

ment, and was therefore admissible for the purpose offered. *Bradley v. Packet Co.*, 13 Pet. 89, 100; *Hostetter v. Park*, 137 U. S. 30, 11 Sup. Ct. 1; *Myers v. Walker*, 24 Ill. 138; *U. S. v. Peck*, 102 U. S. 64. There is no merit in the defense, and a decree must be entered for the libelants for the sum of \$2,700, with interest and costs from November 26, 1894. As the rights of the cross libelant are rested entirely upon an erroneous construction of the obligations of the charter party, the cross libelant is not entitled to recover the \$6,000 paid for the services of the *Globe*, and the cross libel must be dismissed, with costs.

THE BERTHA M. MILLER.

TARR et al. v. JORDAN et al.

(Circuit Court of Appeals, First Circuit. March 23, 1897.)

No. 204.

1. MARITIME LIENS—SUPPLIES—PRESUMPTION OF NECESSITY.

To create a lien for supplies ordered by the master in a foreign port, it must appear that the supplies were reasonably necessary, and that a credit to the vessel is necessary. The necessity for the supplies may be presumed from their nature, and from the fact that the master ordered them; and, in the absence of other facts, the necessity for binding the vessel may also be presumed. But if the supply man knows that the master has funds of the owners, or of his own, credit to the vessel is not authorized, and no lien is created.

2. SAME.

One furnishing a small amount of supplies to a fishing vessel in a foreign port, on the order of the master, has no lien, though he give credit on his books to the vessel and owners, when he knows that the vessel brought in and sold for cash sufficient fish to furnish means of payment. Nor is it material that the vessel departed on the day of receiving the supplies, no fraud being practiced.

Appeal from the District Court of the United States for the District of Massachusetts.

This was a libel in rem by Fritz H. Jordan and others against the schooner *Bertha M. Miller* (James G. Tarr and others, claimants) to enforce an alleged lien for supplies. The district court rendered a decree for libelants, and the claimants have appealed.

An opinion was filed below by Nelson, District Judge, July 16, 1896, in the following terms:

The supplies in this case were furnished to the vessel in a foreign port upon the order of the master. The evidence is sufficient to prove that the supplies were furnished upon the credit of the vessel, and that the libelants had no knowledge that the vessel was run on shares or under a charter that provided that the charterers should supply the vessel for the voyage. As the supplies were necessary for the voyage, and the prices charged were reasonable, the libelants have, by the maritime law, a lien on the vessel therefor. Decree for libelants for \$114.29, with interest from September 1, 1894, and costs.

Michael J. McNeirny, for appellants.

Eugene P. Carver and Edward E. Blodgett, for appellees.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

WEBB, District Judge. The schooner *Bertha M. Miller*, owned in Gloucester, in the state of Massachusetts, was by her owners chartered to the captain and crew for the business of "fresh fishing," in March, 1894, for the fishing season. By the terms of the charter, the captain and crew were to have sole control of the whole vessel, during the season (unless sooner the owners should terminate the charter, the right to do which was reserved), in the prosecution of the fishing business. The charterers were to provide everything necessary for the contemplated business at their own expense, and it was expressly agreed that neither the owners nor the vessel should be liable for any debts or liabilities incurred by the charterers for fishing gear, outfits, provisions, or other expenses in the prosecution of the fishing enterprise, but that for all such debts the charterers should be solely responsible. As compensation for the use of the vessel, the owners were to receive one-fifth of the gross proceeds of the fish which might be caught on said schooner, or in the prosecution of the fishing enterprise, during said time, all expenses of towing, wharfage, and weighing being first deducted from said gross proceeds. There can be no doubt that, under this charter, the charterers became owners of the schooner *pro hac vice*; that is, so long as the charter should continue in force. The "fresh fishing business" was prosecuted along the coast, and consisted of catching fish, which were kept fresh, by being packed in ice, until the vessel could run into some port where her fish could be sold. The trips were from one or two days to two weeks in duration, according to circumstances, depending on the distance it might be necessary to go, and the success in taking fish. While this charter remained in force, August 14, 1894, the schooner, with a fare on board, ran into the port of Portland, in the state of Maine, to make sale of her catch. While there, the captain, finding the vessel stood in need of provisions and supplies for the further prosecution of her business, ordered of the libelants what was so necessary, and the articles ordered were supplied.

That Portland was a foreign port for this schooner is not disputed. That fact gave the master power to subject the vessel to a maritime lien for necessary supplies, furnished by one having no knowledge of the particular terms on which he was sailing her. But this power of the master is not without limitation or qualification. It must appear that the supplies are reasonably necessary, and that the credit to the vessel herself is necessary. The necessity of the supplies is presumed from their nature, and from the fact that the master orders them; and, in the absence of other facts, the necessity for binding the vessel may also be presumed. But if the material man knows that the captain has funds or means of his owners, or of his own, credit to the vessel is not authorized, and no lien is created. *The Lulu*, 10 Wall. 192; *Thomas v. Osborn*, 19 How. 22; *The Kolorama*, 10 Wall. 204; *The Patapsco*, 13 Wall. 329; *The Grapeshot*, 9 Wall. 129. When the *Bertha M. Miller*, in August, 1894, sailed into Portland, she had on board the fish caught

on her trip, and they were to be sold there. Whether they belonged to the owners or to the captain and his associates, they furnished the captain with means to pay for the small quantity of supplies his vessel wanted. As matter of fact, he had bargained his fish before the supplies were ordered, and was to be paid for them in cash as soon as they were delivered. The libelants knew the business in which the schooner was engaged, and how that business was conducted. We do not mean to be understood as saying that they knew anything about the charter of the vessel. Had the schooner come in empty, after an unsuccessful fishing cruise, we have no doubt that she might have been made subject to a lien for the supplies furnished by these libelants.

Some controversy has arisen on the question whether the libelants credited the vessel or her owners for those supplies. The evidence leads to the conclusion that the libelants made the charges on their books to the schooner and owners, showing that they looked to both for payment. But the important question now is whether they had a right to charge these supplies to the vessel, and make her responsible for them. In view of all the evidence, we cannot doubt that the libelants not only knew the nature and methods of the business of the schooner, but that they also knew that she brought in for a market a fare of fish, which the captain could make use of to procure necessities, without binding his vessel. Under such circumstances there was no right to charge those supplies to the schooner, and the form of entry on the libelants' book was of no effect.

But it is contended that, inasmuch as the vessel departed on the same day the supplies were put aboard, to pursue further her fishing business, the charge to her was warranted. The rights and obligations of the parties must be determined by the facts as they existed when the credit was given, and not by subsequent events, especially if there was no fraud practiced. In this case the master of the schooner, after receiving pay for his fish, called at the libelants' place of business, to pay for his supplies, and was postponed by the statement that the libelants had not had time to make up their bills. It was only after this that he sailed from Portland.

Had this cause depended alone upon the facts noticed in its opinion by the district court, we should unhesitatingly have affirmed its decree. But as it appears to us that, however necessary the supplies were, there was no necessity for furnishing them on the credit of the vessel, and that this was known to the libelants, the decree must be reversed. The decree of the district court is reversed, and the case is remanded to that court, with directions to dismiss the libel, with costs for the appellants in each court.

NEW ZEALAND INS. CO. v. EARNMOOR S. S. CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

1. ADMIRALTY JURISDICTION—FEDERAL COURTS—STATE STATUTES—GENERAL AVERAGE—INTEREST.

In the exercise of their admiralty and maritime jurisdiction, the federal courts are governed solely by the legislation of congress and the general principles of the maritime law, and are not bound by state statutes. Accordingly, *held*, that in its determination of the question of the allowance of interest in a libel upon a contract of marine insurance, a court of admiralty is not to be guided by state statutes as to the method of ascertaining the proportions of a general average loss and as to the allowance of interest on contracts.

2. INTEREST—MARINE INSURANCE.

When the owner of a vessel has demanded from an insurer an amount claimed to be due under the policy of insurance by reason of injury to the vessel from perils insured against, and the insurer, while admitting a less amount to be due, has resisted payment of the amount claimed throughout a long litigation, but has never tendered the amount admitted, it is proper for a court of admiralty to allow interest from the time of the demand on the amount finally found to be due, though slightly less than that claimed.

Appeal from the District Court of the United States for the Northern District of California.

Andros & Frank, for appellant.

Chas. Page, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The appellant, New Zealand Insurance Company, was respondent in the court below to a libel brought by the appellee, the Earnmoor Steamship Company, Limited, upon a policy of marine insurance, by which the insurance company insured the appellee against any loss on its steamship Earnmoor which might be caused by any one of the perils usually set forth in a policy of marine insurance. Both companies were incorporated under the laws of the United Kingdom of Great Britain and Ireland; the steamship company having an office for the transaction of its business at Newcastle, England, and the insurance company having an office for the transaction of business in the city and county of San Francisco, state of California, in which city and county the policy sued on was issued. On or about January 10, 1889, and during the life of the policy, the ship, bound on a voyage from Philadelphia to St. Thomas, while proceeding down the Delaware river met with a serious disaster, requiring salvage services and subsequent repairs, which gave rise to a claim in general and particular average against the appellant as underwriter upon the hull and appurtenances of the vessel. In due time an average adjustment was made by adjusters, which shows a loss by the shipowner in particular and general average of a certain amount. Of this amount the appellant was called on to pay a share proportionate to the amount insured by it. The average statement was presented to the appellant July 23, 1889. It charged in particular average, \$43,344.70, and in general average, \$41,598.44. In the settle-