Statement of the case.

INSURANCE COMPANY *v.* BARING.

1. If there be no evidence to support facts, assumed in a prayer for a charge, to have been supported by a greater or less weight of evidence, it is the duty of the court to reject the prayer. It would be error to leave a question to a jury in respect to which there was no evidence.
2. Advances made in a foreign port to equip a vessel, and to procure for her a cargo to a port of destination, are *primâ facie* presumed to be made on the credit of the vessel.
3. They are a lien on the vessel and constitute an insurable interest.

ERROR to the Circuit Court for the District of Louisiana; in which court Baring Brothers & Co. sued the Merchants' Mutual Insurance Company, of New Orleans, for advances made by them, as the declaration in the case alleged, to the master and owners of the British bark Fanny, for the purposes of her equipment and to procure a cargo for the vessel, in a voyage from Cadiz, in Spain, to the port of New Orleans. The plaintiffs also alleged that through their agents they had obtained a policy of insurance, dated December 6th, 1867, from defendants. The insurance company above named insuring the hull of the bark for $9000, in the name of the said agents, containing the clauses, "on account of whom it may concern" and "lost or not lost," for the protection of those advances.

They further alleged that the bark, though well officered, manned, and equipped, suffered so much on the voyage, from the violence of weather, that the master found it necessary to put into a port of Cuba for such repairs as would enable him to prosecute the voyage; that their agents gave due notice of those facts to the president of the insurance company; that the company sent an agent to the port to take charge of the interest of all concerned; and that from the moment the agent arrived there he took exclusive charge of the repairs of the vessel and caused such work to be performed as he thought necessary; that he obtained from their agent there the funds necessary to pay for all such repairs; that the bark completed her voyage; that after her arrival

at the port of destination an adjustment of averages was made by the adjusters of averages in that port for costs, charges, and damages in making such repairs, and that in the said adjustment they, the plaintiffs, were awarded $3507 on the said policy of insurance.

The defendants filed an answer (equivalent to the general issue in an action of assumpsit) and a special plea that the bark was unseaworthy.

The insurance company made three prayers for instruction:

(1.) That if the evidence showed that the insurable interest of the plaintiffs was a bottomry bond on the bark, and that the vessel arrived in safety at the port of destination, the jury should find for the defendants.

(2.) That it is only when the vessel insured is lost that the assured on a bottomry bond can recover, and that if the proof was that there was no loss or destruction of the bark, the jury should find for the defendants, if the plaintiffs had insured on a bottomry bond.

(3.) That the defendants were not bound to tender back the premiums of insurance before availing themselves of any defence against the validity of the policy of insurance, or for its avoidance by a subsequent cause.

Verdict and judgment went for the plaintiffs for the amount awarded by the average adjusters. Exceptions were taken by the defendants to the rulings of the court in refusing to instruct the jury as they requested.

Nothing appeared in the record except the declaration, the answer, the verdict and judgment, the three bills of exceptions to the rulings of the court in refusing to instruct the jury as requested, neither of which contained any report of the evidence, and the motion for new trial, which merely stated that the verdict of the jury was contrary to law and the evidence, without giving any statement of the evidence which was submitted to the jury.

Evidence to show that the action was founded upon a bottomry bond, or that such a bond was offered in evidence, or introduced at the trial, was entirely wanting, nor was there

evidence, direct or circumstantial, to show that such a question as that involved in the third prayer for instruction arose or could have arisen in the case, or that the instruction was a proper one, in any view of the controversy, for the consideration of the jury.

Viewed in the light of these facts (as this court said that the case should be viewed), the several rulings of the court below in refusing to grant the three prayers for instruction were considered by this court together.

Mr. W. M. Evarts, for the plaintiffs in error; Messrs. P. Phillips and D. G. Campbell, contra.

Mr. Justice CLIFFORD, having stated the case, delivered the opinion of the court.

Correct instructions, if applicable to the case, the court, as a general rule, is required to give, unless the same are in substance and effect embodied in those previously given by the court to the jury; but the court is never required by law to give an instruction to the jury which is not applicable to the case, even though it be correct as an abstract principle or rule of law; and it may be added that no prayer for instruction, whether presented by the plaintiff or the defendant, can be regarded as applicable to the case when it is wholly unsupported by the evidence introduced to the jury. Competent evidence may be written or oral, direct or circumstantial, but when there is no legal evidence of any kind to support the theory of fact embodied in a prayer for instruction, whether presented by the plaintiff or the defendant, the instruction should always be refused; and such a ruling can never become a good cause for reversing the judgment. It is clearly error in a court, said Taney, C. J., to charge a jury upon a supposed or conjectural state of facts, of which no evidence has been offered, as the instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in that way by the court, and if there is no evidence which they have a right to consider, then the

charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them, as it may induce them to indulge in conjectures instead of weighing the testimony.* When a prayer for instruction is presented to the court, and there is no evidence upon the subject in the case for the consideration of the jury, it ought always to be withheld, and if it is given under such circumstances, it will, as a general rule, be regarded as error in the court, for the reason that its tendency may be, and often is, to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue.† Bills of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court is prayed, else the court is under no obligation to give the instruction.‡ Though the judge may refuse to declare the law to the jury on a hypothetical question, yet if he gives the instruction and it is erroneous, it is the proper subject of revision.§ But the true rule, if there be no evidence to support the theory of fact assumed in the prayer, is to reject it, as it is error to leave a question to a jury in respect to which there is no evidence.‖

Attempt is made in argument to maintain that the plaintiffs had no insurable interest in the bark unless it be assumed that it was created by a bottomry bond, but the court is entirely of a different opinion, as it is alleged in the declaration that the advances were made to equip the vessel and to procure for her a cargo in the voyage from a foreign port to the port of destination. Founded as the declaration is upon the policy of insurance it must be construed in con-

* United States *v.* Breitling, 20 Howard, 254.

† Goodman *v.* Simonds, Ib. 359.

‡ Vasse *v.* Smith, 6 Cranch, 226; United States *v.* Dunham, 21 Law Reporter, 591; Caldwell *v.* United States, 8 Howard, 366; Blackburn *v.* Crawfords, 3 Wallace, 176.

§ Etting *v.* Bank of the United States, 11 Wheaton, 59; Beaver *v.* Taylor, 1 Wallace, 637.

‖ Chandler *v.* Van Roeder, 24 Howard, 224; Railroad *v.* Gladmon, 15 Wallace, 409.

nection with the policy. By the terms of the policy the insurance is upon the bark, her tackle, and apparel, which is the proper language to be employed in a case where the insured had an interest in the vessel.

Advances made on the credit of a ship for necessary repairs or supplies in a foreign port create a maritime lien upon the ship, and it is well-settled law that a maritime lien is a *jus in re*, and that it constitutes an incumbrance on the property of the ship which is not divested by the death or insolvency of the owner.* Such a lien may be enforced by a process *in rem*, which is founded on a right in the thing, the object of the process being to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or quasi proprietary right in the thing.† Liens of the kind constitute an insurable interest, and it is quite clear that enough is alleged in the declaration to warrant the conclusion that the advances made in this case are properly to be regarded as constituting a maritime lien upon the bark.‡ Contracts for repairs and supplies may be made by the master to enable the vessel to proceed on her voyage, and if it appears that they were necessary for the purpose and that they were made and furnished to a foreign vessel or to a vessel of the United States in a port other than a port of the State to which the vessel belongs, the *primâ facie* presumption is that the repairs and supplies were made and furnished on the credit of the vessel, unless it appears that the master had funds on hand or at his command which he ought to have applied to the accomplishment of those objects, and that the material-men knew that fact or that such facts and circumstances were known to them as were sufficient to put them upon inquiry and to show that if they had used due diligence in that be-

* The Young Mechanic, 2 Curtis, 404; Same Case, 3 Ware, 58; 1 Parsons's Maritime Law, 489; 3 Kent (11th ed.), 170; General Smith, 4 Wheaton, 438.

† The Commerce, 1 Black, 580; Buck et al. *v.* Insurance Co., 1 Peters, 164; The Maggie Hammond, 9 Wallace, 456.

‡ Seamans *v.* Loring, 1 Mason, 127; 1 Phillips on Insurance (5th ed.), § 204; Hancox *v.* Insurance Co., 3 Sumner, 132.

half they might have ascertained that the master had no authority to contract for such repairs and supplies on the credit of the vessel.* Whenever the necessity for the repairs and supplies is once made out it is incumbent upon the owners, if they allege that the funds could have been obtained upon their personal credit, to establish that fact by competent proof, and that the material-men knew the same or were put upon inquiry, as before explained, unless those matters fully appear in the evidence introduced by the other party.†

Apply those principles to the case and it is clear that the objection that the plaintiffs had no insurable interest in the bark utterly fails, as it is not controverted that the advances were made to equip the vessel and to procure a cargo for her in the described voyage; and it is sufficient that such an allegation affords a *primâ facie* presumption that the advances were made on the credit of the vessel, as the record fails to disclose any fact or circumstance to overcome that presumption. Such advances constitute a lien upon the ship, and such a lien gives the lender an insurable interest in the ship.‡

Absolutely nothing appears in the record to support the theory that any such defences as those assumed in the prayers for instruction were in fact set up by the defendants in the subordinate court, except what is contained in the prayers for instruction presented to the court. They pleaded a general denial of the allegations of the declaration and that the bark was unseaworthy at the inception of the risk and throughout the voyage, but no mention is made of any such defences as those implied in the prayers for instruction in any other part of the record, nor is there any evidence whatever upon the subject.

* The Lulu, 10 Wallace, 197; The Patapsco, 13 Wallace, 333; 2 Parsons on Shipping, 322 to 337.

† The Grapeshot, 9 Wallace, 141; Thomas *v.* Osborn, 19 Howard, 22.

‡ Seamans *v.* Loring, 1 Mason, 127; 1 Phillips on Insurance (5th ed.), § 204; Godin *v.* Insurance Co., 1 Burrow, 489; Lucena *v.* Craufurd, 5 Bosanquet & Puller, 294; Wells *v.* Insurance Co., 9 Sergeant & Rawle, 103.

Defences in avoidance of the claim made in the declaration must be proved in the court of original jurisdiction, and if not proved there they cannot be successfully set up in the appellate court to support an assignment of error.

Other matters were discussed at the bar, but it is not necessary to examine any other of the propositions submitted, as these suggestions are sufficient to dispose of the case.

JUDGMENT AFFIRMED.

ROACH *v.* SUMMERS.

1. A surety is not discharged by a contract between his principal and their common obligee, which does not place him in a different position from that which he occupied before the contract was made.
2. Answers in chancery not responsive to a bill, and not sustained by other proof, are of no avail as evidence.

APPEAL from the Circuit Court for the Southern District of Mississippi.

Summers & Co. filed a bill in the court below against Eugene and Naylor Roach (the last a representative of I. W. Roach, deceased), and R. B. and B. M. Butler, for an account and for the foreclosure of a mortgage. The bill averred that in the year 1867, the said E. and I. W. Roach, demised a plantation in the State of Mississippi to R. B. and B. M. Butler for the business of cotton planting; that to enable the Butlers to obtain supplies for the plantation from the complainants, Summers & Co., the Messrs. Roach, together with the Butlers, executed two promissory notes, each in the sum of $2500, payable to the complainants, dated February 1st, 1867, and falling due in October and November of that year; that payment of the notes was secured by a mortgage given by the Messrs. Roach, and that it was agreed the cotton raised on the demised plantation *should be shipped to the complainants;* nothing being alleged in the bill as to what was then to be done with it or its proceeds. The bill