

Case No. 4,456.

THE EMILY B. SOUDER.

{8 Blatchf. 337.}<sup>1</sup>

Circuit Court, E. D. New York.

April 24, 1871.<sup>2</sup>

MARITIME LIENS—ADVANCES FOR SUPPLIES IN FOREIGN PORT—CONTRACT PAYABLE IN GOLD.

1. If advances are made to furnish supplies to a vessel in a foreign port, where neither her master nor her owners are known or have any credit, the presumption is that credit is given to the vessel, and a lien on her for such advances is created.

{Cited in *The Union Express*, Case No. 14,364.}

{See *The Sarah Harris*, Id. 12,346.}

2. If the advances are actually made on the credit of the vessel, it is not necessary that there should be an express pledge of the vessel, or that there should be an expressed intention to give a lien, or even that the advances should be accompanied by a declaration that the advances were so made.
3. An express contract to pay in gold will be enforced, notwithstanding it was made after the passage by congress of the act declaring the paper currency issued by the United States a legal tender.

{Appeal from the district court of the United States for the eastern district of New York.

{This was a libel in rem by Pakenham Beatty, August Tappenbeck, and August Christiansen, trading as Pakenham Beatty & Co., of the port of Maranham, Brazil, against the steamship Emily B. Souder (E. A. Souder, claimant), for certain advances claimed to have been made upon the credit of the vessel. The district court rendered a decree for libellants for \$4,387.70 in gold, with interest, whereupon the claimants appeal.}

Cornelius Van Santvoord, for libellants.

Charles Donohue, for claimant.

The EMILY B. SOUDER.

WOODRUFF, Circuit Judge. I am satisfied, upon an examination of the evidence, that the views expressed by me in the case of *The Acme* [Case No. 28], on the question of the lien claimed for advances upon the vessel in a foreign port, where neither captain nor owners were known, or had any credit, are entirely apt to the present case; and, if I were to state any difference, I should say that the claim of the libellants, Pakenham Beatty & Co., to a lien, is here less doubtful, for, in the case of *The Acme*, the beneficial owners of the vessel applied directly and by letter to the libellants, requesting the advance. The effect of taking bills of exchange drawn on the owners was also considered in that case.

It is true, that the testimony of the captain of the steamer is in some hostility to the libellants' claim to a lien; but, in view of the well settled and oft recognized presumption, that the credit was given to the vessel under such circumstances as are here disclosed, it is in no wise material that there should be an express pledge of the vessel, or that the terms of the advance should in very words declare that the claimant shall have a lien. When the actual advance is made on the credit of the vessel, that is enough. Here, not only such presumption exists, but, in my Judgment, any other assumption is greatly improbable. The inferences of the captain are not, I presume, the result of any intended untruth, but they are drawn from the fact that nothing was said, during the negotiation for advances, suggesting, in terms, that the libellants were to have a lien upon the vessel. However this may be, I think, upon the whole testimony, the conclusion is irresistible, that the advances were not made upon the sole credit of the captain or owners.

As to the right to recover gold, so long as the decisions of the supreme court are not overruled nor modified, I must hold, that an express contract to pay in gold will be respected by the courts, and be enforced, or its breach be redressed, according to its tenor. True, this contract was made since the act of congress declaring the currency issued by the government a legal tender. But the principles of the cases decided allow parties to discriminate between the two kinds of currency, and give effect to their agreement. It is also true, that this action is not founded upon the bills of exchange and the stipulation therein for payment in gold. But, the whole transaction shows that the advance was, in fact, made to be repaid in gold, and the contents of the bills of exchange are cumulative and conclusive evidence of the fact.

The libellants must have a decree for the amount of debt and costs awarded them in the district court [Case No. 4,454], with costs of this appeal.

[NOTE. This libel was for certain advances made by Pakenham Beatty & Co., at the port of Maranham. Brazil, to the steamship Emily B. Souder, which had put into that port in June, 1865, in distress. It seems that the captain was without adequate funds to purchase necessary supplies and make needed repairs, and that he and the owners of the vessel were unknown at Maranham, and without credit there. Under these circumstances he requested the United States consul to obtain for him a consignee who would advance

the requested funds; and it was only after applying without success to several parties that he succeeded in getting Pakenham Beatty & Co., the libelants, to make the advances desired by the captain. It appears that John Pritchard agreed to advance a portion of the funds after Pakenham Beatty & Co. had agreed to advance the whole, and he also libeled the vessel for the amount of his advances. In the district court he had a decree in his favor, which was affirmed by the circuit court in Case No. 4,457. Appeals were prosecuted from this decree, as well as from the decree in the suit by Pakenham Beatty & Co., represented by the principal case, to the supreme court, where both cases were heard together, and the decrees of the circuit court in each of them affirmed, Mr. Justice Field delivering the opinion. It was held that: "1. The presumption of the law is, in the absence of collusion or fraud, that where advances are made to a captain in a foreign port upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues or for pilotage, towage and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the existence of the hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account. 2. The presumption in such cases can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could he raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry. 3. Liens for advances of funds for the necessaries of vessels in a foreign port, have priority over existing mortgages to creditors at home." *The Emily Souder*, 17 Wall. (84 U. S.) 666.]

<sup>1</sup> [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

<sup>2</sup> [Affirmed in 17 Wall. (84 U. S.) 666.]