the benefit of the finding in his favour but that as the master was the servant and agent of the charterers and not of the owner he had no authority to pledge the latter's credit, and that as the owner was not liable for such necessaries the vessel could not be made liable.

2. An action for necessaries at the suit of the person who supplies them cannot be maintained against the ship if the owner of the ship is not the debtor.

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3. Where the owner of the ship is the debtor the action cannot be maintained against her if the necessaries are supplied at the port to which the ship belongs; or if at the time of the institution of the action any owner or part owner of the ship is domiciled in Canada (*The Admiralty Courts Act*, 1861, s. 5; *The Colonial Courts of Admiralty Act*, 1890, s. 2 (3) (*a*).)

4. Where, by the charter-party, the owner transfers the possession and control of the ship to a charterer and the latter appoints the master and crew and pays their wages and other expenses, the master in incurring a debt for necessaries is the agent or servant of the charterer and not the agent or servant of the owner. In such a case the owner is not the debtor, and an action for such necessaries cannot be maintained against the ship.

5. The want of notice of the terms of the charter-party in such a case is not material, notice of the charter-party not being essential where the owner completely divests himself of the possession and control of the ship. (*The Baumwoll Manufactur Von Carl Scheibler* v. *Furness* [1893] A. C. at pp. 19, 21.)

APPEAL from a judgment of the Local Judge of the Nova Scotia Admiralty District.

The material facts of the case are as follows:

The barge *David Wallace* was an American vessel registered at the port of Cleveland, Ohio, her owner living at Lorain in the same State. The barge was on a voyage from the Upper Lakes, via the St. Lawrence, to an Atlantic port in the United States and was towed into Port Hawkesbury, N.S., in distress. While there she obtained supplies from the respondent to enable her to complete her voyage. Having obtained such supplies the barge proceeded on her voyage as far as the port of Shelburne, N.S., where she was arrested by the respondent in an action to recover the amount of the repairs and supplies as necessaries. At the time the necessaries were supplied the vessel was under charter to the Atlantic Transportation Company, the owner having by the charter-party, which was of the description known as a "demise charter," transferred to the charterers the possession and control of the vessel. The charterers appointed the master, the crew

being appointed by him on behalf of the charterers. The charterers paid the wages of the master and crew, and also the running and other expenses of the vessel. These facts were shown, independently of the charter-party by the evidence of Cobb, the master of the barge, and Jenks, the port captain at Port Hawkesbury, of the Atlantic Transportation Company, the charterers. These men had not seen the charter-party, but had become conversant with the above facts from their employment and dealings with the charterers. The respondent knew the vessel was under charter, but he did not know the terms of the charter-party. This document was transmitted by the District Registrar as part of the record in the court below, although it was subject to an objection not disposed of by the trial judge as to the sufficiency of the proof of the signatures of the parties. But the issues turned upon the fact of its existence rather than upon any of its provisions, and the main facts were proved *aliunde*.

The instrument was as follows:

"THIS CHARTER made and entered into this 28th day of September, 1898, between David Wallace, of Lorain, Ohio, managing owner of the schooner barge *David Wallace*, capacity 1,800 gross tons, hereinafter mentioned, party of the first part, and hereinafter called owner, and THE ATLANTIC TRANSPORTATION COMPANY, a corporation organized under the laws of the State of New Jersey, party of the second part, and hereinafter called charterer."

"WITNESSETH: That the owner hereby agrees to charter to the charterer the following named schooner barge, viz.: *David Wallace*, for a period commencing October 1st, 1898, and ending on October 1st, 1901, and the charterer agrees to charter said schooner barge for the period aforesaid, both parties, however, to be governed by the conditions hereinafter expressed."

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"The owner hereby agrees to deliver said schooner barge *David Wallace* to the charterer at the port of Detroit on or about October 1st, 1898. Said schooner barge to be delivered to the charterer in good order and condition, being tight, staunch, strong, and in every way fitted for the service of carrying coarse freight and for being towed."

"The charterer hereby agrees to receive said schooner barge *David Wallace* at said port and upon the expiration of this charter to return the same to the owner at said port in as good condition as she was when received by the charterer, ordinary wear and tear excepted."

"The owner hereby charters said schooner barge to be used by the charterer for the purpose of carrying coal and other coarse freight, and for being towed along the Atlantic coast and the waters adjacent thereto."

"The charterer hereby agrees and binds himself to pay unto the owner as full compensation for the use or hire of said schooner barge *David Wallace* the sum of three hundred and twenty-five dollars ($325) per month, payable at the Commercial National Bank, Cleveland, Ohio, on the first day of each and every month during the term of this charter. The charterer also agrees to insure said schooner barge against marine and fire risks for the benefit of the owner and for the sum of eighteen thousand dollars ($18,000). The expense incident to such insurance to be paid by the charterer and the charterer further agrees to insure the owner against accidents to employees."

"The owner shall have a lien upon all cargoes and sub-freight for the charter money due under this charter. Should said schooner barge be lost, all money paid in advance and not earned, reckoned from the time of loss, shall be returned to the charterer."

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"It is further understood and agreed that the charterer shall not be bound by the terms of this contract unless the charterer shall be able to arrange for the safe passage of the said barge through the rapids of the St. Lawrence River."

"The owner agrees to sell to the charterer at any time prior to October 1st, 1899, the said schooner barge *David Wallace* at the rate of twenty thousand dollars ($20,000.")

"The charterer agrees to pay all running expenses of this schooner barge and including ordinary repairs and replacements, necessary to keep the vessel up and insurable. The charterer agrees that there shall be no authority to incur any lien or place any incumbrance on the vessel and when re-delivered, she shall be free from liens."

"In witness whereof, &c."

While there was a conflict of testimony at the trial as to whether or not the necessaries were supplied, on the order of the master, on the credit of the vessel and owners, or on his order or that of the port captain on the credit of the charterers, the judge below found that the necessaries were supplied on the order of the master and the credit of the vessel and owners, and he held the vessel liable therefor.

The judgment of the court below (26th November, 1902) was as follows:

MACDONALD, (C.J) L.J:

"The Barge *David Wallace*, a vessel registered at the port of Detroit, United States of America, while on a voyage from the Upper Lakes *via* the St. Lawrence, to an Atlantic port of the United States was towed into Port Hawkesbury, Nova Scotia, in distress; and while there was as the plaintiff alleges supplied by him on the order of the master with goods required to

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enable the vessel to complete her voyage. After being refitted at Port Hawkesbury the *David Wallace* proceeded on her voyage, and called at the port of Shelburne. She was arrested there in this action on the 4th April, 1899. The receipt of the goods claimed for by the master of the *David Wallace*, and that these goods and supplies were necessaries without which the vessel could not proceed on her voyage, were not denied; but it was alleged by the owners of the vessel, who appeared to the action, that the vessel was not liable because the credit was not given to them or to their agent. It was alleged that the *David Wallace* was, when these necessaries were supplied by the plaintiff, under charter to a company called the Atlantic Transportation Company of New York, and that the supplies claimed for in this action were furnished for and on the credit of that company. A certified copy of the registry of the *David Wallace* was put in on the trial, in which Ferdinand Cobb is stated to be the master; but it does not appear whether this is the person of the same name who was the master of the vessel when the supplies claimed for were furnished by the plaintiff."

"It is alleged by the defendants that, in September, 1898, the *David Wallace* was chartered by the managing owner of the Atlantic Transportation Company, a company organized under the laws of New Jersey, for a period of three years, and that the vessel was on her voyage to New York under this charter when the necessaries claimed for by the plaintiff were supplied. Before reaching her destination, and while lying in the harbour, of Shelburne the Atlantic Transportation Company became bankrupt, and its affairs put into the hands of receivers. These receivers on the 10th February, 1899, addressed to David Wallace, the managing

owner of the vessel, the following notice of abandonment of the charter:—

"DEAR SIR,—As receivers of the Atlantic Transportation Company we beg to advise you that we have decided not to adopt the charter dated September 28th, 1898, made between you as owner of the barge *David Wallace* and the Atlantic Transportation Company. We understand that this boat is at present at Shelburne, Canada, and we send you this notice in order that you may take such action as you may deem advisable for the protection of your interests in the above named barge."

"The first question to be determined is whether the supplies furuished by the plaintiff were necessaries within the meaning of the statute, and I am of the opinion that they were so, at the time and under the circumstances in proof."

"The next question is whether the goods and supplies were furnished to and on the credit of the ship or that of the company called the Atlantic Transportation Company, and represented by Jenks at Port Hawkesbury when the supplies were delivered to the master of the vessel."

"In the *Perla* (1), the Judge of the High Court of Admiralty said, "where the goods are furnished for the use and benefit of a ship the presumption is that the ship is liable, and to rebut this presumption it must be distinctly proved that credit was given to the individual only whoever he may be."

"The plaintiff in his evidence says: "All these accounts charged here were paid by me in cash at the request of the captain. The bills are 'O. K'd' by the captain, which shows that he received the bills, the signature F. T. Cobb on all of the bills is that of the master." On the arrival of the vessel the captain

(1) Swa. at p. 354.

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came to me to deposit his papers and told me he was in trouble and wanted supplies. I had some discussion with him as to the ability of his owner to pay. I asked him who his owners were and if he knew them? He said the owner was a good man and able to pay the bills. The owner's name was mentioned. The owner resides at Lorain, Ohio. "The captain left his papers with me on arrival. They were the ship's papers, the crews' list, etc. This was an American vessel. American vessels always come to me in my capacity as consular agent. I will swear that Cobb never told me at any time that this barge was under charter, not that I remember. I did not hear it from other people; nothing more than that she was in company of chartered barges when she left, not when she arrived."

"I regret that the plaintiff and the master of the defendant vessel are in serious conflict as to important facts. Cobb, the master of the *David Wallace*, says: "I do not know Alexander Bain and did not have a conversation with him about the charterer of said barge in his store when I first reached Port Hawkesbury. I did not order any supplies from him. The supplies he furnished me for the *David Wallace* were ordered by Capt. Benjamin D. Jenks, the port captain of the Atlantic Transportation Company. I simply furnished the information as to what supplies were needed. They were furnished upon the credit of the Transportation Company, and I acted throughout under the direction of Capt. Jenks." Capt. Jenks was present during the conversation I had with Mr. Bain about the charter. He (Jenks) told Bain that as the charterer would have to pay for the supplies, he (Bain) should give me only what he Capt. Jenks should direct or approve of. Mr. Bain assented, and my part in the conversation consisted only in stating what supplies I

needed. I said nothing about whose credit plaintiff should rely on in furnishing the supplies."

"Alfred Jenks says: "I know plaintiff and had several conversations with him about the charterers in his store, and during the time I was in Port Hawkesbury, in November, 1898." He proceeds to say that he ordered these goods on the credit of the company, and gave plaintiffs a draft on the company in payment of these supplies. "I know the *David Wallace* was in possession of the company because I had charge of her for the company. I do not remember that I informed plaintiff in so many words that I wanted the supplies on the credit of the Atlantic Transportation Company; but I informed him that I was their agent and acting for them, and that we had the boats under charter and that he should not furnish supplies to any of them without my order on approval. I made the same statement to him with reference to the *David Wallace*, particularly, in presence of Capt. Cobb."

"It appears from the register, put in evidence, that on the 30th day of September, 1898, Ferdinand Cobb was the master of the *David Wallace*, but there is nothing to show whether this is the same person who gave evidence in the cause and who was master of the vessel when the necessaries were supplied in the month of November in the same year. It is a reasonable inference, however, that while he states he has been appointed master by the charterers when they were put in possession of the vessel, he had been placed in charge by the owners at the date of the register, and continued in charge under the charterers. The property in the ship had changed, but was still in the owners when these necessaries were supplied, and the ruling in *Williams* v. *Alsup* (1) would appear

(1) 10 C. B. N. S. at p. 427.

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to be applicable. In that case Willes J. said: "The mortgagees have taken a property in the vessel for the purpose of securing money advanced by them. By the permission of the mortgagees, the mortgagor has the use of the vessel. He has therefore a right to use her in the way in which vessels are ordinarily used. Upon the facts which appear in this case, this vessel could not be so used unless the repairs had been done to her. The state of things therefore seems to involve the right of the mortgagor to get the vessel repaired, not on the credit of the mortgagees, but on the ordinary terms subject to the shipwrights' lien. It seems to me that the case is the same as if the mortgagees had been present when the order for the repairs was given. To that extent I think the property of the mortgagees is impliedly modified." In the case for decision the vessel could not proceed on her voyage without the necessaries supplied; could not have been used in the way in which vessels are ordinarily used; and the master, whether as the agent of the owners or others in possession by permission of the owners, would have the right to obtain these supplies on the credit of the ship. In the *Alexandra* (1), the court said: "That the court must not make the owners of a foreign ship liable for the supply of any articles for which, under similar circumstances, if resident here, they would not be responsible in a court of common law"; and therefore, as was said in the *Sophie* (2), it is in all cases necessary to show that the master or other person at whose order the necessaries were supplied had an authority express or implied to bind the owners.

"For the reasons given, I arrive at the conclusion that under the circumstances in evidence the master here had clearly an implied authority to bind the owners of this vessel."

(1) 1 W. Rob. 260. (2) 1 W. Rob. 369.

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"As to the question of maritime lien for necessaries I refer to the *Henrich Björn* (1), where the court said: "The remedy here is not affected by the decision that there is no maritime lien for necessaries. The court has jurisdiction over the subject-matter, and the arrest in the action gives precedence to the claim over all except liens existing at the time of arrest."

"As to the contradictions or discrepancies in the evidence of the plaintiff and Cobb, the master, I adopt the evidence of the plaintiff with little hesitation. Cobb is not corroborated by Jenks, the alleged agent for those in possession of the vessel. I have already quoted his language where he says: "I do not remember that I informed plaintiff in so many words that I wanted the supplies on the credit of the Atlantic Transportation Company, but I informed him that I was their agent, etc." While the plaintiff distinctly swears that no such information was given him. In the result I think the plaintiff must recover the amount of his claim, with costs."

January 26th, 1903.

The case on appeal was now heard at Ottawa.

J. B. Kenny, for the appellant, contended that the facts in evidence clearly showed that the goods were supplied by the respondent to the charterers. He accepted a draft in payment of the goods from Jenks, the agent of the charterers and not from Cobb, the master of the ship. This shows to whom the credit was given. The barge at that time was in possession of the charterers, but not at the time of the arrest.

Again there is no maritime lien for necessaries. (*The Henrich Björn* (2). The statute does not give any right of action that was not available at common law. A remedy is provided, but no new right of action is

(1) 10 P. D. 44. (2) 11 App. Cas. 270.

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Argument of Counsel.

given. You cannot attach the interest of the owner where the ship is under a demise charter. *The Baumwoll Manufactur von Carl Scheibler* v. *Furness* (1); *The Castlegate* (2); *The Alexander* (3); *The Sophie* (4); *Mitcheson* v. *Oliver* (5); *Manufacturer's Accident Insurance Company* v. *Pudsey* (6); *Sandeman* v. *Scurr* (7).

R. G. Code for the respondent:

The evidence shows that the necessaries were supplied on the credit of the ship. Some of the goods were for the repair of the ship. The accounts are headed: "Schr. *David Wallace* and owners." This is strong corroborative testimony of the respondent's contention that the goods were supplied on the credit of the ship. *The Santandarino* (8).

There is no charter-party before the court. A document purporting to be such was objected to at the trial for lack of proof. This objection was never disposed of by the trial judge. It is submitted that the court on appeal ought not to have regard to this document. *Taylor on Evidence* (9); *The Lemington* (10); *The Tasmania* (11); *The Ticonderoga* (12); *The Ripon City* (13); *Abbott on Shipping* (14).

J. B. Kenny, replied, citing: *The Utopia* (15); *The Parlement Belge* (16); *The Dictator* (17); *The Druid* (18); *The Beeswing* (19).

THE JUDGE OF THE EXCHEQUER COURT now (March 9th, 1903,) delivered judgment.

(1) [1893] A. C. 8.
(2) [1893] A. C. 38.
(3) 1 Wm. Rob. 360.
(4) 1 Wm. Rob. 369.
(5) 5 El. & Bl. 419.
(6) 27 S. C. R. 374.
(7) L. R. 2 Q. B. 86.
(8) 23 S. C. R. 145.
(9) 9th ed. ii, 1219.
(10) 2 Asp. M. C. N. S. 475.
(11) 13 P. D. 118.
(12) Swa. 215.
(13) [1897] P. 226.
(14) 14 ed. 73.
(15) [1893] A. C. 492.
(16) 5 P. D. 197.
(17) [1892] P. 304.
(18) 1 Wm. Rob. 391.
(19) 5 Asp. M. L. C. 484.

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Reasons for Judgment.

This is an appeal by the managing owner of the barge *David Wallace* from a judgment of the Local Judge in Admiralty of the Admiralty District of Nova Scotia, whereby in an action for necessaries the learned judge found the sum of one hundred and twenty-one dollars and eighty cents to be due to the respondent, and condemned the barge in that sum and costs. The appellant resided at Lorain, in the State of Ohio, in the United States of America. The respondent was the Consular Agent of the United States at Port Hawkesbury, in the island of Cape Breton and Province of Nova Scotia, where he also carried on a general business of fitting out vessels. The barge *David Wallac* was a foreign vessel, and at the time the supplies ir question were furnished was under charter to the Atlantic Transportation Company. This company was incorporated under the laws of the State of New Jersey, and had an office at the City of New York. The supplies were furnished in November, 1898, at Port Hawkesbury. Ferdinand D. Cobb was at the time master of the *David Wallace*, and Benjamin D. Jenks was port captain for the Atlantic Transportation Company, which had in its possession a number of barges that it owned or chartered. The appellant accepted from Jenks a draft on the company for the amount of his account. On the 2nd of January, 1899, the affairs of the company were placed in the hands of receivers. On the 10th of February, the barge then being at Shelburne, in the Province of Nova Scotia, the receivers gave the appellant notice that they had decided not to adopt the charter dated the 28th September, 1898, and made between him as owner of the barge and the Atlantic Transportation Company. The draft which the respondent had taken was not paid, and on the 1st of April following he commenced his action against the barge and owners. The appellant appeared and defended the action.

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On the trial of the action three questions came up for decision, namely:

1. Were the supplies furnished, and the moneys advanced, necessaries?

2. Were the supplies furnished and the moneys advanced on the order of the master and the credit of the vessel and owners, or on the order of the master or port captain and on the credit of the charterers?

3. If the necessaries were supplied on the master's order, had he authority to pledge the credit of the owners, or to make the vessel liable for such necessaries?

The first question the learned judge answered in the affirmative, and his decision is not called in question here.

On the second question there was a direct conflict of testimony between Bain the respondent on the one hand, and Cobb, the master of the vessel and Jenks, the port captain of the company, on the other. Bain's evidence was given at the trial before the learned judge. Cobb's and Jenks' was taken under commission and in answer to interrogatories. When the *David Wallace* arrived at Port Hawkesbury the master left her papers with the respondent as Consular Agent. These included her certificate of registry, but not the charter-party mentioned. The certificate of registry had on surrender of other papers on change of trade been issued on the 30th of September, 1898, at the Port of Detroit, in the State of Michigan. From the certificate it appeared that the barge or schooner had been built at Cleveland, in the State of Ohio, in the year 1884; that her net tonnage was something over one thousand tons; that she was owned by the appellant and about twenty other persons, and that Ferdinand Cobb, of Lorain, Ohio, was master. Cobb, in his evidence, gives his name as Ferdinand D. Cobb, and

his residence as Brooklyn, in the City of New York. There is no doubt, however, that the same person is intended in each case. Neither Cobb nor Jenks ever saw the charter-party; but from the positions they respectively held in the employ of the Atlantic Transportation Company, and from their dealings with the company, they knew that the barge was chartered by the company; that it was in their possession and under their control; that the master was appointed and paid by them; and that they, through the master, engaged the crew and were to pay their wages and bear other running expenses. Whether or not Bain, the respondent, was in a general way aware of these facts, was one of the matters as to which there was the conflict of testimony that has been referred to.

From the certificate of registry that was left with him Bain knew who the owners were, and he testified that he asked the master about them and whether they were able to pay. He also said that the appellant's name was mentioned and that the master said he was a good man and able to pay the bills. All of the vouchers for things supplied or paid for were certified by the master, and some were made out to the barge *David Wallace* and owners. He stated that he furnished or paid for the supplies at the request of the master and on the credit of the owners of the vessel, and not on the credit of the charterers. Cobb, the master, on the other hand, deposed that he did not order any supplies from the respondent for the *David Wallace*; that such as were furnished were ordered by Jenks, the charterers' port captain, under whose directions he acted; that he only gave the necessary information as to what supplies were needed; and that the latter were furnished on the credit of the charterers, the Atlantic Transportation Company. He also testified that Jenks took him to Bain's store, and

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introduced him and told Bain that as the charterers would have to pay for the supplies, Bain should only furnish what he, Jenks, should direct or approve of, and that Bain assented to this.

The answers of Jenks to the interrogatories submitted to him were to the same effect. He stated that he had several conversations about the charterers with Bain in his store. This was in November, 1898. On his arrival at Port Hawkesbury, Bain was already furnishing supplies to some of the Atlantic Transportation Company's boats, and he told Bain not to give anything more to any boat except on his order. He also informed Bain that he was agent for the company, and he ordered the supplies in question on their credit and gave Bain a draft on them in settlement of the account. Bain having been recalled after Cobb's evidence and that of Jenks had been read denied specifically a number of statements that they made. But he admitted that Jenks had told him in reference to some of the other captains not to supply their vessels without his order; but so far as the *David Wallace* was concerned he denied that Jenks had ordered the supplies or introduced Cobb to him. He also admitted that Jenks had given him a draft on the company in settlement of his account, and he produced the draft and explained that Cobb, when he brought his bills to him told him to put them in with Jenks. From his evidence as a whole it is clear that he knew of the Atlantic Transportation Company and that Jenks was their agent. He supplied some of their vessels on the order of the latter, and he admits that he had heard that some of the company's barges were purchased by them and others hired or chartered. He could not say that he had ever heard that this particular barge (the *David Wallace*), was under charter to the company, but he had heard it talked of that they all were. But

he denied that Cobb had ever told him that the barge was under charter to the company. However that may be, there is, I think, no reason to doubt that at the time he knew the *David Wallace* was one of the barges the company had in its possession, although he did not know what the terms and conditions of the charter-party were. Except so far as he may have thought the vessel would itself be liable, there was, it seems to me, no reason why he should at the time prefer the owners' credit to the charterers' credit. He was furnishing other supplies for the latters' barges, and for those furnished to the *David Wallace* he took without demur a draft made on them by their agent. On the other hand the master knew that the expenses incurred should be borne by the charterers and not by the owners, and, apart altogether from the question of authority, there does not appear to have been any necessity for his pledging the owners' credit.

The learned judge accepted the respondent's version of what took place and found in his favour that the necessaries in question were furnished on the order of the master and on the credit of the vessel and owners, and not on the credit of the charterers, and whatever view one might otherwise have been inclined to take, as to that, the respondent is, I think, on this appeal, entitled to the benefit of the finding in his favour.

Taking it then to be established that the necessaries were supplied on the order of the master and not of the charterers' agent or port captain, we come to the third question, namely: Had the master authority to pledge the owners' credit, or to make the vessel liable for the necessaries furnished?

Now in answering that question the first enquiry that arises is: Was the master, in ordering the supplies furnished, the servant of the owners of the vessel? For as stated by Lord Herschell, then Lord

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Chancellor, in a case decided in 1892, in which it was unsuccessfully sought to make the owners liable upon bills of lading signed by the master, it cannot be disputed as a general proposition of law that a person who does not himself enter into a contract can only be made liable upon the contract if it was entered into by one who was his agent or servant acting within the scope of his authority (1). In the case of *Mitcheson* v. *Oliver* (2), decided in 1855, Parke, B. expressed the same rule in these terms: "No contract can bind a "defendant unless made by some one who had real "authority to bind him, or unless the defendant is "precluded from denying that there was authority in "the person who made the contract;" and he added that it was then perfectly settled that the liability to pay for supplies to a ship depends on the contract to pay for them, and not on the ownership of the ship. The same principle is illustrated by the case of *Frazer* v. *Marsh* (3) decided in 1811, in which Lord Ellenborough, C. J. said that it would be pushing the effect of the registry Acts too far to say that the registered owner who divests himself by charter-party of all control and possession of the vessel for the time being in favour of another who has all the use and benefit of it, is still liable for stores furnished to the vessel by order of the captain during the time. The question was whether the captain who ordered the stores was or was not the servant of the defendant who was sued as owner? And as in the case then under consideration, they did not stand at the time in the relation of owner and master to each other, it was held that the captain was not the defendant's servant, and therefore the latter was not liable for his act.

(1) *Baumwoll Manufactur Von Carl Scheibler* v. *Furness* [1893] A. C. 16.

(2) 5 E. & B. 443.

(3) 13 East 239.

That being the well settled rule of the common law, one naturally enquires as to whether it is in anyway modified by anything to be found in the law or statutes relating to the Admiralty Court or its jurisdiction, which in Canada depends upon, and on this subject is the same as, the law of England (1). In approaching this enquiry it will be found in the first place that it has been held that the Court of Admiralty had no inherent jurisdiction in respect of necessaries supplied to a ship. That proposition has not been accepted without reserve by text writers (2); but it has the support of the highest authority. In their lordships' judgment in the case of *The Two Ellens*, (3), decided in the Privy Council 1872 occurs the following passage:

"It is clear that previous to the passing of the 3 & "4 Vict. c. 65, the Court of Admiralty had no juris- "diction in the case of necessaries supplied to a ship, "and that the supply of such necessaries did not give "any maritime lien upon the ship. It is perfectly true "that for many years prior to the time of Charles II "the Court of Admiralty had claimed, and to a con- "siderable extent exercised, such a jurisdiction; but "the Courts of Common Law, in the time of Charles "II., and subsequently, had prohibited them from "exercising that jurisdiction on the ground that they "never possessed it. Subsequently in the case of *The* "*Neptune* (4), it was decided by this tribunal that "there was no such jurisdiction. Therefore notwith- "standing this jurisdiction was practically exercised "for years, it must be taken now to be conclusively "the law that the Court of Admiralty, by the law of "England, never had jurisdiction in a suit for neces-

(1) *The Colonial Courts of Admiralty Act*, 1890, 53-54 Vict. c. 27, s. 2 (2) and (3) (*a*).

(2) See William's & Bruce's Admiralty Practice, 3rd ed., p. 191, note (*h*), and p. 195, note (1).

(3) L. R. 4 P. C. 166.

(4) 1 Knapp's P. C. Cases, 94.

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" saries supplied to a ship, and that necessaries so sup-
" plied did not give a maritime lien on a ship."

Then in the case of *The Henrich Björn* (1), Lord Bramwell, dealing with the contention that there was jurisdiction where the necessaries were supplied on the high seas says, in effect, that the contention had not been sustained, and that Lord Tenterden's opinion was to the contrary. Where a maritime claim arose within the body of a county the Court of Admiralty, before the year 1840, as pointed out by Lord Watson in the same case (2) never possessed, although it did occasionally, when not prohibited, exercise jurisdiction. By the 6th section of *The Admiralty Court Act*, 1840 (3), it was provided that the High Court of Admiralty should have jurisdiction to decide all claims and demands whatsoever in the nature of salvage, for services rendered to, or damages received by, any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel was within the body of a county or upon the high seas at the time when the services were rendered or damages received, or necessaries furnished in respect of which such claim was made. Then by *The Admiralty Court Act*, 1861, section 5 (4) it was among other things provided that the High Court of Admiralty should, unless it were shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship was domiciled in England and Wales, have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belonged (5).

(1) 11 App. Cas. 282.
(2) 11 App. Cas. 277.
(3) 3 & 4 Vict. c. 65.
(4) 24 Vict. c. 10.
(5) Sec. 5.

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In the case of *The Ella A. Clark* (1), and again in the case of *The India* (2), decided a little later in the same year (1863), Dr. Lushington held that the provision last cited did not apply to foreign ships. But that decision was overruled by the Court of Appeal in the case of *The Mecca* (3). Another question that arose on these statutes was whether they gave the material man a maritime lien on the ship, or only enabled him to enforce his claim in the Admiralty Court, and as one means to that end gave him a right to arrest the ship, but no right against the ship until the action was instituted The construction put upon the sixth section of the Act of 1840, and in general acquiesced in for a number of years, was that it gave such a lien to a person who supplied necessaries to a foreign ship in an English port; while an opposite view was taken as to the effect of the fifth section of the Act of 1861 (4)

In 1884 in the case of *The Rio Tinto* (5), it was held by the Judicial Committee of the Privy Council that section 10, sub-section 10 of *The Vice Admiralty Courts Act*, 1863 (since repealed) by which jurisdiction was given to Vice-Admiralty Courts in respect of claims for necessaries supplied in the possession in which the court was established to any ship of which no owner or part-owner was domiciled within the possession at the time of the necessaries being supplied, did not create a maritime lien with respect to such necessaries. Then in 1886 in the case of *The Henrich Björn* (6), the question as to whether the sixth section of the Act of 1840 gave a maritime lien in respect of necessaries

(1) Br. & L. 32.
(2) 32 L. J. Ad. 185.
(3) [1895] P D 95.
(4) *The West Friesland*, Swa. 454; *The Ella A. Clarke*, Br. & L. 32; *The Pacific*, Br. & L. 213; *The Troubadour*, L. R. 1 A. & E. 302; *The Two Ellens*, L. R. 4 P. C. 161.
(5) 9 App. Cas. 356.
(6) L. R. 10 P. D. 54; 11 App. Cas. 270.

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supplied to a foreign ship in an English port came again under discussion, and it was held by the Court of Appeal and by the House of Lords that it did not. This decision is of great importance and must always be kept in view in dealing with any question respecting the supply of necessaries to a ship. There is a wide difference between the right to enforce a lien against a ship and a right to arrest her to enforce a claim that the plaintiff has against her owner. As pointed out by Lord Justice Fry, in giving the judgment of the Court of Appeal in the case last mentioned (1): "A maritime lien arises the moment "the event occurs which creates it; the proceeding "*in rem* which perfects the inchoate right relates "back to the period when it first attached; the "maritime lien travels with the thing into whoso- "ever possession it may come (2); and the arrest "can extend only to the ship subject to the lien. But "on the contrary the arrest of a vessel under the "statute is only one of several possible alternative "proceedings *ad fundandam jurisdictionem*; no right in "the ship or against the ship is created at any time "before the arrest; it has no relation back to any "earlier period; it is available only against the prop- "erty of the person who owes the debt for necessaries; "and the arrest need not be of the ship in question, "but may be of any property of the defendant within "the realm. The two proceedings, therefore, though "approaching one another in form are different in sub- "stance."

The difference in the position of a creditor who has a proper maritime lien, and one who has no such lien, was also referred to by Lord Watson (3), as follows: "The former, unless he has forfeited the right by his

(1) L. R. 10 P. D. 54.
(2) *The Bold Buccleugh*, 7 Moo. P. C. 284.
(3) 11 App. Cas. 277.

"own laches, can proceed against the ship notwith-
"standing any change in her ownership, whereas the
"latter cannot have an action *in rem* unless at the
"time of its institution the *res* is the property of his
"debtor." And the distinction is of especial importance in cases where, as in the present case, the possession and control of the ship has passed from the actual owner to the charterer who becomes owner *pro tempore* or *pro hâc vice*. In such a case, as has been seen (1), the owner is not liable for necessaries supplied to the ship, and the ship is not liable therefor where the owners are not liable.

Dr. Lushington, in the case of *The Sophie* (2) said that he had observed in a recent case (*The Alexander* (3)), and that he wished it to be distinctly understood, that in all these cases he never could make a ship responsible for advances and supplies for which the owner himself, if he were in the country, would not be responsible. That case is referred to in *William's & Bruce's Admiralty Practice* (4) where it is stated that "it has been laid down in general terms that the "court will entertain claims for necessaries only in "cases where the owners would be liable at common "law. Therefore in all cases it should be shown that "the master or other person at whose orders the neces-"saries were supplied had authority express or implied "to bind the owners." In the class of cases under consideration, that is, where there is a demise of the ship, there is no such authority.

The question under discussion has also arisen in actions on bills of lading signed by the master, or for disbursements made by him, and in actions for damage, and it will, I think, be convenient to refer to some of these cases in further illustration of the subject.

(1) *Frazer* v. *Marsh*, 13 East. 239 and *Mitcheson* v. *Oliver*. 5 E. & B. 443.

(2) 1 Wm. Rob 369.

(3) 1 Wm. Rob. 360.

(4) 3rd ed. p. 192.

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In the case of *Colvin* v. *Newberry* (1) which was twice tried and went to the Exchequer Chamber, and from there to the House of Lords, it was held that the owners of a ship who had demised her to the master, were not liable to persons who knowing the terms of the charter-party had shipped goods on board the vessel. In such a case an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore* during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner (2). This case is an interesting one because of the difference of opinion elicited and from the fact that Lord Tenterden who had concurred in the judgment in the Court of King's Bench in favour of the plaintiffs, in the end moved the judgment in the House of Lords by which the decision of the Exchequer Chamber reversing the Court of King's Bench was affirmed. It is also an important case. It was first tried in 1820, and the decision of the House of Lords was not given until 1832. At that time the Court of Admiralty had no jurisdiction over any claim of that kind. Such jurisdiction as it now has is derived from the sixth section of *The Admiralty Act*, 1861 (3), by which it is provided that the High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port of England or Wales, in any ship for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty, or breach of contract, on the part of the owner, master, or crew of the ship, unless it is shown to the satisfac-

(1) 1 C. & F. 283.

(2) Per Lord Tenterden, 1 C. & F. 297.

(3) 24 Vict. c. 10.

tion of the court that at the time of the institution of the cause any owner or part owner of the ship was domiciled in England or Wales. The case of *The St. Cloud* (1863) (1) was, I think, the first to arise under this provision. In that case it was contended on the part of the defendant, the shipowner, that by reason of the charter party, and the nature of the action, the charterer alone, and not the owner of the ship would be liable at common law for the damage done to the goods, and that therefore the action against the ship could not be maintained. Dr. Lushington found that the defendant had not divested himself altogether of the possession of the ship; that there was no demise, and it became unnecessary for him to express any opinion upon the second proposition relied upon. He also attached weight to the fact that it had not been proved that the shipper had notice of the charter-party. "Until he had such notice" it is stated (2) he "would be justified in supposing that in dealing with "the master for the carriage of his goods, he was deal-"ing with the owner's agent. For *primâ facie*, the "master is the agent of the owner of the ship." *Sandeman* v. *Scurr* (3) was an action against the owners of the ship, not against the ship. On the facts presented it was held that there was no demise of the ship; that the charter-party amounted to no more than a grant to the charterer of the right to have his cargo brought home in the ship, while the ship itself continued through the master and crew in the possession of the owner, the master and crew remaining his servants. That, Chief Justice Cockburn, delivering the judgment of the court stated, was the ground upon which their judgment was founded (4); and he added: "We think that so long as the relation of owner and

(1) Br. & L. 4.
(2) P. 15.
(3) L. R. 2 Q. B. 86.
(4) *Ibid.* p. 96.

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" master continues, the latter, as regards parties who " ship goods in ignorance of any arrangement whereby " the authority ordinarily incidental to that relation " is affected, must be taken to have authority to bind " his owner by giving bills of lading. We proceed " upon the well-known principle that, where a party " allows another to appear before the world as his " agent in any given capacity, he must be liable to any " party who contracts with such apparent agent in " a matter within the scope of such agency. The " master of a vessel has by law authority to sign " bills of lading on behalf of his owners." In this case also weight was attached to the consideration that the shipper was not aware of the charter-party. The case was decided in 1866, and we turn from it to a case that went to the House of Lords and was there decided in 1892, in which it was held that the owner of a ship who has parted with the possession and control of the ship under a charter-party to the charterer is not liable for the loss of goods shipped under bills of lading signed by the captain who was the servant of the charterer, and not of the owner, and who had no authority from the owner to pledge his credit, although the shipper of the goods had no notice of these facts (1). In that case, to which reference has already been made, the owner of the ship who was registered as such, and also as managing owner under *The Merchant Shipping Act*, 1876, let her by charter-party for a term of four months. The charter-party provided that the captain, officers and crew should be paid by the charterer; that the captain should be under the orders of the charterer as regards employment, agency or other arrangements; that the charterer should indemnify the owner from all liabilities arising from

(1) *The Baumwoll Manufactur Von Carl Scheibler* v. *Furness* [1893[A. C. 8.

the captain signing bills of lading; and that the owner should maintain the ship in a thoroughly efficient state in hull and machinery for the service, and should pay for the insurance on the ship. The charterer took possession of the ship and appointed the captain, officers and crew, except the chief engineer, who was appointed by the owner in exercise of the option given him by the charter-party. The charterer sent the ship to New Orleans, where the goods were shipped under bills of lading, some of which were signed by the captain, and some by the agents of the charterer. Neither the captain nor the charterer's agents had any authority in fact from the owner to pledge his credit. The bills of lading contained no reference to the charter party, and the shippers had no notice of its terms. The goods were lost at sea during the currency of the charter owing, it was alleged, to the unseaworthiness of the ship, and the shippers brought their action against the owner for the loss. Lord Herschell, L.C., having shown that the master was not in fact in this case the owner's servant, continued as follows (1):

"But then it is suggested that the liabilities "which arise as between the shipper of goods and the "shipowner may be regarded as to some extent excep- "tional; that although looking at the matter apart from "the relationship to which I have just alluded, there "might be a difficulty in establishing liability, the lia- "bility nevertheless may be made out where the rela- "tionship of shipper and shipowner is found to exist. "But there may be two persons at the same time in diff- "erent senses not improperly spoken of as the owner of "a ship. The person who has the absolute right to the "ship, who is the registered owner, the owner (to borrow "an expression from real property law) in fee simple, "may be properly spoken of no doubt as the owner;

(1) *Ibid.* p, 17.

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" but at the same time he may have so dealt with the " vessel as to have given all the rights of ownership for " a limited time to some other person, who during that " time, may equally properly be spoken of as the owner. " When there is such a person, and that person appoints " the master, officers and crew of the ship, pays them, " employs them and gives them the orders, and deals " with the vessel in the adventure, during that time all " those rights which are spoken of as resting upon the " owner of the vessel, rest upon that person, who is, for " those purposes during that time, in point of law to be " regarded as the owner. When that distinction is once " grasped it appears to me that all the difficulties that " have been raised in the case vanish. There is nothing " in your lordships' judgment, as I apprehend, which " would detract in the least from the law as it has been " laid down with regard to the power of a master to " bind an owner, or with regard to the liabilities " which rest upon an owner. The whole difficulty has " arisen from failing to see that there may be a person " who, although not the absolute owner of the vessel, is " during a particular adventure, the owner for all those " purposes." The difference between such a case and one in which, although the vessel is chartered, the master and crew remain truly the servants of the owner, is alluded to. In the latter case he thought it to be perfectly clear that by reason of the relationship still subsisting, the owner became bound by such a contract as a bill of lading, and by all contracts which a master can ordinarily make, and which persons therefore have a right to presume he is authorized to make, binding the owner. Lord Herschell referred to a number of cases that have been cited. He adopted the test of liability that Lord Ellenborough applied in *Frazer* v. *Marsh* (1) where a master orders stores, and

(1) 13 East 238.

he expressed his opinion that there was no difference between such a case and the case of liabilty in respect of any other matter which the master has a right to do on behalf of his owner, whoever he may be. With respect to notice he did not think that that was an essential part of the defendant's case in *Colvin* v. *Newberry* (1); and he thought it unnecessary to refer to the cases of *The St. Cloud* (2); *Hayn* v. *Culliford* (3); and *Sandeman* v. *Scurr* (4) as they were all ordinary cases of charter-party where there was no pretence of saying that there had been any demise, or anything in the nature of a demise of the vessel, but where the vessel had been chartered, the master of the vessel remaining the servant of the owner. I have already referred to this case at great length, but the reasons for judgment are so instructive that I venture to add the following extracts from the judgment of Lord Watson (5):—

"At the time when the bills of lading were signed "and also at the time when the goods of the appel- "lants suffered damage, the ship was in the possession "and under the control of the charterers who em- "ployed their own master and crew in the navigation. "That point once fixed, it appears to me that there is "really no substantial question which can arise upon "this appeal * * *

"The master who signed the bill of lading was the "servant and agent of the charterers, and not the ser- "vant and agent of the respondent Furness. In that "state of facts the appellants, in order to succeed here, "must establish that the present case forms an ex- "ception from the general rule that a man is not liable "upon contracts made by persons who are neither his

(1) 8 B. & C. 166; 7 Bing. 190; and 1 Cl. & F. 283.
(2) Br. & Lush. 4.
(3) 3 C.P.D. 410; 4 C.P.D. 182.
(4) L. R. 2 Q. B. 86.
(5) [1893] A. C. at p. 21.

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" agents nor his servants. It was argued that the respondent remains liable for contracts made by the " charterer's agent with shippers who had no notice of " the terms of the charter. For that proposition no " authority whatever was produced. All the decisions " cited at the Bar, so far as they had any bearing upon " such circumstances, appear to me to point very distinctly to the opposite conclusion. No doubt, when " a shipowner who enters into a charter-party without " parting with the possession and control of his ship " seeks to limit the powers assigned by law to his captain, the limitation will be altogether ineffectual in " any question with shippers who are ignorant of the " terms of the instrument. That, however, is a question as to the limitation of the powers of an actual " agent who has known powers according to law. " Notice of the limitation must be given to those who " deal with the agent in order to disable them from " contracting with him. But I know of no principle " or authority which requires that notice must be given " when an owner parts even temporarily with the possession and control of his ship in order to prevent " the servant of the charterer from pledging his " credit." In this case some stress was sought to be laid on the fact that the owner was also registered as managing owner. But it was held that that did not make any difference; that the managing owner was registered under the Merchant Shipping Acts, and the register carried about with the vessel for statutory purposes only; and that the legislature did not intend to effect any change in the legal relations existing at the time when the Acts were passed between owners and charterers and the shippers of cargo. In the case of the *Manchester Trust* v. *Furness* (1) the agreement between the owners and charterers was that the own-

(1) [1895] 2 Q. B. pp. 282, 539.

ers should provide and pay for all the provisions and wages of the master and crew and insure the vessel and maintain her in a thoroughly efficient state in hull and machinery during the service. An attempt, however, was made to relieve the owners from liability on bills of lading signed by the master, by providing that he should do so as the charterers' agent; and that the charterers would indemnify the owners against all liabilities arising from the master signing the bills of lading. The latter signed bills of lading in the ordinary form for goods to be delivered to the holders of the bills of lading, they paying freight and other conditions per charter-party. The goods having been misdelivered it was held in an action by the holders of the bills of lading against the shipowners for loss, that the provision in the charter-party referred to did not affect the liability of the owners to the holders of the bills of lading, who were entitled to consider the master as the agent of the owners; and that the reference in the charter-party to the bills of lading did not give the holders constructive notice of the contents of the charter-party, the equitable doctrine of constructive notice of contents of documents not being applicable to mercantile transactions. The case affords another illustration that the test to apply is to find an answer to the question: "Whose servant was the master? Who was "his undiscovered principal when he signed the bill "of lading?" (1) There is another case that may be mentioned here more conveniently than elsewhere, although it did not arise upon a bill of lading. In *Meiklereid* v. *West* (2) it was held that the owner of a demised ship was not liable under section 169 of *The Merchant Shipping Act*, 1854 (3), on an allotment note

(1) Ibid. p. 546.
(2) 1 Q. B. D. 428.
(3) See now *The Merchant Shipping Act*, 1894, s. 143.

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given by a master who was appointed by the charterers.

A seaman has, by the maritime law, a lien on the ship and freight for his wages. The master formerly had no lien therefor or for anything due to him from the owners, and no right to resort to the Admiralty Courts. That has been changed by statute, and now he has a lien on ship and freight for wages and disbursements (1). After the passing of *The Admiralty Court Act*, 1861, and until 1889, when the case of *The Sara* was decided in the House of Lords, it was thought that the master had a lien on the ship for his disbursements, as well as for his wages. That was held in the cases of *The Mary Ann*, (2) *The Feronia*, (3) and *The Ringdove*, (4) but these cases were overruled by the House of Lords in the case of *The Sara* (5), and it was held that the master had no lien on the ship for his disbursements. Then followed *The Merchant Shipping Act*, 1889, by the first section of which the lien was given (6). But this lien does not extend to disbursements made on the charterer's account. For disbursements made as the agent or servant of the owner the lien exists and may be enforced; but not for disbursements made as the agent or servant of the charterer. Here again the test is:— "Whose servant was the master in making the dis- "bursements?" If the owner's he has his lien; if the charterer's there is no lien, The distinction is illustrated by the cases of *The Beeswing*, (7) and *The Turgot*, (8) and the question was fully discussed in the

(1) 7 & 8 Vict. c. 112, s. 16; *The Merchant Shipping Act*, 1854, s. 191; *The Admiralty Court Act*, 1861, s. 10; *The Merchant Shipping Act*, 1889, 52 & 53 Vict. c. 46, s. 1; *The Merchant Shipping Act*, 1894, s. 167.

(2) L. R. 1 A. & E. 8.

(3) L. R. 2 A. & E. 65.

(4) 11 P. D. 120.

(5) L. R. 14 App. Cas. 209.

(6) 52 & 53 Vict. c. 46 s. 1, and *The Merchant Shipping Act*, 1894. s. 167, ss. 2.

(7) 5 Asp. N. S. 484.

(8) 11 P. D. 21.

case of *The Castlegate*, (1) in which it was held by the House of Lords that the master has no maritime lien on the ship for disbursements for which he has no authority to pledge the owner's credit. In the case of *The Ripon City*, (2) in which the lien of the master was sustained, will be found an exhaustive review of the cases by Mr. Justice Gorell Barnes. In the latter case the action was brought in the name of the master by the person who had furnished the supplies, a practice that is sometimes resorted to to afford the material man the benefit of a lien on the ship that would not exist in his own favour.

The Court of Admiralty always had jurisdiction over torts committed by subjects of the Crown upon the high seas. For a discussion of the question of the inherent jurisdiction of the Court of Admiralty for damage, reference may be made to the case of *The Zeta*, (3). By *The Admiralty Court Act*, 1840 (4), jurisdiction was given to the court, as has been seen, to decide all claims and demands whatsoever in the nature of damage received by any ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel was within the body of a county or upon the high seas at the time the damage was received; and by *The Admiralty Court Act*, 1861 (5) it was given jurisdiction over any claim for the damage done by any ship. The maritime lien resulting from collision is not absolute. That, Sir James Hannen, in the case of *The Tasmania* (6) said was the result of the authorities. "It is," he adds "a *primâ facie* liability of the "ship which may be rebutted by showing that the "injury was done by the act of some one navi-"gating the ship not deriving his authority from

(1) (1893) App. Cas. 38.
(2) (1897) P. D. 226.
(3) (1893) App. Cas. 468.
(4) 3 & 4 Vict., c. 65, s. 6.
(5) 24 Vict. c. 10, s. 7.
(6) 13 P. D. 118.

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"the owners; and that, by the maritime law, char-
"terers, in whom the control of the ship has
"been vested by the owners, are deemed to have
"derived their authority from the owners so as
"to make the ship liable for the negligence of the
"charterers, who are *pro hâc vice* owners. These pro-
"positions do not lead to the conclusion that where as
"between the charterers and the person injured, the
"charterers are not liable, the ship remains liable
"nevertheless. On the contrary I draw from these pre-
"mises the conclusion that whatever is a good defence
"of the charterers against the claim of the injured
"person is a good defence for the ship, as it would have
"been if the same defence had arisen between the
"owners and the injured person." And it has been held that there was no maritime lien in cases of damage where the master of the vessel who committed the act complained of exceeded his authority, (*The Druid* (1)); where the vessel in fault belonged to the sovereign of a foreign state, (*The Parlement Belge* (2)); where the charterers had protected themselves from liability by contract with the person complaining of the injury, (*The Tasmania* (3)); and where the control and management of the vessel which had been wrecked had passed from the owners to the port authorities, (*The Utopia* (4)). The following is an extract from the judgment of the Judicial Committee of the Privy Council in the case last-mentioned, delivered by Sir Francis Jeune (5).

"It was suggested in argument that as the action
"against the 'Utopia' is an action *in rem*, the ship
"may be held liable, though there be no liability in
"the owners. Such contention appears to their lord-
"ships to be contrary to principles of maritime law

(1) 1 W. Rob. 398.
(2) L. R. 5 P. D. 197.
(3) L. R. 13 P. D. 110.
(4) [1893] A. C. 492.
(5) P. 499.

" now well recognized. No doubt at the time of action " brought a ship may be made liable in an action *in* " *rem*, though its then owners are not, because, by rea- " son of the negligence of the owners, or their servants " causing a collision, a maritime lien on their vessel " may have been established; and that lien binds the " vessel in the hands of subsequent owners. But the " foundation of the lien is the negligence of the " owners or their servants at the time of the collision, " and if that be not proved no lien comes into exist- " ence, and the ship is no more liable than any other " property which the owner at the time of the collision " may have possessed." *The Bold Buccleugh* (1), *The Ticonderoga* (2), and *The Lemington* (3), afford illustrations of cases in which the maritime lien for damage was enforced. In the case of *The Castlegate*, to which reference has been made, the action was for master's disbursements, but the question of lien for damage was discussed, and Lord Watson made some observations with reference to the authorities that have just been cited (4): "In the case of lien for wages of master and " crew" he said "the legislature has recognized the " rule that it attaches to ships independently of any " personal obligation of the owner, the sole condition re- " quired being that such wages shall have been earned " on board the ship. But that rule which is found- " ed upon obvious considerations of public policy con- " stitutes an exception from the general principle of " the maritime law, which I understand to be that, in- " asmuch as every proceeding *in rem* is in substance a " proceeding against the owner of the ship, a proper " maritime lien must have its root in his personal lia- " bility. It was argued that the case of lien for dam- " ages by collision furnishes another exception to the

(1) 7 Moo. P. C. 267.
(2) Swa. 215.
(3) 2 Asp. N. S. 475.
(4) [1893] A. C. 52.

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" general rule, and there are decisions and dicta which " point in that direction; but these authorities are " hardly reconcilable with the judgment of Dr. Lush- " ington in *The Druid* (1) or with the law as laid down " by the Appeal Court in *The Parlement Belge*, (2) " where the present Master of the Rolls, with the as- " sent of James and Baggallay, L.JJ., stated: 'In a " ' claim made in respect of a collision the property is " ' not treated as the delinquent *per se*. Though the " ' ship has been in collision and has caused injury by " ' reason of the negligence or want of skill of those " ' in charge of her, yet she cannot be made the means " ' of compensation if those in charge of her were not " ' the servants of her then owner, as if she was in " ' charge of a compulsory pilot. That is conclusive to " ' show that the liability to compensate must be fixed, " ' not merely on the property, but also on the owner " ' through the property.' "

And in *Abbott on the Law of Shipping* (3) it is suggested that the grounds upon which it has been held that a ship chartered so as to pass the possession and control of the ship to the charterers may nevertheless be liable in an action *in rem* for the tortious acts of the charterers' servants seem to require further consideration. The grounds given are that as the actual owners have allowed the charterers to become owners *pro hâc vice* the latter must be deemed to have received from the actual owners authority to subject the vessel to claims in respect of which maritime liens may attach to her, and that if damage is done by the negligence of such persons or their servants, the persons injured are entitled by maritime law to a lien on the *res* for the damage sustained. It is of course as indisputable that one cannot be made to answer for the

(1) 1 W. Rob. 391. (2) 5 P. D. 197.
(3) Ed. 1901, p. 73.

wrong of a person who is not his agent or servant as it is that he is not liable on a contract made by such person, unless for some reason he is estopped from denying that the person is his agent or servant.

With regard to notice the result of the cases seems to be that in actions for necessaries or master's disbursements, or on bills of lading the notice or want of notice is important and may be essential where the real owner retains some measure of control over the ship (1); but where he wholly divests himself of the possession and control of the ship the want of notice is not material (2). In the former case the master remains the servant of the owner, and the relationship of principal and agent existing between them, the known authority of the agent cannot be effectually cut down without notice to persons who deal with the agent; but in the latter case the master is not the servant of the owner; no such relationship exists; he has no such authority, and notice is not material. In the case under consideration it seems to me from his own evidence that the plaintiff knew that the barge was under charter to the Atlantic Transportation Company, although he did not know the terms of the charter-party.

It also appears from the cases that have been cited that where a maritime lien comes into existence upon the doing of the act that gives rise to the cause of action the ship may be liable although the real owner may not be liable. But in cases where there is no such lien the ship is not liable unless the owner is liable. A person who supplies necessaries to a ship has no maritime lien on the ship for such necessaries, and the

(1) *Colvin* v. *Newberry*, 1 Cl. & F. 283; *The St. Cloud*, Br. & L. 4, 15; *Sandeman* v. *Scurr*, L. R. 2 Q. B. 86; *The Turgot*, 11 P. D. 21; *The Castlegate*, [1893] App. Cas. 38; *The Manchester Trust* v. *Furness*, [1895] 2 Q. B. D. 539.

(2) *The Baumwoll Manufactur Von Carl Scheibler* v. *Furness*, [1893] A. C. 8.

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real or absolute owner is not liable therefor where at the time the necessaries were supplied he has no possession or control of the ship. In fact, except in cases where the master has a lien for disbursements for necessaries, a matter not now under consideration, one cannot with absolute propriety, speak of the liability of a ship for necessaries. She may in certain cases be proceeded against at the suit of the person who supplies them, but the action is really for the owner's debt, not the ship's, although the necessaries may have been supplied on her account. The action, however, cannot be maintained if the owner is not the debtor, and where he is the debtor it will not lie if the necessaries are supplied at the port to which the ship belongs, or if at the time of the institution of the action any owner or part owner of the ship is domiciled in Canada (1).

In the present case the owners are not the debtors. The master, in incurring the debt, was not their agent or servant, but the agent or servant of the charterers. The owners had demised the barge in question to the charterers. The latter appointed the master, and he, for them, the crew. The master's wages and those of the crew were paid by the charterers, and the running expenses were to be borne by them also. In such a case the master in procuring supplies for the barge was the servant or agent of the charterers, and not of the real owners, and the latter are not liable therefor. Neither is the barge. It seems to me that the third question which was stated, and which was in effect answered in the affirmative by the learned judge who heard the case, should be answered in the negative, and that the plaintiff's action should be dismissed. The learned judge in holding the barge liable in this case relied upon the authority of *The Perla* (2) and *The*

(1) *The Admiralty Court Act, Admiralty Act* 1890, s. 2 (3) (*a*) 1861, s. 5; *The Colonial Courts of*

(2) Swa. 353.

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Alexander (1), but in neither of these cases was there any question of the ship being demised. He also referred to the fact that the master's name appeared on the certificate of registry of the vessel, and he thought it a reasonable inference to draw that while the master had, as he stated, been appointed by the charterers when they were put in possession of her, he had been placed in charge by the owners at the date of registry and continued in charge under the charterers. It is not, I think, a matter of importance; but the charter-party bears date of the 28th of September, 1898, while the certificate of registry taken out on surrender of other papers and change of trade was issued on the 30th of that month, so that it may be that the master had never been in the owners' employ, but having been appointed by the charterers, his name was inserted in the vessel's papers.

I am not sure that the learned judge attached any importance to the inference he drew or to the fact that the master's name appeared in the certificate of registry, although he refers thereto. It does not appear to me to make any difference that the master's name was in the certificate of registry, or whether he had, or had not, been in the service of the owners before he was appointed master by the charterers After his appointment by the latter he was their agent and servant, and not the servant or agent of the owners of the vessel.

The amount in question is inconsiderable, but the question is one of importance, and as I came to a conclusion on this branch of the case different from the view taken by the learned judge before whom the case was tried, I have referred to the authorities at much greater length than I would otherwise have thought necessary.

(1) 1 W. Rob. at p. 360.

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The appeal will be allowed with costs, the judgment appealed from set aside, and the action dismissed with costs to the defendant.

Appeal allowed with costs.

Solicitors for the appellant: *Harris, Henry & Cahan.*

Solicitors for the respondent: *Drysdale & McInnis.*