

the evidence was sufficient to enable me to do so, as it must be in any event comparatively small. If the parties do not agree, a reference may be taken upon this item of damage.

The damage to cargo in the other parts of the ship I must find did not arise from any lack of reasonable or customary dunnage, or insufficiency of the ship, but from extraordinary sea perils.

A decree may be entered accordingly.

Affirmed on appeal, March 19, 1897.

THE W. F. BABCOCK.

GRAVES et al. v. THE W. F. BABCOCK.

(District Court, S. D. New York, March 1, 1897.)

SEAMEN'S WAGES—DESERTION—COMMITMENT THROUGH CONSUL—HONOLULU—FAILURE OF PROOF—CONSUL'S CERTIFICATES NOT EVIDENCE—REV. ST. § 4600—CONSULAR EXAMINATION REQUIRED.

On the ship's arrival at Honolulu, four men at different times, not appearing at the hour of commencing work in the morning, were within a few hours afterwards arrested as deserters by the police authorities at Honolulu on request of the consul, and kept in prison from 10 to 20 days, until the ship sailed. On arrival at New York, and on suit for their wages, an offset was presented for (1) rewards for detection, (2) arrest by the police, (3) board while in prison, and (4) the employment of a stevedore in place of each seaman while in prison, at \$2.50 a day. The seamen denied any intent to desert; the master had no personal knowledge, but only that desertion was reported to him; nor was any record produced of any examination before the consul, such as is required by section 4600 of the Revised Statutes. *Held*, (1) that the evidence of desertion was insufficient; that the mere certificates of the consul were not legal evidence; (3) that no such offsets as are claimed could be allowed, except on proper legal proof of their necessity, and of a substantial compliance with the statutory requirements.

Boddine & Lee, for libelants.  
 Jones & Govin, for claimants

BROWN, District Judge. To the claims of the above four seamen for wages, counter claims are set up for the cost of their arrest as deserters and of their confinement at Honolulu until the ship sailed for New York on February 26, 1896. The items charged in the log against Graves are as follows:

For reward paid for detection.....	\$10 00
For arrest by the police.....	6 00
For 21 days' detention in prison.....	21 00
For supply of a man in his place at \$2.50 per day, 18 days.....	45 00
For breaking window.....	20 00
	\$102 00

These charges exceed the wages earned during the following four months.

The charges against the other libelants are similar, except that against two of them \$20 each is charged for detection. All the men deny any intention to desert. Three of them, as appears from the testimony, went ashore at night, by leave, but got into a drunken

spree with friends on vessels near by; and not having returned at the hour when work was resumed on the ship the next morning, complaint was immediately made against them as deserters before the consul, and before noon they were arrested and lodged in jail; Graves and Donnelly on February 5th, and confined 21 days; and Bauer on February 20th, and confined 6 days. The fourth man, Bradley, had been ashore without leave early in the morning of February 10th to see the British consul, and was arrested by the police as a deserter on his way back to the ship.

There is no proper or sufficient proof of an intention by any of the men to desert. The master's testimony on this point is all hearsay, depending on reports of the mate, who left the ship and was not examined. The mate, he says, reported the men absent and their clothes missing. The weight of evidence certainly shows that the report in the latter respect was mistaken; the men's clothes were in bags in the forecabin all the time (except a couple of articles which one of the men had taken ashore to sell), and were there when the men returned to the ship February 26th.

The evidence does not satisfy me that there was any proper inquiry or finding by any one as to the fact whether the men, or any one of them, had deserted. Section 4600 of the Revised Statutes makes it the duty of consular officers "to reclaim deserters," and to employ the local authorities to that end. No express authority is given to lodge deserters in foreign prisons. But that section requires that "in all cases where deserters are apprehended, the consular officer shall inquire into the facts."

In the master's deposition appears a copy of a letter stating as follows:

"Shortly after the arrival of the ship W. F. Babcock several of the crew deserted. At the request of this office they were arrested and lodged in jail, where they complained to me of ill treatment at the hands of the mate. I summoned the master, and mate, also the men to appear before me. After a full investigation found the charges to be without foundation. Their jail fees, rewards offered for them, etc., have been looked over by me and found to be correct as per vouchers.

"[Signed]

Ellis Mills, General Consul."

This letter was objected to, and it is not legal or competent evidence as to the matters of fact stated in it. I have deferred the decision of the cause to permit evidence of any docket or record of inquiry as to the alleged desertion to be offered; instead of that a further certificate is offered under the seal of the consul, dated January 19, 1897, stating that in the month of February, 1896, complaints were successively made to him by the master that the above-named libelants had deserted,—

"Whereupon at the request of the master I issued requests to the marshal of this government for the arrest and detention of these men, and they were afterwards brought before me, and it then and there having been made to appear to my satisfaction that the aforesaid complaints were true \* \* \* and that the seamen had deserted said vessel, and absented themselves without leave, whereupon at the request of the said master the said seamen were remanded to the jail at Honolulu to remain there until the said vessel should be ready to proceed on her voyage or till the master should require their discharge, and then to be delivered to the said master, he paying all the costs of said commitment and deducting the same out of the wages due to said seamen. And I

further certify that the reason for my action was because I was satisfied that unless they were so detained they would again desert.

"Ellis Mills, Consul General."

This paper has not the appearance of having been prepared from any docket, record, or notes remaining in the consul's office. It does not purport to be a copy of any such record or notes; no dates, other than the month are given, and there is no direct statement that the consular officer made any inquiry into the facts. The latter part seems intended to follow the provisions of section 4598, which does not apply to proceedings before consular officers, but to proceedings before justices of the peace within the United States. In the case of *The Coriolanus, Crabbe*, 239, Fed. Cas. No. 7,380, Judge Hopkinson said: "I never suffer these certificates to be read; they are infinitely weaker than *ex parte* depositions."

To make proceedings before the consul evidence, there must be either a duly-proved copy of his record, or else his deposition, as in the case of other witnesses. These papers are neither, and must, therefore, be disallowed as evidence.

The testimony of all the men, moreover, is very explicit that there was no examination before the consul as to the fact of desertion; but only a hearing upon a complaint of ill treatment made to him by Burns, another seaman, upon which three of the men were called before him while they were in jail, and before Bauer was arrested, as witnesses on that charge. The master's testimony confirms this fact, and supports the testimony of the libellant Bauer, that he was never taken before the consul at all; and if that was the case with Bauer, it is fair to conclude that it was the same with the others, and that they were sent to jail on the master's complaint alone, without inquiry before the consul into the fact of desertion either before imprisonment or afterwards. This is not such an inquiry as section 4600 demands. All the items charged against the seamen based upon the ground of alleged desertion must, therefore, be disallowed.

The haste with which the proceedings against these men were taken; the absence of any genuine inquiry into the fact of desertion; the disclaimer of the men at the time of any intent to desert; the lack of any request and even of any option given to the men when arrested to return to the ship, or opportunity to show that the delay of a few hours in returning was due to drunkenness only, render the procedure against these seamen apparently a very harsh one, and make quite natural, if not legally justifiable, their subsequent violence in speech and act. Whether the men were deserters or not, they could not lawfully be thrown into prison without such an inquiry and opportunity to be heard as the statutes provide. And when such measures are taken by the master with a view to confiscating the wages of seamen for several months succeeding, he must take good care to collect and preserve for his defense, and for the defense of the ship, sufficient legal evidence to show both the necessity for such proceedings, and a substantial compliance with all the statutory requirements to justify it.

Under sections 4603 and 4596 I might impose a small discretionary fine for the two or three hours, which is all the voluntary absence

proved against these men; but in view of their imprisonment, no fine should be imposed. When the ship was ready to sail on February 26th, the men were brought on board in irons. On the way to the ship, Graves, Donnelly, and Bradley, for the purpose of securing their further detention in Honolulu, broke a plate-glass window in one of the stores, for which the captain was obliged to pay \$60. For this unlawful act, each of the three men should be charged with his share, viz. \$20. No other offsets being legally established, they are entitled to the residue of their wages, as follows:

To Graves.....	\$62 67
“ Donnelly .....	61 27
“ Bradley .....	61 17
“ Bauer .....	67 62

—with interest from June 29, 1896.

A decree may be entered accordingly, with costs.

DAVIDSON et al. v. BALDWIN.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1897.)

No. 433.

1. SHIPPING — MORTGAGEE HOLDING LEGAL TITLE — PERSONAL LIABILITY FOR REPAIRS.

One who purchases a vessel at marshal's sale, takes the legal title, and is registered as owner at the customhouse, but who, in fact, purchases for another, and holds the title merely as collateral security for a debt, is a mere mortgagee; and if he is not in possession, and does not appoint the master, he is not personally liable for repairs or supplies furnished on the order of the master. And when it is sought to hold him liable he is not estopped from showing his true relation to the vessel.

2. SAME—APPOINTMENT AND AUTHORITY OF MASTER—ENROLLMENT.

When one is acting as master by appointment of the real owner, his status and authority as such are not affected by the fact that his name has not been inserted as master in the enrollment, for the registry and enrollment are only for the protection of the revenue.

3. SAME—ESTOPPEL.

B. was the registered owner of a vessel, but in fact held the legal title as security for a debt. R. & Sons were the real owners, and R. was enrolled as master, and had full possession and control. Without changing this enrollment, he appointed one M. as master, himself doing the business of the vessel, as managing partner of R. & Sons. As such, he ordered repairs of libelants, they understanding that he did so simply as “manager.” Held, that on these facts, in the absence of any other evidence of a holding out by B. of R., as his manager, B. was not estopped from denying that R. was his agent.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

The record includes three libels in personam, filed by persons doing repairs or furnishing material to the tug Sea Gull, for which it is sought to make the appellee, Stephen Baldwin, liable as owner. These libelants were James Davidson, the Bay City Iron Company, and Charles and William F. Jennison. The record also includes a libel filed by James Murdock, who seeks to recover his wages as master of the Sea Gull. All of these libels were by agreement consolidated and heard together. The facts necessary to be stated, as we find them to be, are these: The tug Sea Gull was originally owned by the Reid Towing & Wrecking Company, a corporation of the state of Michigan, of which

one-half the capital was owned by James Reid, who was the president and manager of the corporation. Under proceeding against the tug in the district court, the Sea Gull was sold at marshal's sale to satisfy sundry decrees of that court. At the sale she was bought by the appellee, Stephen Baldwin, at the price of \$14,000, and a bill of sale executed to him. This purchase was made by Baldwin for James Reid, under an agreement by which he was to advance to Reid \$12,500 of the purchase money, and take and hold the legal title until Reid's note for that sum should be paid, and another note for \$1,000, due Baldwin upon another transaction. Baldwin paid \$12,500 of the price bid at marshal's sale, the remainder of the purchase money being paid by Reid or by another for him. Reid gave to Baldwin the note of James Reid & Sons, a firm composed of himself and two sons, formed for the purpose of carrying on the business originally carried on by the Reid Towing & Wrecking Company, for the sum thus loaned, which the latter indorsed to a bank as a means of raising money thereon. Baldwin gave to Reid an obligation to convey the vessel to him upon payment of that note, and another for \$1,000, made by James Reid alone. That paper was in these words:

"I hereby agree to transfer the tug Sea Gull, all her equipage, all booms, boom chains, pumps, and anything else that I may now have or hereafter come into my possession, upon the payment of two notes held by me. Twelve thousand five hundred dollars is now held by the Preston National Bank, and indorsed by me. This note to be paid by James Reid & Sons, or by James Reid. One of twelve thousand five hundred (\$12,500) dollars, made by James Reid & Sons, and one for one thousand (\$1,000), made by James Reid. Also the interest on said notes, and any other obligation that may be incurred by James Reid that I may become responsible for. Also sufficient to pay me for any trouble that I may be to.

"[Signed]

S. Baldwin. [L. S.]"

The tug was enrolled and registered in the name of Stephen Baldwin as owner, "whereof James Reid was at present master." This enrollment was at Detroit, the place of the residence of said Baldwin. The tug, from the time she was turned over by the marshal, remained in the sole possession of James Reid or James Reid & Sons, and was by them used in connection with two other tugs, owned in whole or part by Reid, in a wrecking and towing business carried on by the firm of James Reid & Sons. The bill of sale to Baldwin and the registry bear date in May, 1891. During most of the season of 1891, Reid himself sailed the Sea Gull; but late in 1891 he hired the appellant James Murdock to sail her, and from then until her destruction by fire, in 1893, Murdock was the acting master, and it is for his wages as master that he has filed his libel. From some time in 1891 (time not ascertainable) Reid was the managing partner of James Reid & Sons, a firm whose place of business was at Bay City, Mich. The business he conducted as "James Reid & Sons," and under this title he managed each of the tugs owned or controlled by James Reid & Sons, and under that style kept his bank account, and bought supplies for his wrecking business and for the tugs, and under the same designation ordered the repairs for the Sea Gull for which the libelants below preferred their several claims. In each instance these supplies and repairs were charged to the Sea Gull, as other supplies or repairs were charged by them to the particular tug to which they were furnished. Under the same designation, Murdock was hired to sail the Sea Gull. Baldwin was not engaged in any sort of maritime business, and was a capitalist. He had nothing whatever to do with the Sea Gull, was never in possession, had no interest in her earnings, and knew nothing of her employment or situation. He gave Reid no employment or authority to act for him, or in any way charge him for supplies or repairs, and was never consulted about the repairs now sued for by either Reid or any of appellants. He knew nothing of Murdock's employment as master. When he entered upon this agreement to aid Reid in buying the Sea Gull, the latter agreed to keep her insured, and did take out insurance to the extent of about \$27,000 in Baldwin's name as owner. Baldwin was ignorant of the fact of such insurance until after the loss of the boat by fire. Upon being apprised of the loss and insurance, he made regular proof of loss, and has collected the greater part of the insurance money. Judge Swan, of the district court, dismissed the several libels, and appeals have been perfected and errors assigned.

F. H. Canfield, for appellants.

T. E. Tarsney and W. W. Wicker, for appellee.

Before TAFT and LURTON, Circuit Judges, and SAGE, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

Under general maritime law, there would be no lien upon the ship for repairs made on order of her master at a home port. The General Smith, 4 Wheat. 443; The Lottawanna, 21 Wall. 559; The Edith, 94 U. S. 518; The Samuel Marshall, 6 U. S. App. 389, 4 O. C. A. 385, and 54 Fed. 396. The repairs made which constitute the basis for the claims here asserted were made at Bay City, a port within the state of the residence of Baldwin, the person sought to be made liable as owner. Bay City was therefore a home, and not a foreign port, whether Baldwin or Reid be treated as owner. The Samuel Marshall, supra. If any lien was fastened upon the Sea Gull to secure the debt for repairs, it would arise alone upon the statute law of Michigan, and then only if the repairs were made upon the credit of the vessel. The Samuel Marshall, supra. The J. E. Rumbell, 148 U. S. 1-19, 13 Sup. Ct. 498. As the Sea Gull was totally destroyed before any libel, it is unimportant to consider whether or not any lien was acquired under the local law, for a lien on the res, dependent alone on local law, would not make the owner liable in personam, unless he would be so upon general principles of law. The evidence makes it clear that the real relation which existed between Reid and Baldwin was that of mortgagor and mortgagee. Baldwin held the legal title as mere collateral security for the payment of debt, and upon payment was obligated to convey the Sea Gull to Reid. That it is competent to show by parol evidence that, although Baldwin had the title, he was, nevertheless, only a mortgagee, is well settled. That the tug was registered in his name does not prevent proof of the real relation. Morgan's Assignees v. Shinn, 15 Wall. 105; Winslow v. Tarbox, 18 Me. 132; Philips v. Ledley, 1 Wash. C. C. 226, Fed. Cas. No. 11,096; Howard v. Odell, 1 Allen, 85; Mitcheson v. Oliver, 5 El. & Bl. 419. Baldwin, as mortgagee, never had actual control of the vessel, never had possession, and was in no way interested in her earnings. That a mortgagee who holds the legal title, but who is not in possession, is not liable personally for supplies and repairs furnished the ship upon order of the mortgagor or master, is now well settled. Winslow v. Tarbox, supra; Howard v. Odell, supra; Philips v. Ledley, supra; 3 Kent, Comm. 134; McIntyre v. Scott, 8 Johns. 160.

But appellants claim that the evidence shows that Reid told some of them that Baldwin had purchased the vessel at the marshal's sale, and led them to believe that he was the owner; that they all knew that Baldwin appeared on the customs' registry as the owner, and Reid as the master; and that none of them knew that Baldwin only held the title as collateral security, or knew of the obligation to convey to Reid when his debt was paid. In support of this position, counsel for appellants rely upon Story, Ag. § 298, where it is said: