not executed, they are not before the court. We do not perceive that in this case, as stated, any proof respecting the heirs of George Boon ought to be required. The court directs the following certificate.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Kentucky, and on the questions and points on which the judges of the said court were opposed in opinion, and which was certified to this court for its opinion, agreeable to the act of congress in such case made and provided, and was argued by counsel: On consideration whereof, this court is of opinion, 1. That under the circumstances stated in the certificate of the judges, the said circuit court could entertain cognisance of the case. 2. That the want of proof that the persons made defendants in the amended bill as the heirs of George Boon, were in fact his heirs, is no obstruction to a decree on the merits of the cause. All of which is hereby ordered and adjudged to be certified to the said circuit court, under the seal of this court.

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*The Ship Virgin, and Graf and Delplat, her owners, Appellants, *v.* Adam Vyfhius, Junior, Appellee. [*538

Adam Vyfhius, Junior, Appellant, *v.* The Ship Virgin, and Graf and Delplat, her owners, Appellees

Bottomry.—Seamen's wages.

On an appeal from the decree of the circuit court of Maryland, on a libel on a bottomry bond originally filed in the district court, it appeared, that commissioners appointed by the circuit court had reported, that a certain sum, being a part of the amount of the bond, was absolutely necessary for the ship, as expenses and repairs in the common course of her employment; no exception was taken to this report by either party, in the circuit court, and it was accordingly confirmed by that court. The report is not open for revision in this court, there being nothing on its face impeaching its correctness.

It is no objection to a bottomry bond, that it was taken for a larger amount than that which could be properly the subject of such a loan; for a bottomry bond may be good in part, and bad in part; and it will be upheld by courts of admiralty, as a lien, to the extent to which it is valid, as such courts, in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity.

It is notorious, that in foreign countries, supplies and advances for repairs and necessary expenditures of the ship, constitute, by the general maritime law, a valid lien on the ship; a lien which might be enforced *in rem*, in our courts of admiralty, even if the bottomry bond were, as it certainly is not, void *in toto*.

An objection was taken to the bond, that the supplies and advances might have been obtained on the personal credit of the owners of the ship, without an hypothecation: *Held*, that the necessity of the supplies and advances being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact, by competent proofs; unless it is apparent from the circumstances of the case.

It was objected, that the supplies and repairs were, in the first instance, made on the personal credit of the master of the ship, and therefore, could not be afterwards made a lien on the ship: *Held*, that the lender on the bottomry bond might well trust the credit of the master, as auxiliary to his security; and the fact that the master ordered the supplies and repairs, before the bottomry was given, can have no legal effect to defeat the security, if they were ordered by the master, upon the faith, and with the intention that a bottomry bond should be ultimately given to secure the payment of them. In cases of this sort, the bottomry bond is, in practice, ordin-

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arily given after the whole supplies and repairs have been furnished; for the plain reason, that the advances required can rarely be ascertained with exactness until that period.[1]

*539] It was objected, that the advances were for a voyage not authorized by the *owners; that the original orders were for the master to get a freight for Baltimore or New York, and if he could not, then to proceed to New Orleans; whereas, the master broke up his voyage, and, without any freight, returned to Baltimore. It may be admitted, that if a bottomry lender, in fraud of the owners, and by connivance with the master, for inproper purposes, advances his money on a new voyage, not authorized by the instructions of the owner, his bottomry bond may be set aside as invalid; but there is no pretence to say, that if the master does deviate from his instructions, without any participation or co-operation or fraudulent intent of the bottomry lender, the latter is to lose his security for his advances, *bonâ fide* made for the relief of the ship's necessities.

Seamen have a lien, prior to that of the holder of a bottomry bond, for their wages; but the owners are also personally liable for such vages; and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners; in the same manner as he would have, if they had previously mortgaged the ship.

Graf, one of the owners, had the ship delivered up to him upon an appraisement, at the value of $1800, and he gave a stipulation, according to the course of admiralty proceedings, to refund that value, together with damages, interest and costs, to the court. He is not of liberty now to insist, that the ship is of less than that value in his hands, or that he has discharged other liens, diminishing the value for which the owners were personally liable, *in solido*, in the first instance.

To the extent, then, of the appraised value of the ship, delivered upon the stipulation, the owners are clearly liable; for she was pledged for the redemption of the debt, and they cannot take the fund, except *cum onere;* but beyond this, there is no personal obligation upon the owners.

In this case, the value of the ship, the only fund out of which payment can be made, fell far short of a full payment of the amount due upon the bottomry bond. But this is the misfortune of the lender, and not the fault of the owners; they are not to be made personally responsible for the act of the master, because the fund has turned out to be inadequate; since, by our law, he had no authority, by a bottomry bond, to pledge the ship and also the personal responsibility of the owners. The consequence is, that the loss, *ultra* the amount of the fund pledged, must be borne by the libellant.

Appeals from the Circuit Court of Maryland. The ship Virgin sailed, in August 1822, from Baltimore to Amsterdam, where she arrived on the 12th of October of that year, under command of John Cunnyngham. By the plan of the voyage, she was to return from Amsterdam to Baltimore, if she could procure a freight; otherwise, she was positively directed to proceed to New Orleans. She was owned, when she sailed, by John C. Delplat, who, during her passage to Amsterdam, became insolvent, and on the 4th of September, sold one-third of her to Frederick C. Graf.

*540] *The vessel, on her way to Amsterdam, encountered severe weather, and arrived there in want of sails and a cable, and of various repairs. At her departure from Baltimore, her owner directed, that at Amsterdam, as the most economical place for the supply, she should be furnished with a mainsail and topsail, and cable, of which it was foreseen she would then be in urgent need. The vessel had a cargo, of which, except twenty hogsheads of tobacco, all belonged to Delplat; and all of the cargo was consigned to N. & I. & R. Vanstaphorst, at Amsterdam, to whom

[1] A lender on bottomry will be protected, in case there was an apparent necessity for his advances. The Fortitude, 3 Sumn. 228. But he is bound to ascertain, that the money is necessary for the particular voyage, as well as that the master has no other resources on hand. The Boston, 1 Bl. & H. 309. There must be an actual necessity; an anticipated want of funds is not enough. The Texas, Crabbe 236. In an action on the bond, the court will not go into the question of the reasonableness of the charges for repairs, if they were made in good faith. The Yuba, 4 Bl. C. C. 352.

Delplat also consigned the vessel. The twenty hogsheads of tobacco belonged to Frederick C. Graf. Agreeable to these consignments, the master, on arrival at Amsterdam, delivered to the Vanstaphorsts the cargo, and committed to them all the concerns of the vessel; in consequence of which, they collected and held in their hands all the freight that was actually payable upon any portion of the cargo, and all the proceeds of the tobacco belonging to Mr. Graf.

The master, desiring to refit the vessel, and afford her all the necessaries for her return-voyage, applied to the Vanstaphorsts for the requisite means, and ultimately even offered them a bottomry of the ship for the funds. After much delay, they refused all advances—intelligence of the failure of Delplat, asserted by them to be largely their debtor, having meanwhile reached them. To provide for the event of this refusal, the master set on foot a negotiation, through brokers, for raising the means by bottomry; and the application to the Vanstaphorsts, and this provisional negotiation, were pending for about three weeks—the master knowing no friends of the owner, except the Vanstaphorsts, to whom he could apply for the aid. During this period, the master contracted, on his own responsibility, for various supplies, which he designates in his evidence, as all those that were furnished before the 1st of November. The payment for these and for the other necessaries of the ship, was made out of the moneys received from the appellee Vyfhius. On the 12th of November, after the Vanstaphorsts had finally declined making the advances, the master contracted with Vyfhius for the loan upon bottomry, of 8000 guilders, at an interest of ten per cent.; all which, he showed, was appropriated for the indispensable uses of the ship.

*About the 3d of November, the master received from Mr. Graf a letter, dated in September 1822, announcing his purchase of one-third of the Virgin, and referring to a certificate of his purchase, as inclosed in the letter; which in fact appeared not to have been inclosed. About the same time, by another letter from Mr. Graf, and perhaps also from other quarters, information was given to the master of Mr. Delplat's failure; and, in consequence, the master, on consultation, determined that it was his duty to proceed with the vessel home to Baltimore, and not to dispatch her to New Orleans. After undergoing repairs, and receiving all her supplies paid for by the appellee Vyfhius, the Virgin sailed from Amsterdam to Baltimore, and arrived there in March 1823. [*541

The owners refusing to pay the appellee his advances, the libel in this cause was filed, which prayed citation against the owners by name, as well as the master, and condemnation of the vessel for paying the loan, and also further relief such as the court might deem adequate and just. The owners, Delplat and Graf, appeared and answered; their answers called into question the fact and the necessity of expenses at Amsterdam, insisting too, that the Vanstaphorsts had property enough of the owners, and which should have been applied for the wants of the ship, and charging that the bottomry was really taken by the Vanstaphorsts, though colorably in Vyfhius' name, and maintaining, finally, that all requisite funds could have been raised on the credit of the owners, or of the master.

A commission for evidence was sent to Holland, the chief object of which was to prove the Vanstaphorsts to be really the owners of the bot-

tomry. The circuit court determined that the bottomry was invalid, but that the owners were personally liable for all the necessary supplies furnished by the means of Vyfhius for the vessel, and that, to that extent, he was entitled in this cause, to recover against them. The cause was then referred to the clerk of the court to ascertain, calling to his aid two merchants, the amount of the necessary supplies referred to. The clerk and his assistants reported their ascertainment; exceptions by Delplat and Graf were filed to it; the case was remanded to the clerk, who called two other merchants to co-operate with him, and they reported their statement of the *necessary expenses, which the court confirmed. Thereupon, the court passed its final decree, awarding payment to Vyfhius, by Delplat and Graf, of the sum of $2900, with interest from the 26th of November 1830, the date of the decree; the principal of the ascertained expenses being $2900. Both parties appealed to this court.

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The case was argued by *Steuart*, for the owners of the ship Virgin; and by *Mayer*, for Mr. Vyfhius.

For the owners of the Virgin, it was contended, that the decree of the circuit court which made them personally liable for the claim of the libellant Vyfhius, was erroneous:

1. Where it is attempted to pursue the owner of a ship personally, for advances which he may be made personally liable, the proper remedy (in the admiralty court) is by libel *in personam*, or at all events, the personal liability must be distinctly averred and charged in the libel.

2. When the proceeding is altogether *in rem* (for example, against a ship on a bottomry bond), it presents no question but the validity of the hypothecation. The court is restricted to that question, and cannot decree *in personam*.

3. The circuit court, acting in its appellate character, could do no more than the district court, that is to say, affirm or reverse the decree of the district court (which simply held the bottomry good, on a libel exclusively *in rem*); and having by its interlocutory order of 1828, pronounced the bottomry invalid, and thereby reversed the decree of the inferior court, it had no right to go further and decree *in personam* against the owners.

4. Although owners, when pursued personally in an admiralty court, may be held personally liable for advances for the necessary repairs and supplies of their ships, expressly made on the personal credit of the owners, or where it is fairly inferred that the personal credit is looked to; yet when it appears the personal credit of the owners was not looked to, they cannot be held personally liable.

5. There is no evidence, that the advances were made on the *credit of Delplat and Graf or either of them, but the contrary is alleged by libellant himself, and appears in all the proofs.

*543]

6. Some of the supplies for which the advances are alleged to have been made, were not necessary, and have been improperly charged and allowed, as appears in the report and exceptions.

7. Part-owners of a ship are not liable beyond the extent of their respective interests, and the decree is erroneous in subjecting Graf to more than one-third, and Delplat to more than two-thirds, in which proportions they held the ship.

8. Evidence appears, sufficient to warrant the belief that Vanstaphorsts were the real lenders of the money advanced to the master, and Vyfhius only an agent of theirs. If so, they (Vanstaphorsts) cannot recover against the owners personally; because they had sufficient funds in the freight, which they were bound to apply to the uses of the ship.

9. Admitting (which is not proved), that the Vanstaphorsts had a right to withhold Delplat's two-thirds of the freight, on the ground of his indebtedness to them—they had no right to withhold from Graf, as they have done, his one-third of the freight, amounting to $1900, and they cannot now recover from him, personally, without accounting for that sum.

10. The evidence raises a strong presumption that Vanstaphorsts knew, and also that Vyfhius knew (or might and ought to have known), that the voyage to Baltimore was in direct violation of the orders of the owners, without any necessity for such violation by the master; and if so, Vyfhius is not entitled to recover against the owners, whether he be considered the real lender, or only as the agent of Vanstaphorsts.

11. All the evidence in the case, taken together, raises a strong presumption, that there was fraud and collusion between Vyfhius and Vanstaphorsts not to apply the freight or other funds of Graf, in Vanstaphorsts' hands, to the uses of the ship, but to subject her unnecessarily to a bottomry, and her owners to loss; wherefore, neither Vyfhius nor Vanstaphorsts are entitled to recover againts the owners.

Steuart argued, that the original advances by Vyfhius were illegal, as there was no survey, showing the necessity for *the repairs, and the outfit of the Virgin. To show that this was necessary, he cited, [*544 Abbott on Shipping 124, note 2, last edition; 1 Wheat. 96. He contended, that the disbursements were paid for on the personal responsibility of the master, as the evidence showed they were made before the bottomry was executed. The freight was an ample fund for the repairs and disbursements, and was properly applicable to pay for the same. Abbott 107, 114; Marshall on Insurance 741; 1 Wheat. 96.

The money was advanced by Mr. Vyfhius to fit out the Virgin for a voyage, in direct opposition to the orders of the owners. She was to proceed to New Orleans, if no freight could be obtained to Baltimore; yet she returned to Baltimore, subjected to the heavy claims of Mr. Vyfhius, and without any freight. Advances are only legal, when they are made to effectuate the proper voyage of the vessel. Abbott on Shipping 124; 1 Wheat. 96; 2 Marsh. on Ins. 741; 1 Ibid. 96; 3 W. C. C. 494. Some of the articles furnished were not necessary. Abbott 106.

The real lenders of the money were the consignees, the Vanstaphorsts, and they could not, as consignees, become creditors by a bottomry contract. Bee 339, 344; Abbott 126, note 1; 1 Dods. 207. Upon the second point, Mr. Steuart cited, 1 Pet. Adm. 94, 98; 2 Ibid. 295. Upon the seventh point, were cited, Abbott 84; 1 Johns. 106; 2 Vern. 643. Upon the eighth point, cited, Bee 339, 344; Abbott 126, note 1; 1 Dods. 207; 2 Ibid. 143–4. Upon the eleventh point, cited, 1 Hagg. Adm. 14, 69–76; Bee 120.

Mayer, for the libellants, Vyfhius & Co., contended for the following positions:

1. The prayer for general relief in the libel warrants the decree *in per-*

sonam, though the special relief prayed is *in rem*. 1 Johns. Ch. 111; 6 Har. & Johns. 29; 2 Atk. 2; 4 Madd. 468; 6 Ibid. 218; 1 Cox 58.

2. Where a bottomry is declared ineffectual, the person who has supplied the necessaries for the ship for which the bottomry *is given, *545] is remitted to his original right *in personam*, against the owners, who are bound for all supplies to the ship; which is also impliedly hypothecated for them. *In personam*, the libellant here waives marine interest, and claims only principal and legal interest. To that extent, the bottomry binds personally, where the *res* is, after the bottomry, accepted. This personal liability exists, whether the bottomry be good or unavailing. Bee 252; 2 Pet. Adm. 295; 2 Bro. Adm. 407; Emerigon Mar. Laws 101, 104. The penal obligation at least goes to the value of the *res*. 1 Hagg. 13–14. Or, at all events, the lender, as to it, is only involved in any equities that may subsist between master and owners, when the supplies are furnished to the master (Emer. p. 82), so as so far to limit the personal responsibility; and the lender is then substituted for the master's lien for supplies, which is here conceded to him. The accepted definition of bottomry, implies a personal responsibility of the owners, for, at least, principal and legal interest, under the bottomry itself. The only aspect in which the remedy is exclusively *in rem* under a bottomry bond, is as to the marine interest. 2 Bl. Com. 457–8; 1 Paine 671; 1 W. C. C. 293; 3 Ibid. 294; 2 Pet. Adm. 295.

The question of personal liability under a bottomry, is only a point of jurisdiction. And in England, only a court of equity can give the relief personally under the limited scope *there* of the admiralty remedies. 6 Madd. 11, 79; 2 Ld. Raym. 931, 981; 3 T. R. 269 (*Yates* v. *Hall*, 1 Ibid. 73, is erroneous as to the grounds of these decisions); 1 Ves. sen. 443; 1 Bro. P. C. 288; Emerigon Mar. Laws 71–104. Our admiralty courts give a remedy *in personam*, where there is a remedy *in rem* for supplies, and even where the latter does not exist; and a vessel is impliedly hypothecated for repairs in a foreign port. Abbott 125; Bee 169; 2 Gallis. 345; 1 Paine 620; *The General Smith*, 4 Wheat. 438. Our admiralty courts, within the sphere of their jurisdiction, act as courts of equity. 2 Gallis. 526; 3 Mason 255, 334; 4 Ibid. 250. Where, as here, all parties are before the court, it may decree as equity requires, 1 Wheat. 197; and avoid circuity of remedy. The court may moderate interest on bottomries. Abbott *127. Owners are liable, and *in solido*, without regard to their *546] respective portions of interest in the ship, for master's contracts for the ship. Abbott 100, 106, 76; 11 Mass. 34; 2 Rose 91; 1 Stark. 23; 2 Ibid. 377; Cowp. 639; 1 Dall. 129; 10 Mass. 47; 7 Johns. 311; 1 Cow. 290; Emerig. 101.

The lender may claim to be substituted to the master's remedies *in personam* and *in rem*, in admiralty, for disbursements for supplies. Abbott 107, 115, 248; 1 Paine 73; 1 Pet. Adm. 223. The claim for personal liability need not to be under the bond, as such. It may rest on the implied hypothecation, or on the general responsibility of the owners for supplies to their ship, or against the owners, as holders of the *res*. 3 T. R. 340; 1 Gallis. 75; 5 Pet. 675. In all cases in admiralty, *in rem*, the respondent's fidejussory caution binds him personally, even beyond the value of the *res*; unless, abandoning the *res*, he enters into a special fidejussory caution. 2 Bro. Adm. 406, 408–11; 3 T. R. 340; 1 Gallis. 75; 3 Wheat. 58; 1 Gallis.

503, 541 ; 2 Ibid. 249. The stipulation here does not supersede this implied responsibility of the owners ; though it is one more appropriate for a prize than an instance proceeding. 3 T. R. 340 ; 1 Gallis. 148. A process *in personam* may begin by monition simply, as here. 3 Rob. 177 ; 3 T. R. 340 ; 1 Gallis. 75. Admiralty here would, for such supplies, decree *in personam*. It does, for pilotage, 1 Mason 108 ; for master's wages, 3 Ibid. 91 ; for *respondentia* claims, 4 Ibid. 250 ; for salvage, Abbott 399 ; 1 Pet. Adm. 94 (as in England, 1 Rob. 271 ; 3 Ibid. 177); for material-men, 4 Wheat. 438. The remedy *in rem* implies remedy *in personam* on account of the *res*. 1 Pet. Adm. 238, note of Judge WINCHESTER'S decision. The remedies *in rem* and *personam* may both be prayed for, or alternatively enforced under one libel, as a bill in equity may have two aspects of relief. 2 Ld. Raym. 981 ; Bee 252 ; 2 Pet. Adm. 295 ; 1 Ibid. 94. If necessary to the award of remedy *in personam*, the libel would be allowed by this court to be amended in the court below. 11 Wheat. 1 ; 12 Ibid. 1 ; 7 Cranch 570 ; 9 Ibid. 244. This court may render such decree *in rem* as *the court below should have rendered, if it deems a decree *in personam* improper. 3 Dall. 54. [*547

It is maintained, that the relief *in personam* may be decreed, for principal and legal interest, although the bottomry bond be good *in rem*. The bottomry is good here, although taken where there were consignees of the vessel, and even admitting that they had funds ; those funds being denied to the master, if they existed. Although the master may have purchased the supplies, the lenders of the money to pay for them did not advance their means upon his personal credit. And if the advances had not been made, the vessel might, in the foreign port, have been proceeded against. Abbott 125, 126 ; 1 W. C. C. 52 ; 1 Dods. 276, 288, 464 ; 2 Ibid. 147 ; 1 Hagg. 13, 176, 326 ; 1 Wheat. 96. The lenders were not bound to see to the application of the money ; nor implicated in any degree on account of the master's violation of his instructions as to the voyage to be pursued. Abbott 126 ; Bee 362–3 ; 2 Dall. 194 ; 1 Dods. 465 ; 3 W. C. C. 495, 497. The payments for duties and port-charges were proper to be secured by bottomry. 2 Caines 77 ; 1 Hagg. 176.

If the record be considered as presenting the question whether the seamen's wages are to be deducted from the bottomry, it is contended, that the owners being personally liable for them, they cannot make them a charge against the bottomry interest ; the bottomry holder would be substituted for the seamen against the owners, if they (the bottomry holders) had paid the wages. Cited also, *The Langdon Cheves*, 2 Mason 58.

Steuart, in reply.—It is contended on the part of the libellant, that the bottomry bond is good, so far as it covers advances strictly within the law of maritime loans ; and for the residue, recourse must be had *in personam*. To show what circumstances are necessary to make a valid bottomry, he cited, *The Aurora*, 1 Wheat. 96 ; 2 Pet. Adm. 301–3 ; Abbott 125. There is no precedent of a decree in the admiralty *in personam*, except *The Fair American*, 1 Pet. Adm. 87 ; and that was a case in the circuit court. The allegations in the libel in this case are not sufficient to maintain a claim *in *personam*. The prayer for general relief is not enough for this purpose. The relief by a decree *in personam* is not consistent with the [*548

case made by the bill; and is not, therefore, within the rules of chancery proceedings. If the claims of the libellant are *in personam*, he has his remedy at common law; and the admiralty will not convert a claim, originally against the ship, into one of a common-law character exclusively. Cited also, 2 Hagg. 48, 66; 2 Pet. Adm. 295; Bee 254; 1 Pet. Adm. 94; *The Mary*, Bee 120.

Story, Justice, delivered the opinion of the court.—This is the case of a libel *in rem*, upon a bottomry bond, originally instituted in the district court of the district of Maryland, and thence brought by appeal to the circuit court, and thence by appeal to this court. The ship Virgin belonged to Baltimore, and being in Amsterdam, in the kingdom of Holland, in November 1822, a bottomry bond was there given to the libellant by the master, for the sum of $3200, and maritime interest at the rate of ten per cent., for advances asserted to be made by the libellant to supply the necessities of the ship, on a voyage from Amsterdam to Baltimore. The voyage was duly performed; and the bottomry loan not being paid by the owners, proceedings were duly commenced for the recovery thereof, and the suit has been protracted to the present period. The owners interposed a claim and defensive allegation, denying the validity of the bond; and at the hearing in the district court, a decree was entered, affirming its validity, and awarding to the libellants the full amount of the bottomry bond, with interest at the rate of six per cent. from the filing of the libel. The circuit, on the appeal, reversed this decree, pronounced the bottomry bond invalid, and then proceeded to entertain the suit *in personam* against the owners; holding them liable for the necessary supplies and repairs of the ship, in the same manner as if the suit had been originally commenced *in personam* against the owners. And after some interlocutory proceedings, the circuit court awarded a final decree against the owners, for the sum of $2900, being
*549] the amount ascertained by a report of commissioners, as * "expenditures and advances absolutely necessary, and made in the course of the usual employment of the ship," with interest from the time of the decree, until the payment of the amount thereof. From this decree, both parties have appealed to this court, and the cause now stands upon the argument for a final decision.

The first question is, whether the bottomry bond was valid in its origin, and constituted a good lien on the ship. Several objections have been taken to its validity. In the first place, it is said, that the bottomry bond, though taken in the name of the libellant, Vyfhius, was, in fact, taken in trust, and for the benefit of Vanstaphorst & Company, who were the consignees of the ship and cargo, and had ample funds of the owners in their hands, to meet the necessary expenditures, if any were necessary; and therefore, they cannot now subject the ship to a bottomry lien. But we do not think that this objection is sustained as matter of fact, by the evidence in the case. The only testimony to support it is a loose statement of Schimmelpennick, one of the partners of the house of Vanstaphorst & Company; who stated to a witness, "that the expenses of the Virgin had amounted to about 8000 guilders, and that they would not be so foolish as to make such an expense for Delplat, without securing themselves by a bottomry." This language is quite equivocal, and admits of different interpretations; and it does not

appear, upon what occasion, nor under what circumstances, it was used. It may mean, that they had declined to make the advances without a bottomry bond, without meaning to affirm, that one had been actually taken for their benefit. But, what is most important in the case, this declaration cannot be competent evidence against Vyfhius, who is not shown to have had any knowledge of it, or to have been in privity with Schimmelpennick; so that, as to him, it is the mere hearsay of a third person. And on the other hand, the master of the Virgin expressly disclaims any knowledge, that any of the advances were made by Vanstaphorst & Company, and affirms that they were made by Vyfhius, at his request, through the instrumentality of a broker. We may then dismiss all further consideration of this objection, since the bottomry bond is not traced home to Vanstaphorst & Company.

*The next objection is, that the advances were not necessary for the supplies and repairs of the ship. This objection is not now [*550 fairly open upon the record. The second and last report of the commissioners expressly finds, that the sum of $2900 of the advances was absolutely necessary for the ship, as expenses and repairs, in the common course of her employment. No exception was taken to this report by either party, and it was accordingly confirmed by the circuit court; so that it is not now open for review in this court, there not being anything on its face impeaching its correctness. It is true, that the bottomry bond was taken for a larger amount; but that furnishes no ground of objection to the bond, except for the surplus; for a bottomry bond may be good in part, and bad in part; and it will be upheld by courts of admiralty, as a lien, to the extent to which it is valid; as such courts in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity. There are many authorities to this effect; but it is only necessary to cite the cases of *The Augusta*, 1 Dods. 283, *The Tartar* and *The Nelson*, 1 Hagg. Adm. 169, 176. And, indeed, except so far as regards the maritime interest of ten per cent., the question would be unimportant; for it is notorious, that in foreign countries, supplies and advances for repairs and necessary expenditures of the ship, constitute, by the general maritime law, a valid lien on the ship; a lien which might be enforced *in rem*, in our courts of admiralty, even if the bottomry bond were, as it certainly is not, void *in toto*.

The next objection is, that the supplies and advances might have been obtained upon the personal credit of the owners, without an hypothecation. Now, the necessity of the supplies and advances being once made out, it is incumbent upon the owners, who assert that they could have been obtained upon their personal credit, to establish that fact by competent proofs, unless it is apparent from the circumstances of the case. Now, not only is there no proof to this effect, upon the record, but it is fairly repelled by the testimony of the master, as well as by the other circumstances of the case. When the ship sailed on her voyage from Baltimore to Amsterdam, she was exclusively owned by Delplat; and she, as well as her cargo, a great part *of which was also owned by Delplat, was consigned to Vanstaphorst & [*551 Company. Delplat failed, daring the voyage, and about that time assigned one-third of the ship to Graf, and the other two-thirds to other persons. The cargo, on the ship's arrival, was delivered, pursuant to the consignment, to Vanstaphorst & Company, and certainly could not be rightfully withheld

from them under the bills of lading. Delplat, after deducting all his consignments, remained in debt to Vanstaphorst & Company, in about 19,000 guilders. And after they were apprised of Delplat's failure, and after a negotiation of some weeks between them and the master for advances, they declined to make any to him; and he was thus compelled to obtain them elsewhere.

It is wholly immaterial, in this case, whether Vanstaphorst & Company had funds in their possession, which ought to have been advanced by them for the relief of the ship. It is sufficient, to justify the master, that he could not obtain them; and the non-existence of funds, and the non-ability to get at them, must, as to the master, be deemed to be precisely equal predicaments of distress. It would not be very easy to convince any lender of money, that he could safely trust to the personal security of an insolvent debtor; and although Graf was not involved in the failure of Delplat, yet his title was acquired on the eve of Delplat's failure, and did not appear on the ship's papers, so that a cautious lender might well hesitate as to the ability of the master to bind Graf; even if it had appeared, which it does not, that Graf's credit was not unquestionable at Amsterdam, that his personal security, given by an acknowledged agent, would have been satisfactory. But the truth is, that the master's testimony negatives any other adequate means of supplying the ship's necessities, without resort to a bottomry bond; and there is not the least reason to suppose, that he did not act with entire good faith, and from a consciousness that funds could not otherwise be obtained. It is certainly incumbent on the owners, if they assert that such means existed, to give some solid proofs in support of their assertion.

Then, again, it is objected, that the supplies and repairs were, in the first instance, made upon the master's credit. But how were they made? There is not a tittle of proof, that the material-men originally trusted to his personal credit exclusively, *waiving the lien which the foreign law would give on the ship for them, or the general responsibility of the owners. On the contrary, they might well trust to his credit, as auxiliary to these sources; and the fact that the master ordered the supplies and repairs, before the bottomry bond was given, can have no legal effect to defeat that security, if they were so ordered by the master, upon the faith, and with the intention, that a bottomry bond should ultimately be given to secure the payment of them. In truth, in cases of this sort, the bottomry bond is in practice ordinarily given, after the whole supplies and repairs have been furnished, for the plain reason, that the advances required can rarely be ascertained with exactness, until that period. In a case before Lord Stowell,(a) an objection of a similar nature was taken, viz., that the advances were made before the bottomry bond was taken; but that learned judge overruled it, and said, that it was sufficient, that it was the understanding of the parties at the time, that the money should be secured by means of bottomry; and that it was of no consequence, whether the money was advanced at once, and the bond immediately entered into, or whether the master received it, from time to time, in different sums, and gave a bond for the whole amount. And he added, what is very significant under

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(a) La Ysabel, 1 Dods. 273, 276.

the circumstances of the present case, that the party who lent the money, had a right, by the maritime law, to detain the ship and cargo, until the debt was repaid; and it was only by the means of the bond, that the owners had the benefit of the liberation of their property.

In the next place, it is objected, that the advances were for a voyage not authorized by the owners; that the original orders were for the master to get a freight for Baltimore or New York, and if he could not, then to proceed to New Orleans; whereas, the master broke up his voyage, and without any freight, returned to Baltimore. Now, it may be admitted, that if a bottomry lender, in fraud of the owners, and by connivance with the master, for improper purposes, advances his money on a new voyage, not authorized by the instructions of the owner, his bottomry bond may be set aside as invalid. *But there is no pretence to say, that if the master does deviate from his instructions, without any participation or co- [*553
operation or fraudulent intent of the bottomry lender, the latter is to lose his security for his advances, *bonâ fide* made for the relief of the ship's necessities. In the present case, there is no proof, that Vyfhius ever saw the master's instructions; much less, that he fraudulently co-operated with him in a wilful disobedience of the orders of the owner. A new and unexpected state of things had arisen; the owner had failed, and new owners had been substituted, with some of whom he had not had any communication. Under these circumstances, he applied for advice to the friends of his former owners, and they advised him to return home; as not only prudent and proper, but as required by the change of ownership. His own judgment coincided with theirs; and there is no ground to assert, that he did not act with entire good faith, and that under all the circumstances, the course adopted by him was not discreet and fit for such an emergency. To set aside a bottomry bond, given under such circumstances, would be to impair in no small decree the general confidence of the commercial community in their security; and would overturn the great maritime policy upon which they have been hitherto held sacred and privileged liens.

We have thus considered the principal objections urged against the bottomry bond, and are of opinion, that they are unmaintainable. The consequence is, that the bond must be upheld to the extent of the property pledged for the security of it. It has been said, that the seamen have a prior lien on the ship for their wages, and that the amount of the wages ought first to be deducted. Undoubtedly, the seamen have such prior lien, but the owners are also personally liable for such wages; and if the bottomry holder is compelled to discharge that lien, he has a resulting right to compensation over against the owners, in the same manner as he would have, if they had previously mortgaged the ship. But, in strictness, no such question arises on the present record. Graf, one of the owners, has had the ship delivered up to him upon an appraisement, at the value of $1800; and he has given a stipulation, according to the course of admiralty proceedings, to refund that value, *together with damages, interest and costs, to [*554
the court. He is not at liberty now to insist, that the ship is of less than that value in his hands; or that he has discharged other liens, diminishing the value for which the owners were personally liable *in solido*, in the first instance.

To the extent, then, of the appraised value of the ship, delivered upon

the stipulation, the owners are clearly liable; for she was pledged for the redemption of the debt, and they cannot take the fund, except *cum onere*. But beyond this, there is no personal obligation upon the owners. It has been correctly remarked by Lord STOWELL,(*a*) that the form of bottomry bonds is different in different countries, and so is their authority. In some countries, they bind the owners; in others, not; and where they do not, even though the terms of the bond should affect to bind the owners, that part would be insignificant; but it would not at all touch upon the efficiency of those parts, which have an acknowledged operation. In England and America, the established doctrine is, that the owners are not personally bound, except to the extent of the fund pledged which has come into their hands.(*b*) To this extent, indeed, they may correctly be said to be personally bound; for they cannot subtract the fund, and refuse to apply it to discharge the debt. But in that case, the proceeding against them is rather in the character of possessors of the thing pledged, than strictly as owners. In the present case, the value of the ship, the only fund out of which payment can be made, falls far short of a full payment of the amount due upon the bottomry bond. But this is the misfortune of the lender, and not the fault of the owners. They are not to be made personally responsible for the act of the master, because the fund has turned out to be inadequate; since, by our law, he had no authority, by a bottomry bond, to pledge the ship, and also the personal responsibility of the owners. The consequence is, that the loss, *ultra* the amount of the fund pledged, must be borne by the libellant.

But as the owners have had the full benefit of the bond, under the appraisement and delivery, during this protracted controversy, *it is
*555] but reasonable, that they should be responsible for interest upon the appraised value, from the time when the delivery upon the appraisement took place.

The view, which has been thus taken of the present case, renders it wholly unnecessary to consider, whether a decree *in personam* could be made by the circuit court, upon a libel and proceedings instituted *in rem*. That and the other questions respecting the exercise of the admiralty powers of the court, may well be left for decision, when they shall constitute the very points in judgment.

The decree of the circuit court must be reversed; and a decree will be entered conformable to the opinion of this court, to be carried into effect by that court.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Maryland, and was argued by counsel: On consideration whereof, it is declared by this court, that the bottomry bond in the case stated is, and ought to be held valid for the sum of $2900, being the amount ascertained by the second and last report of the commissioners to be due to the libellant for expenditures and advances absolutely necessary, and made in the course of the *usual* employment of the said ship Virgin, and also for the additional sum of ten per cent., the maritime interest agreed on, and payable by the terms of the

(*a*) The Nelson, 1 Hagg. Adm. 176.
(*b*) The Tartar, 1 Hagg. Adm. 1, 13; The Nelson, Id. 169, 176.

said bottomry bond, amounting, in the whole, to the sum of $3190, and that the said libellant is entitled to the said last-mentioned sum, with interest thereon, at the rate of six per cent., from the commencement of the present suit to the time when the decree of this court shall be carried into effect by the circuit court; and it is hereby ordered, adjudged and decreed by this court accordingly: and it is hereby further ordered, adjudged and decreed, that the decrees of the district and circuit courts, so far they differ from this present decree be, and hereby are, reversed accordingly. And this court, further proceeding to render such decree as the circuit court ought to have rendered in the premises, it is further ordered, adjudged and decreed, that the said claimant, Graf, do *forthwith pay into the said circuit court the sum of $1800, being the amount of the appraised [*556 value of the said ship Virgin, delivered to him on stipulation, as in the proceedings mentioned, together with interest thereon, at the rate of six per cent., from the 24th day of March 1824, when the same was delivered to him on stipulation as aforesaid, unto the day when the same sum shall be so paid into the circuit court, together with the costs of the district and circuit courts; and unless he shall do so, within ten days after the said circuit court shall require the same to be done, that execution do issue, in due form of law, upon the stipulation aforesaid, against all the parties thereto. And upon the payment of such sums, then that the claimants, as owners of the said ship Virgin, be and hereby are for ever exonerated from all other and further payment in the premises. And it is further ordered, adjudged and decreed, that this cause be remanded to the said circuit court, with directions to carry this decree forthwith into effect.[1]

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[1] On the 9th of November 1874, the question of bottomry came before this court, in the case of —

The Belle of the Sea.

Strong, Justice, delivered the opinion of the court.—Very clearly, the ship was not discharged from the bottomry lien, unless the bond was actually paid, or unless the libellants agreed to pay it and look to the freights, the general average, and the insurances exclusively, for their reimbursement. Of actual payment, there is no evidence whatever; on the arrival of the ship at New York, Mr. E. A. Hammond, who had a mortgage upon her, which, with interest, amounted to more than $80,000, took her into his possession, in virtue of authority conferred by the mortgage, and employed the libellants to take up the bottomry bond, to collect the freight, the general average and insurance, and generally to transact the business of the vessel. Subsequently, this arrangement was assented to by the owner and the charterer. Accordingly, the libellants took up the bond, by taking an assignment of it from the Messrs. Ward, who held it, and proceeded to adjust the business of the ship, collecting the freights, general average, and insurance, and making the necessary disbursements; but as they were unable to realize from the insurances what was expected, the sums collected proved insufficient to pay the expenses of discharging the ship, the commissions and the necessary disbursements, together with the bottomry bond. They now claim the right to apply what they have been able to collect, first, to reimburse themselves the commissions, necessary expenses, and disbursements made by them on account of the ship; and secondly, to the discharge of the bottomry lien, looking to the ship for that portion of the bond which, by such marshalling of the fund, remains unpaid. And such, we think, are their rights, if they have not been surrendered. By the assignment of the bottomry bond to them, they became bottomry-creditors and even if there had been no such assignment, and they in fact paid the bond, at the instance of the owner and mortgagee, they would have been entitled, in equity, to the rights of the bottomry-creditor. Being thus creditors by bottomry, and also by payments on behalf of the ship for expenses, they have a clear right to apply whatever funds of the ship come to their hands, first, to the satisfaction of their unsecured claims; and secondly, to the bond, and to look to the ship for any unpaid balance of the bottomry. If, however, when they undertook their agency, they agreed to pay the bond, and thus discharge its lien, looking to the freight, the general average

and the insurance alone for reimbursement, or to the personal liability of the owner, as the appellants insist they did, they cannot now set up a lien on the ship. But we do not think the evidence establishes any such agreement, and its existence is quite improbable. They were adjusters of averages, and they desired to be employed as such, to attend to the business of the ship. To secure such employment, they made the most favorable representation of what they were able and willing to do. But they proposed to the Messrs. Ward, who held the bond, to take it up, taking an assignment of it, before they had an interview with Mr. Kimball, the owner. They could then have had no accurate knowledge of the amount of the freight, the general average, and the insurance. They could not have known that the ship's resources would not suffice to pay the bottomry, and the other expences necessary to make the freight and the general average available. And they had then no control over the insurance. It is therefore, quite unlikely, that they undertook to pay the bond and discharge the lien. Their arrangement was with the mortgagee, and there is no evidence, that they agreed with him to do anything more than take the bond from the holder, and act as general agents of the ship, in adjusting its affairs. The proofs do not establish that, in that arrangement, they undertook to satisfy the bottomry and extinguish its lien, without regard to the amount of freight, general average, and insurances which could be collected, and without regard to the necessary disbursements and commissions. Such is not the testimony of Mr. Higgins, nor has the mortgagee so testified, and the owner was not present at the arrangement.

The appellants, however, rely upon the statement of two sons of the owner, who do not speak at all of the arrangement with the mortgagee. They speak only of a subsequent interview of Mr. Higgins with the owner, from whom the possession had been taken, and who had then no control over the settlement of the ship's affairs. Their statement is, that Higgins proposed to pay the bottomry bond, for the owner, if he would give his firm adjustments of claims against insurance companies, and expressed his convictions of what his firm could do, making some promises respecting the rate of commissions, a promising to apply collections to the bond immediately. The sons state further, that this was verbally agreed to, but the policies were not delivered in pursuance of any such agreement, nor was there any agreement to deliver them, and what is very remarkable, the sons state that nothing was said at that interview about the policies. They were subsequently handed to Mr. Higgins to be collected, and the amount to be applied to the payment of the bottomry bond, if necessary. These witnesses are contradicted in some particulars by Mr. Higgins; but assuming that their statement is correct, it falls far short of the proof, that Higgins agreed to discharge the ship from the bottomry lien, or agreed to pay the bond and look only to the freight, insurances and general average. And even if the firm could be considered as agents of the owner, the payment of his debt, or the debt of the ship, could not work a satisfaction of the debt, or extinguish its lien; it would only change the creditor. We are of opinion, then, that no arrangement with the owner has been proved, by which the libellants have been disabled from enforcing the bottomry lien.

Another defence has been set up. The appellants contend, that the libellants are estopped from resorting to the ship for any balance of the bond unpaid by their representations. They insist, that they purchased the ship, relying upon a representation of Mr. Higgins, that if they purchased, and would settle certain claims of the charterers, there would be at least $3000 beyond what was needed to pay the bottomry bond, and other claims of the firm. There is, however, no sufficient proof of such representations. They are denied by Mr. Higgins, and the only person who affirms they were made is Mr. Nickerson, the purchaser himself. And even the testimony of Mr. Nickerson appears to assert only that Higgins expressed an opinion respecting what would be the result, rather than a positive assertion of the fact. This is quite an insufficient basis for an estoppel, and manifestly the opinion was not relied upon. Nickerson had examined for himself, some of the accounts at least.

This disposes of the case. Admitting the libellants have no lien in admiralty, for their fees and commissions, or even for their disbursements on account of the ship, they had, as we have said, a right to apply the funds they had in hand, first, to the satisfaction of the debt due them for such fees, commissions and disbursements, applying only to the remainder of the bond. For the balance unpaid, they have the security of the bottomry lien.

The decree of the circuit court is affirmed with interest at the rate allowed in Pennsylvania, and with costs.