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 C. 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:

"It will make no difference in respect to the liability of the owner, in case of repairs to ships, that by private agreement or charter party, between the owner and master, the latter is to have the entire ship to his own use for a specified period, and is to make all the repairs at his own expense, for such a private agreement cannot vary the rights of third persons."

This text is supported by the well-known case of Rich v. Coe, Cowp. 636. But the case cited and the doctrine stated apply only where the person sought to be made liable is the real owner, and the person ordering the repairs was the master appointed by the owner. In such case the existence of a secret agreement by which the master was to sail the ship on his private account, and himself keep her in repair, would not affect the rights of third persons ignorant of the charter party, and guilty of no negligence. This is the rule applied in the case of The Samuel Marshall, 6 U. S. App. 389, 4 C. C. A. 385, and 54 Fed. 396. The rule stated by Judge Story has its foundation in the liability of the owner for the engagements of the master within the well-defined limits of the authority implied from the office of master. But the real question in all such cases is, who is the contracting owner made liable by the master's conduct within the well-defined scope of a master's implied authority? The mortgagor, although he holds the title, and appears in the registry as the owner, is, if out of possession, not the owner whom the master is authorized by law to bind for repairs made on his order. Whatever doubt may have been entertained at one time, it is now well settled that a mortgagee out of possession is not the owner made liable by repairs made on order of the mortgagor or the master. 3 Kent, Comm. pp. 133, 134. Neither is the case altered because the mortgagee holds the legal title under a bill of sale absolute on its face, and stands upon the registry as the owner. The latter circumstance does not change the real relation of the mortgagee, and does not by itself estop him from showing that he was not the owner when sought to be made liable for repairs. The owner who is made liable by the master's act is the owner whose agent he is, and from whom he derived his authority.

The books contain many cases in which there concurred the facts here relied upon to estop the defendant from denying his liability. Thus, in the case of Mitcheson v. Oliver, 5 El. & Bl. 419, the action was for repairs, and work done, and materials furnished to fit out the ship Progress on order of one who appeared on the registry as her master. The defendant appeared on the same registry as owner. But the defendant showed in defense that he had agreed to sell the Progress to one G., by a contract in writing, unregistered and unknown to the plaintiffs, and that the master had actually been appointed by G., though circumstances, including the enrollment, led plaintiffs to suppose him to have been appointed by O. A verdict in favor of plaintiffs was set aside by the court of queen's bench, upon the ground that there had been a misdirection, and that the jury had come to a wrong conclusion, and that the verdict ought to have been for the defendant. Park, B., among other things, said:

"None of us, I believe, have doubted that the jury came to the wrong conclusion, and that the verdict ought to have been for the defendant, on this single ground that no contracts can bind a defendant unless made by some