"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

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. It is perfectly settled now that the liability to pay for supplies to a ship depends upon the contract to pay for them, and not on the ownership of the ship. We are all satisfied that, on this evidence, the jury ought not to have found Thomson really agent for the defendant in making this contract, nor that the defendant held out false colors, representing that Thomson had authority to bind him, when in point of fact he had not, so as to induce the plaintiffs to believe that he could make the contract for the defendant, and that the plaintiffs acted in the supply on that belief."

Touching the summing up of the trial judge, the court said:

"Lord Campbell told the jury that 'the defendant would not be liable to the plaintiffs' demand, merely as owner of the ship, nor by reason of this being registered as such owner; nor would he be liable merely by the orders being given to the plaintiffs by the registered master of the ship,' and so far the direction is perfectly accurate; but then comes an enumeration of the circumstances under which the defendant 'might be liable,' which must be understood as meaning that, if the jury found that these circumstances all existed, they should find for the plaintiffs. We think that this enumeration is defective. The circumstances enumerated are: If the defendant 'remained in possession of the ship, and held himself out as owner, and if a person acted as master of the ship with his privity and consent, and the goods and work were supplied to and done upon the ship upon the credit of the owner, by the bona fide orders of the master, given with the privity of the owner, and if the goods and work were fit, necessary, and proper for the ship, under the circumstances in which she was placed, and fit and necessary for the purposes of the ship, at the time of the orders.' Now, we think that, though all these circumstances existed, yet it would not be enough to render the defendant liable, unless the person acted as the defendant's master of the ship with his privity and consent, and the goods and work were supplied to and done upon the ship, not merely 'upon the credit of the owner, by the bona fide orders of the master given with the privity of the owner,' but as on a contract with the owner on orders given by the master as for him. Now, in this case, on the evidence, it appears that the defendant did not, by word or deed, in any way hold out Thomson as his master; and therefore the defect in this part of the summing up is material, and would influence the verdict."

The mere fact that one stands on the registry as the owner by no means determines that he is the contracting owner made liable through the agency of the master. 3 Kent, Comm. pp. 133, 134.

In Howard v. Odell, 1 Allen, 85, the facts were these: The ship was registered as owned by Odell & Kidder. The plaintiff sold supplies for the ship to Odell. Upon inquiry made when the first bill was made, Odell said that the ship was owned by Odell & Kidder. Afterwards plaintiff sent to the customhouse, and found her so registered. The charge was made to the ship. The fact was that Kidder held a bill of sale absolute on its face for one-half of her from one Wilson, which was duly recorded. But it was shown that in fact Kidder only held this title as collateral security for the payment of a debt due him from Wilson, and never exercised any acts of ownership over her, nor authorized Odell to in any way incur liability for him. Upon the facts, it was sought to hold Kidder personally liable for repairs and supplies ordered by Odell. The court held Kidder not liable. Bigelow, C. J., delivering the opinion of the court, after saying that it was settled that the mortgagee of a vessel not having her in his possession or control was not liable for supplies or repairs furnished on the order of the master or mortgagor, said: