A SELECTION OF CASES

ON

THE LAW OF ADMIRALTY

WITH NOTES AND CITATIONS

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CASES ON ADMIRALTY.

CHAPTER I.

JURISDICTION.

CONSTITUTION OF THE UNITED STATES.

ARTICLE III., SECTIONS 1 AND 2.

THE judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. . . .

The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction.[1]

STATUTE OF THE UNITED STATES.

ACT OF 1789, CHAPTER 20, SECTION 9, SEPTEMBER 24.

[1 *United States Statutes at Large*, 76.]

And be it further enacted, That the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. . . . And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

1 "These courts [territorial courts], then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the States in those courts only which are established in pursuance of the 3d article of the Constitution, the same limitation does not extend to the territories. In legislating further Congress exercises the combined powers of the general and of a state government." *Per* MARSHALL, C. J., in American Co. *v.* Canter, 1 Pet. 511, 545. — ED.

GLASS AND OTHERS, APPELLANTS, v. THE SLOOP BETSEY AND OTHERS.

IN THE SUPREME COURT, UNITED STATES, FEBRUARY TERM, 1794.

[*Reported in 3 Dallas, 6.*]

CAPTAIN PIERRE ARCADE JOHANNENE, the commander of a French privateer, called the Citizen Genet, having captured as prize, on the high seas, the sloop Betsey, sent the vessel into Baltimore; but upon her arrival there, the owners of the sloop and her cargo filed a libel in the District Court of Maryland, claiming restitution, because the vessel belonged to subjects of the king of Sweden, a neutral power, and the cargo was owned jointly by Swedes and Americans. The captor filed a plea to the jurisdiction of the court, which, after argument, was allowed; the Circuit Court affirmed the decree; and, thereupon, the present appeal was instituted.

The general question was, whether, under the circumstances of this case, an American Court of Admiralty has jurisdiction to entertain the complaint or libel of the owners, and to decree restitution of the property? It was argued by *E. Tilghman* and *Lewis*, for the appellants; and by *Winchester* (of Maryland) and *Du Ponceau*, for the appellee.

For the appellants. There can be no doubt that this is a civil cause of admiralty and maritime jurisdiction, and so within the very terms of the judicial act. Restitution, or no restitution, is the leading point; that necessarily, indeed, involves the point of prize, or no prize, as a defence for capturing; but if the admiralty is once fairly possessed of a cause, it has a right to try every incidental question. That the vessel is a legal prize, may be a good plea to the suit; but it is not a good plea to the jurisdiction of the court; and the captor, by bringing his prize into an American port, has himself submitted to the American jurisdiction, which is in this instance to be exercised by the Judicial, not the Executive, department. Const. U. S. art. 3, sect. 1. Jud. Act. sect. 9. Doug. 580, 84, 5. 592, 4. Carth. 474. 1 Sid. 320. 3 T. Rep. 344. 4 T. Rep. 394, 5. Skyn. 59. T. Ray. 473. Carth. 32. 6 Vin. Abr. 515. 3 Bl. Com. 108. 1 Vent. 173. 2 Saund. 259. 2 Keeb. 829. Lev. 25. Sid. 320. 4 Inst. 152, 154. 2 Bulst. 27, 8, 9. 2 Vern. 592. 3 Bl. C. 108. 2 L. Jenk. 755, 727, 733, 751, 754, 755, 780.

For the appellees. I. The District Court has no jurisdiction by the Constitution and laws of the United States (which form the only possible source of Federal jurisdiction), for, although it is admitted, that by the 1st and 2d sections of the 3d article of the Constitution, and the Judicial act, the jurisdiction of the District Court extends to all civil causes of admiralty and maritime jurisdiction; yet, it is denied, that prize is a civil cause of that description; nor can the

expression vest a power in the District Court to decide the legality of a prize, even by a citizen of the United States. A citizen, indeed, can only make a prize when the United States are at war with some foreign power; but being at peace with all the world, no such question can now be agitated; and, of course, no jurisdiction, in such a case, can exist in any of its courts. By comparing the act of Congress with the Constitution, it is obvious, that the former does not vest in the District Court, the same, or so extensive, a judicial power, as the latter would warrant. The Constitution embraces admiralty cases of whatever kind, — whether civil or criminal, done in time of peace, or in time of war; but the act of Congress limits the power of the District Court to civil causes of admiralty and maritime jurisdiction; and the court can have no other, or greater power, than the act has given. Civil causes cannot possibly include captures, or the legality of a prize which can only be made in time of war. The words are used to denote that the causes are not to be foreign causes, or arising from, and determinable by, the *jus belli;* but are such as relate to the community, arising in the time of peace, and are determinable by the civil or municipal law; whereas prize is not a civil marine cause; nor is it a subject of civil jurisdiction. Doug. 2 Ruth. Inst. 595. The jurisdiction of the admiralty courts of England and of the United States arises from the same words; but it is manifest, that the latter has no other jurisdiction by law than that which has been exercised by the instance court in England, which is widely different from the prize court, though the powers are usually exercised by the same person. The prize court can only have continuance during war, and derives its powers from the warrant which calls it into activity. Doug. 613; 2 Woodes. 452; Collect. Jurid. 72. The Instance court derives its jurisdiction from a commission, enumerating particularly every object of judicial cognizance; but not a word of prize; any more than is contained in the act of Congress when enumerating the objects of judicial cognizance in the District Court. The manner of proceeding in these courts is totally different. The question of prize, or no prize, is the boundary line, and not the locality; and the nature of that question not only excludes the instance but the common law, and all other courts; so that whenever a cause involves the question of prize, and a determination of that question must precede the judgment, they will decline the exercise of jurisdiction and refer it to the prize court. Besides, Congress have not yet declared the rules for regulating captures on land or water (Const. art. 1, sect. 8); and if the District Court is now a court of prize, it is a court without rules, to determine what is, or what is not, lawful prize; for the rules of an instance court will not apply. If, upon the whole, the District Court has no jurisdiction, under the act of Congress, of a case of prize by a citizen of the United States, it cannot have jurisdiction of a prize by a citizen of France, which is the question raised by the libel.[1]

The Court, having kept the cause under advisement for several

[1] The arguments of counsel are much abridged. — ED.

days, informed the counsel, that besides the question of jurisdiction as to the District Court, another question fairly arose upon the record,— whether any foreign nation had a right, without the positive stipulations of a treaty, to establish in this country an admiralty jurisdiction for taking cognizance of prizes captured on the high seas, by its subjects or citizens, from its enemies? Though this question had not been agitated, the court deemed it of great public importance to be decided; and, meaning to decide it, they declared a desire to hear it discussed. *Du Ponceau*, however, observed, that the parties to the appeal did not conceive themselves interested in the point; and that the French minister had given no instructions for arguing it. Upon which, JAY, Chief Justice, proceeded to deliver the following unanimous opinion.

BY THE COURT: The judges being decidedly of opinion, that every District Court in the United States possesses all the powers of a Court of Admiralty, whether considered as an instance, or as a prize court,[1] and that the plea of the aforesaid appellee, Pierre Arcade Johannene, to the jurisdiction of the District Court of Maryland, is insufficient: Therefore it is considered by the Supreme Court aforesaid, and now finally decreed and adjudged by the same, that the said plea be, and the same is hereby overruled and dismissed, and that the decree of the said District Court of Maryland, founded thereon, be, and the same is hereby revoked, reversed, and annulled.

And the said Supreme Court being further clearly of opinion, that the District Court of Maryland aforesaid has jurisdiction competent to inquire, and to decide, whether, in the present case, restitution ought to be made to the claimants, or either of them, in whole or in part (that is, whether such restitution can be made consistently with the laws of nations and the treaties and laws of the United States); therefore it is ordered and adjudged that the said District Court of Maryland do proceed to determine upon the libel of the said Alexander S. Glass and others, agreeably to law and right, the said plea to the jurisdiction of the said court, notwithstanding.

And the said Supreme Court being further of opinion, that no foreign power can of right institute, or erect, any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of treaties, it is therefore decreed and adjudged that the admiralty jurisdiction, which has been exercised in the United States by the consuls of France, not being so warranted, is not of right.

It is further ordered by the said Supreme Court, that this cause be, and it is hereby, remanded to the District Court, for the Maryland District, for a final decision, and that the several parties to the same do each pay their own costs.

1 Penhallow v. Doane, 3 Dall. 54, 97; Jennings v. Carson, 4 Cranch, 2; The Amiable Nancy, 3 Wheat. 546; Jennings v. Carson (1792), 1 Pet. Adm. 1 *Accord*. See also Act of June 30, 1864, "An Act to regulate Prize Proceedings and the Distribution of Prize Money, and for other Purposes," 13 U. S. St. at Large, 306. — ED.

THE UNITED STATES *v.* LA VENGEANCE.

IN THE SUPREME COURT, UNITED STATES, AUGUST TERM, 1796.

[*Reported in* 1 *Curtis's Decisions*, 230 (3 *Dallas*, 297).]

ERROR to the circuit court for the district of New York. The district attorney filed an *ex officio* information in the district court against the French privateer La Vengeance, alleging that certain arms and ammunition were exported in that schooner, contrary to the act of May 22, 1794 (1 U. S. Stat. at Large, 369). The owner of the schooner filed a claim and answer, denying the exportation of arms, and as to the gunpowder, alleging it to have been part of the supplies of the Semillante, a frigate belonging to the republic of France, and to have been taken from the frigate, and put on board the schooner, by order of the proper officer of the republic. The district judge decreed a forfeiture, but on appeal this decree was reversed by the circuit court, sitting without a jury.

The only questions made by the attorney-general on this writ of error were, whether this was a civil cause, and a cause of admiralty and maritime jurisdiction.

The chief justice informed the opposite council (*Du Ponceau*), that as the court did not feel any reason to change the opinion, which they had formed upon opening the cause, they would dispense with any further argument; and on the 11th of August he pronounced the following judgment.

BY THE COURT. We are perfectly satisfied upon the two points that have been agitated in this cause. In the first place, we think that it is a cause of admiralty and maritime jurisdiction. The exportation of arms and ammunition is, simply, the offence; and exportation is entirely a water transaction. It appears, indeed, on the face of the libel, to have commenced at Sandy Hook; which, certainly, must have been upon the water. In the next place, we are unanimously of opinion, that it is a civil cause: it is a process of the nature of a libel *in rem*; and does not, in any degree, touch the person of the offender.

In this view of the subject, it follows, of course, that no jury was necessary, as it was a civil cause; and that the appeal to the circuit court was regular, as it was a cause of admiralty and maritime jurisdiction.[1] Therefore,

Let the decree of the circuit court be affirmed with costs.

But on opening the court the next day, the chief justice directed the words "with costs" to be struck out of the entry, as there ap-

[1] The Sally, 2 Cranch, 406; The Betsey and Charlotte, 4 Cranch, 443; Whelan *v.* U. S., 7 Cranch, 112; The Sarah, 8 Wheat. 391; The Merino, 9 Wheat. 421; The Josefa Legunda, 10 Wheat. 312; Clark *v.* U. S., 2 Wash. C. C. 519 *Accord.* — ED.

peared to have been some cause for the prosecution. He observed, however, that in doing this, the court did not mean to be understood as at all deciding the question, whether, in any case, they could award costs against the United States; but left it entirely open for future discussion.

S. WARD, CLAIMANT, APPELLANT, *v.* W. M. PECK AND OTHERS.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1855.

[*Reported* in 18 *Howard*, 267.]

THIS was an appeal from the circuit court of the United States for the eastern district of Louisiana.

Mr. Justice GRIER [1] delivered the opinion of the court.

The pleadings in this case present but the single question of the title or ownership of the Bark Mopang.

Originally, the court of admiralty in England entertained jurisdiction of petitory as well as mere possessory actions. Since the Restoration, that court, through the jealous interference of courts of law, had ceased to pronounce directly on questions of ownership or property. Petitory suits were silently abandoned, and, if in a possessory action a question of mere property arose, especially of a more complicated nature, it declined to interfere.

This "submission to authority rather than reason" has continued till the statute of 3 and 4 Vict. c. 65, § 4, restored to the admiralty plenary jurisdiction of such questions. See case of The Aurora,[2] and The Warrior.[3]

In this country, where the courts of admiralty have not been subjected to such jealous restraints, the ancient jurisdiction over petitory suits or causes of property has been retained. In the case of The Tilton,[4] Mr. Justice STORY has examined this question with his usual learning and ability. The authority of that case has never been questioned in our courts. See Taylor *v.* Royal Saxon.[5] In the case of the New England Ins. Co. *v.* Brig Sarah Anne,[6] in this court, the only question was the title or ownership of the brig, yet the cause was entertained without any expression of doubt as to jurisdiction.

The following agreed statement of facts presents the merits of this case: —

[1] Only the opinion of the court is given. DANIEL, J., delivered a dissenting opinion. — ED.

[2] 3 Rob. 133, 136.
[3] 2 Dodson, 288, 2 Brown Civ. & Ad. 430.
[4] 5 Mason, 465.
[5] 1 Wall. 322.
[6] 13 Pet. 387.

"That the libellants are the owners of the said Bark Mopang, unless their title has been divested by the sale made by the master under the following circumstances: The bark sailed from New Orleans on or about the 29th November, 1846, for Tampico and other Mexican ports. That, on or about the 6th of December thereafter, she struck aground, was abandoned by her officers and crew on the north breakers off the bar of Tampico; that she floated over the bar, and was boarded by one Clifton, who refused to deliver her to the master; that a claim for salvage was made; that by agreement between the master and Clifton, the vessel was sold to the claimant, Ward, on the ——. It is admitted that the sale to Ward was unauthorized by the circumstances in which the master was placed.

"The libellants had a valued policy upon the vessel taken out at New Orleans. On the 9th day of January, 1847, they gave notice of abandonment to the underwriters as for a total loss, who refused to accept the same. They were sued for a total loss by libellants. Judgment found for defendant."

This statement amounts to an admission of want of title in the claimant. The abandonment by her owners to the underwriters could not affect the title of the claimant, by way of ratification or estoppel. The insurance is but a wager between the parties to it, on the safety of the vessel. By the rule of the contract the ship may be abandoned, and the whole insurance claimed, when the damages exceed half the value.

Nothing but extreme necessity can justify the sale of the vessel by the master. The abandonment was based on the damage done to the vessel at the time of the accident. If accepted, the master became the agent of the insurer; and whether accepted or not, his act, without authority, can receive no ratification from allegations or admissions made by any party in a dispute on the contract of assurance, where the inquiry as to the act of the master was irrelevant. The defendant, having obtained possession unlawfully, was a trespasser, and can no more plead the abandonment as a confirmation of his title than if he had obtained it by theft or piracy; moreover, if the circumstances would have justified a sale by the master, no abandonment was necessary. It cannot, therefore, by any possible implication, amount to a confirmation of such sale.

The judgment of the circuit court is affirmed.[1]

[1] Rose *v.* Hinely, 4 Cranch, 241; The Tilton, 5 Mass. 465; The Watchman, 1 Ware, 232; The Henry, Bl. & How. 465; The Royal Saxon, 1 Wall. Jr. 311, 322, 323; The J. B. Lunt, Fed. Cas. No. 7246; The Friendship, 2 Curt. 426; The Betsina, Fed. Cas. No. 14,236; The Martha Washington, 1 Cliff. 463; The North Cape, 6 Biss. 505; 528 Pieces of Mahogany, 2 Low. 323; The Fannie, 8 Ben. 429; Daily *v.* Doe, 3 Fed. R. 903; The J. W. French, 13 Fed. R. 916; The Director, 26 Fed. R. 708 *Accord.*

The John Jay (1853), 3 Blatchf. 67 *Contra.*

But the *res* in a petitory or possessory action must be a vessel, its furniture or cargo. Tome *v.* Four Cribs of Lumber, Taney, 533; Gastrel *v.* A Cypress Raft, 2 Woods, 213; Snyder *v.* A Floating Dry Dock, 22 Fed. R. 685. Compare Wood *v.* The Two Barges, 46 Fed. R. 204. — Ed.

THE HINE *v.* TREVOR.

IN THE SUPREME COURT, UNITED STATES, DECEMBER, 1866.

[*Reported in* 4 *Wallace*, 555.]

ERROR to the Supreme Court of the State of Iowa; the case, as disclosed by the record, having been in substance this: —

A collision occurred between the steamboats Hine and Sunshine, on the *Mississippi River*, at or near St. Louis, in which the latter vessel was injured. Some months afterwards, the owners of the Sunshine caused the Hine to be seized while she was lying at Davenport, Iowa, in a *proceeding under the laws of that State*, to subject her to sale in satisfaction of the damages sustained by their vessel. The code of Iowa, under which this seizure was made, gives a lien against any boat found in the waters of that State, for injury to person or property by said boat, officers or crew, etc.; gives precedence in liens; authorizes the seizure and sale of the boat, without any process against the wrongdoer, whether owner or master, and saves the plaintiff all his common law rights, but makes no provision to protect the owner of the vessel.

The owners of the Hine interposed a plea *to the jurisdiction of the state court.* The point being ruled against them, it was carried to the Supreme Court of the State, where the judgment of the lower court was affirmed; and by the present writ of error this court was called upon to reverse that decision.

Mr. Cook, in favor of the concurrent state jurisdiction.

Mr. Grant contra.[1]

Mr. Justice MILLER delivered the opinion of the court.

The record distinctly raises the question, how far the jurisdiction of the District Courts of the United States in admiralty causes, arising on the navigable inland waters of this country, is exclusive, and to what extent the state courts can exercise a concurrent jurisdiction?

Nearly all the States — perhaps all whose territories are penetrated or bounded by rivers capable of floating a steamboat — have statutes authorizing their courts, by proceedings *in rem*, to enforce contracts or redress torts, which, if they had the same relation to the sea that they have to the waters of those rivers, would be conceded to be the subjects of admiralty jurisdiction. These statutes have been acted upon for many years, and are the sources of powers exercised largely by the state courts at the present time. The question of their conflict with the constitutional legislation of Congress, on the same subject, is now for the first time presented to this court.

We are sensible of the extent of the interests to be affected by our decision, and the importance of the principles upon which that decision

[1] The arguments of counsel are omitted. — ED.

must rest, and have held the case under advisement for some time, in order that every consideration which could properly influence the result might be deliberately weighed.

There can, however, be no doubt about the judgment which we must render, unless we are prepared to overrule the entire series of decisions of this court upon the subject of admiralty jurisdiction on Western waters, commencing with the case of The Genesee Chief,[1] in 1851, and terminating with that of The Moses Taylor,[2] decided at the present term;[3] for these decisions supply every element necessary to a sound judgment in the case before us.

The history of the adjudications of this court on this subject, which it becomes necessary here to review, is a very interesting one, and shows with what slowness and hesitation the court arrived at the conviction of the full powers which the Constitution and acts of Congress have vested in the Federal judiciary. Yet as each position has been reached, it has been followed by a ready acquiescence on the part of the profession and of the public interested in the navigation of the interior waters of the country, which is strong evidence that the decisions rested on sound principles, and that the jurisdiction exercised was both beneficial and acceptable to the classes affected by it.

From the organization of the government until the era of steamboat navigation, it is not strange that no question of this kind came before this court. The commerce carried on upon the inland waters prior to that time was so small, that cases were not likely to arise requiring the aid of admiralty courts. But with the vast increase of inland navigation consequent upon the use of steamboats, and the development of wealth on the borders of the rivers, which thus became the great water highways of an immense commerce, the necessity for an admiralty court, and the value of admiralty principles in settling controversies growing out of this system of transportation, began to be felt.

Accordingly we find in the case of The Steamboat Thomas Jefferson,[4] that an attempt was made to invoke the jurisdiction in the case of a steamboat making a voyage from Shippingport, in Kentucky, to a point some distance up the Missouri River, and back again. This court seems not to have been impressed with the importance of the principle it was called upon to decide, as, indeed, no one could then anticipate the immense interests to arise in future, which by the rulings in that case were turned away from the forum of the Federal courts. Apparently without much consideration — certainly without anything like the cogent argument and ample illustration which the subject has since received here — the court declared that no act of Congress had conferred admiralty jurisdiction in cases arising above the ebb and flow of the tide.

In the case of The Steamboat Orleans,[5] the court again ruled that the District Court had no jurisdiction in admiralty, because the

[1] 12 How. 443. [2] 4 Wall. 411. [3] Id.
[4] 10 Wheat. 428. [5] 11 Pet. 175.

vessel, which was the subject of the libel, was engaged in interior navigation and trade, and not on tide-waters. The opinion on this subject, as in the case of The Thomas Jefferson, consisted of a mere announcement of the rule, without any argument or reference to authority to support it.

The case of Waring *v.* Clark,[1] grew out of a collision within the ebb and flow of the tide on the Mississippi River, but also *infra corpus comitatus.* The jurisdiction was maintained on the one side and denied on the other with much confidence. The court gave it a very extended consideration, and three of the judges dissented from the opinion of the court, which held that there was jurisdiction. The question of jurisdiction above tide-water was not raised, but the absence of such jurisdiction seems to be implied by the arguments of the court as well as of the dissenting judges.

The next case in order of time, The Genesee Chief,[2] is by far the most important of the series, for it overrules all the previous decisions limiting the admiralty jurisdiction to tide-water, and asserts the broad doctrine that the principles of that jurisdiction, as conferred on the Federal courts by the Constitution, extend wherever ships float and navigation successfully aids commerce, whether internal or external.

That case arose under an act of Congress, approved February 26th, 1845.[3] The Genesee Chief was libelled under this act for damages arising from a collision on Lake Ontario. A decree having been rendered against the vessel, the claimants appealed to this court.

It was urged here that the act under which the proceeding was had was unconstitutional.

1st. Because the act was not a regulation of commerce, and was not therefore within the commercial clause of the Constitution.

2d. Because the constitutional grant of admiralty powers did not extend to cases originating above tide-water, and Congress could not extend it by legislation.

The court concurred in the first of these propositions, that the act

[1] 8 How. 441. [2] 12 How. 457.

[3] 5 Statutes at Large, 726. "*Be it enacted, etc.*, that the District Courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide-waters, within the admiralty and maritime jurisdiction of the United States; and in all suits brought in such courts in all such matters of contract or tort, the remedies, and the forms of process, and the modes of proceeding, shall be the same as are or may be used by such courts in cases of admiralty and maritime jurisdiction; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner, and to the same extent, and with the same equities, as it now does in cases of admiralty and maritime jurisdiction; saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it; and saving also to the parties the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the state laws, where such steamer or other vessel is employed in such business of commerce and navigation." — ED.

could not be supported as a regulation of commerce. The Chief Justice, who delivered the opinion, then entered into a masterly analysis of the argument by which it was maintained that the admiralty power conferred by the Federal Constitution did not extend beyond tide-water in our rivers and lakes.

This argument assumed that in determining the limits of those powers, we were bound by the rule which governed the Admiralty Court of Great Britain on the same subject at the time our Constitution was adopted. And it was said that the limit of the court's power in that country was the ebb and flow of the tide.

This was conceded to be true as a matter of fact, but the Chief Justice demonstrated that the reason of this rule was that the limit of the tide in all the waters of England was at the same time the limit of practicable navigation, and that as there could be no use for an admiralty jurisdiction where there could be no navigation, this *test* of the navigability of those waters became substituted as the rule, instead of the navigability itself. Such a rule he showed could have no pertinency to the rivers and lakes of this country, for here no such test existed. Many of our rivers could be navigated as successfully and as profitably for a thousand miles above tide-water as they could below; and he showed the absurdity of adopting as the test of admiralty jurisdiction in this country an artificial rule, which was founded on a reason in England that did not exist here. The true rule in both countries was the navigable capacity of the stream; and as this was ascertained in England by a test which was wholly inapplicable here, we could not be governed by it. The cases of The Thomas Jefferson and The Steamboat Orleans, already referred to, were then examined and overruled.

This opinion received the assent of all the members of the court except one.

Although the case arose under the act of 1845, already cited, which in its terms is expressly limited to matters arising upon the lakes and the navigable waters connecting said lakes, and which the Chief Justice said was a limitation of the powers conferred previously on the Federal courts, it established principles under which the District Courts of the United States began to exercise admiralty jurisdiction of matters arising upon all the public navigable rivers of the interior of the country.

This court also, at the same term in which the case of The Genesee Chief was decided, held in Fretz *v.* Bull,[1] in which the point was raised in argument, that the Federal courts had jurisdiction according to the principles of that case in the matter of a collision on the Mississippi River above tide-water.

As soon as these decisions became generally known, admiralty cases increased rapidly in the District Courts of the United States, both on the lakes and rivers of the West. Many members of the legal profession engaged in these cases, and some of the courts have from this

[1] 12 How. 466.

circumstance assumed, without examination, that the jurisdiction in admiralty cases arising on the rivers of the interior of the country is founded on the act of 1845; and such is perhaps the more general impression in the West. The very learned court whose judgment we are reviewing has fallen into this mistake in the opinion which it delivered in the case before us, and it is repeated here by counsel for the defendant in error.

But the slightest examination of the language of that act will show that this cannot be so, as it is confined, as we have already said, to cases arising "on the lakes and navigable waters connecting said lakes." The jurisdiction upon those waters is governed by that statute, but its force extends no further.

The jurisdiction thus conferred is in many respects peculiar, and its exercise is in some important particulars different under that act from the admiralty jurisdiction conferred by the act of September 24th, 1789.

1. It is limited to vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade.

2. To vessels employed in commerce and navigation between ports and places in different States.

3. It grants a jury trial if either party shall demand it.

4. The jurisdiction is not exclusive, but is expressly made concurrent, with such remedies as may be given by state laws.[1]

But the true reason why the admiralty powers of the Federal courts began now to be exercised for the first time in the inland waters was this: the decision in the case of The Genesee Chief, having removed the imaginary line of tide-water which had been supposed to circumscribe the jurisdiction of the admiralty courts, there existed no longer any reason why the general admiralty powers conferred on all the District Courts by the ninth section of the Judiciary Act,[2] should not be exercised wherever there was navigation which could give rise to

[1] "That case (The Hine v. Trevor), not at all involving the question of jurisdiction upon the lakes, but simply upon the interior rivers, did not receive that full deliberation in respect to this question, which, in the present case, is called for. We have now examined it with care, and given to it our best consideration, and are satisfied, that since the decision of the case of The Genesee Chief, the court must regard the district courts as having conferred upon them a general jurisdiction in admiralty upon the lakes and the waters connecting them, by the ninth section of the original act of 1789; and the enabling act of 1845, therefore, has become inoperative and ineffectual as a grant of jurisdiction; and, as it was an act, on the face of it, and as intended, in its purpose and effect, to extend the admiralty jurisdiction to these waters, we cannot, without utterly disregarding this purpose and intent, give effect to it as a limitation or restriction upon it. We must, therefore, regard it as obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested, which is rather a mode of exercising jurisdiction than any substantial part of it. The saving clause in this act, as to the concurrent remedy at common law, is, in effect, the same as in the act of 1789, and is, therefore, of necessity, useless and of no effect." *Per* NELSON, J., in The Eagle, 8 Wall. 15, 25. DRUMMOND, J., expressed a similar opinion as early as 1853 in The Flora, 1 Biss. 29. The clause in the act of 1845, giving to either party the right of trial by jury, has been deemed to be unconstitutional. The City of Toledo, 73 Fed. R. 220. See also Lee v. Thompson, 3 Woods, 167. — ED.

[2] 1 Statutes at Large, 77.

admiralty and maritime causes. The Congress which framed that act — the first assembled under the Constitution — seemed to recognize this more extended view of the jurisdiction in admiralty, by placing under its control cases of seizure of vessels under the laws of impost, navigation, and trade of the United States, when those seizures were made in waters navigable from the sea by vessels of ten tons burden or upwards.

The case of The Magnolia [1] is another important case in the line of decisions which we have been considering. It was a case of collision occurring on the Alabama River, far above the ebb and flow of the tide, on a stream whose course was wholly within the limits of the State which bears its name. This was thought to present an occasion when the doctrines announced in the case of The Genesee Chief might properly be reconsidered, and modified, if not overruled. Accordingly we find that the argument in favor of the main proposition decided in that case was restated with much force in the opinion of the court, and that a very elaborate opinion was delivered on behalf of three dissenting judges. The principles established by the case of The Genesee Chief were thus reaffirmed, after a careful and full reconsideration. It was also further decided (which is pertinent to the case before us), that the jurisdiction in admiralty on the great Western rivers did *not* depend upon the act of February 3d, 1845, but that it was founded on the act of September 24th, 1789. That decision was made ten years ago, and the jurisdiction, thus firmly established, has been largely administered by all the District Courts of the United States ever since, without question.

At the same time, the state courts have been in the habit of adjudicating causes, which, in the nature of their subject-matter, are identical in every sense with causes which are acknowledged to be of admiralty and maritime cognizance; and they have in these causes administered remedies which differ in no essential respect from the remedies which have heretofore been considered as peculiar to admiralty courts. This authority has been exercised under state statutes, and not under any claim of a general common law power in these courts to such a jurisdiction.

It is a little singular that, at this term of the court, we should for the first time have the question of the right of the state courts to exercise this jurisdiction, raised by two writs of error to state courts, remote from each other, the one relating to a contract to be performed on the Pacific Ocean, and the other to a collision on the Mississippi River. The first of these cases, The Moses Taylor, had been decided before the present case was submitted to our consideration.

The main point ruled in that case is, that the jurisdiction conferred by the act of 1789, on the District Courts, in civil causes of admiralty and maritime jurisdiction, is exclusive by its express terms, and that this exclusion extends to the state courts. The language of the ninth section of the act admits of no other interpretation. It says, after

[1] 20 How. 296.

describing the criminal jurisdiction conferred on the District Courts, that they "shall also have *exclusive* original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, when the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden." If the Congress of the United States has the right, in providing for the exercise of the admiralty powers, to which the Constitution declares the authority of the Federal judiciary shall extend, to make that jurisdiction exclusive, then, undoubtedly, it has done so by this act. This branch of the subject has been so fully discussed in the opinion of the court, in the case just referred to, that it is unnecessary to consider it further in this place.

It must be taken, therefore, as the settled law of this court, that wherever the District Courts of the United States have original cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive, and no other court, state or national, can exercise it, with the exception always of such concurrent remedy as is given by the common law.

This examination of the case, already decided by this court, establishes clearly the following propositions: —

1. The admiralty jurisdiction, to which the power of the Federal judiciary is by the Constitution declared to extend, is not limited to tide-water, but covers the entire navigable waters of the United States.

2. The original jurisdiction in admiralty exercised by the District Courts, by virtue of the act of 1789, is exclusive, not only of other Federal courts, but of the state courts also.

3. The jurisdiction of admiralty causes arising on the interior waters of the United States, other than the lakes and their connecting waters, is conferred by the act of September 24th, 1789.

4. The admiralty jurisdiction exercised by the same courts, on the lakes and the waters connecting those lakes, is governed by the act of February 3d, 1845.

If the facts of the case before us in this record constitute a cause of admiralty cognizance, then the remedy, by a direct proceeding against the vessel, belonged to the Federal courts alone, and was excluded from the state tribunals.

It was a case of collision between two steamboats. The case of The Magnolia,[1] to which we have before referred, was a case of this character; and many others have been decided in this court since that time. That they were admiralty causes has never been doubted.

We thus see that every principle which is necessary to a decision of this case has been already established by this court in previous cases. They lead unavoidably to the conclusion, that the state courts of Iowa acted without jurisdiction; that the law of that State attempting to confer this jurisdiction is void, because it is in conflict with the act of Congress of September 24th, 1789, and that this act is well authorized by the Constitution of the United States. Unless we are prepared to

[1] 20 How. 296.

retract the principles established by the entire series of decisions of this court on that subject, from and including the case of The Genesee Chief, down to that of The Moses Taylor, decided at this term, we cannot escape this conclusion. The succeeding cases are in reality but the necessary complement and result of the principles decided in the case of The Genesee Chief. The propositions laid down there, and which were indispensable to sustain the judgment in that case, bring us logically to the judgment which we must render in this case. With the doctrines of that case on the subject of the extent of the admiralty jurisdiction we are satisfied, and should be disposed to affirm them now if they were open to controversy.[1]

It may be well here to advert to one or two considerations to which our attention has been called, but which did not admit of notice in the course of observation which we have been pursuing without breaking the sequence of the argument.

1. It is said there is nothing in the record to show that The Hine was of ten tons burden or upwards, and that, therefore, the case is not brought within the jurisdiction of the Federal courts. The observation is made, in the opinion of the Supreme Court of Iowa, in reference to the provision of the act of 1845, which that court supposed to confer jurisdiction on the Federal courts in the present case, if it had such jurisdiction at all. We have already shown that the jurisdiction is founded on the act of 1789. That act also speaks of vessels of ten tons burden and upwards, but not in the same connection that the act of 1845 does. In the latter act it is made essential to the jurisdiction that the vessel which is the subject of the contract, or the tort, should be enrolled and licensed for the coasting trade, and should be of twenty tons burden or upwards. In the act of 1789, it is declared that the District Courts shall have jurisdiction in admiralty of seizures for violations of certain laws, where such seizures are made on rivers navigable by vessels of ten tons burden or upwards from the sea. In the latter case, the phrase is used as describing the carrying capacity of the river where the seizure is made. In the former case, it relates to the capacity of the vessel itself.

2. It is said that the statute of Iowa may be fairly construed as coming within the clause of the ninth section of the act of 1789, which "saves to suitors, in all cases, the right of a common law remedy where the common law is competent to give it."

But the remedy pursued in the Iowa courts, in the case before us, is in no sense a common law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. That a writ may be issued and the vessel seized, on filing a petition similar

[1] Genesee Chief *v.* Fitzhugh, 12 How. 443 (overruling The Thomas Jefferson, 10 Wheat. 448, and The Orleans, 11 Pet. 175); Fretz *v.* Bull, 12 How. 466; The Eagle, 8 Wall. 15; *In re* Garnett, 141 U. S. 1; Boston *v.* Crowley, 38 Fed. R. 202; The Willamette Valley, 62 Fed. R. 293 *Accord*. — Ed.

in substance to a libel. That after a notice in the nature of a monition, the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued. Such is the general character of the steamboat laws of the Western States.

While the proceeding differs thus from a common law remedy, it is also essentially different from what are in the West called suits by attachment, and in some of the older States foreign attachments. In these cases there is a suit against a personal defendant by name, and because of inability to serve process on him on account of non-residence, or for some other reason mentioned in the various statutes allowing attachments to issue, the suit is commenced by a writ directing the proper officer to attach sufficient property of the defendant to answer any judgment which may be rendered against him. This proceeding may be had against an owner or part owner of a vessel, and his interest thus subjected to sale in a common law court of the State.

Such actions may, also, be maintained *in personam* against a defendant in the common law courts, as the common law gives; all in consistence with the grant of admiralty powers in the ninth section of the Judiciary Act.[1]

But it could not have been the intention of Congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the States to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases. Thus the exclusive jurisdiction of the Federal courts would be defeated. In the act of 1845, where Congress does mean this, the language expresses it clearly; for after saving to the parties, in cases arising under that act, a right of trial by jury, and the right to a concurrent remedy at common law, where it is competent to give it, there is added, "any concurrent remedy which may be given by the state laws where such steamer or other vessel is employed."

THE JUDGMENT IS REVERSED, and the case is remanded to the Supreme Court of Iowa, with directions that it be

Dismissed for want of jurisdiction.[2]

1 "Properly construed, a party under that provision may proceed *in rem*, in the admiralty, or he may bring a suit *in personam* in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common-law remedy in the state courts or in the Circuit Court of the United States, if he can make proper parties to give that court jurisdiction of his case." *Per* CLIFFORD, J., in The Belfast, 7 Wall. 624, 644. See to the same effect: Taylor *v.* Carryl, 20 How. 583, 598; The Moses Taylor, 4 Wall. 411, 420, 421; Leon *v.* Galceran, 11 Wall. 185; Steamboat Co. *v.* Chase, 16 Wall. 522, 532, 533; Schoonmaker *v.* Gilmore, 102 U. S. 118; Manchester *v.* Massachusetts, 139 U. S. 240, 262; DeLovio *v.* Boit, 2 Gall. 398. — ED.

2 The Belfast, 7 Wall. 624; The Glide, 167 U. S. 606 (reversing Atlantic Works *v.* The Glide, 157 Mass. 525. See also 159 Mass. 60); The Menominie, 36 Fed. R. 197; Walters *v.* Mollie Dozier, 24 Iowa, 192; Stewart *v.* Harry, 3 Bush, 438 *Accord.*

Similarly proceedings *in rem* cannot be entertained in the state courts upon maritime contracts. The Moses Taylor, 4 Wall. 411; The Lottawanna, 21 Wall. 558, 580; Francis *v.* The Harrison, 1 Sawy. 353; The John Farron, 14 Blatchf. 24, 26; Terrell *v.* Schooner, 4 Fed. R. 552; The Menominie, 36 Fed. R. 197; Crawford *v.* Bark, 42 Cal. 469; Marshall *v.* The H. H. Curtis, 5 Bush, 607; Berwin *v.* Steamship, 19 La. An. 384; Warren *v.* Kelley, 80 Me.

EX PARTE BOYER AND ANOTHER.

IN THE SUPREME COURT, JANUARY 7, 1884.

[*Reported in* 109 *United States*, 629.]

MR. JUSTICE BLATCHFORD delivered the opinion of the court.[1]

The owners of the canal-boat Brilliant and her cargo filed a libel in admiralty, in the District Court of the United States for the Northern District of Illinois, against the steam canal-boat B and C, in a case of collision. The libel alleges that the Brilliant is a vessel of more than 20 tons burden, and was employed, at the time of the collision, in the business of commerce and navigation between ports and places in different States and Territories in the United States, upon the lakes and navigable waters connecting said lakes; that the B and C is a vessel of more than 20 tons burden, and was, at the time of the collision, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories of the United States, upon the lakes and navigable waters of the United States; that, in August, 1882, the Brilliant, while bound from Morris, Illinois, to Chicago, Illinois, towed, with other canal-boats, by a steam canal-boat, and carrying the proper lights, and moving up the Illinois and Lake Michigan canal, about four miles south of the Chicago end of the canal, was, through the negligence of the B and C, struck and sunk, with her cargo, by the B and C, which was moving in the opposite direction, to the damage of the libellants $1500. The owners and claimants of the B and C answered the libel, giving their version of the collision, and alleging that it was wholly due to the faulty navigation of the Brilliant, and that it occurred on the Illinois and Michigan canal, at a place within the body of Cook county, in the State of Illinois. In November, 1883, the District Court made an interlocutory decree, finding that both parties were in fault, and decreeing that they should each pay one half of the damages occasioned by the collision, to be thereafter ascertained and assessed by the court.[2]

The owners of the B and C have now presented to this court a petition, praying that a writ of prohibition may issue to the judge of the said District Court, prohibiting him from proceeding further in said suit. The ground alleged for the writ is the want of jurisdiction of the District Court, as a court of admiralty, over the waters where the collision occurred.

512; Wight *v.* Maxwell, 4 Mich. 45; Griswold *v.* Otter, 12 Minn. 465; Dever *v.* Steamboat, 42 Miss. 715; The Josephine, 39 N. Y. 19; Brookman *v.* Hamill, 43 N. Y. 554; Poole *v.* Kermite, 59 N. Y. 554; The Petrel *v.* Dumont, 28 Oh. St. 602; Waggoner *v.* St. John, 10 Heisk. 503; Weston *v.* Moore, 40 Wis. 455.

Nor will a plaintiff be permitted to obtain, in a state court, an equitable remedy upon a maritime contract or marine tort. Terrell *v.* Schooner, 4 Fed. R. 552. — ED.

[1] Only the opinion of the court is given. — ED.

[2] Reported in, *sub nom.* The B. and C, 18 Fed. R. 593. — ED.

The Illinois and Michigan canal is an artificial navigable waterway connecting Lake Michigan and the Chicago River with the Illinois River and the Mississippi River. By the act of Congress of March 30th, 1822, ch. 14, 3 Stat. 659, the use of certain public lands of the United States was vested in the State of Illinois forever, for a canal to connect the Illinois River with the southern bend of Lake Michigan. The act declared

"That the said canal, when completed, shall be and forever remain a public highway, for the use of the government of the United States, free from any toll or other charge whatever for any property of the United States, or persons in their service, passing through the same."

This declaration was repeated in the act of March 2d, 1827, ch. 51, 4 Stat. 234, granting more land to the State of Illinois to aid it in opening the canal. We take judicial notice of the historical fact that the canal, 96 miles long, was completed in 1848, and is 60 feet wide and 6 feet deep, and is capable of being navigated by vessels which a canal of such size will accommodate, and which can thus pass from the Mississippi River to Lake Michigan and carry on interstate commerce, although the canal is wholly within the territorial bounds of the State of Illinois. By the act of 1822, if the land granted thereby shall cease to be used for a canal suitable for navigation, the grant is to be void. It may properly be assumed that the District Court found to be true the allegations of the libel, before cited, as to the character and employment of the two vessels, those allegations being put in issue by the answer.

Within the principles laid down by this court in the cases of The Daniel Ball,[1] and The Montello,[2] which extended the salutary views of admiralty jurisdiction applied in The Genesee Chief,[3] The Hine *v.* Trevor, and The Eagle,[4] we have no doubt of the jurisdiction of the District Court in this case. Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial,[5] and is wholly within the body of a State,[6] and subject to its ownership and control; and it makes no difference as to the jurisdiction of the District Court that one or the other of the vessels was at the time of the collision on a voyage from

[1] 10 Wall. 557. [2] 20 Wall. 430. [3] 12 How. 443. [4] 8 Wall. 15.

[5] The Avon (1873), Brown, Adm. 174; The Steamer Oler (1874), 2 Hughes, 12; Steam Barge *v.* Monitor (1877), 9 Ben. 78; Malony *v.* City of Milwaukee (1880), 1 Fed. R. 611 *Accord.* — ED.

[6] Waring *v.* Clarke, 5 How. 441; St. John *v.* Paine, 10 How. 557; Newton *v.* Stebbins, 10 How. 586; Steamboat *v.* Rea, 18 How. 223; Jackson *v.* Steamboat, 20 How. 296; Phil. Co. *v.* Phil. Co. 23 How. 209, 215; The Propeller Commerce, 1 Black, 574; The Belfast, 7 Wall. 629, 637; The Wave, Bl. & How. 235; Roberts *v.* Skolfield, 3 Ware, 184 *Accord.* — ED.

one place in the State of Illinois to another place in that State.[1] Many of the embarrassments connected with the question of the extent of the jurisdiction of the admiralty disappeared when this court held, in the case of The Eagle, *ubi supra*, that all of the provisions of § 9 of the Judiciary Act of September 24th, 1789, ch. 20, 1 Stat. 77, which conferred admiralty and maritime jurisdiction upon the District Courts, were inoperative, except the simple clause giving to them "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction." That decision is carried out by the enactment in § 563 of the Revised Statutes, subdivision 8, that the District Courts shall have jurisdiction of "all civil causes of admiralty and maritime jurisdiction," thus leaving out the inoperative provisions.

This case does not raise the question whether the admiralty jurisdiction of the District Court extends to waters wholly within the body of a State, and from which vessels cannot so pass as to carry on commerce between places in such State and places in another State or in a foreign country; and no opinion is intended to be intimated as to jurisdiction in such a case.

The prayer of the petition is denied.

THE PLYMOUTH.

IN THE SUPREME COURT, UNITED STATES, DECEMBER, 1865.

[*Reported in* 3 *Wallace*, 20.]

THE steam-propeller Falcon, employed by its owners in navigating our great northern lakes, anchored beside the wharf of Hough & Kershaw, in Chicago River; "navigable water." Upon the wharf large packing-houses were built, and these, at the time, were filled with valuable stores. Owing to the negligence of those in charge of the Falcon, the vessel took fire; and the flames, stretching themselves to the wharf and packing-houses, set these last on fire, which with their stores were wholly consumed. Hough and Kershaw filed, accordingly, in the District Court for the Northern District of Illinois, a libel in admiralty, for cause of damage, civil and maritime, against the owners of the Falcon, and attached a vessel of theirs called the Plymouth.

The District Court, regarding the case as not one for the Admiralty, dismissed the libel for want of jurisdiction. The Circuit Court, on appeal, considered that the dismissal was rightly made. The case was now here for review.

[1] The Commerce, 1 Black, 574; The Belfast, 7 Wall. 624; The Eagle, 8 Wall. 15; The Mary Washington, 16 Fed. Cas. 1006; U. S. *v.* Burlington Co., 21 Fed. R. 331; The Tolchester, 42 Fed. R. 180 *Accord.*

The opinion to the contrary in Allen *v.* Newberry, 21 How. 244; Maguire *v.* Card, 21 How. 249, and in a few other cases is no longer law. — ED.

Mr. A. W. Arrington, in favor of the jurisdiction.[1]

Mr. Spalding, contra.

Mr. Justice NELSON delivered the opinion of the court: —

The court below dismissed the libel for want of jurisdiction; and that question is the only one that has been argued in this court.

It will be observed that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over marine torts depends upon locality — the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark.

In the case of Thomas *v.* Lane,[2] Mr. Justice STORY, in a case where the imprisonment was stated in the libel to be on shore, observed: "In regard to torts, I have always understood that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never, I believe, deliberately claimed to have any jurisdiction over torts, except such as are maritime torts; that is, torts upon the high seas, or on waters within the ebb and flow of the tide." Since the case of The Genesee Chief, navigable waters may be substituted for tide-waters. This view of the jurisdiction over maritime torts has not been denied.

But it has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that, as the origin of the wrong was on the water, in other words, as the wrong began on the water (where the admiralty possesses jurisdiction), it should draw after it all the consequences resulting from the act. These mixed cases, however, will be found, not cases of tort, but of contract, which do not depend altogether upon locality as the test of jurisdiction, such as contracts of material-men, for supplies, charter-parties, and the like. These cases depend upon the nature and subject-matter of the contract, whether a maritime contract, and the service a maritime service to be performed upon the sea, or other navigable waters, though made upon land. The cases of torts to be found in the admiralty, as belonging to this class, hardly partake of the character of mixed cases, or have, at most, but a very remote resemblance.[3]

They are cases of personal wrongs, which commenced on the land; such as improperly enticing a minor on board a ship and there exercising unlawful authority over him. The substance and consummation of the wrong were on board the vessel — on the high seas, or

[1] The argument for appellant is omitted. — ED. [2] 2 Sumn. 9.

[3] Thomas *v.* Lane, 2 Sumn. 2; The Huntress, *per* WARE, J., Davies, 85; United States *v.* Magill, 1 Washington C. C. 463; 4 Dallas, 345, 2d ed.; Plumer *v.* Webb, 4 Mason, 383–4; 1 Kent, 367* and n.

navigable waters — and the injury complete within admiralty cognizance. It was the tortious acts on board the vessel to which the jurisdiction attached.

This class of cases may well be referred to as illustrating the true meaning of the rule of locality in cases of marine torts, namely, that the wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the cause of damage, in technical language, whatever else attended it, must have been there complete.

Much stress has been given to the fact, by the learned counsel who would support the jurisdiction, in his argument, that the vessel which communicated the fire to the wharf and buildings, was a maritime instrument, or agent, and, hence, characterized the nature of the tort. In other words, that this characterized it as a maritime tort, and, of course, of admiralty cognizance.

But this, we think, is a misapprehension. The owner of a vessel is liable for injuries done to third persons or property by the negligence or malfeasance of the master and crew while in the discharge of their duties and acting within the scope of their authority. It is upon this principle that the defendants are liable, if at all, to the libellants for the damages sustained. The circumstance that the agents were in the employment of the owners on board the vessel, and that the negligence occurred, while so employed, and which occasioned the damage, gives to the libellants the right of action. But, if they had been employed upon any other structure in the river, — on a raft, or floating platform, for work, on the river, — and the fire had been communicated to the wharf and buildings on account of their negligence while so engaged, the right of action would have been the same. The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.

A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. The fact, therefore, of its having taken place on board the propeller Falcon, in the present case, is not an element that imparts any peculiar character to the nature of the tort complained of. This is so in cases of collision, in which the offending vessel may be attached and proceeded against as one of the remedies for the wrong done. The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality, — the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.

We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board of a vessel, except as evidence that it originated on navigable waters, — the Chicago River; and, as we have seen, the simple fact that it originated there, but the whole damage done upon land, the cause of action, not being complete on navigable waters, affords no ground for the exercise of the admiralty jurisdiction. The negligence, of itself, furnishes no cause of action; it is *damnum absque injuria*. The case is not distinguishable from that of a person standing on a vessel, or on any other support in the river, and sending a rocket or torpedo into the city, by means of which buildings were set on fire and destroyed. That would be a direct act of trespass; but quite as efficient a cause of damage as if the fire had proceeded from negligence. Could the admiralty take jurisdiction?[1] We suppose the strongest advocate for this jurisdiction would hardly contend for it. Yet, the origin of the trespass is upon navigable waters, which are within its cognizance. The answer is, as already given: the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends, — on the high seas or navigable waters.

The learned counsel, who argued this case for the appellants with great care and research, admitted that it was one of first impression; that he could find no case in the books like it. The reason is apparent, for it is outside the acknowledged limit of admiralty cognizance over marine torts, among which it has been sought to be classed. The remedy for the injury belongs to the courts of common law.[2]

Decree affirmed.

[1] The admiralty has no jurisdiction where an object thrown or falling from a vessel hits and injures a person or property on shore. U. S. *v.* Davis, 2 Sumn. 482 (*semble*); The Epsilon, 6 Ben. 378, 381 (*semble*); The Mary Stewart, 10 Fed. R. 137; The Mary Garrett, 63 Fed. R. 1009; Price *v.* Bell, 66 Fed. R. 62.

Conversely the admiralty has jurisdiction when damage is inflicted upon a person or property upon a ship by a missile thrown from shore. Hermann *v.* Port Blakely Co., 69 Fed. R. 646. — Ed.

[2] *Ex parte* Phœnix Co., 118 U. S. 110; Goodrich *v.* Gagnon, 36 Fed. R. 123 *Accord.*

Similarly, if a vessel by a culpable collision injures a person or property on shore, the admiralty has no jurisdiction. Johnson *v.* Chicago Co., 119 U. S. 388; The Savannah, 21 Fed. Cas. 548 (citing English cases *contra*, because of certain statutes); The Ottawa, 1 Brown, Adm. 356; The Maud Webster, 8 Ben. 547; The Arkansas, 17 Fed. R. 383; The C. Accome, 20 Fed. R. 642; The Professor Morse, 23 Fed. R. 803; City *v.* Curtis, 37 Fed. R. 705; The John C. Sweeney, 55 Fed. R. 240; Horner Co. *v.* Compagnie Générale, 63 Fed. R. 845; Brig *v.* Canfield, 27 Mich. 479; Spry Co. *v.* Steam Barge, 76 Mich. 320.

In the following cases the admiralty had jurisdiction, the defendant's vessel having collided with objects floating on the water. The Brazos, 10 Ben. 435; The Ceres, 10 Ben. 435; The F. & P. M. No. 2, *infra*. — Ed.

THE STRABO.

IN THE DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, NOVEMBER 7, 1898.

[*Reported in* 90 *Federal Reporter*, 110.]

THOMAS, District Judge.[1] The exceptions to the libel concede the following facts for the purpose of raising the question of the jurisdiction of this court: The libellant, employed in loading a ship lying at a dock, attempted to leave the ship by means of a ladder, by reason of the master's negligence not secured to the ship's rail, whereupon the ladder fell, and the libellant was thrown to the ground, and injured. From this statement is inferred (1) that the injured person was on the ship; (2) that the negligent omission, viz., to fasten the ladder to the ship, was suffered on the ship; (3) that the causal influence was brought to bear and took effect upon the libellant while he was on the ship; (4) that a physical injury was caused to the libellant by his fall, which was increased by his striking the dock.

Several classes of cases exist which have relevancy to the subject under consideration. The first class is where the primal cause arises on the ship, and is communicated to property on the land. Such are cases of fire, originating on the ship, and carried or spreading to the shore; The Plymouth, *In re* Phœnix Ins. Co.[2] In this class also fall the cases of missiles sent from the ship, and taking effect elsewhere; U. S. *v.* Davis,[3] The Epsilon.[4] Also, cases are included where some part of the ship comes in contact with the land, to the injury of persons or property thereon (Johnson *v.* Elevator Co.,[5] The Maud Webster[6]); and herein should be gathered instances where the vessel does damage to wharves (The C. Accame,[7] Homer Ramsdell Transp. Co. *v.* Compagnie Générale Transatlantique[8]). Also, cases fall within this class where material discharged from a ship comes in contact with persons on land. Anderson *v.* The Mary Garrett.[9] See, also, Price *v.* The Belle of the Coast.[10] In all cases arising under this first class, the injured person or thing is on land when the negligent act operates upon him or it, and a court of admiralty has no jurisdiction. Another class includes cases where the primal cause arises on land, and is injuriously communicated to the ship on the water. Herein are included structures wrongfully maintained, and interrupting navigation; Atlee *v.* Packet Co.,[11] The Maud Webster, Greenwood *v.* Town of Westport,[12] Oregon City Transp. Co. *v.* Columbia St. Bridge Co.,[13] City of Boston *v.* Crowley,[14] The

[1] Only the opinion of the court is given. — ED.
[2] 118 U. S. 610.
[3] 2 Sumn. 482.
[4] 6 Ben. 378.
[5] 119 U. S. 388.
[6] 8 Ben. 547.
[7] 20 Fed. 642.
[8] 63 Fed. 845, 848.
[9] 63 Fed. 1009.
[10] 66 Fed. 62.
[11] 21 Wall. 389.
[12] 60 Fed. 560.
[13] 53 Fed. 549.
[14] 38 Fed. 202, 204.

Arkansas.[1] And herein fall cases where material discharged from land into the ship does injury to persons on the ship; Hermann *v.* Mill Co.[2] In this class of cases, the ship, and hence a person or thing thereon, is on the water, and it has been considered that the court had jurisdiction.[3] The H. S. Pickands[4] is different. There, a person descending from the ship by means of a ladder was thrown upon the wharf by reason of the previous negligent act of the master in removing the end of the ladder from the cleat that held it in place on the wharf, and it was adjudged that this court was without jurisdiction. In that instance the causative negligent omission was on land, but operated upon the libellant while he was on the ship, provided the ladder be deemed an incident or attachment of the ship. It differs from the cases under the first class in this: that a negligent condition initiated on shore was set in operation by the libellant attempting to leave the ship by the ladder.

It may be considered whether these decisions have been made pursuant to some rule of general application. All cases for ultimate authority refer to The Plymouth. There it was said: —

"The wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. In other words, the cause of damages, in technical language, whatever else attended it, must have been there complete."

Again, "the whole, or at least the substantial cause of action, arising out of the wrong, must be complete within the locality upon which the jurisdiction depends, — on the high seas or navigable waters."

What construction has been placed upon these expressions in subsequent opinions? In The Mary Stewart,[5] where the entire transaction was in fact on a wharf, it is said: —

"There are two essential ingredients to a cause of action, viz., a wrong, and damage resulting from the wrong, Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage — the other necessary ingredient — must also happen on water."

This holding was criticised in City of Milwaukee *v.* The Curtis,[6] where it is stated that: —

"It suffices if the damage — the substantial cause of action arising out of the wrong — is complete upon navigable waters."

Also, in Hermann *v.* Mill Co.,[7] the rule stated in The Mary Stewart

[1] 17 Fed. 383. [2] 69 Fed. 646.

[3] Phila. Co. *v.* Phila. Co., 23 How. 209; Atlee *v.* Packet Co., 21 Wall. 389; The Neil Cochran, 1 Brown, Adm. 162 (*semble*); The Arkansas, 17 Fed. R. 383, 386 (*semble*); Leonard *v.* Decker, 22 Fed. R. 741; Etheridge *v.* Phila., 26 Fed. R. 43; City *v.* Crowley, 38 Fed. R. 202; Assante *v.* Charleston Co., 40 Fed. R. 765; Hill *v.* Board, 45 Fed. R. 260; Oregon Co. *v.* Columbian Co., 53 Fed. R. 549; Sullivan *v.* Lake Co., 56 Fed. R. 735; Greenwood *v.* Westport, 60 Fed. R. 560; The Normannia, 62 Fed. R. 469 (false representations on land followed by damage at sea); Hermann *v.* Port Blakely Co., 68 Fed. R. 646 *Accord.* — Ed.

[4] 42 Fed. 239. [5] 10 Fed. 137. [6] 37 Fed. 705. [7] 69 Fed. 646.

is regarded as too broad, and the learned judge interprets the law as follows: —

"I think that the only true and rational solution of the jurisdictional question, where the tort occurs partly on land and partly on water, is to ascertain the place of the consummation and substance of the injury. This latter element of the wrong is necessarily the only substantial cause of action; otherwise it would be *damnum absque injuria.*"

In The H. S. Pickands,[1] it was considered that, to confer jurisdiction on this court, the injury must have been consummated and the damage received upon the water, although the wrongful act may have been done on the ship.

In The Maud Webster,[2] the court said: —

"In a case of tort, there can be no jurisdiction in the admiralty unless the substantial cause of action, arising out of the wrong, was complete upon navigable waters."

In Johnson *v.* Elevator Co.,[3] it is held that this court has not jurisdiction of a tort when the substance and consummation of the wrong has taken place on land, and not on navigable water, "the cause of action not having been complete on such water."

It will be observed that more precise knowledge is derived from the nature of the cases than from the general language used. The cases usually involve a state of facts showing that the negligent act or omission arose in one locality, and was communicated to the libellant or to his property in another locality, and that the damage or actual physical injury always occurred in the locality where the wrongful act or omission took effect. But in The H. S. Pickands,[4] it appears that the negligent omission was on the dock, was communicated to the libellant on the ship, or at least on the ladder leading to the ship, and the chief physical injury resulted from his falling on the dock. While the cases wherein the jurisdiction has been contested usually show either the cause on the water, and the operation of the cause and all injury on land, or the cause on the land, and the operation of the cause and all injury on water, the language of the opinions is often broader. In The Plymouth, The Maud Webster, and Johnson *v.* Elevator Co., the statement is that the substantial cause of action must be complete on navigable waters, or similar phraseology is used. In City of Milwaukee *v.* The Curtis, Hermann *v.* Mill Co., and The H. S. Pickands, the locality of the completion of the damage or injury is emphasized as the test of the locality where the tort was committed. It does not seem that it was the intention in the latter cases to lay down the rule that the physical injury must be completed on the water to give courts of admiralty jurisdiction, irrespective of the locality where the breach of duty first operated upon the person injured. Such a rule would imply that the first direct effect of a breach of duty upon the injured person on the ship could not create a cause of action if the injury were completed on land. Such a position should be tested.

[1] 42 Fed. 239. [2] 8 Ben. 547. [3] 119 U. S. 388. [4] 42 Fed. 239.

If a ship carpenter were employed to mend a yard on a vessel lying at a dock, and, by the master's negligence, he were caused to fall, and he should fall upon the vessel or in the water, would this court have jurisdiction; but, if he should strike on the dock, would this court be without jurisdiction? If a passenger, standing at the gangway, for the purpose of alighting, were disturbed by some negligent act of the master, would the jurisdiction of this court depend upon the fact whether he fell on the deck, and remained there, or whether he was precipitated upon the dock in the first instance, or finally landed there after first falling on some part of the ship? If a seaman, by the master's neglect, should fall overboard, would this court entertain jurisdiction if the seaman fell in the water, and decline jurisdiction if he fell on the dock or other land? The inception of a cause of action is not usually defined by such a rule. It may be admitted that the act of omission which puts in force the primary hurtful agency does not constitute the cause of action; for, until such force takes effect injuriously upon the person or property of some one, there is a mere naked breach of duty, and the case is *damnum absque injuria;* but, where the breach of duty puts in motion agencies that come in actual injurious collision with the person or property of another to whom the duty was due, the cause of action at once arises, and the locality of the tort is fixed, however much the physical injury may be aggravated by subsequent occurrences, which may be regarded as continuations of the original wrongful act, and its immediate operation, and in a sense as incidents thereof.

The more consistent rule seems to be that a court of admiralty has jurisdiction when the negligent act or omission, wherever done or suffered, takes effect, and produces injury to the person or property of another, on navigable waters. In that case it would be unimportant where the breach of duty occurred, or where the physical injury was completed. Under such a rule the holdings against jurisdiction would be defensible in cases where articles hurled or discharged from a ship take effect and injure a person on shore, or where fire is communicated from the ship to the shore, or the ship itself comes in contact with persons or things on shore, or things unlawfully in the water interrupting navigation. And so as to holdings in favor of jurisdiction, where articles are cast or discharged from the land into the ship, thereby injuring it or persons or property thereon, or where the ship comes in contact, to its injury, with defective docks, or other things illegally interrupting navigation, or structure in or over the water in an unlawful condition. Such a rule would justify the decision in the cases cited, save, perhaps, that of The H. S. Pickands.

Let it be supposed that a man is on the deck of a vessel, and a cause arising on the shore — for instance, the moving boom of a derrick — strikes him, casting him to the land, where he receives added injury; would the admiralty be without jurisdiction? Suppose he is rigging a derrick on land, and, by a negligent act, is cast on a ship lying at the dock or in the water, and receives additional injury; would

this court have jurisdiction? It seems that both inquiries should be answered in the negative. So, in The H. S. Pickands Case, if it could be said that the injured man was on the ship, by being on the ship's ladder, and received any actionable injury thereon, this court would have jurisdiction, although the greater injury was received from contact with the dock. But the facts in that case are not sufficiently detailed to admit of accurate inquiry. It is said above that, in addition to the breach of duty, there must be an injurious effect from it upon the person or property of a person on the water, to give this court jurisdiction. What is injurious effect? If the libel showed that only injury entitling to nominal damages were received, it may be conceded that this court would not entertain jurisdiction; but it cannot be assumed that, when a person is thrown from a ladder, there would be nothing more of injury while falling than would be compensated by nominal damages.

In the present case it has been assumed that the libellant, while stepping on the ladder, was still on the ship; and if that inference be correct, then he received the effect of the wrongful act on the ship. The libel alleges neglect in fastening the ladder to the ship, and therefore it may be inferred that the breach of duty arose on an appliance of the ship. The libellant was thrown from the ladder, and it cannot be assumed that, through nervous shock or otherwise, he received no injury until he struck the dock. But even so, the whole wrongful agency was put in motion and took effect on the ship, and thereby the libellant was hurled from his position on the ship, and, before he reached the dock, was subjected to conditions inevitably resulting in physical injury, wherever he finally struck. Therefore, may it not be concluded that a cause of action arose before the physical injury had been completed? This question does not require present decision, and is reserved, as it may be inferred that the libellant received some personal injury before striking the dock, although, upon striking, his injury was enhanced. It is intended to be decided at this time that if the libellant received any physical injury before striking the dock, although the sum of his injuries were not complete until he did reach the dock, this court has jurisdiction. In reaching this conclusion the court has been limited by the meagre statement of facts in the libel. Upon the hearing of the merits, the facts may receive such modification or change as to demand, by the force of previous authority, a different holding. The exceptions should be overruled.[1]

[1] The Daylesford, 30 Fed. R. 633 *Accord.*
The H. S. Pickands, 42 Fed. R. 239 *Contra.*
See The Carolina, 30 Fed. R. 199. — Ed.

RUNDELL *v.* LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

IN THE CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, MARCH 22, 1900.

[*Reported in* 100 *Federal Reporter*, 655.]

APPEAL from the District Court of the United States for the Northern District of Illinois.

Charles A. Munroe, for appellant.

Gilbert E. Porter, for appellee.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

BUNN, District Judge. This is an appeal from a decree in admiralty dismissing a libel *in personam* for want of equity. 94 Fed. 366. The appellant, as administrator of the estate of Edwin R. Rundell, deceased, filed his bill in the district court to recover damages for the death of the deceased, for the use and benefit of a minor son. The libel sets forth that on July 2, 1898, Edwin R. Rundell, residing at Chicago, became a passenger on board the steamship La Bourgogne, being one of appellee's steamships, at the port of New York, and bound for the port of Havre, in France; that the ship set sail from New York on the 2d day of July, and so continued upon her voyage in the Atlantic Ocean until the 4th day of July, when it collided with a ship called the Cromartyshire, an English sailing vessel, and in the collision was sunk and wholly lost, and Rundell was killed by being drowned, wholly through the fault and improper navigation of the steamship by its officers and crew; that said steamship was upon said voyage being operated by the appellee, a corporation organized under the laws of France and a citizen of that country; that said steamship was sunk upon the high seas, in the Atlantic Ocean, about 60 miles south of Sable Island, beyond the territorial jurisdiction of any nation, but was at the time flying the French flag. The libel further avers that certain sections of the statute law of France, which are set forth *in hæc verba*, gave a legal representative a right of action for the death of his intestate occurring through the negligence of another; and that by the decisions of some of the courts of France (which are not identified or set forth) said statute law is held to extend to and operate upon all persons, whether citizens or aliens, upon the high seas, in vessels flying the French flag; and that under those statutes and decisions a right of action for the death of said deceased, enforceable in the district court, arose and exists in favor of the libellant; and prays judgment for the sum of $50,000.

We think there are two very substantial grounds upon which the decree of the district court should be sustained. The first is that it does not appear from the libel that the death of the deceased occurred upon the steamship La Bourgogne, the averments being merely that he lost his life by drowning, as a result of a collision and consequent sinking of the vessel; second, that in cases arising in tort upon the high seas the United States district court, sitting in admiralty, can not enforce the local law of France, even if in terms it applied to the case, which does not appear, but that such cases must be adjudged and governed by the general maritime and admiralty law as understood and administered by the United States courts.

As stated, there is no allegation that the deceased was drowned while upon the appellee's ship, and there can be no implication to that effect. The implication is rather the other way, as the pleading must be construed most strongly against the pleader. The acts of negligence which caused the sinking of the vessel were committed upon the vessel, but these would be *damnum absque injuria*, unless it also appear that the drowning of the deceased, which constitutes the real damage and injury, was also upon the vessel. The drowning would not be in any sense under the French flag, unless it was upon the sinking vessel. It will not be claimed that the jurisdiction of the flag extended upon the high seas beyond the limits of the ship flying it. To make the local law of France, therefore, of any possible application, it should appear by clear averment that the drowning took place upon the steamship. The libel nowhere states that the deceased came to his death while upon the Bourgogne. The averments are merely that he lost his life by drowning as a result of a collision and sinking of the vessel. The plain implication, therefore, is that he was drowned upon the high seas, apart from the vessel. At least, there is nothing to show to the contrary. The locus of the tort, therefore, which must always be determined by the place where the injury and damage arise, rather than where the negligent act is committed, must be considered as being upon the high seas, rather than upon French territory, supposing that the flying of the French flag made the vessel French territory while upon the high seas, as is claimed. The place where the death occurred and the damage arose must be held to be the *locus in quo*. The damage is the substance and consummation of the injury, and from that alone springs the right of recovery; The Plymouth, Leonard *v.* Decker,[1] The City of Lincoln,[2] City of Milwaukee *v.* Curtis,[3] The H. S. Pickands,[4] The Mary Garrett,[5] Hermann *v.* Mill Co.[6]

We think these cases abundant to show that if deceased came to his death, not in the vessel, but on the high seas outside the vessel, the local law of France, which it is only claimed extends to the vessel flying the French flag, can have no application to the case.

2. In regard to the second exception, that the libel is insufficient in law to enable the libellant to recover damages in an action of

[1] 22 Fed. 741. [2] 25 Fed. 835. [3] 37 Fed. 705.
[4] 42 Fed. 239. [5] 63 Fed. 1009. [6] Fed. 646.

tort for the death of the deceased occurring upon the high seas by reason of the negligence of the defendant, because the general maritime law, by which the admiralty court in this country is governed, allows of no recovery in such a case, we are of opinion that this exception was well taken, and that the decision of the district court was correct.[1]

The decree of the District Court is affirmed.

STEELE *v.* THACHER.

In the United States District Court, District of Maine, December Term, 1825.

[*Reported in* 1 *Ware*, 91.]

The libel alleged that in February last, Captain Thacher, master of brig Jane, at Portland, shipped John Smith Steele, the libellant's son, to go a voyage on the high seas from Portland to the West Indies; that in pursuance of this contract the said John went the voyage from Portland to Grenada, and was thus transported out of the State without the parent's consent, by which means he has lost the services and society of his son, etc.

Ware, District Judge.[2]

In this case the question as to the jurisdiction must be determined by the locality of the act, whether it was done on the high seas. The act, complained of by the libellant, is the shipping his son, a minor, at Portland, and transporting him to parts beyond the sea, to wit, to Grenada, in the West Indies, without his consent. The contract was made on shore; but the contract, admitting it to be illegal, does not constitute the tort. The execution of the contract is that in which the tort consists, and that was on the high seas. If it be said that it had its inception on land, and within the body of a country, the answer has been already given, that the English cases on this point are not held to be law in this country; but where the substance of the tort is committed on the high seas, when it there has its consummation, if it be all one continued act, the jurisdiction of the admiralty will attach to the whole matter, though part of it may have taken place on land and within the body of a country. This principle seems to be reasonable in itself, and in the mass of inconsistent and contradictory authorities with which the English books abound, on the subject of admiralty jurisdiction, we can find direct authority for it, though I will not contend that it stands uncontradicted. In Comyn's Digest, tit. Admiralty, F. 5, it is said, "If the libel be founded on a

[1] The opinion of the court has been abridged. — Ed.

[2] Only so much of the case is given as relates to the locality of the tort. The libel was dismissed for want of proof. — Ed.

single continued act which was principally on the sea, though part was on the land, a prohibition will not go." Such, precisely, is the present case. On the whole, I cannot bring my mind to doubt but that this court, sitting as a court of admiralty, has a clear and undoubted jurisdiction over the subject-matter of this allegation in the libel. I might have disposed of this part of the case by simply referring to the case of De Lovio *v.* Boit,[1] where the whole question of the admiralty jurisdiction is discussed with an ability and learning which leaves nothing to be added to the subject. But the objection was strongly urged by the counsel for the respondent, and as the point raised in this case was not before the court in judgment in that referred to, a respectful attention to the argument of the learned counsel required that it should be fairly examined.[2]

THE CORSAIR.

IN THE SUPREME COURT, UNITED STATES, MAY 16, 1892.

[*Reported in* 145 *United States Reports*, 335.]

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.[3]

This was a libel *in rem* against the tug Corsair, by the mother of one Ella Barton, to recover for the loss of her life in a collision alleged to have been occasioned by the negligence of those in charge of the tug. Exceptions to this libel were sustained, upon the ground that a suit *in rem* would not lie for injuries resulting in death; but leave was given to amend by proceeding *in personam* against the owners of the tug. Exceptions were also filed to the amended libel upon the ground that the amendment introduced a new party to the suit, and, as against such party, the year had elapsed within which, under the law, the action must be brought.

1. The decree of dismissal so far as it operated upon the amended libel, was proper for two reasons: First, the amendment to the original libel by introducing the owners of the tug as parties defendants was in violation of Admiralty Rule 15, providing that "in all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or owner alone *in personam*.

Second. If the so-called amended libel be considered as an independent libel against the owners *in personam*, then it is clearly defec-

[1] 2 Gall. 392.

[2] Plummer *v.* Webb, 4 Mas. 380 (*semble*); Sherwood *v.* Hall, 3 Sumn. 127; Tillmore *v.* Moore, 4 Fed. R. 231; The Dauntless, 7 Fed. R. 366 *Accord*.

To same effect are Barque Yankee *v.* Gallagher, McAllist. 467; The Florence, 2 Flip. 56. — ED.

[3] Only the opinion of the court on the question of jurisdiction is given. — ED.

tive in failing to aver that the respondents were the owners of the tug at the time of the accident.

2. An important question arises in connection with the dismissal of the original libel, which has never been squarely presented to this court before, and that is as to the power of the District Court to entertain a libel *in rem* for damages incurred by loss of life, where by the local law a right of action survives to the administrator or relatives of the deceased, but no lien is expressly created by the act. A similar question arose in the case of *Ex parte* Gordon,[1] where a writ of prohibition was applied for to enjoin the prosecution of an action *in rem* for loss of life; but the writ was denied upon the ground that the liability was within the jurisdiction of the District Court to decide, and any error it might commit in this particular could only be corrected by appeal. Subsequently in the case of The Harrisburg[2] it was held that in the absence of an act of Congress or a state statute giving a right of action therefor, a suit in admiralty could not be maintained to recover damages for the death of a human being, caused by negligence.[3] This was a mere application to the court of admiralty of a principle which had been announced by this court as applicable to courts of common law in Insurance Co. *v.* Brame.[4] The Harrisburg was a Pennsylvania vessel, and the collision occurred in the waters of Massachusetts, both of which States gave a remedy by civil action, with a proviso that such action should be brought within one year after the death; and while the question of the right to sue *in rem* for the recovery of such damages when an action at law had been given therefor by the state statute was presented in that case, it was not decided, since the suit was not begun until nearly five years after the death, and the case went off upon that ground.

Prior to this decision, a number of libels both *in rem* and *in personam* had been brought for loss of life in the courts of different districts, and, as a rule, the liability was held to exist, but the question whether such liability should be enforced *in rem* or *in personam* does not seem to have been discussed, except in the cases of The Sylvan Glen[5] and The Manhassett,[6] in one of which Judge Benedict, and in the other Judge Hughes, held, that, while the state statute created a right it did not create a lien, and that a libel *in rem* could not be maintained. Since the decision in the Harrisburg Case, that no libel can lie, except where a right to sue is given by a local statute, the

[1] 104 U. S. 515. [2] 119 U. S. 199.

[3] The Vera Cruz, 10 App. Cas. 59; The Alaska, 130 U. S. 201; The Sylvan Glen, 9 Fed. R. 335; The E. B. Ward, Jr., 16 Fed. R. 255 *Accord.*

The following cases and *dicta* to the contrary are overruled: Plummer *v.* Webb, 1 Ware, 75 (*semble*); Cutting *v.* Seabury, 1 Sprague, 522 (*semble*); The Sea Gull, Chase's Dec. 146; The Highland Light, Chase's Dec. 150; The City of Brussels, 6 Ben. 370; The Epsilon, 6 Ben. 378, 381 (*semble*); The Towanda, Fed. Cas. No. 14,109; The City of Houston, 17 Fed. R. 459 (cited); The Charles Morgan, 2 Flip. 274; The David Reeves, 5 Hughes, 89; Holmes *v.* O. & C. Co., 5 Fed. R. 75; The Garland, 5 Fed. R. 75; The E. B. Ward, Jr., 17 Fed. R. 456 (reversing s. c. 16 Fed. R. 255); The Manhassett, 18 Fed. R. 918, 19 Fed. R. 430; The E. B. Ward, Jr., 23 Fed. R. 900; The Columbian, 27 Fed. R. 704. — Ed.

[4] 95 U. S. 754. [5] 9 Fed. R. 335. [6] 18 Fed. R. 918.

question has been presented only in the case of The North Cambria,[1] in which Judge Butler adopted the views expressed in The Sylvan Glen and The Manhassett. In The Oregon,[2] a lien was given by the state statute and was enforced in the Admiralty.

A similar question under Lord Campbell's Act, allowing damages to be recovered "whensoever the death of a person shall be caused by wrongful act, neglect, or default," has been the subject of much discussion in the courts of England. By the Admiralty Court Act of 1861, sect. 7, jurisdiction was given to the High Court of Admiralty over "any claim for damage done by any ship," and by sect. 35 "the jurisdiction conferred by this act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*." Giving a construction to these provisions, it was held by Sir Robert Phillimore in 1867, in The Sylph,[3] that personal injuries were included by the words "damage done by a ship," and that proceedings *in rem* might be taken for damages occasioned by such injuries. In the subsequent case of The Guldfaxe,[4] the same rule was applied to a suit for damages instituted by the personal representatives of a seaman who had been killed in a collision. This was subsequently affirmed in The Explorer,[5] decided in 1870. The same question came before the Court of Queen's Bench upon an application for a writ of prohibition in the case of Smith *v.* Brown,[6] in 1871, wherein it was held that the word "damage" did not include loss of life and personal injury, and that the Admiralty Court Act conferred no jurisdiction upon the High Court of Admiralty to entertain a suit under Lord Campbell's Act. The judgment of the court in this case was delivered by Lord Chief Justice Cockburn, and concurred in with some doubt by Mr. Justice Blackburn. Notwithstanding this prohibition, however, the Court of Admiralty continued to assume jurisdiction of actions *in rem* brought by the personal representatives of a deceased person. This appears from the case of The Franconia,[7] Sir Robert Phillimore being of the opinion that he was bound by the case of The Beta,[8] in which the judicial committee of the Privy Council had held that the word "damage" referred to injuries to the person as well as to property. On appeal to the Court of Appeal, his judgment was affirmed by a divided court. The question was again raised before the Admiralty Division of the High Court of Justice, in the case of The Vera Cruz,[9] in which Mr. Justice Butt did not discuss the question, but held, in deference to the previous decisions of Dr. Phillimore, that an action *in rem* would lie by the widow and administratrix of the master of a British schooner against the Vera Cruz, and that the plaintiff should recover a moiety of the damage she had sustained, both vessels being adjudged to be in fault. On appeal the Court of Appeal, 9 Prob. Div. 96, held that it was not bound by its former decision by a divided court in the case of The Franconia, and reversed the judgment of the Admiralty Division.

[1] 40 Fed. R. 655. [2] 45 Fed. R. 62. [3] L. R. 2 Ad. & Ec. 24.
[4] L. R. 2 Ad. & Ec. 325. [5] L. R. 3 Ad. & Ec. 289. [6] L. R. 6 Q. B. 729.
[7] 2 Prob. Div. 163. [8] L. R. 2 P. C. 447. [9] 9 Prob. Div. 88.

The case was again appealed to the House of Lords, and the judgment of the court below was affirmed. 10 App. Cas. 59, 65, 66, 67, 73. Lord Chancellor Selborne in delivering the opinion held that the 35th section of the Admiralty Court Act above cited showed that "while an option to proceed *in rem* or *in personam* is given as to the jurisdiction conferred by the act, yet from the very nature of such an option every case provided for by the act is regarded as a proper case for a proceeding *in rem;* and accordingly the appellant, considering that the 7th section brought cases under Lord Campbell's Act within the purview of the Admiralty jurisdiction, justly upon that hypothesis held it to mean such actions as were capable of being brought by a proceeding like the present *in rem;* and if the action cannot be so brought, then I apprehend it will follow *ex converso* that the 7th section does not extend to this description of claim." "No one can say," said he, "that Lord Campbell's Act relates expressly to claims for damage done by ships; and this section in the act of 1861 relates to that and to nothing else. . . . Every word of that legislation" (Lord Campbell's Act) "being, as it appears to me, legislation for the general case, and not for particular injury by ships, points to a common law action, points to a personal liability, and a personal right to recover, and is absolutely at variance with the notion of a proceeding *in rem.*" Lord Watson concurring, said: "I entertain no doubt that a right of action such as is given by Lord Campbell's Act in a case like the present is not a 'claim for damage done by a ship' within the meaning of the 7th section of the Admiralty Court Act, 1861."

This is the last expression of the highest court of England upon the question of proceeding *in rem* under Lord Campbell's Act, and must be regarded as settling the law of that country that such jurisdiction is not conferred. That, notwithstanding this, an action *in personam* will lie in the Admiralty Division is evident from the case of The Bernina,[1] in which the Admiralty took cognizance of the case, and upon appeal to the Court of Appeal, 12 Prob. Div. 58, and subsequently to the House of Lords, 13 App. Cas. 1, the jurisdiction was sustained, a trial by jury being now permitted in that court, although the main question discussed was as to the principle involved in the case of Thorogood *v.* Bryan,[2] which was overruled. While these cases turn upon the construction of the English acts, the courts have been guided in such construction by principles which are of general application both in this country and in England.

A maritime lien is said by writers upon maritime law to be the foundation of every proceeding *in rem* in the Admiralty. In much the larger class of cases, the lien is given by the general Admiralty law, but in other instances, such for example as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel, the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a

[1] 11 Prob. Div. 31. [2] 8 C. B. 115.

lien upon the offending thing. If it merely gives a right of action *in personam* for a cause of action of a maritime nature, the District Court may administer the law by proceedings *in personam*,[1] as was done with a claim for half pilotage dues under the law of New York, in the case of *Ex parte* McNiel,[2] but unless a lien be given by the local law, there is no lien to enforce by proceedings *in rem* in the Court of Admiralty.[3]

The Louisiana act declares, in substance, that the right of action for every act of negligence, which causes damage to another, shall survive, in case of death, in favor of the minor children or widow of the deceased; and in default of these, in favor of the surviving father and mother, and that such survivors may also recover the damages sustained by them by the death of the parent, child, husband, or wife. Evidently nothing more is here contemplated than an ordinary action according to the course of the law as it is administered in Louisiana. There is no intimation of a lien or privilege upon the offending thing, which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed *in rem*.

3. We do not find it necessary to express an opinion whether a libel *in rem* will lie for injuries suffered by the deceased before her death, a right of action for which passes to the immediate relatives, under the Louisiana statute, since there is no proper averment in the libel to show that such damages were suffered. It is true that the seventh paragraph alleges that from the time the "tug struck the bank of the river to the time she sunk," (about ten minutes,) "and the said Ella Barton was drowned, she, said Ella Barton, suffered great mental and physical pains and shock, and endured the tortures and agonies of death." But there is no averment from which we can gather that these pains and sufferings were not substantially contemporaneous with her death and inseparable as matter of law from it. Kearney *v.* Boston & Worcester Railroad,[4] Hollenbeck *v.* Berkshire Railroad Co.,[5] Kennedy *v.* Standard Sugar Refinery,[6] Moran *v.* Hollings.[7] Had she suffered bodily wounds and bruises, from the result of which she lingered and ultimately died, it is possible that her sufferings during her illness would give a separate cause of action; but the very fact

[1] Holmes *v.* O. & C. Co., 5 Fed. R. 75; *In re* Long Island Co., 5 Fed. R. 599; The Sylvan Glen, 9 Fed. R. 335; Grimsley *v.* Hawkins, 46 Fed. R. 400; The City of Norwalk, 55 Fed. R. 98, affirmed in 61 Fed. R. 364; *In re* Humboldt Ass'n, 60 Fed. R. 428, 73 Fed. R. 239; The Oceanic, 61 Fed. R. 338, affirmed in 74 Fed. R. 261; Bigelow *v.* Nickerson, 70 Fed. R. 113; The Jane Grey, 95 Fed. R. 693 *Accord*.

[2] 13 Wall. 236.

[3] The Sylvan Glen, 9 Fed. R. 335; The Manhassett, 18 Fed. R. 908 *Accord*.

The following cases *contra* are overruled: The Garland, 5 Fed. R. 924; *In re* Long Island Co., 5 Fed. R. 599 (*semble*); The Clatsop Chief, 8 Fed. R. 163.

If for a tort causing death, a lien is given by the statute of the State within whose territory the tort was committed, or, by the statute of the State in which the offending vessel was domiciled, in case the tort was committed on the high seas, the Admiralty courts may entertain a proceeding *in rem*. The Oregon, 45 Fed. R. 62; The St. Nicholas, 49 Fed. R. 671, 677; The Willamette, 70 Fed. R. 874 (affirming s. c. 59 Fed. R. 800); The Oregon, 73 Fed. R. 846; Laidlaw *v.* Oreg. Co., 81 Fed. R. 876, 879; McRae *v.* Bowers Co., 86 Fed. R. 344, 350.

[4] 9 Cush. 108. [5] 9 Cush. 478. [6] 125 Mass. 90. [7] 125 Mass. 93.

that she died by drowning indicates that her sufferings must have been brief, and, in law, a mere incident to her death. Her fright for a few minutes is too unsubstantial a basis for a separate estimation of damages.

The decree of the court below is, therefore,

Affirmed.

A. BARNETT *v.* D. B. LUTHER.

IN THE CIRCUIT COURT, UNITED STATES, OCTOBER TERM, 1853.

[*Reported in* 1 *Curtis*, 434.]

CURTIS, J.[1] It appears, from the evidence in this case, that the libellant had been engaged in painting the mizzen-mast head, and when he came down to dinner, left the paint-pot so carelessly secured, that by the motion of the vessel the paint was thrown down on the house. The master ordered the man to be called from the forecastle; and when he came on deck, the mate ordered him to go aloft and take his paint-pot down. The man went; but as he passed aft, he used insolent language towards the officers, who were all on deck. The master ordered him to be silent, and told him he would flog him if he did not obey; but he continued to grumble, as the witness expresses it, until he came down to the deck, and then he passed over to the weather side, where the master was standing, and stopped near him, looking at him, as the only witness who describes the occurrence says, with an insolent look. The master took the top-gallant brace, and struck him with the end of it over the shoulder; the man instantly seized the master, and they fell together on the deck. The man put his hand back, as if feeling for his sheath-knife; but he had left it below. The second mate then interfered; the master got up, the man rose to his feet, and immediately struck the second mate, who returned the blow; they seized each other, the second mate threw him down, and while down, struck him once or twice in the face. The man was then put in irons until the next morning, but not deprived of his food. The next day he was set at liberty.

This case has been argued upon the ground that a technical assault by the master is made out by the evidence; and that, since the Act of Congress of September 28, 1850 (9 Stat. at Large, 515), abolishing the punishment of flogging in the navy and in vessels of commerce, the master cannot justify his act of striking the seaman, even though his insolence deserved punishment. And it was stated by the counsel for the libellant, that this appeal had been brought here to try that question.

To determine what is the precise effect of this Act of Congress upon the authority of the master of a vessel to inflict punishment

[1] Only the opinion of the court is given. — ED.

upon the crew is a matter of no small difficulty, and of very great importance. It is a question which should be settled only after great consideration, when it shall become necessary to do so. This case does require it. For if it were admitted that in an action at law this seaman could recover nominal damages for the blow inflicted by the master, it does not follow that the admiralty will award him nominal damages. A court of admiralty is a court of equity acting on marine affairs. As such, it regards and protects only substantial rights. Merely nominal claims, which do not amount to any substantial right, and are not so connected with any substantial right as to be necessary to its vindication, are not subjects of relief here. It is true that a claim for nominal damages may be so connected with a substantial right, as to present the only means of trying and vindicating it. And in such a case, though the damages are nominal, the subject-matter of the suit may be important, and a fit subject of litigation. Cases in which, by acquiescence for a length of time, an adverse right may be gained, are of this description. And at the common law, the prevailing party having a legal right to costs, which is of itself a substantial right, it is necessary to decide claims to nominal damages upon strict legal principles, even where nothing but a question of costs is involved. But in the admiralty the costs are in the discretion of the court, and do not depend upon the question whether the libellant recovers one dollar or nothing.

In this case, the libellant was, throughout, in the wrong. He was negligent, in not properly securing the paint-pot. He was grossly in fault for his insolence to the master, and his disobedience of his order to be silent; and still more for confining the master, and striking the second officer. He amply deserved quite as much punishment as he received. And if, which I do not intend to decide, there was a departure by the master from the strict line of his authority, when he struck the libellant with a rope, the provocation was so great, the blow so slight, and the conduct of the libellant so insubordinate and violent, that he could in no event recover more than nominal damages. These, for the reasons already suggested, I do not feel bound to award to him.

The decree of the District Court is affirmed.

ISAAC WORTMAN *v.* WALTER S. GRIFFITH AND ANOTHER.

IN THE UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK, SEPTEMBER, 1856.

[*Reported in* 3 *Blatchford*, 528.]

NELSON, J.[1] The libellant is the owner of a shipyard, together with apparatus, consisting of a railway-cradle and other fixtures and

[1] Only the opinion of the court is given. — ED.

implements, used for the purpose of hauling up vessels out of the water, and sustaining them while they are being repaired. Certain rates of compensation are charged, regulated by the tonnage of the vessel, for hauling her up on the ways, and a *per diem* charge is made for the time occupied while she is under repair, in cases where the owner of the yard and apparatus is not employed to do the work, but the repairs are made by other shipmasters, as in the present instance.

The main controversy in the court below related to the terms upon which the service was to be rendered. Judge Hall, who heard the case, settled the amount, upon his view of the evidence, at $631.97, and I am not disposed to interfere with his conclusion. The proofs are conflicting, and not very clear either way in respect to the agreement.

The doubt I have had in the case is upon the objection raised to the jurisdiction of the court — a point not taken in the court below. It is claimed by the counsel for the respondents, that the agreement for the service rendered is to be regarded simply as a hiring of the yard and apparatus; and, certainly, if this be the true character of the transaction, there would be great difficulty in upholding the jurisdiction. On the other side, it is contended that the service rendered was a service in the repairs of the vessel, and was as much a part of them as the work of the shipmaster, or the materials furnished by him.

There can be no doubt, that in cases where the shipmaster owning the shipyard and apparatus is employed to make the repairs, the service in question enters into and becomes part of the contract, and is thus the appropriate subject of admiralty jurisdiction. And the question is, whether any well-founded distinction exists between a transaction of that character and the present one. The owner of the yard and apparatus, together with his hands, superintends and conducts the operation of raising and lowering the vessel, and also of fixing her upon the ways, preparatory to the repairs. The service requires skill and experience in the business, and is essential in the process of repair. I do not go into the question whether this is a contract made, or a service rendered, on the land or on the water. It undoubtedly partakes of both characters. But, I am free to confess, I have not much respect for this and other like distinctions that have sometimes been resorted to, for the purpose of ascertaining when the admiralty has, and when it has not, jurisdiction. The nature and character of the contract and of the service have always appeared to me to be sounder guides for determining the question.

Although a distinction may be made between this case, in the aspect presented, and the case where the shipmaster is employed to make the repairs, I am inclined to think that it is not a substantial one, and that, to adopt it, would be yielding to a refinement which I am always reluctant to incorporate into judicial proceedings. A dis-

tinction, to be practical, should be one of substance, and one which strikes the common sense as founded in reason and justice.

I must, therefore, overrule the point of jurisdiction, and

Affirm the decree.[1]

INSURANCE CO. *v.* DUNHAM.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1870.

[*Reported in* 11 *Wallace*, 1.]

MR. JUSTICE BRADLEY delivered the opinion of the court.[2]

The case presents the question whether the District Court for the District of Massachusetts, sitting in admiralty, has jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover for a loss.

This precise question has never been decided by this court. But, in our view, several decisions have been made which determine the principle on which the case depends. The general jurisdiction of the District Courts in admiralty and maritime cases has been heretofore so fully discussed that it is only necessary to refer to them very briefly on this occasion.

The Constitution declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," without defining the limits of that jurisdiction. Congress, by the Judiciary Act passed at its first session, 24th of September, 1789, established the District Courts, and conferred upon them, among other things, "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction."

As far as regards civil cases, therefore, the jurisdiction of these courts was thus made coextensive with the constitutional gift of judicial power on this subject.

Much controversy has arisen with regard to the extent of this jurisdiction. It is well known that in England great jealousy of the admiralty was long exhibited by the courts of common law.

The admiralty courts were originally established in that and other maritime countries of Europe for the protection of commerce and the

[1] The Vidal Sala, 12 Fed. R. 207; The Scotia, 35 Fed. R. 916, 917 *Accord*.

The decision to the contrary in Ransom *v.* Mayo, 3 Blatchf. 70, affirming s. c. Fed. Cas. No. 11,571 a, may be regarded as overruled. Bradley *v.* Bolles, Abb. Adm. 569, in which case a contract to scrape the bottom of a vessel, preparatory to coppering her, was held to be non-maritime, is discredited by LOWELL, J., in the George T. Kemp, *infra*, p. 52, and by ERSKINE, J., in the Vidal Sala, 12 Fed. R. 207, 211.

Admiralty has jurisdiction of claims for REPAIRS, SUPPLIES, and MATERIALS for a ship. The New Jersey, 1 Pet. Adm. 223, 227; The Sandwich, 1 Pet. Adm. 233; The Jerusalem, 2 Gall. 345; The President, 4 Wash. C. C. 453; The Robert Fulton, Paine, 620; The Thomas Scattergood, Gilp. 1; A New Brig, Gilp. 473; Davis *v.* Child, 2 Ware, 7; The Elektron, 48 Fed. R. 689 (libel for breach of contract to furnish supplies).

[2] Only so much of the opinion of the court as relates to the question of jurisdiction is given. — ED.

administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world. Its system of procedure has been established for ages, and is essentially founded, as we have said, on the civil law; and this is probably one reason why so much hostility was exhibited against the admiralty by the courts of common law, and why its jurisdiction was so much more crippled and restricted in England than in any other state. In all other countries bordering on the Mediterranean or the Atlantic the marine courts, whether under the name of admiralty courts or otherwise, are generally invested with jurisdiction of all matters arising in marine commerce, as well as other marine matters of public concern, such as crimes committed on the sea, captures, and even naval affairs. But in England, partly under strained constructions of parliamentary enactments and partly from assumptions of public policy, the common law courts succeeded in establishing the general rule that the jurisdiction of the admiralty was confined to the *high* seas and entirely excluded from transactions arising on waters within the body of a county, such as rivers, inlets, and arms of the sea as far out as the naked eye could discern objects from shore to shore, as well as from transactions arising on the land, though relating to marine affairs.

With respect to contracts, this criterion of locality was carried so far that, with the exception of the cases of seamen's wages and bottomry bonds, no contract was allowed to be prosecuted in the admiralty unless it was made upon the sea, and was to be executed upon the sea; and even then it must not be under seal.

Of course, under such a construction of the admiralty jurisdiction, a policy of insurance executed on land would be excluded from it.

But this narrow view has not prevailed here. This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England. "Its boundary," says Chief Justice Taney,[1] "is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the Federal government." "Courts of admiralty," says the same judge in another case,[2] "have been found necessary in all commercial

[1] The Steamer St. Lawrence, 1 Black, 527. [2] The Genesee Chief, 12 Howard, 454.

countries, not only for the safety and convenience of commerce, and the speedy decision of controversies where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes and the great navigable streams which flow through the Western States."

In accordance with this more enlarged view of the subject, several results have been arrived at widely differing from the long-established rules of the English courts.

First, as to the *locus* or territory of maritime jurisdiction; that is, the place or territory *where* the law maritime prevails, where torts must be committed, and where business must be transacted, in order to be maritime in their character; a long train of decisions has settled that it extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether landlocked or open, salt or fresh, tide or no tide. "Are we bound to say," — says Justice Wayne, delivering the opinion of the court in Waring *v.* Clarke,[1] — "are we bound to say, because it has been so said by the common law courts of England in reference to the point under discussion, that *sea* always means *high sea* or *main sea?* . . . Is there not a surer foundation for a correct ascertainment of the locality of marine jurisdiction in the general admiralty law than the designation of it by the common law courts? . . . We think, in the controversy between the courts of admiralty and common law upon the subject of jurisdiction, that the former have the best of the argument; that they maintain the jurisdiction for which they contend with more learning, more directness of purpose, and without any of that verbal subtilty which is found in the arguments of their adversaries."

It was a long time, however, before the full extent of the admiralty jurisdiction was firmly established. The Judiciary Act expressly extended it to seizures, under laws of impost, navigation, or trade of the United States, where made on waters navigable from the sea by vessels of ten or more tons burden as well as upon the high seas, thus at once ignoring the English rule; but for some time it was held that the jurisdiction could not go further, and that this grant was confined to tide-waters. But in the case of The Genesee Chief,[2] decided in 1851, it was expressly adjudged that tide was no criterion of admiralty jurisdiction in this country; that it extended to our great internal lakes and navigable rivers as well as to tide-waters. "It is evident," says Chief Justice Taney,[3] "that a definition which would at this day limit public rivers in this country to tide-water rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tide-

[1] 5 Howard, 462. [2] 12 Howard, 443. [3] Id. 457.

water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. The lakes and the waters connecting them are undoubtedly public waters, and, we think, are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." This judgment has been followed by several cases since decided, and the point must be considered as no longer open for discussion in this court.

Secondly, as to *contracts*, it has been equally well settled that the English rule which concedes jurisdiction, with a few exceptions, only to contracts made upon the sea and to be executed thereon (making *locality* the test) is entirely inadmissible, and that the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions. Even in England the courts felt compelled to rely on this criterion in order to sustain the admiralty jurisdiction over bottomry bonds, although it involved an inconsistency with their rules in almost every other case. In Menetone *v.* Gibbons,[1] Lord Kenyon makes this sensible remark: "If the admiralty has jurisdiction over the subject-matter, to say that it is necessary for the parties to go upon the sea to execute the instrument, borders upon absurdity." In that case there happened to be a seal on the bond, of which a strong point was made. Justice Buller answered it thus: "The form of the bottomry bond does not vary the jurisdiction; the question whether the court of admiralty has or has not jurisdiction depends on *the subject-matter*." Had these views actuated the common law courts at an earlier day it would have led to a much sounder rule as to the limits of admiralty jurisdiction than was adopted. In this court, in the case of The New Jersey Navigation Company *v.* Merchants' Bank,[2] which was a libel *in personam* against the company on a contract of affreightment to recover for the loss of specie by the burning of the steamer Lexington on Long Island Sound, Justice Nelson, delivering the opinion of the court, says:[3] "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship. . . . On looking into the several cases in admiralty which have come before this court, and in which its jurisdiction was involved, it will be found that the inquiry has been, not into the jurisdiction of the court of admiralty in England, but into the nature and subject-matter of the contract, whether it was a maritime contract, and the service a maritime service, to be performed upon the sea or upon waters within the ebb and flow of the tide." [The last distinction based on tide, as we have seen, has since been abrogated.] Jurisdiction in that case was sustained by this court, as it had previously been in cases of suits by ship-carpenters and materialmen on contracts for repairs, materials, and supplies, and by pilots for pilotage: in none of which would it have been allowed to the admiralty courts in England.[4] In the subsequent case of Morewood *v.*

[1] 3 Term, 269; [2] 6 Howard, 344. [3] Ib. 392.
[4] See cases cited by Justice Nelson, 6 Howard, 390, 391.

Enequist,[1] decided in 1859, which was a case of charter-party and affreightment, Justice Grier, who had dissented in the case of The Lexington, but who seems to have changed his views on the whole subject, delivered the opinion of the court, and, amongst other things, said: "Counsel have expended much learning and ingenuity in an attempt to demonstrate that a court of admiralty in this country, like those of England, has no jurisdiction over contracts of charter-party or affreightment. They do not seem to deny that these are maritime contracts, according to any correct definition of the terms, but rather require us to abandon our whole course of decision on this subject and return to the fluctuating decisions of English common law judges, which, it has been truly said, 'are founded on no uniform principle, and exhibit illiberal jealousy and narrow prejudice.'" He adds that the court did not feel disposed to be again drawn into the discussion; that the subject had been thoroughly investigated in the case of The Lexington, and that they had then decided "that charter-parties and contracts of affreightment were 'maritime contracts,' within the true meaning and construction of the Constitution and act of Congress, and cognizable in courts of admiralty by process either *in rem* or *in personam*." The case of The People's Ferry Co. *v.* Beer,[2] being pressed upon the court, in which it had been adjudged that a contract for building a vessel was not within the admiralty jurisdiction, being a contract *made* on land and to be *performed* on land, Justice Grier remarked: "The court decided in that case that a contract to build a ship is *not a maritime contract;* but he intimated that the opinion in that case must be construed in connection with the precise question before the court; in other words, that the effect of that decision was not to be extended by implication to other cases."

In the case of The Moses Taylor,[3] it was decided that a contract to carry passengers by sea as well as a contract to carry goods, was a maritime contract and cognizable in admiralty, although a small part of the transportation was by land, the principal portion being by water. In a late case of affreightment, that of The Belfast,[4] it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were not the subject of interstate commerce. But as the transportation was on a navigable river, the court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford, delivering the opinion of the court, says:[5] "Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality."

It thus appears that in each case the decision of the court and the

[1] 23 Howard, 493. [2] 20 Ib. 401. [3] 4 Wallace, 411.
[4] 7 Wallace, 624. [5] 7 Ib. 637.

reasoning on which it was founded have been based upon the fundamental inquiry whether the contract was or was not a *maritime contract*. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the *subject-matter* of the contract. If that was maritime the contract was maritime. This may be regarded as the established doctrine of the court.

The subject could be very copiously illustrated by reference to the decisions of the various District and Circuit Courts. But it is unnecessary. The authoritative decisions of this court have settled the general rule, and all that remains to be done is to apply the law to each case as it arises.

It only remains, then, to inquire whether the contract of marine insurance, as set forth in the present case, is or is not a maritime contract.

It is objected that it is not a maritime contract because it is made on the land and is to be performed (by payment of the loss) on the land, and is, therefore, entirely a common law transaction. This objection would equally apply to bottomry and respondentia loans, which are also usually made on the land and are to be paid on the land. But in both cases payment is made to depend on a maritime risk; in the one case upon the loss of the ship or goods, and in the other upon their safe arrival at their destination. So the contract of affreightment is also made on land, and is to be performed on the land by the delivery of the goods and payment of the freight. It is true that in the latter case a maritime service is to be performed in the transportation of the goods. But if we carefully analyze the contract of insurance we shall find that, in effect, it is a contract, or guaranty, on the part of the insurer, that the ship or goods shall pass safely over the sea, and through its storms and its many casualties, to the port of its destination; and if they do not pass safely, but meet with disaster from any of the misadventures insured against, the insurer will pay the loss sustained. So in the contract of affreightment, the master guarantees that the goods shall be safely transported (dangers of the seas excepted) from the port of shipment to the port of delivery, and there delivered. The contract of the one guarantees against loss from the dangers of the sea, the contract of the other against loss from all other dangers. Of course these contracts do not always run precisely parallel to each other, as now stated; special terms are inserted in each at the option of the parties. But this statement shows the general nature of the two contracts. And how a fair mind can discern any substantial distinction between them on the question whether they are or are not, maritime contracts, is difficult to imagine. The object of the two contracts is, in the one case, maritime service, and in the other maritime casualties.

And then the contract of insurance, and the rights of the parties arising therefrom, are affected by and mixed up with all the questions that can arise in maritime commerce, — jettison, abandonment, average, salvage, capture, prize, bottomry, etc.

Perhaps the best criterion of the maritime character of a contract is the system of law from which it arises and by which it is governed. And it is well known that the contract of insurance sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law; and the common law remedies, when applied to it, were so inadequate and clumsy that disputes arising out of the contract were generally left to arbitration, until the year A. D. 1601, when the statute of 43 Elizabeth was passed creating a special court, or commission, for hearing and determining causes arising on policies of insurance. The preamble to that act, after mentioning the great benefit arising to commerce by the use of policies of insurance, has this singular statement: "And whereas, heretofore such assurers have used to stand so justly and precisely upon their credits as few or no controversies have arisen thereupon, and if any have grown the same have, from time to time, been ended and ordered by certain grave and discreet merchants appointed by the lord mayor of the city of London, as men, by reason of their experience, fittest to understand and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their moneys of every several assurer by suits commenced in her majesty's courts, to their great charges and delays." The commission created by this act was to be directed to the judge of the admiralty for the time being, the recorder of London, two doctors of the civil law, and two common lawyers, and eight grave and discreet merchants. The act was thus an acknowledgment of the jurisdiction to which the case properly belonged. Had it not been for the jealousy exhibited by the common law courts against the court of admiralty, in prohibiting its cognizance of policies of insurance half a century before,[1] the latter court, as the natural and proper tribunal for determining all maritime causes, would have furnished a remedy at once easy, expeditious, and adequate. It was only after the common law, under the influence of Lord Mansfield and other judges of enlightened views, had imported into itself the various provisions of the law maritime relating to insurance, that the courts at Westminster Hall began to furnish satisfactory relief to suitors. And even then, as remarked by Sir W. D. Evans, "the inadequacy of the existing law to settle, *proprio vigore*, complicated questions of average and contribution, is very manifest and notorious. Such questions are, by consent, as matter of course, and from conviction of counsel that justice cannot be attained in any other way, referred to private examination; but a law can hardly be considered as perfect which is not possessed of adequate powers within itself to complete its purpose, and which requires the extrinsic aid of personal consent."[2] The contrivances to which Lord Mansfield resorted to remedy in a measure these difficulties are stated by Mr. Justice Park, in the introduction to his work on insurance.

[1] 4 Institutes, 139.

[2] Evans's Statutes, vol. ii. p. 226, 3d ed.

These facts go to show, demonstrably, that the contract of marine insurance is an exotic in the common law. And we know the fact, historically, that its first appearance in any code or system of laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime laws of the ancient Rhodians. By this law, if either ship, freight, or cargo was sacrificed to save the others, all had to contribute their proportionate share of the loss. This division of loss naturally suggested a previsional division of risk; first, amongst those engaged in the same enterprise; and, next, amongst associations of ship-owners and shipping merchants. Hence it is found that the earliest form of the contract of insurance was that of mutual insurance, which, according to Pardessus, dates back to the tenth century, if not earlier, and in Italy and Portugal was made obligatory. By a regulation of the latter kingdom, made in the fourteenth century, every ship-owner and merchant in Lisbon and Oporto was bound to contribute two per cent. of the profits of each voyage to a common fund from which to pay losses whenever they should occur.[1] The next step in the system was that of insurance upon premium. Capitalists, familiar with the risks of navigation, were found willing to guaranty against them for a small consideration or premium paid. This, the final form of the contract, was in use as early as the beginning of the fourteenth century,[2] and the tradition is, that it was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities. Express regulations respecting the contract, however, do not appear in any code or compilation of laws earlier than the commencement of the fifteenth century. The earliest which Pardessus was able to find were those contained in the Ordinances of Barcelona, A. D. 1435; of Venice, A. D. 1468; of Florence, A. D. 1523; of Antwerp, A. D. 1537, etc.[3] Distinct traces of earlier regulations are found, but the ordinances themselves are not extant. In the more elaborate monuments of maritime law which appeared in the sixteenth and seventeenth centuries, the contract of insurance occupies a large space. The *Guidon de la Mer*, which appeared at Rouen at the close of the sixteenth century, was an elaborate treatise on the subject; but, in its discussion, the principles of every other maritime contract were explained. In the celebrated marine ordinance of Louis XIV., issued in 1681, it forms the subject of one of the principal titles.[4] As is well known, it has always formed a part of the Scotch maritime law.

Suffice it to say, that in every maritime code of Europe, unless England is excepted, marine insurance constitutes one of the principal heads. It is treated in nearly every one of those collected by Par-

[1] 2 Pardessus, Lois Maritimes, 369; 6 id. 303.
[2] Id. vol. ii. pp. 369, 370; vol. iv. p. 566; vol. v. pp. 331, 493.
[3] Id. vol. v. pp. 493, 65; vol. iv. pp. 598, 87.
[4] Lib. 3, title 6.

dessus, except the more ancient ones, which were compiled before the contract had assumed its place in written law. It is, in fact, a part of the general maritime law of the world; slightly modified, it is true, in each country, according to the circumstances or genius of the people. Can stronger proof be presented that the contract is a maritime contract?

But an additional argument is found in the fact that in all other countries except England, even in Scotland, suits and controversies arising upon the contract of marine insurance are within the jurisdiction of the admiralty or other marine courts.[1] The French Ordinance of 1681 touching the Marine, in enumerating the cases subject to the jurisdiction of the judges of admiralty, expressly mentions those arising upon policies of assurance, and concludes with this broad language: "And generally all contracts concerning the commerce of the sea."[2] The Italian writer, Roccus, says: "These subjects of insurance and disputes relative to ships are to be decided according to maritime law, and the usages and customs of the sea are to be respected. The proceedings are to be according to the forms of maritime courts and the rules and the principles laid down in the book called 'The Consulate of the Sea,' printed at Barcelona in the year 1592."[3]

It is also clear that, originally, the English admiralty had jurisdiction of this as well as of other maritime contracts. It is expressly included in the commissions of the admiral.[4] Dr. Browne says: "The cognizance of policies of insurance was of old claimed by the Court of Admiralty, in which they had the great advantage attending all their proceedings as to the examination of witnesses beyond the seas or speedily going out of the kingdom."[5] But the intolerance of the common law courts prohibited the exercise of it. In the early case of Crane *v.* Bell, 38 Hen. VIII, A. D. 1546, a prohibition was granted for this purpose.[6] Mr. Browne says, very pertinently: "What is the *rationale*, and what the true principle which ought to govern this question; viz., What contracts should be cognizable in admiralty? Is it not this? All contracts which relate purely to maritime affairs, the natural, short, and easy method of enforcing which is found in the admiralty proceedings."[7]

Another consideration bearing directly on this question is the fact that the commissions in admiralty issued to our colonial governors and admiralty judges, prior to the Revolution, which may be fairly supposed to have been in the minds of the Convention which framed the Constitution, contained either express jurisdiction over policies of insurance or such general jurisdiction over maritime contracts as to embrace them.[8]

The discussions that have taken place in the District and Circuit Courts of the United States have not been adverted to. Many of

[1] See Benedict's Admiralty, § 294, ed. 1870.
[2] Sea Laws, 256.
[3] Roccus on Insurance, note 80.
[4] Benedict, § 48.
[5] 2 Browne's Civil and Admiralty Law, 82.
[6] See 4 Institutes, 139.
[7] 2 Civil and Admiralty Law, 88.
[8] Benedict, chap. ix.

them are characterized by much learning and research. The learned and exhaustive opinion of Justice Story, in the case of De Lovio *v.* Boit,[1] affirming the admiralty jurisdiction over policies of marine insurance, has never been answered, and will always stand as a monument of his great erudition. That case was decided in 1815. It has been followed in several other cases in the first circuit.[2] In 1842 Justice Story, in reaffirming his first judgment, says that he had reason to believe that Chief Justice Marshall and Justice Washington were prepared to maintain the jurisdiction. What the opinion of the other judges was he did not know.[3] Doubts as to the jurisdiction have occasionally been expressed by other judges. But we are of opinion that the conclusion of Justice Story was correct.

The answer of the court, therefore, to the question propounded by the Circuit Court will be, that the District Court for the District of Massachusetts, sitting in admiralty, HAS JURISDICTION to entertain the libel in this case.[4]

Answer accordingly.

[1] 2 Gallison, 398. [2] Gloucester Insurance Co. *v.* Younger, 2 Curtis, 332, 333.

[3] Hale *v.* Washington Insurance Co., 2 Story, 183.

[4] De Lovio *v.* Boit, 2 Gall. 398; The Gold Hunter, Bl. & How. 300, 303; Insurance Co. *v.* Younger, 2 Curt. 332; Hale *v.* Insurance Co., 2 Story, 183; The Guiding Star, 9 Fed. R. 521, 18 Fed. R. 263 *Accord.*

A court of admiralty has no jurisdiction of an action for fraudulent representations which induced the libellant to accept a policy of insurance not covering the intended risk. Williams *v.* Providence Co., 56 Fed. R. 159.

The following are illustrations of maritime contracts and services within the admiralty jurisdiction: —

CHARTER-PARTIES: — The Tribune, 3 Sumn. 144; The Freight Cargo, 1 Ware, 149; The Gold Hunter, Bl. & How. 300, 303; Oakes *v.* Richardson, 2 Low. 173; Maury *v.* Culliford, 10 Fed. R. 388; The Fifeshire, 11 Fed. R. 743; The Monte A., 12 Fed. R. 331; The Alberto, 24 Fed. R. 379; The Baracoa, 44 Fed. R. 102; The E. D. Merritt, 57 Fed. R. 254.

TRANSPORTATION OF GOODS: — New Jersey Co. *v.* Merch. Bank, 6 How. 344; Morewood *v.* Enequist, 23 How. 491; The Gold Hunter, Bl. & How. 300; The H. M. Wright, Newb. 494; Monteith *v.* Kirkpatrick, 3 Blatchf. 279; Vose *v.* Allen, 3 Blatchf. 289; The Hardy, 1 Dill. 460; 227 Tons of Coal, 4 Fed. R. 478; The Queen of the Pacific, 61 Fed. R. 213.

CARRIAGE OF PASSENGERS: — The Moses Taylor, 4 Wall. 411; The H. M. Wright, Newb. 494; The Aberfoyle, 1 Blatchf. 360; The Pacific, 1 Blatchf. 587; Cobb *v.* Howard, 3 Blatchf. 524.

BOTTOMRY AND RESPONDENTIA CONTRACTS: — Benzen *v.* Jeffries, 1 Ld. Ray. 152; The Barbara, 4 Rob. 1; The Atlas, 2 Hagg. 48; Corish *v.* Murphy, 2 Bro. Civ. & Adm. Law, 530, App.; The Virgin, 8 Pet. 538; Wilmer *v.* Smilax, 2 Pet. Adm. 295, n.; The Sloop Mary, 1 Paine, 671; Franklin Co. *v.* Lord, 4 Mas. 248, 253; The Draco, 2 Sumn. 157 (discrediting The Ship John, 1 Wash. C. C. 293). But see The Brig Attila, Crabbe, 326.

CONSORTSHIP: — Andrews *v.* Wall. 3 How. 568.

DEMURRAGE: — Certain Tons of Coal, 34 Fed. R. 913; Empire Co. *v.* Phila. Co., 77 Fed. R. 919, 70 Fed. R. 268; Wood *v.* Keyser, 84 Fed. R. 688.

PILOTAGE: — Hobart *v.* Dorgan, 10 Pet. 108; *Ex parte* McNiel, 13 Wall. 236; *Ex parte* Hagar, 104 U. S. 520 (half-pilotage); The New Jersey, 1 Pet. Adm. 223, 227; The Anne, 1 Mas. 508; The Wave, Bl. & How. 235; The Robert Mercer, 1 Sprague, 284; The America, 1 Low. 176; The Alaska, 3 Ben. 391; Banta *v.* McNeil, 5 Ben. 74.

RANSOM: — Maisonnaire *v.* Keating, 2 Gall. 325, 340–342.

SALVAGE: — The North Carolina, 15 Pet. 40; The Wave, Bl. & How. 235; The Roanoke, 50 Fed. R. 574; McMullin *v.* Blackburn, 59 Fed. R. 177.

SURVEYS: — Dorr *v.* Pacific Co., 7 Wheat. 581, 612, 613; Janney *v.* Columbia Co., 10 Wheat. 411.

BARK SAN FERNANDO *v.* JACKSON AND MASON.

IN THE UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF LOUISIANA, MARCH 18, 1882.

[*Reported in* 12 *Federal Reporter*, 341.]

PARDEE, C. J. This suit is brought by a libel *in personam*, to recover the share due by defendants in a case of general average. The record shows a proper case for general average, and that on the arrival of the bark at this port the cargo was delivered on an average bond. The only questions raised in the case are: (1) As to the jurisdiction of the court; and (2) as to the amount due. I have held the case for some time for consideration of the question of jurisdiction. Since the decision in Ins. Co. *v.* Dunham, there seems to be no doubt that the admiralty courts have jurisdiction in all cases of maritime obligations. And that general average comes under the head of maritime obligations there cannot be much question. In fact, there is no doubt that the claim for general average is a lien enforceable in admiralty on the cargo saved until the delivery of the cargo, and the real question is whether the jurisdiction remains after the lien is lost by delivery, so that the claim may be enforced *in personam* against the consignees.

The obligation of the cargo to contribute, in a proper case of general average, is a maritime obligation for which the cargo is bound, but not the consignees. When the cargo is delivered there is an implied obligation, or, if a bond is taken, an express obligation, on the part of the consignees to contribute the share due by the cargo so received by them. Is this last obligation a maritime obligation?

In Cutler *v.* Rae,[1] it is clearly decided not to be a maritime contract. It is said: —

TOWAGE: — The May Queen, 1 Sprague, 588; The W. J. Walsh, 5 Ben. 72; The James McMahon, 10 Ben. 103; Boutin *v.* Ward, 82 Fed. R. 685.

WAGES OF SEAMEN: — Harden *v.* Gordon, 2 Mas. 541; Martin *v.* Acker, Bl. & How. 279; The Canton, 1 Sprague, 437; The May Queen, 1 Sprague, 588.

WHARFAGE: — *Ex parte* Easton, 95 U. S. 68; The New Jersey, 1 Pet. Adm. 223, 228; *Ex parte* Lewis, 2 Gall. 483; The Phœbe, 1 Ware, 354; The Kate Tremaine, 5 Ben. 60; The Anna Ryan, 7 Ben. 20 (double wharfage); Atlantic Co. *v.* Weinberg, 9 Ben. 464; The Virginia Rulon, 13 Blatchf. 519; The J. H. Starin, 15 Blatchf. 473, 503; The B. F. Woolsey, 16 Fed. R. 418; The George E. Berry, 25 Fed. R. 780; The Mary K. Campbell, 31 Fed. R. 840; The Shrewsbury, 69 Fed. R. 1017; The C. Vanderbilt, 86 Fed. R. 785.

But a claim for winter wharfage, *i. e.*, for storage of vessels at wharf, while navigation is closed, was not considered a maritime claim in The Murphy Tugs, 28 Fed. R. 429, 432; The C. Vanderbilt, 86 Fed. R. 785 (*semble*).

MISCELLANEOUS CONTRACTS: — Heller *v.* Fox, 51 Fed. R. 298 (suretyship bond for performance of maritime services).

The Trimountain, 5 Ben. 246; The Bark Onore, 6 Ben. 564, and The River Queen, 2 Fed. R. 731 (services in putting cargo in landing condition).

The Hiram R. Dixon, 33 Fed. R. 297 and The Marion S. Harris, 85 Fed. R. 798 (contract for supplies made before vessel is launched). But see *contra*, The Enterprize, Bee, 345.

[1] 7 How. 729.

"The owner of the goods is liable, because at the time he receives the goods they are bound to share in the loss of other property by which they have been saved, and he is not entitled to demand them until the contribution has been paid; and as this lien upon his goods has been discharged by the delivery, the law implies a promise that he will pay it. But it is not implied by the maritime law which gave the lien. It is implied upon the principles of the common law courts, upon the ground that in equity and good conscience he is bound to pay the money, and is therefore presumed to have made the promise when he received the goods."

It would seem that where the consignee receives the goods and gives a general average bond, the express contract takes the place of, and stands upon the same footing as, the implied obligation referred to in Cutler *v.* Rae. So that, if the case of Cutler *v.* Rae is the law, the question of jurisdiction herein raised is settled adversely. But at the very time of the decision in that case, and ever since, doubts have been thrown upon its correctness. See the remarks of the chief justice rendering the decision, and of Justices Wayne and Catron, dissenting; also Curtis, Jur. U. S. Courts, 261; Dike *v.* St. Joseph.[1] And in Ins. Co. *v.* Dunham it is practically overruled.

It is said by Judge Curtis in Gloucester Ins. Co. *v.* Younger,[2] that it would be remarkable if the admiralty were held not to have jurisdiction over an implied or express promise to contribute to a general average loss, and yet had jurisdiction over an express promise in a policy of insurance to indemnify one for what he might be obliged to contribute. Since the case of Dunham, referred to, this last jurisdiction is undisputed. The practice in the courts of this district has been in favor of the jurisdiction claimed, and the learned district judge in this case has maintained it. Although the case of Cutler *v.* Rae has never been directly overruled, I think I must either disregard that case or else disregard the later decisions of the supreme court. The learned proctors for defendants are a little confused in the cases cited as to contracts for towage, master's wages, and mortgages. In those cases (libels *in rem*) it was held that where there was no lien there was no jurisdiction to proceed *in rem*.

As to the amount claimed, while there is some doubt about the charges for commissions and for the adjuster's services, yet, as these charges are proved to be regular, and the report of the adjuster containing them is approved by the average committee of the board of underwriters, I am not disposed to have the matter reëxamined. The adjustment made at the port of destination I understand to be the correct one, and clearly the one made at Passages, Spain, was erroneous, and the libellants were not bound by it, particularly when the respondents rejected it.

Let a decree in terms affirming the judgment of the District Court be entered.[3]

[1] 6 McLean, 573.
[2] 2 Curt. 334.
[3] Gloucester Co. *v.* Younger, 2 Curt. 322, 333, 334 (*semble*); The St. Joseph, 6 McL. 573

W. TRAINER AND ANOTHER v. THE BOAT SUPERIOR.

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA, NOVEMBER SESSIONS, 1834.

[*Reported in Gilpin*, 514.]

THIS was a claim by the libellants for wages, under circumstances somewhat peculiar. The vessel was originally built for a canal-boat, but was now employed as a museum, for the exhibition of various articles for public amusement at the places to which she went, along the shores of the bays and rivers in the United States.

The libellants were shipped at Philadelphia, on the 15th December, 1833, at twenty-five dollars a month, as musicians to play for the attraction and amusement of the audience or spectators, who should attend the exhibition, which was made on board of the boat at the wharf or shore of the places where they stopped.[1]

Judge HOPKINSON delivered the following opinion: —

It is incumbent on the libellants to show that this was a maritime contract, or that the services performed by them were maritime. The courts, from the convenience of the jurisdiction in such cases, have gone a great way in considering services on board of a vessel to be maritime, although, strictly speaking, the persons were not mariners, nor employed in the navigation of the vessel. Their cooks, carpenters, stewards, and even surgeons have been allowed to sue in the admiralty as mariners, or as persons rendering maritime services under a maritime contract. The broadest principle, however, that has yet been recognized is, that the services rendered must be necessary, or, at least, contribute to the preservation of the vessel, or of those whose labor and skill are employed to navigate her. Thus a carpenter is required for the preservation and repair of the ship, in case of accident; the cook and steward to feed the crew; the surgeon to attend to their health and minister to the sick. This, certainly, is opening a ground sufficiently extensive for every case that, with any reason or under any pretence, can be considered as a case of maritime service. But to obtain a jurisdiction over the claim of these libellants, we must go much beyond that limit. The contract was expressly for services having nothing to do with the navigation or preservation of the boat or her crew, and, in truth, were required only at times when the boat was at rest, and employed as a place for the exhibition of curiosities. They did sometimes work, but at their own will and pleasure. They took up an oar when tired of the fiddle bow, and handled a sail as a change from their music books.

(*semble*); Coast Co. *v.* Phœnix Co., 7 Fed. R. 236; Haller *v.* Fox, 51 Fed. R. 298 (*semble*) *Accord.* — ED.

[1] The statement of facts is abridged. — ED.

The libel must be dismissed, and, if wages are due to the libellants, they may be recovered in another place.

DECREE. That the libel be dismissed with cost.[1]

THE GEORGE T. KEMP.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, JUNE, 1876.

[*Reported in* 2 *Lowell*, 477.]

BROWN'S CLAIM.[2] The petitioners, S. R. Brown & Son, had acted as stevedores in stowing the cargo for the last voyage of the ship, and asked that they might be decreed to rank with the material-men against the proceeds.

R. M. Thompson, for the petitioner.

O. W. Holmes, Jr., and *W. Munroe*, for the claimants.

LOWELL, J. I am asked to review the decision which I felt bound to make in The A. R. Dunlap,[3] in which I followed the authorities, against my own opinion, in refusing a similar petition, expressing at the same time the hope that the case would be carried to the circuit court. Longer experience has taught me that cases of this sort rarely go beyond this court, and under these circumstances, the suitor, whose position I consider sound, has a right to my judgment. Besides, it will be found, upon a critical examination of the decisions which I followed, that, although they have never been overruled on this special point of a stevedore's lien, their course of reasoning has been declared unsound by the highest authority; and so an adherence to the mere result of those cases is not defensible on the ground of *stare decisis*, because it is standing by the letter at the expense of the principle.

The cases referred to are The Amstel,[4] The Joseph Cunard,[5] The

[1] The W. F. Brown, 46 Fed. R. 290 (actors) *Accord.*

In the following cases the services were deemed maritime: Atkin *v.* Burrows, 1 Pet. Adm. 244 (mate); The Louisiana, 2 Pet. Adm. 268 (steward); The Lethe, Bee, 424 (surgeon); The Pekin, Gilp. 203 (steward); The Ohio, Gilp. 505 (pilot, deckhands, engineer, and firemen); The Brandywine, Newb. 5 (female cook); The Charles F. Perry, 1 Low. 475 (cook); The Sultana, Bro. Adm. 13 (clerk); The North America, 5 Ben. 486 (firemen on steamers); The Ocean Spray, 4 Sawy. 105 (sealers); The Minna, 11 Fed. R. 759 (persons employed solely to fish); The James H. Shrigley, 50 Fed. R. 287 (female cook); The Atlantic, 53 Fed. R. 607 (engineer of steam dredge); Saylor *v.* Taylor, 77 Fed. R. 474 (employees on steam dredge); The Flatboat, 84 Fed. R. 200 (workers of pile-driver on flatboat); McRae *v.* Bowers Co., 86 Fed. R. 345 (mechanics keeping in order machinery of steam dredge). In The Ocean Spray, *supra*, DEADY, J., said, p. 111: "It is admitted that such persons as surgeons, carpenters, cooks, stewards, and cabin-boys are considered mariners. But it is claimed that this is so for the reason that these persons all aid in the navigation and preservation of the vessel. But I think the better reason is found in the fact that they are co-laborers in the leading purposes of the voyage." — ED.

[2] Only what relates to this claim is given. — ED.

[3] 1 Lowell, 350.

[4] Blatch. & How. 215.

[5] Olcott, 120.

S. G. Owens.[1] The reasons are more fully given in the first case than in the others, but are alike in all. They are, first, that a stevedore works on land, or on a vessel at the wharf; and, second, that his concern is with the cargo rather than with the ship, and they liken him in this respect to the drayman, who brings the cargo to the vessel. The notion that the maritime character of a contract for either labor or materials, or of the remedy for furnishing them independently of contract, depends upon the situation of the vessel as being upon the high seas or in a dock, reached its climax when it was held that a laborer who scraped the bottom of a foreign vessel, preparatory to her being coppered, had no lien: Bradley *v.* Bolles;[2] and that the ship-keeper of a domestic vessel could not sue even *in personam*, in the admiralty:[3] Gurney *v.* Crockett.[4]

These decisions were made during the time, after Judge Story's death, when the supreme court seemed bent upon narrowing the jurisdiction in all possible directions, by decisions, some of which have now been overruled and others explained to mean much less than they appeared to intend. Judge Betts, in the decisions above cited, was evidently embarrassed by this state of opinion; for he had himself decided, ten years earlier, that a watchman or ship-keeper, who was given a lien by a state statute, might proceed for it in the admiralty; which, of course, decided that the labor or contract was maritime, and, by consequence, that a proceeding *in personam* would lie: The Harriet.[5] It is now settled that a contract for supplies and repairs or other necessaries to a vessel is maritime in its nature, because it has to do with a ship. While, therefore, I agree that the stevedore is not a mariner, and has no lien on a domestic ship unless the local law gives it, I cannot hold, consistently with the present binding authorities, that his contract is not maritime. And so of the ship-keeper. If the services or contract properly concern the ship and her owners, they are clearly maritime, and can be sued against the owner of a domestic ship personally, or against the foreign ship *in rem* in this court. The cases in the supreme court are so recent that I do not cite them.

This brings us to the second point, that the ship and owner are not concerned with the wages of a stevedore, because they relate only to the cargo, and therefore are not maritime. Mr. Benedict expresses his unhesitating opinion that the service is maritime.[6] Judge Bene-

[1] 1 Wall. Jr. 370.

[2] Abb. Adm. 569.

[3] The services of a watchman, at least while the vessel is in commission, are maritime. The Thomas Scattergood, Gilp. 1; The Harriet, Olc. 229; The Trimountain, 5 Ben. 246; The John T. Moore, 3 Woods, 61; The Erinagh, 7 Fed. R. 231; The Maggie P., 32 Fed. R. 300; The Hattie Thomas, 59 Fed. R. 297, 299; McRae *v.* Bowers Co., 86 Fed. R. 344, 347.

But similar services while the vessel is out of commission were thought not to be maritime in Gurney *v.* Crockett, Abb. Adm. 490; The E. A. Barnard, 2 Fed. R. 712 (see, however, The Joseph Nixon, 43 Fed. R. 926, 928); The Murphy Tugs, 28 Fed. R. 429, 432; The America, 56 Fed. R. 1021; The Grand Turk, 2 Pittsb. R. 326.— ED.

[4] Abb. Adm. 490.

[5] Olcott, 229.

[6] Bened. Adm. (2d ed.) § 285.

dict expressed a similar opinion, though he felt bound to follow the decisions: The Circassian.[1] That was a domestic vessel, and I consider his decision to have been right, as well as his general opinion; that is, the service is maritime, but it gives no lien, unless by the state law. Whether a stevedore is a material-man, strictly speaking, may be doubtful; but I apprehend that the law itself is no longer doubtful that one who furnishes what is reasonably necessary for a foreign ship, her voyage or business, stands on the same footing towards the ship as a material-man: Thomas *v.* Osborn;[2] The Emily Souder.[3] And, if it was ever true, it is no longer so, that the ship is only responsible for what is physically annexed to it, such as repairs. In most cases the responsibility of the owner and of the ship are, by our law, coextensive; and whatever the master has the right to buy on credit will bind both, and this is not only what is absolutely necessary for the ship and crew, but for the voyage or business of the ship: The Fortitude,[4] The Gustavia,[5] The Grapeshot,[6] The Medora,[7] The Robert L. Lane,[8] Stearns *v.* Doe,[9] Webster *v.* Seekamp,[10] Weston *v.* Wright,[11] The Alexander,[12] The Riga,[13] The Zodiac,[14] The Duke of Bedford,[15] The Gauntlet.[16] I am not now speaking of the necessity for a credit, which has been pretty much explained away. There is no doubt that the ship is liable in this case, if a ship would usually be liable in like cases. It seems incredible that it could ever have been thought that the master, who in proper cases may charter, hypothecate, or even sell his ship, cannot bind it for the cost of stowing the cargo, which is one of the ordinary and self-evident necessities of a voyage. The above-cited cases show what expenses may be made by the master on the credit of the owner or in bottomry. I will, however, cite one or two late decisions, to show the character of the charges which are now held to be legitimate liens upon a vessel without a bond.

It is well known that the high court of admiralty in England was, for some centuries, prohibited from enforcing these tacit hypothecations; and that an act of parliament has now given that court jurisdiction to decide all claims and demands for necessaries supplied to a foreign vessel.[17] Thereupon the tacit lien revived, without mention of lien in the statute, and the courts have held, that not merely what is necessary for the ship, but what is reasonably proper for the voyage, comes within the statute. The decisions are cited and explained in The Riga, *ubi supra;* in which, among other charges, the following were allowed as necessaries: tonnage and harbor dues, services of the libellant as agent and broker in procuring a charter, premium of insurance paid at the request of the owner. In The Emily Souder,[18] Field, J., says, "The moneys advanced by the libellants, it is true, were not entirely for the repairs to the vessel and the supplies needed

[1] 1 Bened. 209.
[2] 19 How. 22.
[3] 17 Wall. 666.
[4] 3 Sumner, 228.
[5] Blatch. & How. 189.
[6] 9 Wall. 129.
[7] 1 Sprague, 133.
[8] 1 Lowell, 388.
[9] 12 Gray, 482.
[10] 4 B. & Ald. 352.
[11] 7 M. & W. 396.
[12] 1 W. Rob. 362.
[13] L. R. 3 Eccl. & Adm. 516.
[14] 1 Hagg. 320.
[15] 2 Hagg. 294.
[16] 3 W. Rob. 82.
[17] 3 & 4 Vict. ch. 65, § 6.
[18] 17 Wall. 666, 669.

for the voyage: they were intended and applied in part to meet the expenses of her towage into port and of pilotage, and to pay the custom-house dues, consular fees, and charges for medical attendance upon the sailors. These various items, however, stood in the same rank with necessary supplies and repairs to the vessel, and the libellant's advancing funds for their payment, were equally entitled as security to a lien on the vessel."

These cases are decisive. If the person who advances the money has a lien, it is because the service paid for was necessary. The stream cannot rise above its source. I hold, therefore, that the stevedore has a lien on a foreign ship for his services rendered at the request of the master in a case in which the ship is to stow the cargo.

Petition granted.[1]

THE ELECTRON.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, DECEMBER 10, 1891.

[*Reported in* 48 *Federal Reporter*, 689.]

IN Admiralty. The Electro-Dynamic Company of Philadelphia libelled the yacht Electron to recover for machinery furnished. James Bigler filed a cross-libel, and moved for stay until security is filed.

Wilcox, Adams & Green, for motion.

Robinson, Bright, Biddle & Ward and *Mr. Ward*, opposed.

BROWN, J. In the first above libel the claim is for $2,106.08, with interest, the balance of a bill alleged to be due "in and about the refitting and repairing" of the yacht Electron, belonging in Philadelphia, by furnishing her with a quantity of electrical machinery for the purpose of propelling her by electricity. The yacht was arrested and released on security given, and has answered, alleging misrepresentations and various breaches in the performance of the contract under which the repairs were furnished, and an offer to return the articles. The cross-libel alleges substantially the same misrepresentations and breaches, and claims damages by reason thereof in the sum of $4,553.04. Under the fifty-third rule of the Supreme Court

[1] The William, Bro. Adm. 208, 225 (*semble*); The Trimountain, 5 Ben. 247; The Windermere, 2 Fed. R. 722; The Canada, 7 Fed. R. 119; The Hattie M. Bain, 20 Fed. R. 389; The Senator, 21 Fed. R. 191; The Velox, 21 Fed. R. 479; The Director, 34 Fed. R. 57, 67; The Scotia, 35 Fed. R. 916; The Wyoming, 36 Fed. R. 495; The Gilbert Knapp, 37 Fed. R. 209; The Mattie May, 45 Fed. R. 899; The Main, 51 Fed. R. 954; Norwegian Co. *v.* Washington, 57 Fed. R. 224; The Anaces, 87 Fed. R. 565, 567 *Accord*.

The following cases *contra* may be regarded as overruled: The Amstel, Bl. & How. 215; The Joseph Cunard, Olc. 120; Cox *v.* Murray, Abb. Adm. 341; The S. G. Owens, 1 Wall. Jr. 370; The Circassian, 1 Ben. 209; The A. R. Dunlap, 1 Low. 350; The Ilex, 2 Woods, 229; Hubbard *v.* Roach, 2 Fed. R. 393; The E. A. Barnard, 2 Fed. R. 712; The Ole Oleson, 20 Fed. R. 384; The Magnolia, 37 Fed. R. 367. — ED.

in admiralty, she now moves that the respondents' proceedings in the original libel be stayed until security is given for the damages claimed in the cross-libel. The defence to the original libel is the same as the ground of claim in the cross-libel. The case is therefore within the fifty-third rule of the Supreme Court in admiralty, as construed by this court in the case of Vianello *v.* Credit Lyonnais.[1] It is urged, however, that the cross-libel is for a demand which could not be entertained in admiralty, because it is merely an action for damages for the breach of a contract for supplies. No doubt, if the court was without jurisdiction of the cause of action stated in the cross-libel, the motion should not be granted; but, though actions for damages and for misrepresentations and breaches of contracts for supplies may not be frequent, I cannot regard them as beyond the proper jurisdiction of the admiralty. In the case of The Eli Whitney,[2] though it was held that an action *in rem* would not lie for false representations which had been the inducement to the execution of a charter-party, there is no intimation that an action *in personam* would not lie for such a cause. The contract in this case, being for supplies, is a maritime contract, within the ordinary jurisdiction of the admiralty courts. Upon such a contract, and all its incidents, the rights and remedies of the parties are reciprocal. The contract being maritime, the admiralty, says Curtis, J., in Church *v.* Shelton,[3] "will proceed to inquire into all its breaches, and all the damages suffered thereby, however peculiar they may be, and whatever issues they involve." See, also, Cox *v.* Murray;[4] The J. F. Warner,[5] The W. A. Morrell,[6] The Baracoa.[7] In the latter case the action was for damages for breach of the stipulations of a charter-party, and, as respects jurisdiction, is indistinguishable from the present, though the form of remedy in this case is *in personam* only. The cross-libel is therefore properly brought, and falls within the rule; and the motion for stay of proceedings on the original libel, until security is given, is granted.[8]

THE SHIP ANNIE SMITH.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, OCTOBER, 1878.

[*Reported in* 10 *Benedict*, 110.]

CHOATE, J. This is a suit of licitation and partition brought by the owners of a moiety of the ship Annie H. Smith, against the ship and

[1] 15 Fed. R. 637. [2] 1 Blatchf. 360. [3] 2 Curt. 271, 274.
[4] Abb. Adm. 342. [5] 22 Fed. R. 342. [6] 27 Fed. R. 570.
[7] 44 Fed. R. 102.
[8] In Watts *v.* Camors, 10 Fed. R. 145; The Alberto, 24 Fed. R. 379, a ship-owner was allowed to proceed in admiralty for damages caused by a breach of contract to furnish a cargo.

the owners of the other moiety. The libel prays a sale of the ship under the decree of the court and the distribution of the proceeds among the owners. That the courts of admiralty have jurisdiction of such a suit, seems to be settled by authority, so far as this country is concerned.[1] There are three reported cases in which the court has entertained such a suit, and granted the relief here prayed for. They are the case of the sloop Hope,[2] in the District Court of South Carolina in 1793, the case of The Seneca,[3] in the Circuit Court for the Eastern District of Pennsylvania in 1829, and the case of The Vincennes,[4] in the District Court of Maine in 1851. These decisions have received the emphatic approval of eminent text writers as being in accordance with the principles of the maritime law. (Story on Partnership, § 438; Benedict's Admiralty, 2d ed. § 274; 2 Parsons, A. & S. 343; Dunlap's Adm. Pr. p. 67; 2 Kent Com. 370.)

In the case of The Seneca, Judge Hopkinson, of the District Court, denied the relief on the ground that the court had not jurisdiction, and the English Court of Admiralty has also declined to exercise this power, but the great weight of authority is in favor of the jurisdiction; and in cases where the relief is shown to be necessary, the sale by decree of the court seems to be the only practicable means of restoring the ship to its proper use as a vehicle of commerce, and therefore highly beneficial to those public interests which are peculiarly the care of the Admiralty. The fact that the power is not exercised in England may be accounted for, perhaps, by the well-known restrictions to which the jurisdiction of the English admiralty courts was subjected in early times through the jealousy and the greater power of the other courts. This power of sale, so far as the cases have gone, has only been exercised where the owners are equally divided in respect to the employment of the ship or appointment of the master. Where they are unequally divided, the rights of the majority and minority owners respectively are for the most part well settled. The majority in interest have the right to employ the ship in navigation, notwithstanding the objection and protest of the minority and their refusal to join in the adventure, but in such a case the minority may require security for the safe return of the vessel.[5]

[1] Head *v.* Amoskeag Co., 113 U. S. 9, 23 (*semble*); The Hope, Bee, 2; The Seneca, 3 Wall. Jr. 395; The Betsina, Fed. Cas. No. 14,236 (*semble*); The Vincennes, 2 Pars. Shipp. & Adm. 343 (cited); The Ocean Belle, 6 Ben. 253; Coyne *v.* Caples, 8 Fed. R. 638. In the case last cited DEADY, J., said, pp. 639, 640: "There seems to be some doubt in the books as to the jurisdiction of a court of admiralty to compel a sale of a vessel on account of a disagreement between her owners as to her employment at the instance of a minority in value. No substantial reason is given for declining the jurisdiction, while every argument suggested by analogy and convenience is in favor of it." Story, Part. §§ 437–439; 2 Par. S. & A. 242; Ben. Ad. § 274 (see also The Marengo, 1 Low. 52; The Nelly Schneider, 3 Prob. Div. 152). But in a case of equal division of interests, the jurisdiction is generally admitted. — ED

[2] Bee's Rep. 2.

[3] 18 Amer. Jur. 486.

[4] Cited 2 Parsons on Shipping and Adm. 343.

[5] The Orleans, 11 Pet. 175; Head *v.* Amoskeag Co., 113 U. S. 9, 23 (*semble*); Fox *v.* Paine, Crabbe, 271; The Marengo, 1 Sprague, 506; The Betsina, Fed. Cas. No. 14,236; The Marengo, 1 Low. 52; The Ocean Belle, 6 Ben. 253; Scudd *v.* Raymond, 18 Fed. R. 547; Swain *v.* Knapp, 34 Minn. 232.

If the majority in interest unreasonably refuse to employ the ship, it has been suggested that a sale may be enforced. Willings *v.* Blight.[1]

The particular point of disagreement in the case of The Seneca was as to who should go as master; and Mr. Justice Washington held that, although not expressly mentioned in these foreign codes, the case was within their reason, because a disagreement as to the master operated as effectually as a disagreement as to the voyage to be undertaken, to prevent the ship from being sent to sea; and he held further, that if the moiety objecting to a master, honestly entertained an objection to him, on the ground of their want of confidence in his skill or integrity, they did assign a plausible reason for their conduct. From this case, therefore, and the authorities on which it rests, may be deduced these rules, as governing and limiting the exercise of this power of sale on the application of a moiety of the owners, *first:* that the disagreement must be such as prevents the present employment of the ship in navigation; and, *secondly*, that the objecting moiety asking for a sale must either propose a different employment of the ship, or, if they merely object to the voyage or the master proposed by the other moiety, their objection must be based on reasonable grounds.[2]

THE RICHARD WINSLOW.

In the United States Circuit Court of Appeals, Seventh Circuit, January 6, 1896.

[*Reported in* 71 *Federal Reporter*, 426.]

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

This was a libel by J. Henry Norton and others against the schooner Richard Winslow to recover damages to a cargo of corn. The circuit court dismissed the libel with costs, 67 Fed. 240, and the libellant's appeal.

On the 16th day of November, 1893, J. Henry Norton and Edward S. Worthington, the libellants, shipped on board the schooner Richard Winslow, then lying at the port of Chicago, a cargo of white corn amounting to 59,779$\frac{2}{8}$ bushels, to be carried by the schooner from the port of Chicago to the port of Buffalo. The property was shipped under a bill of lading in the usual form, except as hereinafter stated. By the terms of the bill of lading the property was to be delivered at the port of Buffalo to the "order of Norton and Worthington, care of

But the dissenting owners in such a case, bearing no share of the burden, are not entitled to any share of the profits of the voyage. Willings *v.* Blight, 2 Pet. Adm. 288; The Marengo, 1 Low. 52; Coyne *v.* Caples, 8 Fed. R. 638 *Accord.* — Ed.

[1] 2 Pet. Adm. 290.

[2] The opinion of the court is abridged. Choate, J., decided that the libellant had failed to show sufficient grounds for decreeing a sale of the vessel. — Ed.

Thomas O'Brien, Buffalo, for shipment to care of ——, New York." The bill of lading contained the following provisions: "Lake freight to Buffalo, three (3) cents per bushel; including free storage in vessel in Buffalo harbor until April 1, 1894, to be unloaded at shipper's option on or before April 1, 1894." The vessel proceeded on her voyage, and arrived safely at the port of Buffalo on the 22d of November, 1893, when her hatches were opened, the cargo examined, and found to be in like order and condition as at the time of shipment. The hatches were then put on, and covered with tarred paper and canvas covers. The schooner was then moored at a place designated by the shippers or their agent in the harbor of Buffalo. The vessel was stripped for the winter, the crew discharged, and the vessel remained in the care of a ship-keeper. In February, 1894, while the schooner was so lying in the harbor of Buffalo with the cargo stowed in her holds, heavy gales from the northeast prevailed, suddenly lowering the water in the harbor from three to four feet, causing the schooner to take the bottom, and straining the butts of her deck, hatch combings, and mast apartment. In consequence of such straining, some 820 bushels of the cargo were damaged and rendered in bad condition, and the remainder to some extent injured by reason of the discolored and damaged portion of the corn mixing with the sound portion. The libel was filed to recover for such damage, it being claimed to have been caused by the negligence of the vessel and her owners. At the hearing below, the libel was dismissed upon three grounds: First, that the contract was not within the cognizance of the admiralty; second, that the liability of the owners at the time of the injury was that of warehouseman, and that there was no neglect or want of ordinary care; third, that there was no liability under the "Harter Act" (27 St. 445, c. 105, § 3).

Charles E. Kremer, for appellants.

George D. Van Dyke, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, after stating the facts, delivered the opinion of the court.

The contract here was dual in character. It contemplated a carriage by sea from the port of Chicago to the port of Buffalo, and thereafter storage of the cargo in the vessel at the port of Buffalo until the opening of navigation. Such contracts have become frequent upon the Great Lakes with respect to the forwarding of the crops; the ship being thereby assured of a cargo just before the close of navigation, and the shipper obtaining cheap or free storage during the closed season of navigation, and being also thereby enabled to reach the seaboard immediately upon the opening of navigation. The question presented is whether this contract with respect to the storage of the corn at the harbor of Buffalo during the closed season of navigation can be deemed a maritime contract, and so within the admiralty jurisdiction. Long ago Judge Story took issue with the common law courts of England, which sought to restrict the admi-

ralty jurisdiction to causes of action arising "from things done upon the sea," and asserted the true limitation of that jurisdiction to be "to things pertaining to the sea." De Lovio *v.* Boit.[1] For many years his position was vigorously assailed, even by the justices of the supreme court; Mr. Justice Campbell in The Magnolia,[2] decided in 1857, speaking of it as a "broad pretension for the admiralty, under which the legal profession and this court staggered for thirty years before being able to maintain it." Finally, in 1870, in Insurance Co. *v.* Dunham, by the unanimous concurrence of the judges, the position of Judge Story was fully sustained, and the court declared the true criterion of admiralty jurisdiction with respect to contracts "is the nature and subject-matter of the contract as whether it was a maritime contract having reference to maritime service or maritime transactions." A maritime contract must therefore concern transportation by sea. It must relate to navigation, and to maritime employment. It must be one of navigation and commerce on navigable waters. Unquestionably there was here a contract for carriage by sea, and that contract was maritime in its nature. But there was joined with it a contract with respect to the cargo after the completion of the voyage that was in no respect maritime in its nature. If, as Judge, now Mr. Justice, Brown observes in The Pulaski,[3] the storage were a mere incident to the transportation, the entire contract would be held to be maritime, and within the admiralty jurisdiction. But here the contract for holding the corn in storage did not concern navigation. It could not take effect until after completion of the voyage, and had no relation to further transportation of the cargo by the vessel. It was to be performed at a time when the vessel was not engaged in commerce or navigation, or in preparation therefor. It was merely a contract for winter storage, and was no more maritime in its nature than the non-maritime contracts for winter wharfage (The Murphy Tugs[4]); for the employment of a dismantled hull (The Hendrick Hudson[5]); for the storage of a vessel's outfit during winter (Gilbert Hubbard & Co. *v.* Roach[6]); or for the service of a ship-keeper during winter (The Sirius[7]). The reason is that such service does not pertain to the navigation of a ship, nor assist a vessel in the discharge of a maritime obligation.

It is alleged that at the time of the injury in question the maritime contract of affreightment was not ended, and could only be completed by a delivery of the cargo, which here remained in the possession of the vessel; but we think that under the terms of the bill of lading in question the contract of storage was to take effect upon the arrival of the vessel in the harbor at Buffalo, and that there was constructive delivery which would terminate the liability of the carrier as such. Here the cargo was not to be delivered to the consignee in pursuance of the contract of carriage, but was to be held by the carrier upon

[1] 2 Gall. 398, Fed. Cas. No. 3776. [2] 20 How. 335. [3] 33 Fed. 383.
[4] 28 Fed. 429. [5] 3 Ben. 419, Fed. Cas. No. 6355.
[6] 2 Fed. 393. [7] 65 Fed. 226.

storage as warehouseman only, upon the completion of the voyage. The character in which the cargo was held by the vessel changed from that of carrier to that of warehouseman. The maritime service had been performed fully and completely within the letter and spirit of the contract. Thereafter the cargo was held by the vessel as warehouseman under the liability attached to that relation. Because the ship was afloat when used as a warehouse does not render the contract for storage a maritime contract, any more than in the case of a floating warehouse, a floating saloon, or a floating church. Such employment does not pertain to navigation, with which alone the admiralty is concerned. The force of the position was felt by the learned counsel for the appellant, who urged upon us at the argument, with earnestness and with a zeal born of his liking for the admiralty jurisdiction, that because such transactions as this have become frequent upon the lakes and the courts of admiralty can, as was asserted, more efficiently pass upon such cases, it will be detrimental to the interests of commerce and to the commercial community to deny a remedy upon such contracts in the courts of admiralty. Without criticising the suggestion, we can only say that, however convenient it might be to do so, we do not think it our duty to extend the admiralty jurisdiction beyond its well-established limitations and to a subject-matter that does not pertain to navigation. The decree of the district court will be affirmed.[1]

ROACH AND LONG, APPELLANTS, *v.* W. CHAPMAN AND OTHERS.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1859.

[*Reported in* 22 *Howard*, 129.]

MR. JUSTICE GRIER delivered the opinion of the court.[2]

The libellants claim to have a lien on the steamboat Capitol, for a balance due them for machinery furnished in her construction. The boat was built at Louisville, Kentucky, and the libellants furnished the boilers and engines. Payments were made as the work progressed, and bills of exchange taken for the balance due after the vessel was completed. These were not paid. The boat left the port and the State, and was afterwards sold, and became the property of the claimants.

[1] The Pulaski, 33 Fed. R. 383; Pacific Co. *v.* Ferguson, 76 Fed. R. 993, 996 (*semble*); *In re* Hydraulic Steam Dredge, 80 Fed. R. 545, 547 (*semble*); The C. Vanderbilt, 86 Fed. R. 785, 793; McRae *v.* Bowers Co., 86 Fed. R. 344, 347 (*semble*).

For another instance in which the court treated the contract as divisible, holding one part maritime and the other part non-maritime, see Pacific Co. *v.* Ferguson, 76 Fed. R. 993 (contract to carry by land and water). — ED.

[2] Only the opinion of the court is given. — ED.

Among other things, the claimants pleaded to the jurisdiction of the court. This plea was sustained by the circuit court.

A contract for building a ship or supplying engines, timber, or other materials for her construction is clearly not a maritime contract.[1]

Any former dicta or decisions which seemed to favor a contrary doctrine were overruled by this court, in the case of the People's Ferry Co. *v.* Beers.[2]

It is said here, that the law of Kentucky creates a lien in favor of the libellants; and that, as this case originated before the adoption of our rule, which took effect on the first of May, 1859, it may, upon the principles recognized by this court in Peyroux *v.* Howard,[3] be enforced in the admiralty. But (to quote the language of the court in Orleans *v.* Phœbus [4]) "that decision does not authorize any such conclusion. In that case, the repairs of the vessel, for which the state laws created a lien, were made at New Orleans, on tide-waters. The contract was treated as a maritime contract, and the lien under the state laws was enforced in admiralty, upon the ground that the court, under such circumstances, had jurisdiction of the contract, as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States." [5]

It is clear, therefore, that the judgment of the circuit court, dismissing the libel for want of jurisdiction, must be affirmed, without noticing other questions raised by the pleadings.

[1] People's Ferry *v.* Beers (1857), 20 How. 393; Edwards *v.* Elliott, 21 Wall. 532; The Glide, 167 U. S. 606, 620; Clinton *v.* Brig Hannah (1781), Bee, Adm. 419; The Medora (1846), 2 Wood. & M. 92, 110 (*semble*); The Revenue Cutter (1860), Brown, Adm. 76; Young *v.* The Ship Orpheus (1861), 2 Cliff. 29; The Guiding Star, 9 Fed. R. 521, 18 Fed. R. 263; The J. C. Rich, 46 Fed. R. 136; The Paradox, 61 Fed. R. 860; McMaster *v.* One Dredge, 95 Fed. R. 832; Sinton *v.* Steamboat, 46 Ind. 476; Mitchell *v.* Steamboat, 45 Mo. 67; Peich *v.* Steamboat, 45 Mo. 69 *Accord.*

DeLovio *v.* Boit, 2 Gall. 398, 475 (*semble*); The Hornet, Crabbe, 422, 427 (*semble*); The Richard Busteed, Sprague, 441, and the cases in the second paragraph of note 5 on that page *Contra.*

Nor is a contract to furnish labor or materials for the completion of a vessel any the more a maritime contract because made after the vessel was launched. The Iosco, Brown, Adm. 495; *In re* Glenmont, 32 Fed. R. 703; The William Windom, 73 Fed. R. 496; Wilson *v.* Lawrence, 82 N. Y. 409; Waddell *v.* Steamer, 2 Wash. Ter. 76.

But see *contra* The Eliza Ladd, 3 Sawy. 519; The Revenue Cutter No. 2, 4 Sawy. 143; The Manhattan, 46 Fed. R. 797; The L. B. X., 93 Fed. R. 233 (*semble*). — ED.

[2] 20 How. 400.

[3] 7 Pet. 343.

[4] 11 How. 184.

[5] The Ship Norway, 3 Ben. 163; The J. C. Rich, 46 Fed. R. 136; The Paradox, 61 Fed. R. 860; The William Windom, 73 Fed. R. 496; McMaster *v.* The Dredge, 95 Fed. R. 832 *Accord.*

The statutory lien allowed in the following cases was enforced on the assumption that a contract for the building of a ship was a maritime contract. The Sandwich, 1 Pet. Adm. 233 n.; The Hull of a New Brig, 1 Story, 244 (*semble*); Davis *v.* A New Brig, Gilp. 473; Harper *v.* The New Brig, Gilp. 536; The Calisto, 2 Ware, 29; The Nucleus, Fed. Cas. No. 8598 (*semble*); The Ellen Stewart, 5 McL. 269 (*semble*); The Young Mechanic, 2 Curt. 404, 1 Ware, 535 s. c.; The Hull of a New Ship, 2 Curt. 416; The Kiersage, 2 Curt. 421; The

DOOLITTLE *v.* KNOBELOCH.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF SOUTH CAROLINA, JUNE 14, 1889.

[*Reported in* 39 *Federal Reporter*, 40.]

SIMONTON, J.[1] The libel sets up a claim against the steamer *in rem* and her owner, the respondent, *in personam*, for services and advances. The services were going to New York as the agent of Knobeloch, and purchasing for him the steamer Bellevue, and coming in her on her voyage from New York to Charleston, looking generally after the interests of the owner; not, however, having any control or concern in the navigation of the vessel. The advances consist of cash to the master from time to time, and moneys paid for supplies to the steamer, pilotage, and dock fees. The libel was amended by striking out all claim *in rem* on the steamer. Respondent excepts to the jurisdiction of the court. The jurisdiction in admiralty depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. The Jefferson.[2] It is not easy to get an exact definition of the term "maritime contract." It is far easier to say what is not a maritime contract. "The true criterion," says that eminent jurist, Mr. Justice Bradley, "is the nature and subject-matter of the contract, as whether it has reference to maritime services or maritime transactions." Insurance Co. *v.* Dunham. Mr. Browne, in his work on Civil and Admiralty Law (volume 2, page 82), asks the question: "What contracts should be cognizable in admiralty?" and answers it: "All contracts which relate purely to maritime affairs." "Maritime contracts are such as relate to commerce and navigation," says Justice Clifford. The Orpheus.[3] The English courts limit courts of admiralty by the locality of the contract. Our courts look to the subject-matter. De Lovio *v.* Boit.[4] But "to be a maritime contract, . . . it is not enough that the subject-matter of it, the consideration, the service, is to be done on the sea. It must be in its nature maritime. It must relate to maritime affairs. It must have a connection with the navigation of the ship, with her equipment or preservation, or with the maintenance or preservation of the crew, who are necessary to the navigation and safety of the ship. Thus a carpenter, a surgeon, a steward, though not strictly mariners or seamen, may all sue for their wages in the admiralty because they contribute in their several ways to the preservation and support of the vessel and her crew." The Farmer.[5] The charge for services in purchasing the steamer cannot be entertained in this court.

Sam Slick, 2 Curt. 450; The Samuel Strong, Newb. 187 (*semble*); The Charles Mears, Newb. 197. — ED.

[1] Only the opinion of the court is given. — ED.

[2] 20 How. 393. [3] 2 Cliff. 29. [4] 2 Gall. 398. [5] Gilp. 531.

It does not spring from a maritime contract. A ship-broker cannot sue in admiralty for services in procuring a charter-party, as they do not arise out of a maritime contract. The Thames.[1] Nor do the services of an agent in soliciting freight come within this category. The Crystal Stream.[2] Nor is a contract for building a ship (Cunningham *v.* Hall [3]), nor for furnishing materials for building a ship (The Orpheus [4]), a maritime contract. The underlying principle is this: All these are preliminary services leading to a maritime contract. They do not constitute in themselves a maritime contract. Of the same character is the purchase of a vessel. See Edwards *v.* Elliott.[5] The service in the purchase of the steamer in this case was not a maritime contract.

The claim for advances made to the master and steamer do not come within our jurisdiction. "Admiralty has no jurisdiction over an account between the agent of a steamboat and its owners for moneys paid for its use." Minturn *v.* Maynard,[6] White *v.* Dollars,[7] Bank *v.* The Charles E. Page.[8] The same conclusion must be reached with regard to the claim for services in coming on the steamer from New York. He was not master, pilot, officer, engineer, fireman, or one of the crew. He only stood for the owner, — a privileged passenger. His service was not in its nature maritime, did not relate to maritime affairs, had no connection with the navigation of the steamer, nor with her equipment or preservation or with the maintenance or preservation of the crew. The libel is dismissed for want of jurisdiction. No decree can be made as to costs. Railway Co. *v.* Swan,[9] Blacklock *v.* Small,[10] Mayor *v.* Cooper.[11] Each party is responsible to the officers of the court for costs incurred at his instance.[12]

[1] 10 Fed. R. 848. [2] 25 Fed. R. 575 [3] 1 Cliff. 43. [4] 2 Cliff. 29.
[5] 21 Wall. 532. [6] 17 How. 477. [7] 19 Fed. R. 848; Hen. Adm. p. 135, § 47.
[8] MS. Cir. Ct. South Carolina, Dec. 1886. [9] 111 U. S. 387, 4 Sup. Ct. Rep. 510.
[10] 127 U. S. 105, 8 Sup. Ct. Rep. 1096. [11] 6 Wall. 250.

[12] Admiralty jurisdiction was denied in the following cases because the contracts or services were not thought to be maritime: The Tribune, 3 Sumn. 144 (*semble* — contract to procure a charter-party); The Thames, 10 Fed. R. 848 (services in procuring charter-party); The J. C. Williams, 15 Fed. R. 558 (commissions for procuring freight); The Crystal Stream, 25 Fed. R. 575 (soliciting freight); The Harvey and Henry, 86 Fed. R. 656 (soliciting freight); The Humboldt, 86 Fed. R.; Minturn *v.* Maynard, 17 How. 477, 351 (commissions of general passenger and freight agent); Richard *v.* Hogarth, 94 Fed. R. 685 (procuring contract of affreightment); The H. C. Grady, 87 Fed. R. 232 (soliciting patronage); The Havana, 54 Fed. R. 201 (advertising steamer's excursions); Marquardt *v.* French, 53 Fed. R. 603 (procuring marine policy); The City of Clarksville, 94 Fed. R. 201 (claim against one for not procuring insurance); The Morning Glory, Fed. Cas. No. 12,542 (procuring crew); The Retriever, 93 Fed. R. 480 — discrediting The Gustavia, Bl. & How. 189 — (procuring crew); The Paola R., 32 Fed. R. 174 (compressing cotton before any contract of affreightment. But a contract to compress and load upon a ship is maritime. The Wivanhoe, 26 Fed. R. 927); Diefenthal *v.* Hamburg Co., 46 Fed. R. 397 (contract to supply provisions for a year to all vessels of A in port of New Orleans); The Main, 51 Fed. R. 954, 958 (*semble*. Drayage).

THE GAS FLOAT WHITTON No. 2.

In the Court of Appeal, December 17, 1895.

[*Reported in Law Reports*, 1896, *Probate Division*, 42.]

Lord Esher, M. R.[1] This was an appeal from a divisional court of the admiralty division sitting as a court of appeal from the county court of Hull, having admiralty jurisdiction. The cause was a salvage cause. The alleged salvage was the saving from danger of a gas float. The nature of the float and the circumstances of the alleged salvage were ascertained by the county court judge. They were that the float "Whitton No. 2" was made of iron; that the lower part bore the resemblance of a ship or boat; that part called by the county court judge the hull had two ends, sharped like the bows of a vessel; it was fifty feet long and twenty feet broad; it had no mast, sternpost, forepost, or rudder; its interior was wholly occupied by a cylinder into which gas was pumped so as to fill it, and so that the gas went up to a light elevated on a pyramid of pieces of wood fifty feet high. The float could not, by reason of its structure, be used for any purpose of its being navigated. It could not be navigated. It could not carry any man or any goods from place to place. It could not hold any man in it except that he could by means of a man-hole and ladder ascend to the light at the top to clean or arrange it. The float was fixed by an anchor or anchors and otherwise at a particular spot in the river Humber, so as to remain always fixed at that spot. It, however, broke away, and was carried down the Humber, and was in danger in the Humber, and was saved in the Humber by the exertions of the plaintiffs.

The question in dispute was whether the county court had jurisdiction to hear and determine upon the claim of salvage reward.

It was argued on behalf of the appellants before us that the gas float was not the subject-matter of a salvage claim in the high court of admiralty within either its common law or any statutable jurisdiction, and that if it was not so, neither was it within the statutable jurisdiction of the county court.

The first point raised is, whence is the original or common law jurisdiction of the high court of admiralty of England to be ascertained? The answer is from the continuous practice, and the judgments of the great judges who have presided in the admiralty court, and from the judgments of the courts at Westminster. This proposition was so stated in The Gaetano and Maria:[2] "It is not the ordinary municipal law of the country, but it is the law which the English court of admiralty either by act of Parliament or by reiterated decisions and tradi-

[1] The statement of the case, the arguments of counsel, and portions of the judgment of Lord Esher are omitted. Kay and Lopes, L. JJ., concurred, but gave no judgments. — Ed.

[2] 7 P. D. 137, at p. 143.

tions and principles has adopted as the English maritime law." Neither the laws of the Rhodians, nor of Oleron, nor of Wisbuy, nor of the Hanse Towns, are of themselves any part of the admiralty law of England. It was attempted by one of the counsel for the respondents to say that the laws of Oleron were to be considered as part of the law of England. To any one who reads some of their strange enactments — as, for instance, in the Laws of Oleron [1] (Art. 23): "If a pilot through ignorance causes the ship to miscarry, he shall make full satisfaction, or lose his head." (Art. 24): "If the master or one of his mariners or any one of the merchants cut off his head, they shall not be bound to answer for it." (Art. 26): "If the lord of any place be so barbarous as to maintain [wreckers, etc.], he shall be fastened to a post or stake in the midst of his own mansion-house, which, being fired at the four corners, all shall be burnt together," etc. — it must be ridiculous to suggest that they are part of the English law. But they contain many valuable principles and statements of marine practice which, together with principles found in the Digest and in the French and other ordinances, were used by the judges of the English court of admiralty when they were moulding and reducing to form the principles and practice of their court. All these sources of legal principles were used by Lord Tenterden in his great work; but he says in his preface: [2] "It should be observed, however, not only of all these treatises, but also of the civil law and the ordinances, without excepting even the ordinance of Oleron (which, being considered as the edict of an English prince, has been received with peculiar attention in the court of admiralty), that they have not the binding force or authority of law in this country, and that they are here quoted, sometimes to illustrate principles generally admitted and received," etc. It should be remarked that as the law of the admiralty is to be ascertained from the practice and judgments of its judges, it must be found or deduced from affirmative practice or judgments; that neither principle nor proposition can be deduced from mere negative, *i. e.*, by saying the point has never been treated in the court of admiralty. If you find that the court of admiralty has affirmatively stated that it has jurisdiction in certain cases, you cannot affirm that it has jurisdiction in other cases merely on the ground that the court of admiralty has not expressly excluded them by negative words. You must bring the proposed case within some affirmed principle or some affirmative judgment or practice.

The second point, therefore, is, what is the jurisdiction of the High Court of Admiralty as to salvage, ascertained from its practice and judgments and from statutes? As to its practice and judgments, irrespective of statutes, it seems to be one uniform continuous statement by judges and writers of authority that the jurisdiction as to salvage is exercised in respect of a ship, her apparel, and her cargo; of freight

[1] See a General Treatise of the Dominion of the Sea and a compleat body of the Sea Laws, 3d ed. pp. 151, 153.

[2] Abbott's Treatise on Merchant Ships and Seamen, 5th ed. p. xi.

in danger, and saved by reason of the saving of the ship or cargo; and of flotsam, jetsam, or lagan, being each of them part of the cargo of a ship. Lord Tenterden [1] thus expresses it: It is "the compensation that is to be made to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of salvage." In Park on Insurance, chap. viii., on Salvage (8th ed. vol. i. p. 300), "Salvage is an allowance made for saving a ship or goods, or both, from the dangers of the seas, fire, pirates, or enemies." In Kent's Commentaries (12th ed. vol. iii. p. 245), "Salvage is the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss, in cases of shipwreck, derelict, or recapture. . . . The equitable doctrine of salvage came from the Roman law, and it was adopted by the admiralty jurisdictions in the different countries of Europe." In Parsons's Law of Shipping, chap. viii., of Salvage (vol. ii. p. 260), "In admiralty, and generally in the law merchant, it means the compensation which is earned by persons who voluntarily assist in saving a ship or her cargo from peril." In Williams and Bruce's Admiralty, 2d ed. p. 114, chap. vi., on Salvage, "Salvage is the reward payable for services rendered in saving property lost at sea, or in saving any wreck, or in rescuing a ship or boat, or her cargo, or apparel, or the lives of the persons belonging to her, from loss or danger." In Mr. Carver's book [2] (which will be the Abbott on Shipping of the future), chap. xi., on Salvage and Wreck, s. 322, "By the common law, one who saves, or helps in saving, a vessel to which he is a stranger from danger at sea, is entitled to a reward for his services. . . . So, also, with regard to cargo or other property belonging to a vessel at sea which is rescued from danger, whether while in the vessel or after having been thrown or washed out of her; those who rescue such property are entitled to reward, and to a lien upon the property for that reward. The reward thus payable to these salvors is called salvage." There is no word used by any of these writers which mentions any subject or object as the subject or object of salvage under the common law jurisdiction as to salvage of the High Court of Admiralty, other than the ship, her apparel, or cargo, or the wreck of them. If in Williams and Bruce more is meant by the phrase "property lost at sea," the statement is, in the notes, made to depend on the authority of American cases, which will be discussed hereafter. In the last treatise on the subject of salvage — Kennedy on Salvage — the case is thus stated (p. 2): "A salvage service, in the view of the Court of Admiralty, may be described, sufficiently for practical purposes, as a service which saves or helps to save maritime property — a vessel, its apparel, cargo, or wreck — or the lives of persons belonging to any vessel, when in danger," etc. The learned author then quotes the American cases as to rafts of timber, but observes: "There does not appear, however, to be any

[1] Abbott's Treatise on Merchant Ships and Seamen, 5th ed. p. 397.
[2] The Carriage of Goods by Sea, 2d ed. p. 327.

reported case in which the English Admiralty Court has awarded salvage for the preservation of any but such maritime property as is included in the suggested description." So far, therefore, as the text-writers are to be considered, if the extended meaning of the subject-matter of salvage in the High Court of Admiralty in its original or common law jurisdiction is that which is asserted on behalf of the plaintiffs in this case, all the text-writers but two have overlooked it, and of the two one founds it solely on the American cases, and the other cites those cases but questions them. If we go further, and examine the sources of the English law, as, for instance, the laws of Oleron, Wisbuy, and others, every article in them treats of ships and what concerns them, and of nothing else. For example, art. 43 of the Laws of Oleron, "In all other things found by the seaside which have formerly been in the possession of some or other, as wines, oil, and other merchandise, although they have been cast overboard, and left by the merchants," etc. So in the most valuable and remarkable code known as the Ordinance of Louis XIV., of August, 1681, the whole of more than 100 sections deals with ships and the affairs of ships only, and with the wreck of ships or effects, called shipwreck effects. See s. xlv., headed "Wrecks and Ships Run Aground."[1] In the Black Book of the Admiralty there is no passage to indicate anything but ships and the conduct of them. In the Wisbuy Town-law on Shipping, ch. xiii., headed "Of things found on the sea,"[2] runs thus: "Should a man find goods driving on the sea, where he can see no land, should he bring these things to land, he shall have half for his labor; if he could see the land he shall have a third part. Sect. 1: Should a man find goods on the ground where he has to use oars and hooks, he shall have the third part. Sect. 2: Should a man find a ship driving on the sea and no people are in it, and he brings it to land, of that which results from it, whether from the ship or from the goods, he shall have half, and it shall remain outside the city's bounds. Sect. 3: Should a man find goods driving to land to which he can wade, he shall have of them the eighth penny; so likewise should a man find goods driven on to the shore he shall have the eighth penny therefrom. If any one denies that he has found such goods, and is afterwards convicted of it, that is theft." Reading the word "goods" here subject to the context of all the other clauses, it must, I think, mean goods which have been on a ship. The truth is that no merchant or legislator ever imagined goods at sea which had got there without having been in a ship. Then, turning to what is, after all, the chief source from which the jurisdiction of the Admiralty Court is to be ascertained, namely, the decisions of the English courts, we begin with Sir Henry Constable's case,[3] which defines what is "wreck of the sea," and that "'flotsam' is when a ship is sunk, or otherwise perished, and the

[1] See a Treatise of a Dominion of the Sea and a compleat body of the Sea Laws, 3d ed. pp. 349 to 356.

[2] Black Book of the Admiralty, edited by Sir Travers Twiss, vol. iv. p. 405.

[3] 5 Rep. 106a.

goods float on the sea; 'jetsam' is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into the sea, and afterwards notwithstanding the ship perish; 'lagan' is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again; . . . and none of these goods which are called jetsam, flotsam, or lagan, are called wreck so long as they remain in or upon the sea; . . . and the Court of Admiralty . . . shall have cognizance and jurisdiction of them whilst they are in or upon the sea." In Hartford *v.* Jones,[1] Holt, C. J., held in favor of a lien as against an action of trover, the lien being claimed for salvage services; that is, being an admiralty lien. But those services were alleged to be for saving the goods from a ship which took fire, and that they hazarded their lives to save them. In Nicholson *v.* Chapman[2] an action of trover was brought in respect of a quantity of timber placed in a dock on the banks of the Thames, but, the ropes accidentally getting loose, it floated, and was carried by the tide. It was saved, and the defendants refused to deliver it until salvage was paid. Eyre, C. J., and the court held that the saving of it was not such salvage as the law recognizes, *i. e.*, in the admiralty or the common law courts. "The question is," said the Lord Chief Justice, "whether this transaction could be assimilated to salvage? The taking care of goods left by the tide upon the banks of a navigable river . . . may in a vulgar sense be said to be salvage; but it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving; and that our law has also provided that this recompense should be a lien upon the goods which have been saved." He then goes on to say that goods carried by sea are exposed to danger, etc., and that the recompense is dictated by principles of public policy recognized in civilized and commercial countries. He then continues: "Such are the grounds upon which salvage stands; they are recognized by Lord Chief Justice Holt in Hartford *v.* Jones. But see how very unlike this salvage (*i. e.*, in Hartford *v.* Jones) is to the case now under consideration." The difference thus alluded to evidently is that in the earlier case the goods were saved from a ship on the sea; in the later case the goods were never on the sea at all.

In the case of a Raft of Timber[3] Dr. Lushington refused to issue a monition, *i. e.*, a summons, calling upon the owner of the raft to shew cause why salvage should not be awarded. It is said that the question was only as to the locality in which the services were rendered. But Dr. Lushington also relied upon the nature of the object. "This," he said,[4] "is neither a ship or sea-going vessel; it is simply a raft of timber." There is no case in any English court in which

[1] 1 Ld. Raym. 393.
[2] 2 H. Bl. 254.
[3] 2 Wm. Rob. 251.
[4] 2 Wm. Rob. at p. 255.

the question of salvage reward has ever been entertained unless the subject of the salvage service was a ship, her apparel, or cargo, or freight, which is peculiar to ships, or wreck of a ship or her cargo, or, by statute, the life of a person in danger, because the person has been on board ship. It follows that no jurisdiction of the admiralty in England can be carried, by reason of the practice or judgments of the admiralty or any other court, beyond a claim for salvage in respect of the subjects and objects above named.

As to the alleged extension of the jurisdiction of the High Court of Admiralty by statute, the question is whether it has been extended by statute in cases of salvage claims to any subjects or objects which were not subjects or objects of salvage claims before the statutes.

The statutes have added one subject — namely, life — as liable to salvage, to be awarded by the High Court of Admiralty, but have added no other.

The question argued, that a larger jurisdiction as to the subjects or objects of salvage is given to the county courts than to the High Court of Admiralty, is too preposterous to be worthy of further notice.

It was argued that the gas float was a ship within the ordinary meaning of the word ship, or within the meaning of what was said to be the definition of the word ship in some judgments of the court. It is said that the judgment of Lord Blackburn in *Ex parte* Ferguson [1] is inconsistent with the view that "ship" is to be used only in its ordinary meaning amongst people conversant with shipping business, But the description given of that which in the case was called a "coble" made it clear that that coble was a vessel in its ordinary sense, though all cobles are not ships or vessels, but some are only boats. The case of The Mac [2] was much relied upon. It is the case of a hopper-barge. I agree that expressions used by me were not happy. I think the first phraseology is well enough: "The word includes anything floating in or upon the water, built *in a particular form, and used for a particular purpose.*" [3] But I think the subsequent phrase, "She is used in navigation . . . for the purposes of navigation," was unhappy. It should have been "She was being navigated." In the case of The Cleopatra [4] the thing saved was held to be sufficiently like a ship to be not unfairly treated as a ship. The case of The Owners of a Caisson,[5] before Sir Robert Phillimore, is relied on. It looks as if the judge of the Admiralty Court was asked by both sides to name the amount, and the distribution of a fair reward. If so, he acted as an arbitrator. If he acted as judge, the case is contrary to all others, and is wrong.

It seems impossible to say that within the ordinary English meaning among merchants or sailors or persons dealing with maritime affairs this thing could be called a ship, a vessel, or a boat. But now we have to deal with the argument that the general law maritime acknow-

[1] L. R. 6 Q. B. 280. [2] 7 P. D. 126. [3] 7 P. D. at p. 130. [4] 3 P. D. 145.
[5] Pritchard's Maritime Digest, 3d ed. vol. ii. p. 2078, No. 1139; Shipping Gazette, May 10, 1876.

ledged in the High Court of Admiralty included, and includes, subjects or objects as the subjects or objects of salvage which are beyond ship, apparel, and cargo, including flotsam, jetsam, and lagan, and wreck of ship or cargo. It was argued that everything found floating on the water, although it itself could not possibly be a navigable thing, might be the subject or object of salvage; and it was said that there are American judgments which justify such a statement. If there are, I for one should hesitate long before I differed from them. I have the greatest respect and admiration for American decisions. It is because of the reference to the American judgments that I have used immense labor in writing this judgment. I hope it will be some day considered in American courts. But before examining the American judgments, I will refer to the statement of the law by Bowen, L. J., in Falcke *v.* Scottish Imperial Insurance Company:[1] "The general principle is, beyond all question, that work and labor done or money expended, by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. . . . With regard to salvage, . . . the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law for the purposes of public policy, and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, *nor to anything except ships or goods* in peril at sea." The judgment of Martin, B., in Palmer *v.* Rouse[2] seems to be to the same effect: "The case depends on the construction of the Merchant Shipping Act, 1854. That act was passed with reference to shipping, and must therefore be taken to apply to matters connected with shipping. The act gives a jurisdiction unknown at common law, and subjects the owners of goods to the payment of charges to which at common law they were not liable. It must therefore be construed strictly. Now, according to the well-known meaning of flotsam, . . . it refers to goods having been at sea in a ship and separated from it by some peril."

The case principally relied on in the American reports is that called A Raft of Spars.[3] It was a libel *in rem*, filed in April, 1848, in a district court having admiralty jurisdiction, to recover compensation for salvage services. The raft, which consisted of sixteen spars, was observed to be adrift below the Narrows, and floating out to sea. The libellant stopped the raft, and towed it to the Staten Island shore. The owner of the raft instituted a replevin action in

[1] 34 Ch. D. 234, at p. 248. [2] 3 H. & N. 505, at p. 509. [3] 1 Abbott, Adm. 291.

the Supreme Court of the State of New York and intervened in the admiralty suit, and moved that the action there should be set aside, or that all proceedings in it should be stayed until the replevin suit in the state court should be determined. On this motion, Betts, J., said: "The single point which arises for decision upon the motion is whether this court will, either as matter of right to the claimant or by comity towards the municipal courts, cause the prosecution of this action to surcease until the action at law in the state court is determined." The point that an Admiralty Court had no jurisdiction to entertain the question of salvage does not seem to have been argued at that stage. The judgment seems to be that, assuming for the purposes of the motion before it, both courts had jurisdiction, there was no legal reason for postponing the hearing of the one suit to the hearing of the other. What might be decided in either court on the hearing was left for the future. The cause came on for hearing in February, 1849, when Betts, J., overruled the objection to the jurisdiction, entertained the case in admiralty, and decreed salvage.[1] The next case in order of date is Tome *v.* Four Cribs of Lumber.[2] It was heard in November, 1853, in the Circuit Court on appeal from the District Court in Admiralty. Rafts, or a raft of timber, were being floated down the Susquehanna River. The raft was anchored in the stream. By reason of a sudden rise in the river, accompanied by a high wind and heavy sea, the rafts went adrift and were carried down the river with the current. They were stopped by one Davis, who claimed salvage. The District Court entertained and allowed salvage reward. In the Circuit Court the judgment was reversed by Taney, C. J., on the ground that the District Court had no jurisdiction. The chief justice relied much on the case of Nicholson *v.* Chapman.[3] He says:[4] "These rafts, anchored in the stream, although it be a public navigable river, are not the subject-matter of admiralty jurisdiction, in cases where the right of property or possession is alone concerned. They are not vehicles intended for the navigation of the sea, or the arms of the sea; they are not recognized as instruments of commerce or navigation by any act of Congress. They are piles of lumber, and nothing more, fastened together and placed upon the water until suitable vehicles are ready to receive them, and transport them to their destined port, and any assistance rendered to these rafts, even when in danger of being broken up, or swept down the river, is not a salvage service in the sense in which that word is used in the courts of admiralty. . . . The District Court therefore had not jurisdiction to issue the process," etc. This judgment seems to me to adopt the reason of the judgment in Nicholson *v.* Chapman,[3] contained in the words: "The service had none of the qualities or character of the services for which the maritime law of all commercial nations allowed salvage when the property was in danger of perishing from the perils of the sea." There are parts of the judgment of the chief

[1] 1 Abbott, Adm. 485.
[2] Taney's Judgments, 533.
[3] 2 H. Bl. 254.
[4] Taney's Judgments, 533, at p. 547.

justice which seem to show that he thought the raft in question was not in danger. But that is not a point of jurisdiction; it is a point which would be an answer to the claim at the trial, and which would have to be tried by the court if it assumed, or could assume, jurisdiction.

The case Fifty Thousand Feet of Timber,[1] in 1871, in the District Court, is with respect to two rafts of timber found floating in the harbor of Boston. Lowell, J., decreed a salvage reward. He said: "A salvage service is performed when goods are saved from peril at sea, or on other navigable waters, or cast upon the shores thereof. . . . There are two judgments that a raft of timber is an exception to the general rule: Nicholson *v.* Chapman;[2] Four Cribs of Lumber."[3] This seems to be hardly an accurate description. The cases did not state that there was an exception; they stated a rule, and decided that rafts of timber were not within it. The judgment, with deference, is more sarcastic than well considered. The learned judge asserts that Taney, C. J., was mistaken, and Dr. Lushington wrong. He construes the English statute 9 & 10 Vict. c. 99, s. 40, with deference again, I say, wrongly. He says that the only difficulty in the case before Dr. Lushington was as to locality, and he says that "it was so held by Judge Betts in a well-considered judgment." He continues: "A suit for salvage is neither contract nor tort. It resembles the latter in being a proceeding for unliquidated damages, and in depending on locality." Is that a correct description either of a salvage suit, or even of the action to which the learned judge assimilates such suit?[4] "If the services are rendered, it is of no consequence whether the goods are a ship or part of a ship, or were ever on board a ship. A great many of the cases are of mere derelict goods picked up at sea; and no one ever heard that it would be a defence to a proceeding for salvage, that the goods had been washed out to sea from the shore by a gale or a flood, or had been dropped from a balloon. I have had a case of the former kind; though, to be sure, the subject-matter was an unmanned vessel. If it had been a barrel of oil, the principle would have been the same." I cannot accept this judgment as a careful discussion and decision on American law. Bywater *v.* A Raft of Piles,[5] in June, 1890, is decided on the authority of the cases before Betts, J., and Lowell, J., and on an endeavor to distinguish the case before Taney, C. J.[6]

[1] 2 Lowell, 64. [2] 2 H. Bl. 254. [3] Taney's Judgments, 533.

[4] "It may, however, be doubted whether the civil jurisdiction, in cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur in vessels to which the admiralty jurisdiction, in cases of contracts, applies. If one of several landsmen, bathing in the sea, should assault, or imprison, or rob another, it has not been held here that the admiralty would have jurisdiction of the action for the tort." Benedict, Am. Adm. (3d ed.) 74. — Ed.

[5] D. C. D. Wash. 42 Fed. R. 917.

[6] The views of Betts, and Lowell, JJ., were adopted in Muntz *v.* A Raft of Timber, 15 Fed. R. 555, 15 Fed. R. 557; Bywater *v.* A Raft of Piles, 42 Fed. R. 917; Whitmire *v.* Cobb, 88 Fed. R. 91 (sticks of timber); Whitmire *v.* Hudson, 88 Fed. R. 991 (sticks of timber).— Ed.

Whilst writing this judgment, and, indeed, at a very late period of it, the counsel on both sides, with the loyalty always shown by counsel to the court, sent to me the case of Cope *v.* Vallette Dry Dock Company,[1] decided in January, 1887, in the Supreme Court of the United States. It was an appeal from the Circuit Court of Louisiana, which had dismissed a libel for salvage brought in the District Court, on the ground that the District Court sitting in admiralty had no jurisdiction to entertain in the particular case a claim for salvage. The salvage claimed was in respect of saving from total loss a dry dock. It was a structure contrived for the purpose of taking ships out of the water in order to repair them, and for no other purpose. It consisted of a large oblong box, with a flat bottom and perpendicular sides; in the year 1866 it had been put in position by being permanently moored by means of large chains to the bank of the Mississippi River, and was sparred off from the bank by means of spars to keep it afloat. When it was desired to dock a vessel the dry dock was sunk by letting in water until the vessel to be docked could be floated into it. It was then raised by pumping the water out, leaving the docked vessel in a position to be inspected and repaired. It was furnished with engines, but they could only be used for pumping, and the dry dock had no means of propulsion, either by wind, steam, or otherwise. It was not designed for navigation, and could not be practically used therefor. As a conclusion of law the Circuit Court found that the services of the libellants were not salvage services, and that neither that court nor the District Court had jurisdiction of the case. Bradley, J., delivering the judgment of the Supreme Court, said: "We have no hesitation in saying that the decree of the Circuit Court was right.[2] A fixed structure, such as this dry dock is, not used for the purpose of navigation, is not a subject of salvage service any more than is a wharf or a warehouse when projecting into or upon the water. . . . A ship or vessel, used for navigation and commerce, though lying at a wharf, and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects, and are capable of receiving salvage service." The judgment then cites the passage from Abbott, and cites other English authorities, and then says: "If we search through all the books, from the Rules of Oleron to the present time, we shall find that salvage is only spoken of in relation to ships and vessels and their cargoes, or those things which have been committed to, or lost in, the sea or its branches, or other public navigable waters, and have been found and rescued." The judgment then discusses the case of the hopper barge,[3] and then, referring to the American cases, says: "There has been some conflict of decision with respect to claims for salvage services in rescuing goods lost at sea and found floating on the surface or cast

[1] 119 Sup. Ct. U. S. 625.

[2] Salvor Co. *v.* Sectional Co., Fed. Cas. No. 12,273 *Accord.*

To the same effect in The Hendrick Hudson, 3 Ben. 419 (salvage denied in the case of a floating hotel). — Ed.

[3] The Mac, 7 P. D. 126.

upon the shore. When they have belonged to a ship or vessel as part of its furniture or cargo, they clearly come under the head of wreck, flotsam, jetsam, lagan, or derelict, and salvage may be claimed upon them. But when they have no connection with a ship or vessel some authorities are against the claim, and others are in favor of it." The only authorities in America for the use of the large terms insisted upon by the arguments before us are the cases before Betts, J., and Lowell, J. I think that those cases cannot be supported in America, or acted on here. As to American law, I think the case in the Supreme Court is decisive.

I come, therefore, to the conclusion that by the common or original law of the High Court of Admiralty the only subjects in respect of the saving of which salvage reward could be entertained in the admiralty court were ship, her apparel and cargo, including flotsam, jetsam, and lagan, and the wreck of these and freight; that the only subject added by statute is life salvage; and that the county court has no right to exercise jurisdiction with regard to any other subject-matter than that which might be entertained by the High Court of Admiralty. Whether salvage could be granted for the saving of what is called a lightship may be doubtful. I incline to think not; if it could be, it is only because the lightship would be held to be a ship. As to some instances which were proposed — such as the Victory in Portsmouth Harbor — I have no doubt that she is a ship. So was the Dreadnought, used for years as a hospital. So is a ship used as a coal hulk. But the thing in question on this appeal is not a ship in any sense.

Appeal allowed.[1]

[1] Affirmed in 1897, App. Cas. 337. Lord Herschell said, pp. 344, 345: "I turn now to the American cases, on which so much reliance has been placed. . . . Some of the cases relied on related to the rescue of things which, having been in tow of vessels, had broken loose and were in peril. Where goods are being towed from place to place, although they are not, strictly speaking, cargo, they yet partake of its character and are closely analogous to it. They are being transported from place to place by a vessel. . . . It may be, then, that in salvage law a broad and liberal construction should be extended to the word 'cargo,' so as to embrace goods in course of being transported by a vessel though not inside it. I desire to reserve my opinion on the point, in case it should hereafter be necessary to decide it.

"Reliance was also placed on cases in which salvage had been allowed for services rendered to rafts of timber which were adrift. Such a case presents greater difficulty than the class just alluded to. But here again it must be remembered that rafts are frequently so constructed as to be in a sense navigated: they are capable of being and are steered. They often have crews resident on board; they are used for the transport, from place to place, by water, of the timber of which they consist, and sometimes of timber upon them. Whether these considerations would suffice to support the decisions that salvage may be awarded in respect of services rendered to them or not, it is obvious that they are quite foreign to the case which has now to be dealt with by your lordships; and it is only on such considerations, if at all, that the decisions can, in my opinion, be supported."

The following objects have been included within the term ship or vessel, as something navigable, and the admiralty jurisdiction attached accordingly: —

Ferry-Boats: — The Cheeseman, 2 Bond, 363; The Gate City, 5 Biss. 200; The F. B. Nimick, 2 Fed. R. 86; The St. Louis, 48 Fed. R. 312.

The early cases, Harris *v.* Nugent, 3 Cr. C. C. 649; The Farmer, Gilp. 524, to the contrary are no longer law.

Tug of less than Five Tons: — The Ella B., 24 Fed. R. 508.

THE F. & P. M. No. 2.

In the United States District Court, Eastern District of Wisconsin, January 17, 1888.

[*Reported in* 33 *Federal Reporter*, 511.]

Dyer, J. This is a suit in admiralty, brought by the libellant, a citizen of Michigan, against the steam-vessel F. & P. M. No. 2, owned and employed in navigation by the Flint & Pere Marquette Railroad Company, to recover the value of a raft of logs, which, on the eighteenth day of September, 1886, were being towed by a tug from a point on the east shore of Lake Michigan to Ludington. The libel alleges that the raft or boom of logs was being towed into the harbor of Ludington; that the steamer, in entering the same port, negligently ran into the raft, striking it with such force as to break the boom

A Raised Wreck: — The Progresso, 46 Fed. R. 292.

Canal-Boats: — The Kate Tremaine, 5 Ben. 60; The E. M. McChesney, 15 Blachf. 183, 8 Ben. 150. But see The Ann Arbor, Fed. Cas. No. 407, 408.

Lighters: — The General Cass, Bro. Adm. 334; Miller *v.* Dredges, 40 Fed. R. 597 (cited).

Barges: — The Mac, 7 Prob. Div. 126; The D. C. Salisbury, Olc. 71; The Union Express, Bro. Adm. 516; Disbrow *v.* The Walsh Brothers, 36 Fed. R. 607; Miller *v.* Dredges, 40 Fed. R. 597 (cited); The City of Pittsburg, 45 Fed. R. 699. But see Jones *v.* Coal Barges, 3 Wall. Jr. 53; Wood *v.* The Two Barges, 46 Fed. R. 204.

Scows: — The Florence, 2 Flip. 56; Endner *v.* Greco, 3 Fed. R. 411; The Alabama, 22 Fed. R. 449, 19 Fed. 544; The Starbuck, 61 Fed. R. 502; The International, 83 Fed. R. 840 (*semble*); The Scow No. 15, 92 Fed. R. 1010.

Floating Boathouses: — Woodruff *v.* One Covered Scow, 30 Fed. R. 269.

Floating Bathhouses: — The Public Bath No. 13, 61 Fed. R. 692 (not permanently moored).

Floating Theatre: — The W. F. Brown, 46 Fed. R. 290 (not permanently moored).

Floating Elevators: — The Hezekiah Baldwin, 8 Ben. 556 (not permanently moored).

Wharf Boats: — The Old Natchez, 9 Fed. R. 476.

Dredges: — The Alabama, 22 Fed. R. 449, 19 Fed. R. 544; The Pioneer, 30 Fed. R. 206 (criticised in Pile Driver E. O. A., 69 Fed. R. 1005, 1009); The Endless Chain Dredge, 40 Fed. R. 253; The Commodore, 40 Fed. R. 258; The Atlantic, 53 Fed. R. 607; The Starbuck, 61 Fed. R. 502; Saylor *v.* Taylor, 77 Fed. R. 476; The International, 83 Fed. R. 840 (*semble*); McRae *v.* Bowers Co., 86 Fed. R. 344; McMaster *v.* One Dredge, 95 Fed. R. 832 (distinguishing *in re* Hydraulic Steam Dredge No. 1, 80 Fed. R. 545, a stationary dredge for throwing mud upon land for filling purposes. See the similar case of a marine pump, The Big Jim, 61 Fed. R. 503); Steam Dredge No. 1, 87 Fed. R. 760.

See Maltby *v.* A Steam Derrick-boat, 3 Hughes, 477, 478 *semble contra*.

Pile Drivers: — Lawrence *v.* Flatboat, 84 Fed. R. 200, 86 Fed. R. 907 (used in constructing bulkheads for harbor lights). But see *contra* Pile Driver E. O. A., 69 Fed. R. 1005 (used for driving piles at docks).

Raft of Logs: — A Raft of Spars, Abb. Adm. 485 (salvage); 50,000 Feet of Timber, 2 Low. 64 (salvage); Muntz *v.* A Raft of Timber, 15 Fed. R. 555, 15 Fed. R. 557 (salvage); Bywater *v.* A Raft of Piles, 42 Fed. R. 917 (salvage); Whitmire *v.* Cobb, 88 Fed. R. 91 (*semble*, salvage); Whitmire *v.* Hudson, 88 Fed. R. 991 (*semble*, salvage).

But see *contra* Tome *v.* Four Cribs of Lumber, Taney, 533 (no possessory libel); A Raft of Cypress Logs, 1 Flip. 543 (no claim *in rem* for seamen's services); The W. H. Clark, 5 Biss. 295, 308 (no liability for collision); Gastrel *v.* A Cypress Raft, 2 Woods, 213 (no petitory libel).

The following objects have been held not to come under the class of ships or vessels: —

Floating Hotel: — The Hendrick Hudson, 3 Ben. 419 (to be permanently moored).

Floating Platform: — Ruddiman *v.* A Scow Platform, 38 Fed. R. 150 (moored).

Floating Dry Dock: — Cope *v.* Vallette Co., 119 U. S. 625 (permanently moored); Snyder *v.* A Floating Dry Dock, 22 Fed. R. 685 (permanently moored). — Ed.

and scatter the logs; and that, in consequence of the collision, many of the logs floated out into the lake, and were lost. The libel further alleges, and the answer admits, that the steamer was duly enrolled and licensed for the coasting trade, and employed in navigation and commerce upon the lakes within the admiralty jurisdiction of the United States. The defence made by the answer is that the collision occurred through the negligence of the tug which had the logs in tow. A motion is now made by the respondent to dismiss the libel for want of jurisdiction. As the place where the collision happened was upon public navigable waters, no issue arises concerning the question of locality as a ground of jurisdiction. The point presented is whether the raft of logs in question is the subject-matter of maritime jurisdiction, so as to enable the owner to maintain a suit in admiralty against the steamer, to recover for the injury and loss sustained.

In the case of The W. H. Clark,[1] Judge Hopkins expressed a serious doubt whether "admiralty jurisdiction could be sustained *against* a raft of lumber," in a case of collision; and cited Tome *v.* Lumber,[2] quoting Chief Justice Taney's remarks in that case, that cribs of lumber "are not vehicles intended for the navigation of the sea. They are not recognized as instruments of commerce or navigation by any act of Congress; they are piles of lumber, and nothing more, fastened together and placed upon the water." But in the case of the W. H. Clark it was not necessary for Judge Hopkins to decide, and he did not decide, the question whether, in a case of collision, a remedy in admiralty could be enforced either in favor of or against a raft of lumber, for the reason that the steamer having the raft in tow was found in fault, and therefore liable for the injury done to the boat collided with. What he said, therefore, on the subject of jurisdiction, so far as it related to the raft of lumber, was *obiter*. In Tome *v.* Lumber,[2] an attempt was made to maintain a suit in admiralty for an alleged salvage service in rescuing certain rafts of lumber which had been driven from their anchorage in the Susquehanna River, and were found floating down the stream. It was there held that rafts *anchored in a stream* are not the subjects of admiralty jurisdiction, *where the right of property or possession is alone concerned;* that they are piles of lumber, and nothing more, placed upon the water until suitable vehicles are ready to receive and transport them to their destined port; and that any assistance rendered to them, even when in danger of being broken up and swept down the stream, is not a salvage service, in the sense in which that word is used in courts of admiralty. As will be observed, the action was a possessory one, instituted in a court of admiralty by the owners of the lumber, to recover it from a party who was seeking to hold it for salvage service; and it was held that the remedy of the owners to regain possession was an ordinary action of replevin. Clearly, the case can have no greater application to the question under consideration, than its particular facts and the character of the action warrant.

[1] 5 Biss. 308. [2] Taney, 547.

In the case of A Raft of Cypress Logs,[1] it was held that a libel *in rem* cannot be maintained for services in navigating a raft of logs. That was a case of contract, and it was held that "in actions of contract the agreement sued on must be maritime in its character; it must pertain in some way *to the navigation of a vessel*, having carrying capacity and employed as an instrument of travel, trade, or commerce, though its form, size, and means of propulsion are immaterial." The Gen. Cass.[2] As a raft is not a ship or vessel, it was held that the contract of service upon which the suit was based was not a maritime contract, and, therefore, that a court of admiralty had not jurisdiction of the action. But, in deciding the case, Judge Brown was careful to say that it was unnecessary "to consider whether a raft may not, for some purposes, be the subject of admiralty jurisdiction."

Thackeray *v.* The Farmer [3] was also a case of contract, and it was there decided that a contract for the payment of labor on board of a vessel employed in carrying fuel to the city of Philadelphia, from the opposite shore of the Delaware River, could not be enforced by a suit *in rem* in the admiralty. It may well be doubted whether, in the present state of the law of admiralty, this case would now be accepted as authoritative, even upon the question there decided. It is worthy of notice that it arose when the admiralty jurisdiction was greatly restricted, — in fact confined to waters within the ebb and flow of the tide. In any event, the decision of Judge Hopkinson does not, in principle, go to the extent of forbidding jurisdiction in admiralty, in a case which might be supposed, of collision upon the waters of a navigable river, between such a craft as is described in that case and a duly-enrolled and licensed ship engaged in ocean commerce.

In Jones *v.* The Coal Barges,[4] the subject of dispute was a collision between two coal barges loaded with coal, one of which was floating down the Monongahela River, and ran foul of the other, which was fastened to the shore, but standing out further in the stream than she had a right to be. They were described as open chests or boxes, which were made for transporting coal, were floated by the stream, and sold for lumber at the end of the voyage; and it was held that a remedy *in rem* against one by the owner of the other, for its contracts or torts, could not be enforced in the admiralty. Stress was laid on the fact that these barges were not enrolled and licensed for the coasting trade, under the provisions of the Act of February 26, 1845, then in force, which extended the jurisdiction of courts of admiralty to the lakes and other navigable waters.

But, admitting that a raft of lumber or logs is not the subject of salvage service, as was held in Tome *v.* Lumber,[5] because, as is said in some of the cases, "salvage," in the sense in which the term is used in the maritime law, can only be claimed for the rescue of a ship or its cargo or portions of the same; and conceding that the right of

[1] 1 Flip. 543. [2] Brown, Adm. 334. [3] Gilp. 524.
[4] 3 Wall. Jr. 53. [5] Taney, 594.

possession of such property must be asserted in a common law action, and not in a suit in admiralty: admitting also the law in relation to contract service to be as stated in the cases cited from 1 Flip. 543, and Gilp. 524, — does it follow that the owner of a raft of logs which is in tow of a tug, presumptively duly enrolled and licensed, and which is run into upon navigable waters by a steamer also duly enrolled and licensed, and engaged in interstate commerce, may not enforce his remedy in admiralty, either *in rem* against the boat, or *in personam* against the owner? Why may not such remedy be enforced, as well in such case, as against either the steamer or the tug, if the collision had occurred between them?

The jurisdiction of the admiralty in cases of tort depends upon locality. Conk. Adm. 21. This collision occurred upon navigable waters, over which, confessedly, the admiralty has jurisdiction. As a subject of commerce, the raft or boom of logs was being transported from one port to another in tow of the tug. Its relation to the tug was somewhat in the nature of cargo. Both the raft and the steamer which inflicted the injury were, at the time, actually engaged in navigation. The decision in Jones *v.* The Coal Barges turned upon the construction placed on the Act of 1845, which confined the jurisdiction of admiralty courts on the lakes and rivers, to "matters of contract and tort in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, *enrolled and licensed for the coasting trade.*" But, since that decision, the jurisdiction of courts of admiralty has been greatly extended. In the case of The Eagle,[1] it was held that the Act of 1845 was inoperative and nugatory, with the exception of the clause therein which gave to either party the right of trial by jury, when requested, and that the district courts could take cognizance of all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same as upon the high seas, and bays and rivers navigable from the sea. The eighth subdivision of section 563, Rev. St. U. S., declares, in substantially the language of the opinion in the case of The Eagle, that the district courts shall have cognizance of all civil causes of admiralty and maritime jurisdiction; and sect. 3, ch. 1, Rev. St., defines the word "vessel," as it is used in the statutes, as including "every description of water-craft, or other artificial contrivance used, or capable of being used, as a means of transportation on water."

In *Ex parte* Boyer, it was decided that a court of admiralty has jurisdiction of a suit *in rem* in a case of collision between two canal-boats navigating a canal within the body of a State; and that, too, although the libellant's boat was bound from one place in a State to another place in the same State.

In the case of The Rock Island Bridge,[2] a libel was filed against the bridge, for alleged damages done to two steamboats, and it was held that there was no foundation for a proceeding *in rem*, because the bridge was fixed and immovable, like a wharf or real estate, and

[1] 8 Wall. 15. [2] 6 Wall. 213.

was therefore not the subject of maritime lien. But Mr. Justice Field says, speaking for the court, that "there is no doubt . . . that the jurisdiction of the admiralty extends to all cases of tort committed on the high seas, and, in this country, on navigable waters. For the redress of these torts, the courts of admiralty may proceed *in personam ;* and, when *the cause of the injury is the subject of a maritime lien,* may also proceed *in rem.*" Further he says: "A maritime lien can only exist upon movable things engaged in navigation, *or upon things which are the subjects of commerce on the high seas or navigable waters.* It may arise with reference to vessels, steamers, *and rafts,* and upon goods and merchandise carried by them." The case at bar, it will be observed, is one against a steamer, confessedly the subject of a maritime lien.

In Atlee *v.* Packet Co.,[1] it was held that a court of admiralty had jurisdiction of a suit *in personam* by the owner of a barge against a party who had built a structure in the navigable channel of the Mississippi River, which had been the cause of injury to the barge. See, also, Railroad Co. *v.* Tow-Boat Co.,[2] wherein Mr. Justice Grier said: "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts it depends entirely upon locality." In this case a railroad company was held liable in a suit in admiralty for an injury done to a vessel by piles which had been driven and left in the bed of a navigable river.

In the case of The Arkansas,[3] it was decided, in a well-considered opinion by Judge Love, that where a vessel is injured by collision with a structure unlawfully placed in the navigable channel of a river, the party creating the obstruction may be sued for the injury in an action *in personam,* in a proper court of admiralty; but the owners of the vessel cannot, in such a case, proceed *in rem* against the solid structure, whatever it may be, because there can be no maritime lien upon such a structure, to be enforced in the admiralty by its seizure and sale. Further, that where a structure lawfully created in the navigable channel of a river is injured by a collision caused by the negligent management of a vessel, the owner of such structure may proceed in an admiralty court, by action *in personam* against the owners of the vessel, or *in rem* against the vessel. If this be the law, — and I have no doubt it is, — no reason is perceived why the owner of a raft of logs which is in course of transit on navigable waters may not proceed *in rem* against a boat or vessel which negligently runs into and destroys or injures the raft.

In Muntz *v.* Timber,[4] it was decided that a raft of timber is subject to the jurisdiction of the admiralty court, in the matter of salvage.

Many other cases might be cited, showing the extension, in various directions, of the admiralty jurisdiction, since the days of the old tide-water doctrine, — cases that include injuries to barges in tow of other vessels, ferry-boats, scows, yachts, pleasure boats, and other craft which would have had no recognition as "ships or vessels," in

[1] 21 Wall. 389. [2] 23 How. 209. [3] 17 Fed. R. 383. [4] 15 Fed. R. 555.

the earlier history of admiralty law in this country. But further discussion of the question seems superfluous, as I have no doubt, in the present state of judicial decision on the subject, this court, as a court of admiralty, has jurisdiction of the controversy set forth in the libel and answer in this case.[1]

THE UNITED STATES *v.* McGILL.

IN THE UNITED STATES CIRCUIT COURT, DISTRICT OF PENNSYLVANIA, OCTOBER TERM, 1806.

[*Reported in* 4 *Dallas*, 426.[2]]

THIS was an indictment for the murder of Richard Budden, containing three counts: 1. Charging the murder to have been committed on the high seas; 2. Charging it to have been committed in the haven of Cape François; 3. Charging the mortal stroke to have been given on the high seas, and the death to have happened on shore, at Cape François.

The indictment was founded on the 8th section of the penal law,[3] which provides "that if any person, or persons, shall commit upon the high seas, or in any river, haven, bason, or bay, out of the jurisdiction of any particular state,[4] murder, etc., every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death."

Upon the evidence it appeared, that the prisoner was mate of the brig Rover, of which Richard Budden, the deceased, was master; that, on the 3d of May, 1806, while the brig lay in the harbor of Cape François, the prisoner gave the deceased a mortal stroke, with a piece of wood; that the deceased, languishing with the wound, was taken on shore, alive, the next morning; and that he died the day subsequent to that on which he was taken on shore.

After a defence on the merits, the prisoner's counsel (*Ingersoll* and

[1] The Two Ferry Boats, 2 Bond, 363, 373 (*semble*); The M. R. Brazos, 10 Ben. 435 (injury by vessel to a floating bathhouse permanently moored); The Athabasca, 45 Fed. R. 65 (*semble*); The John C. Sweeney, 55 Fed. R. 542, 543 (*semble*) *Accord.*

Jones *v.* Coal Barges, 3 Wall. Jr. 53 *Contra.*

In the Hendrik Hudson, 3 Ben. 419, and in Snyder *v.* A Floating Dry Dock, 22 Fed. R. 685, 686, it was intimated that a floating hotel, although not a vessel, might nevertheless be liable in admiralty for a tort. But there is a dictum to the contrary in The W. H. Clark, 5 Biss. 245, 308, as to an injury by a raft. See also Muntz *v.* A Raft of Timber, 15 Fed. R. 557. "Jurisdiction does not depend on the wrong being done by a vessel, or those connected with it; or against a vessel, or those connected with it; 'but on the locality where it occurred. Every species of tort, however occurring . . . if upon the high seas or navigable waters, is of admiralty cognizance.'" *Per* Butler, J., in The Ceres, Fed. Cas. No. 12,881. — ED.

[2] 1 Wash. C. C. 463, s. c. — ED.

[3] Act of April 30, 1790, 1 U. S. Stat. at Large, 113.

[4] "State" in this act means any State in the Union. U. S. *v.* Furlong, 5 Wheat. 184. — ED.

Joseph Reed objected, in point of law, that the death, as well as the mortal blow, were necessary to constitute murder; and that both the death and the blow must happen on the high seas, to give jurisdiction to this court, under the terms of the act of Congress. These positions were elaborately argued; and the following authorities were cited in support of them. 1 Hale, 425, 6. 4 Co. 42, 6. 2 Hale, 188. 3 Hawk. 188, 333. Plowd. 1 Hale, 427. Leach C. L. 723. 4 Bl. C. 303. 2 Co. Rep. 93. 2 Inst. 1 Hawk. 187. East C. L. 365. 1 Leon. 270. Cro. E. 196. Leach C. L. 432.[1]

PETERS, J. It is a general rule with me, to abstain from the exercise of jurisdiction, whenever I doubt my authority to exercise it. On the present occasion, it is not necessary to give an opinion, whether the present is a case of admiralty and maritime jurisdiction, upon the general principles of the admiralty and maritime law; for, confining myself to the 8th section of the penal act, I find sufficient to decide, that, at all events, it is not a case within the jurisdiction of this court. The court can only take cognizance of a murder committed on the high seas; and as murder consists in both the stroke and the consequent death, both parts of the crime must happen on the high seas to give jurisdiction; not one part on the high seas and another part in a foreign country.

WASHINGTON, J. The point principally urged by the prisoner's counsel is so clear, that it can receive little elucidation from argument. The offence of which we have cognizance is murder committed on the high seas. Now, murder is a technical term, of known and settled meaning; and, when used by the legislature, it imports the same as if they had said that the court shall have jurisdiction in a case of felonious killing upon the high seas. We have no doubt, therefore, that the death, as well as the mortal stroke, must happen on the high seas, to constitute a murder there.

But the more important question is, whether the present case remains unprovided for by the laws of the United States? The judicial act gives jurisdiction to the Circuit Court of "all crimes and offences cognizable under the authority of the United States." 1 vol. 55, s. 11. There are, undoubtedly, in my opinion, many crimes and offences against the authority of the United States which have not been specially defined by law; for, I have often decided, that the Federal courts have a common law jurisdiction in criminal cases; and in order to ascertain the authority of the United States, independent of acts of Congress, against which crimes may be committed, we have been properly referred to the constitutional provision, that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." But still the question recurs, is this a case of admiralty and maritime jurisdiction within the meaning of the Constitution? The words of the Constitution must be taken to refer to the admiralty and maritime jurisdiction of England (from whose code and practice we derive our systems of jurisprudence, and, generally speaking,

[1] The argument of the district attorney is omitted. — ED.

obtain the best glossary), but no case, no authority, has been produced to show that in England such a prosecution would be sustained (independent of acts of parliament) as a cause of admiralty and maritime jurisdiction. Nor am I disposed to consider the doctrine of the civil law which has been mentioned, as furnishing a guide to escape from the silence of our own code, as well as of the English code upon the subject.

Upon the whole, therefore, I am of opinion that the present is a case omitted in the law, and that the indictment cannot be sustained. It is some relief to my mind, however, that I have no doubt of the power of Congress to provide for such a case. It is true, that it would be inconsistent with common law notions to call it murder; but Congress, exercising the constitutional power to define *felonies* on the high seas, may certainly provide, that a mortal stroke on the high seas, wherever the death may happen, shall be adjudged to be a felony.

Upon this charge the jury immediately acquitted the prisoner.[1]

THE UNITED STATES *v.* WILSON.

IN THE UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK, MARCH 5, 1856.

[*Reported in* 3 *Blatchford*, 435.]

BETTS, J.[2] The indictment in this case is founded upon the Act of Congress, approved March 26, 1804,[3] entitled "An Act in addition to the Act entitled 'An act for the punishment of certain crimes against the United States,'" by the 1st section of which it is enacted, that any person, not being an owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or other vessel unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death.

The fact charged against the prisoner is admitted by his demurrer to the indictment; and, it being conceded, on the part of the United States, that the vessel was destroyed in the East River or western extremity of Long Island Sound, at a point between City Island and Hart Island, within the territorial limits of the town of Pelham, in the county of Westchester and State of New York, and accordingly within the jurisdiction of that State, the question raised by the demurrer is, whether the place where the act was done is within the

[1] Ball *v.* U. S., 140 U. S. 118, 135 (*semble*); U. S. *v.* Armstrong, 2 Curt. 442; U. S. *v.* Hewecker, 79 Fed. R. 59, 72; Commw. *v.* Macloon, 101 Mass. 1, 14 *Accord*. — ED.

[2] Only the opinion of the court is given. — ED.

[3] 2 U. S. Stat. at Large, 290.

criminal jurisdiction of the Federal courts. We assume it as a notorious geographical fact, that the breadth of water at that place, from Long Island on the South to the main land on the North shore, is not beyond the reach of ordinary eyesight, and does not exceed two miles. That point was not in controversy on the argument, and therefore we have not called for specific evidence to fix the distance.

The Constitution of the United States declares,[1] that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction;" and it is now indisputable that, by force of the constitutional provision, the civil jurisdiction of the courts of the United States, in maritime causes of contract or tort, embraces tide-waters within the bays, inlets of the sea, and harbors along the sea-coast of the country, and in navigable rivers. The Thomas Jefferson,[2] The Steamboat Orleans *v.* Phœbus,[3] The United States *v.* Coombs,[4] Waring *v.* Clarke,[5] The N. J. Steam Nav. Co. *v.* The Merchants' Bank.[6] But it is a fundamental doctrine, in respect to the Federal courts of inferior jurisdiction, that they cannot take cognizance of criminal offences of any grade, without the express appointment or direction of positive law. To enable them to exercise the functions bestowed by the Constitution over crimes and misdemeanors, there must be a designation, by positive law, both of the offence and of the tribunal which shall take cognizance of it. The United States *v.* Hudson,[7] *Ex parte* Bollman,[8] The United States *v.* Coolidge,[9] Wharton's Cr. Law, 76 to 80. Congress has, by the statute referred to, defined the crime of destroying a vessel. The act must be done wilfully and feloniously, by a person not an owner, and on the high seas. The place where the offence is committed becomes thus an essential element in the description of the crime. The mere fact that the accused wilfully destroyed the vessel, being upon waters within the jurisdiction of the United States, does not subject him to prosecution and punishment under this act, unless the vessel was at the time on the *high seas*.

It is no doubt within the competency of Congress to bring all waters subject to Federal jurisdiction within the scope of its criminal jurisprudence. This is manifestly the doctrine declared by the Supreme Court in the cases of The United States *v.* Bevans,[10] and The United States *v.* Wiltberger.[11] But the power is regarded as dormant unless exercised by direct enactments of law. It is not enough that a felony of the highest enormity is charged in the indictment, or that the laws of the United States denounce it as a capital crime, and subject it to trial and judgment in the national courts; but it must further be manifest that the place where the transaction occurred is designated by legislative enactment as one over which this authority may be exercised by the court. Thus, any person committing mur-

[1] Art. 3, § 2.
[2] 10 Wheat. 428.
[3] 11 Pet. 175.
[4] 12 Pet. 72.
[5] 5 How. 441.
[6] 6 How. 344.
[7] 7 Cranch, 32.
[8] 4 Cranch, 75.
[9] 1 Wheat. 415.
[10] 3 Wheat. 336.
[11] 5 Wheat. 76.

der on board an American vessel in bays, harbors, basins, or rivers, not within the jurisdiction of any State of the Union, is triable in the courts of the United States, and punishable therefor, the same as if the crime were committed upon the high seas. Act of April 30th, 1790, § 8.[1] But he cannot be punished for manslaughter committed elsewhere than upon the *high seas*, because the 12th section of the Act of April 30th, 1790, extends only to that offence when committed in that locality.[2] The United States *v.* Wiltberger.[3] Place is made, by the statute, an essential ingredient in the offence; and, if the *locus in quo* specified in the indictment is not, in a legal sense, the *high seas*, this court has no jurisdiction over the charge. The United States *v.* Furlong.[4]

There is less precision in the use of the term *high seas* in reference to the jurisdiction of maritime courts in civil actions, than in cases of a criminal character, because, in the former, it is immaterial to the authority of the court whether the transaction be on the open ocean, or on inland waters subject to the ebb and flow of the tide. In those cases, it might be immaterial whether tide-waters were or were not universally denominated high seas, neither the rights of the parties nor the power of the court being affected by the appellation. In the construction of criminal law, greater exactness and certainty are demanded, and words must be interpreted so as to carry out clearly the intention of the lawmaker.

It appears to us very manifest, that Congress, prior and subsequently to the enactment under consideration, has, in its criminal legislation, sedulously evinced the intention to use the term *high seas* in its popular and natural sense, and in contradistinction to mere tide-waters flowing in ports, havens, and basins. Thus, in the 8th section of the Act of April 30th, 1790, and in the 4th, 5th, 6th, 7th, 8th, and 11th sections of the Act of March 3d, 1825,[5] *high seas* are discriminated from rivers, havens, basins, and bays, which are not within any State in the Union, all the enactments importing unequivocally the meaning of Congress, that the term *high seas* alone embraces no waters that are landlocked in their position, and are subject to territorial jurisdiction.

The adjudications already cited from the Supreme Court affirm that to be the legal import and effect of the language; and the more labored and erudite elucidations made by inferior courts show that construction to be in consonance with the principles of general jurisprudence. United States *v.* Grush,[6] The Schooner Harriot,[7] Thomas *v.* Lane. In United States *v.* Robinson,[8] Judge Story applied the doctrine to the act now under consideration, and held that a bay in the Island of Bermuda, where an American vessel had been felo-

[1] 1 U. S. Stat. at Large, 113.
[2] U. S. *v.* Smith, 3 Wash. C. C. 78 *Contra.* — Ed.
[3] 5 Wheat. 76.
[4] 5 Wheat. 184.
[5] 4 U. S. Stat. at Large, 115, 116, 117.
[6] 5 Mas. 290. [7] 1 Story, 251. [8] 4 Mas. 307.

niously burned and destroyed, was not on the high seas, within the purview of the statute in question.

We are of opinion, upon a careful consideration of the subject, that the offence charged in this indictment is not, within the purview of the Act of March 26th, 1804, cognizable by this court, and that, accordingly, judgment must be rendered for the prisoner. The prisoner will be remitted by the marshal to the custody of the proper state authority by which he was detained when he was arrested on this indictment.[1]

S. M. BOGART AND OTHERS, LIBELLANTS, v. THE STEAMBOAT JOHN JAY.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1854.

[*Reported in* 17 *Howard*, 399.]

MR. JUSTICE WAYNE delivered the opinion of the court.[2]

We will confine ourselves, in this opinion, to the inquiry, whether or not a court of admiralty has jurisdiction to decree the sale of a ship for an unpaid mortgage, or can, on that account, declare a ship to be the property of the mortgagees, and direct the possession of her to be given to them. The questions of pleading made in the case, and the other points argued, we shall not notice. The conclusion at which we have arrived makes that unnecessary.

The libellants were the owners of the steamer John Jay. They sold her to Joseph McMurray for the sum of $6,000; $1,000 in cash, and the residue of $5,000 upon a credit, for which promissory notes were given, payable to their order, in three, six, nine, twelve, fifteen, eighteen, twenty-one, and twenty-four months. On the day of sale, McMurray, the purchaser, executed in a single deed, containing the whole contract between himself and the libellants, a transfer of the boat to the latter as a security for the payment of his notes, with the proviso "that this instrument is intended to operate only as a mortgage to secure the full and just payment of the eight promissory notes given in consideration of the purchase-money of said vessel or steamboat." McMurray failed to pay the second note. Upon such failure the libel was filed. The libellants set out the contract; allege that it was to operate as a mortgage to secure the payment of McMurray's notes; state his failure to pay the second note; claim, in the fifth article of their libel, that McMurray's failure to pay had revested

[1] U. S. *v.* Robinson, 4 Mas. 307; U. S. *v.* Grush, 5 Mas. 290 (Crimes Statute of 1825, ch. 276, § 22) *Accord.*

The words "high seas" in other criminal statutes have received a similar interpretation. U. S. *v.* Wiltberger, 5 Wheat. 76 (Act of 1790, c. 36, § 12).

The term "high seas" in criminal statutes do not include the great lakes. Henry Miller's case, Bro. Adm. 156. — ED.

[2] Only the opinion of the court is given. — ED.

them with the title to the boat, and that McMurray's had become forfeited, from his non-compliance with the condition contained in the contract of sale. Their prayer is, that they may have a decree for the amount of the unpaid purchase-money, with interest and costs, and that The John Jay and her equipments may be condemned to pay the same. Afterwards, upon their appeal in the Circuit Court, they moved to amend their libel by inserting the words, "or that the steamboat John Jay may be decreed to be their property, and the possession be directed to be delivered to them."

To this libel George Logan, by way of answer, put in a claim of ownership of the John Jay, by a *bona fide* purchase from McMurray; and he further denies the jurisdiction of the court, upon the ground that the contract between the libellants and McMurray was not maritime, or a case of admiralty and maritime jurisdiction. It appears that McMurray had received the possession of the boat; that she had been enrolled at the custom-house in his name; that he first sold one fourth of her to Logan, and afterwards, on the 2d December, executed a bill of sale for the whole of her to Logan, which was recorded in the custom-house; and that thereupon The John Jay was enrolled and licensed in the name of Logan.

Upon the hearing of the cause in the District Court, the libel was dismissed. It was carried, by appeal, to the Circuit Court, and the judgment of the District Court having been affirmed, it is now here upon appeal from the Circuit Court. We think that the affirmance of the judgment of the District Court was right, and will here briefly give our reasons for that opinion.

It has been repeatedly decided in the admiralty and common law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done. In the case of The Neptune,[1] Sir John Nicholl, in giving his judgment, observes: "Now upon questions of mortgage, the court of admiralty has no jurisdiction; whether a mortgage is foreclosed, whether a mortgagee has a right to take possession of a chattel personal, whether he is the legal or only the equitable owner, and whether a right of redemption means that a mortgagee is restrained from selling in repayment of his debt till after the time specified for the redemption is passed, the decision of these questions belongs to other courts; they are not within the jurisdiction or province of the courts of admiralty, which never decide on questions of property between the mortgagee and owner."

This is not so, because such a jurisdiction had been denied by the jealousy of the courts of the common law. Its foundation is, that the mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea. It is a security to make

[1] 2 Hagg. Adm. R. 132.

the performance of the mortgagor's undertaking more certain; and, whilst he continues in possession of the ship, disconnecting the mortgagee from all agency and interest in the employment and navigation of her, and from all responsibility for contracts made on her account. Such a mortgage has nothing in it analogous to those contracts which are the subjects of admiralty jurisdiction. In such a case, the ship is the object for the accomplishment of the contract, without any reference to the use of her for such a purpose. There cannot be, then, any thing maritime in it. A failure to perform such a contract cannot make it maritime. A debt secured by the mortgage of a ship does not give the ownership of it to the mortgagee. He may use the legal title to make the ship available for its payment. A legal title passes conditionally to the mortgagee. Where there has been a failure to pay, he cannot take the ship *manu forti*, but he must resort either to a court of equity or to statutory remedies for the same purpose when they exist, to bar the mortgagor's right of redemption by a foreclosure, which is to operate at such time afterward, when there shall be a foreclosure without a sale, as the circumstances of the case may make it equitable to allow. Indeed, after a final order of foreclosure has been signed and enrolled, and the time fixed by it for the payment of the money has passed, the decree may be opened to give further time, if there are circumstances to make it equitable to do so, with an ability in the mortgagor to make prompt payment. Thornhill *v.* Manning.[1]

Courts of admiralty have always taken the same view of a mortgage of a ship, and of the remedies for the enforcement of them, that courts of chancery have done of such a mortgage and of any other mortgaged chattel. But, from the organization of the former and its modes of proceeding, they cannot secure to the parties to such a mortgage the remedies and protection which they have in a court of chancery. They have, therefore, never taken jurisdiction of such a contract to enforce its payment, or by a possessory action to try the title, or a right to the possession of a ship. It is true that the policy of commerce and its exigencies in England have given to its admiralty courts a more ample jurisdiction in respect to mortgages of ships, than they had under its former rule, as that has been given in this opinion. But this enlarged cognizance of mortgages of ships has been given there by statute 3 and 4 Victoria, ch. 65. Until that shall be done in the United States, by Congress, the rule, in this particular, must continue in the admiralty courts of the United States, as it has been. We affirm the decree of the court below.[2]

[1] 7 Eng. Rep. 97, 99, 100.

[2] The Atlas, 2 Hagg. 48; The Neptune, 3 Hagg. 129, 132; Schuchardt *v.* Babbidge, 19 How. 239; The Eclipse, 135 U. S. 599, 608; The J. E. Rumbell, 148 U. S. 1, 15; Davis *v.* Child, 2 Ware, 71; The William, Bl. & How. 66; Dean *v.* Bates, 2 Wood. & M. 87; Maitland *v.* The Brig Atlantic, Newb. Adm. 514; The William D. Rice, 3 Ware, 134; Zollinger *v.* The Emma, 30 Fed. Cas. 939; Srodes *v.* The Collier, 22 Fed. Cas. 1019, 1021; The Island City, 1 Low. 375, 379; Morgan *v.* Tapscott, 5 Ben. 252; Deely *v.* Brigantine, 2 Hughes, 70; The C. C. Trowbridge, 14 Fed. R. 874; Britton *v.* Venture, 21 Fed. R. 928; The Ella

MEYER AND ANOTHER v. PACIFIC MAIL STEAMSHIP CO.

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, DECEMBER 6, 1893.

[*Reported in* 58 *Federal Reporter*, 923.]

MORROW, District Judge.[1] The libel alleges that on the 22d day of May, 1891, E. L. G. Steele & Co., of San Francisco, delivered to the Pacific Mail Steamship Company, at the port of San Francisco, State of California, 2200 gunnies of wheat and 5000 gunnies of corn, in good order and well conditioned, to be carried and transported upon the steamer San Blas, or any of said company's steamers, or steamers employed by them, then lying in the port of San Francisco, and bound for Panama, unto the port of Champerico, in the republic of Guatemala, and there delivered in good order to the libellants, who were then and there the owners thereof, for the freight of $3726.88, to be paid by the said libellants; the said E. L. G. Steele & Co. receiving therefor from the said Pacific Mail Steamship Company a bill of lading and contract of affreightment, which is annexed to the libel.

It is further alleged that, although the said freight was prepaid upon said merchandise, the said Pacific Mail Steamship Company did not carry all of said merchandise upon said steamer San Blas, or upon any of said company's steamers, or upon any steamer employed by them,

Slaymaker, 28 Fed. R. 767; The Madrid, 40 Fed. R. 677; The Kattie O'Neil, 65 Fed. R. 111 *Accord*.

Before the decision in the principal case, admiralty jurisdiction over mortgages was entertained in the Districts of Massachusetts and Pennsylvania. The Granite State, 1 Spr. 277, Fed. Cas. No. 5687 n.

Admiralty will not entertain jurisdiction of a cause begun by a libel which is essentially a bill in equity; *e. g.*, in case of

SPECIFIC PERFORMANCE OF A CONTRACT: — The Eclipse, 135 U. S. 599; Andrews *v.* Essex Co., 3 Mas. 16; The Perseverance, Bl. & How. 385; The S. C. Ives, Newb. 205; The Robert K. Kirkland, 92 Fed. R. 407.

TRUSTS: — The Eclipse, 135 U. S. 599; Kellum *v.* Emerson, 2 Curt. C. C. 79; A Cargo of Mineral Phosphate, 15 Fed. R. 285; The Amelia, 23 Fed. R. 406 (affirming s. c. 6 Ben. 475); The G. Reusens, 23 Fed. R. 403; The Robert K. Kirkland, 92 Fed. R. 407.

REFORMATION OF INSTRUMENT: — The Eli Whitney, 1 Blatchf. 360; Williams *v.* Prov. Co., 56 Fed. R. 159.

CONTRIBUTION: — Grant *v.* Poillon, 20 How. 162.

SETTLEMENT OF PARTNERSHIP TRANSACTIONS: — Vanderwater *v.* Miller, 19 How. 82; Ward *v.* Thompson, 22 How. 330.

ACCOUNTING BETWEEN PART-OWNERS: — The Phœbus, 11 Pet. 175; Martin *v.* Walker, Abb. Adm. 579; The Larch, 2 Curt. 426 (reversing s. c. 3 Ware, 28); The Betsina, Fed. Cas. No. 14,136; The Marengo, 1 Low. 52; The Ocean Belle, 6 Ben. 253; The H. E. Willard, 52 Fed. R. 387 (affirming s. c. 53 Fed. R. 599, and discrediting The Charles Hemje, Hughes, 359).

In Duryee *v.* Elkins, Abb. Adm. 529 (see also The Fairplay, Bl. & How. 136) a seaman's claim for his wages to be measured by a certain proportion of the net earnings was dismissed for want of jurisdiction, apparently on the ground that the claim of the libellant was a bill for an account. But his claim was not a fiduciary claim and, therefore, not the foundation of a true bill for an account. Such a claim was rightly upheld in admiralty in Dexter *v.* Munroe, 2 Sprague, 39; Macomber *v.* Thompson, 1 Sumn. 384; Kellum *v.* Emerson, 2 Curt. 79, 83. — ED.

[1] Only the opinion of the court is given. — ED.

then lying in the port of San Francisco; but, on the contrary, in violation of their said contract of affreightment, only carried a part of said merchandise upon said steamer San Blas, leaving behind 250 gunnies of wheat and 1433 gunnies of corn, which said merchandise was not shipped or carried forward as in said bill of lading or contract of affreightment specified, but was delayed and carried forward by a steamer not in the port of San Francisco on said 22d day of May, 1891, but which arrived subsequently thereto, whereby the libellants lost the market for which said merchandise was destined, to their damage in the sum of $692.30 in United States gold coin.

The answer of the respondents admits the delivery of the bill of lading, but alleges, among other things, that it was made and delivered by the mutual mistake of respondent and E. L. G. Steele & Co.; that it was the mutual intent and meaning of the respondent and E. L. G. Steele & Co. that no less than 300 tons of the corn and wheat should be carried and transported to the port of Champerico on the respondent's steamer San Blas, and that the balance of the corn and wheat should be carried and transported to the port of Champerico by the respondent's steamer then advertised to sail on June 3, 1891, and it should have been so stated in the contract of affreightment, and it was the mutual intention of the parties to the contract of affreightment that the bill of lading and contract of affreightment made and delivered to E. L. G. Steele & Co. by the respondent should fully express the contract made, but, through inadvertence and by mutual mistake of the parties thereto, the bill of lading and contract of affreightment were made and delivered as alleged in the libel, and failed to state the contract entered into between the parties thereto, and the bill of lading and contract of affreightment should be corrected so as to state the true contract made between the parties.

The libellants except to the answer on the grounds that it does not state facts sufficient to constitute a defence, and that it sets up an agreement on a contract of affreightment not contained in the provisions of the bill of lading, and inconsistent with and contrary thereto, in which particular the libellants insist that the respondent's answer is irrelevant and immaterial.

The portion of the respondent's answer excepted to by the libellants sets up an equitable defence, based upon the mutual mistake of the parties. A court of admiralty exercises its jurisdiction upon equitable principles, but it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake. The Eclipse.[1] It has jurisdiction over maritime contracts when executed, but not over contracts leading to the execution of maritime contracts. Andrews *v.* Insurance Co.[2] This principle of admiralty jurisdiction is not controverted by counsel for respondent, but he contends, as the court has jurisdiction of the action, it must determine the case upon the equity involved in the defence, or dismiss the libel without prejudice, that the party may bring his suit in a forum

[1] 135 U. S. 599–608, 10 Supt. Ct. 873.

[2] 3 Mas. 6–16.

which would have jurisdiction to settle the matter upon the issues raised by the pleadings. When the original libel brought in a court of admiralty seeks to reform a maritime contract, it is the practice to dismiss the libel for want of jurisdiction over that particular action. Andrews *v.* Insurance Co.,[1] Williams *v.* Insurance Co.[2] But in this case the court has jurisdiction over the cause of action, as stated in the libel, and no case has been cited where the libel has been dismissed because the answer sets up an equitable defence. Reference to the numerous cases in which the scope and character of admiralty jurisdiction has been discussed would be out of place here. It is sufficient to say that the jurisdiction of United States courts in admiralty over maritime contracts has been established in the most explicit and comprehensive terms, and, while the precise question raised in this case does not appear to have been determined by the courts, nevertheless there are certain general principles of jurisdiction which warrant the conclusion that a court of admiralty is not ousted of its jurisdiction over a cause of action based upon a maritime contract, because one of the parties to the contract contends it should be reformed. If we admit this defence in an action *in personam*, we must admit it in an action *in rem*, and the result will be to withdraw the admiralty jurisdiction and its remedies from such contracts upon the mere allegation of an answer that there is an equitable defence. This practice would, in my judgment, be wholly inadmissible.

The remaining question is as to the relevancy or materiality of the matter set up in the answer as a defence to the action on the bill of lading. In the case of The Delaware,[3] the Oregon Iron Company shipped iron on board the bark Delaware at Portland, Or., to be carried to San Francisco. The iron was not delivered, and on a libel filed by the iron company the defence set up by the owner of the vessel was that by a verbal agreement between the parties the iron was stowed on deck, and that the whole of it, except a small quantity, had been jettisoned in a storm. On the trial the owner offered proof of this parol agreement, but the libellant objected to the evidence as repugnant to the contract set forth in the bill of lading, and the decree was for the libellant, which was equivalent to a decree that the evidence offered was incompetent. The respondent contends that this case has no application to the question now under consideration because the claim made for equitable relief had not been raised by the pleadings. Admitting this to be so, nevertheless the Supreme Court has here declared a rule with respect to such a transaction as the one at bar that excludes the evidence of a verbal agreement, and under this authority I am of the opinion that the evidence is irrelevant and immaterial. It follows that the exception should be sustained, and it is so ordered.

[1] 3 Mas. 16. [2] 56 Fed. 159. [3] 14 Wall. 579.

CHAPTER II.

MARITIME LIENS.

THE BOLD BUCCLEUGH.[1]

IN THE PRIVY COUNCIL, DECEMBER 10, 1851.

[*Reported in* 7 *Moore, Privy Council Cases*, 267.]

THIS appeal originated in a cause of damage, civil and maritime, promoted by the respondents, the owners of the barque William, against the steamship, the Bold Buccleugh, by reason of a collision between these vessels.

The Bold Buccleugh belonged to the Edinburgh and Dundee Steam Packet Company, trading between Leith and Kingston-upon-Hull, in Yorkshire, the partners of which company were all resident in Scotland. The collision took place in the river Humber, on the 14th of December, 1848, when the barque William was run down by the Bold Buccleugh, and totally lost.

On the 19th of the same month, an action for damage was entered in the High Court of Admiralty in England, on behalf of the respondents (who were domiciled and resided in England), the owners of the barque William, against the Bold Buccleugh and the partners of the Edinburgh and Dundee Steam Company, and a warrant of arrest was extracted and forwarded to Hull to be executed; but the Bold Buccleugh had left that port for Leith before the arrival of the warrant, and consequently could not be arrested.

The owners of the barque William then applied to the owners of the Bold Buccleugh to give bail to the action, which they declined to do, and the Bold Buccleugh, still continuing out of the jurisdiction of the Admiralty Court, and within the jurisdiction of the Scotch courts, the owners of the William, on the 30th of January, 1849, commenced a suit against the owners of the Bold Buccleugh, in the Court of Session in Scotland, and the steamer was forthwith arrested in Leith Harbor; but on bail being given to answer the action in that court she was released. By a bill of sale, dated the 26th of June, 1849, the owners of the Bold Buccleugh sold her absolutely to the appellant for £4800, without notice to him of any unsatisfied claim arising out of the damage done to the William, or any suit pending in regard thereto, in the Court of Session in Scotland; but in August following, the vessel, having returned to Hull, was again arrested by

[1] D. Harmer, Appellant, and W. E. Bell and others, Respondents.

virtue of a warrant, under seal of the High Court of Admiralty, and a fresh action commenced in that court, instructions being sent to Scotland for the immediate abandonment of the suit in the Court of Session. An appearance under protest was entered by the appellant, and an Act on Petition brought in on his behalf, disclaiming the jurisdiction of the Court of Admiralty to entertain the second suit.[1]

Judgment was reserved, and now delivered by

Sir John Jervis. There were two questions in this case: First, the effect of the pendency of another proceeding in Scotland for the same cause of action; secondly, the liability of the vessel by a proceeding *in rem* after a *bona fide* sale, without notice.

It is manifest that these two defences are of a totally different nature; the first being a declinatory plea properly the subject of a protest; and the second, an absolute bar. Generally, it is inconvenient to depart from the settled rules of procedure, and to raise such questions differing in degree by the same defence; but as the court below did not object to this course, we merely notice it to observe, that we do not approve of such a proceeding, and pass on to deliver our opinion upon the two points raised.

Upon the first point we have not, from the commencement of the discussion, entertained any doubt, but we desired the second question to be re-argued, because it was of general importance, and because we were unable to find any authorities bearing directly upon it; and some of the cases to which we were referred were apparently conflicting with each other.

The course which was taken upon the second argument makes it convenient to dispose of the second question in the first instance.

It is admitted that the Court of Admiralty has jurisdiction in a case of collision by a proceeding *in rem* against the ship itself; but it is said that the arrest of the vessel is only a means of compelling the appearance of the owners; that the damage confers no lien upon the ship, and that the owners having appeared, the question is to be determined according to the interests of the party litigant, without reference to the original liability of the vessel causing the wrong. For these propositions, *dicta* have been referred to, which are entitled to great respect, but which, upon consideration, will be found not to support the propositions for which they were cited. In The Johann Friederich,[2] Dr. Lushington is reported to have said that proceedings *in rem* in the Court of Admiralty were analogous to those by foreign attachment in the courts of the city of London. For the purpose for which that allusion was made, viz., the liability of the property of foreigners to be arrested by process out of the Court of Admiralty and the courts of the city of London, the two proceedings may be analogous; but in other respects they are altogether different. The foreign attachment is founded upon a plaint against the principal debtor, and must be returned *nihil* before any step can be taken

[1] The statement of facts is abridged and the arguments of counsel are omitted. — Ed.
[2] 1 W. Rob. 37.

against the garnishee; the proceeding *in rem*, whether for wages, salvage, collision, or on bottomry, goes against the ship in the first instance. In the former case the proceedings are *in personam*, in the latter, they are *in rem*. The attachment, like a common law distringas, is merely for the purpose of compelling an appearance; and if the defendant appears within a year and a day, even after judgment and execution against the garnishee, and puts in bail, the attachment is at an end. If the owners do not appear to the warrant arresting the ship, the proceedings go on without reference to their default, and the decree is confined exclusively to the vessel. Many other distinctions will be found upon reference to the notes to Turbill's case.[1] It is not correct, therefore, to say that the proceeding *in rem* is in all respects analogous to the proceeding by foreign attachment, and that the former is merely to compel an appearance, because the latter is undoubtedly for that purpose only.

In all proceedings *in rem*, whatever be the foundation of the jurisdiction, the warrant is the same, and the proceedings are conducted in the same form, and there is no reason for saying that a different rule is to prevail, where the foundation of the jurisdiction is a collision from that which is admitted to be the practice, when the suit is instituted for salvage, or the recovery of wages against the ship.

But it is further said, that the damage confers no lien upon the ship, and a dictum of Dr. Lushington, in the case of The Volant,[2] is cited as an authority for this proposition. By reference to a contemporaneous report of the same case,[3] it seems doubtful whether the learned judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a dictum merely, not necessary for the decision of that case, cannot be taken as a binding authority.

A maritime lien does not include or require possession. The word is used in maritime law not in the strict legal sense in which we understand it in courts of common law, in which case there could be no lien where there was no possession, actual or constructive; but to express, as if by analogy, the nature of claims which neither presuppose nor originate in possession. This was well understood in the civil law, by which there might be a pledge with possession, and a hypothecation without possession, and by which in either case the right travelled with the thing into whosesoever possession it came. Having its origin in this rule of the civil law, a maritime lien is well defined by Lord Tenterden to mean a claim or privilege upon a thing to be carried into effect by legal process; and Mr. Justice Story[4] explains that process to be a proceeding *in rem*, and adds, that wherever a lien or claim is given upon a thing, then the admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it. A maritime lien is the foundation of the proceeding *in rem*, a process to make perfect a right inchoate from the moment the

[1] 1 Wms. Saund. 67, n. 1.
[2] 1 W. Rob. 387
[3] 1 Notes of Cases, 508.
[4] 1 Sumn. 78.

lien attaches; and while it must be admitted that where such a lien exists, a proceeding *in rem* may be had, it will be found to be equally true, that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists, which gives a privilege or claim upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing, into whosesoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and when carried into effect by legal process, by a proceeding *in rem*, relates back to the period when it first attached. This simple rule, which, in our opinion, must govern this case, and which is deduced from the civil law, cannot be better illustrated than by reference to the circumstances of The Aline,[1] referred to in the argument, and decided in conformity with this rule, though apparently upon other grounds. In that case, there was a bottomry bond before and after the collision, and the court held, that the claim for damage in a proceeding *in rem* must be preferred to the first bondholder, but was not entitled against the second bondholder to the increased value of the vessel by reason of repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien attached, he was, so to speak, a part-owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim. So by the collision the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction.

This rule, which is simple and intelligible, is in our opinion applicable to all cases. It is not necessary to say that the lien is indelible, and may not be lost by negligence or delay where the rights of third parties may be compromised; but where reasonable diligence is used, and the proceedings are had in good faith, the lien may be enforced, into whosesoever possession the thing may come.

The remaining point may be disposed of in a few words. The pleadings show that the proceedings in Scotland were commenced by process against the persons of the defendants, and that the seizure of the vessel was collateral to that proceeding, for the mere purpose of securing the debt. We have already explained that, in our judgment, a proceeding *in rem* differs from one *in personam*, and it follows, that the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other.

For these reasons, we are of opinion that the judgment of the court below must be affirmed, with costs.[2]

[1] 1 W. Rob. 111.

[2] The Europa, Br. & Lush. 89, 2 Moo. P. C. N. S. 1, S. C.; The Charles Amelia, L. R. 2 Ad. & Ec. 330; The Parlement Belge, 5 Prob. Div. 197, 218 (*semble*); The Ringdove, 11 Prob. Div. 120; The Rio Tinto, 9 App. Cas. 356, 360 (*semble*); Currie *v.* McKnight, 1897 A. C. 97, 102, 106 (*semble*); Sheppard *v.* Taylor, 5 Pet. 675; Vandewater *v.* Mills, 19 How. 82, 89; The Rock Island Bridge, 6 Wall. 213, 215 (*semble*); The Chusan, 2 Story, 455; The Ship Mary, 1 Paine, 180; The Scow Bolivar, Olc. 480; Foster *v.* Pilot No. 2, Newb.

SLARK AND OTHERS v. BROOM AND CAUGHLIN.

IN THE SUPREME COURT, LOUISIANA, JUNE, 1852.

[*Reported in* 7 *Louisiana Annual Reports*, 337.]

SLIDELL, J.[1] The object of this suit is to recover of the defendants, as owners of the ship Cato, the value of certain goods shipped on board that vessel at Liverpool, under bills of lading, in the usual form, signed by her captain, and which were not delivered at New Orleans, the port of destination.

In their petition, the plaintiffs allege that they had a privilege for their claim upon the ship Cato, and that the vessel having been lost, they have a privilege upon the amount of insurance effected upon her; they obtained a writ of sequestration, which was levied upon a sum of $5000 in the hands of the Crescent Insurance Company. The district judge, in giving judgment in favor of the plaintiffs against the defendants personally, gave also a judgment of privilege upon the property sequestered. It would seem that the district judge supposed the vessel had been sequestered, for, in his written opinion containing the reasons for judgment, he speaks of the right of the plaintiffs to a judgment, "with privilege on the ship."

Although the plaintiffs might have had, for the non-delivery of the goods, a privilege upon the ship, had she arrived within our jurisdiction, we know of no provision of our laws which gives them a privilege upon the insurance money. That no such privilege can be claimed, was decided in an analogous case, in Thayer *v.* Goodale,[2] and Eymar *v.* Lawrence *et al.*,[3] it was held, that the privilege of the master for his wages does not extend to the insurance money, received by the owner's agent from the underwriters, upon the vessel which was destroyed by perils of the sea.[4]

It is, therefore, decreed, that so much only of the decree of the District Court as adjudges a privilege on the property sequestered be reversed, and said claim of privilege is hereby rejected. And it is further decreed, that said judgment, in other respects, be affirmed, the costs of the appeal to be paid by the plaintiff.

215; The Robert F. Stockton, Crabbe, 480; The Young Mechanic, 2 Curt. 404, 410 (*semble*); The Avon, Bro. Adm. 170; The Native, 14 Blatchf. 34, 36; Briggs *v.* A Light Boat, 7 All. 287, 296 *Accord*. — ED.

[1] Only a portion of the opinion of the court relating to the question of privilege is given. — ED.

[2] 4 L. R. 222.

[3] 8 L. R. 42.

[4] The John T. Moore, 1 Woods C. C. 61, 68 (*semble*); Eymar *v.* Lawrence, 8 La. 38 *Accord*.

Similarly, a charge, in the nature of a *jus in re*, upon land upon which a building stands, does not attach to the insurance money received upon a policy of insurance taken out by the owner of the land. Whitehouse *v.* Cargill, 88 Me. 479. — ED.

THE GAZELLE.

In the United States District Court, District of Massachusetts, February, 1858.

[*Reported in* 1 *Sprague*, 378.]

Sprague, J. This is a libel for wages, by two seamen, against a small British vessel, belonging to Cornwallis, in the Province of Nova Scotia. The suit is prosecuted with the approbation of the British consul at Boston, and is resisted by the claimants, purchasers under a sheriff's sale. On the sixth day of November, 1857, these libellants shipped at Cornwallis, for a voyage from that place to Boston, and back; one of them, Clark, as mate, for $19 per month, and the other, Murphy, as seaman, for $15 per month. Under this contract the vessel arrived at Boston, on the seventh day of December last; and on the eighth of the same month she was arrested by a sheriff, by virtue of a process from a state court, sued out by a creditor of the owners of the vessel. This proceeding is called an attachment on mesne process. Those not conversant with the local law of Massachusetts are often misled by the use of the word "attachment." The object is not to compel an appearance by the defendant; but the property of the debtor is taken by the sheriff, and held by him, as security for the payment of any judgment which the plaintiff may recover. A judgment was recovered by the creditor in the state court, and execution issued thereon; and on the 30th day of January last the sheriff sold the vessel at auction, by virtue of that execution, and she was immediately afterwards delivered to the purchasers. This libel was filed on the 23d of December, 1857, and on the same day a warrant was issued for the arrest of the vessel. The marshal attempted to execute this process, but found the sheriff in possession, claiming to hold her under the writ of attachment from the state court; and as he refused to permit the marshal to enter upon the vessel, or to take her into his custody, the latter desisted from the attempt. In that state of the case I refused to proceed to exercise jurisdiction over her. Whether the sheriff could rightfully refuse to permit the marshal to take possession, in order to enforce a paramount lien, and whether the marshal could properly have proceeded to execute his precept, by force, in the same manner as against unlawful resistance by a private individual, are grave questions, which I do not now decide.[1] Whatever may have been the respective rights and duties of the two executive officers, the fact was, that the marshal had never had possession, and returned his precept unexecuted, and this debarred the court from proceeding fur-

[1] It is now settled law that the marshal cannot interfere with the sheriff's possession. Taylor *v.* Carryl, 20 How. 583, as explained in Freeman *v.* Howe, 24 How. 450; see also The Sailor Prince, 1 Ben. 234; The Caroline, 1 Low. 173. — Ed.

ther. I could not exercise jurisdiction over a vessel which was not, and had never been, in the custody of any officer of the court.

On the 27th day of January, 1858, on motion of the proctor for the libellant, another warrant to arrest the vessel was issued, which was duly executed on the 5th of February, before which time the custody of the sheriff had ceased, he having delivered the vessel to the purchasers under the sheriff's sale.

Although the sheriff was permitted to hold possession of this vessel, until he had sold her on execution, and had terminated his custody by a delivery to the purchaser, such sale and delivery did not divest or impair the lien of the libellants. The purchaser took the vessel *cum onere*. The sale by the sheriff was by the common law writ of *fieri facias* only. The prior attachment on mesne process had only the effect of bringing the property within the reach of the writ of execution, but gave no efficacy to the sale, which derived all its force from the execution. In such a suit, no notice is given, except to the debtor, and his rights alone are affected. It is a suit *in personam* merely. It is in no respect a suit *in rem*. Neither the writ of attachment nor of execution directed the officer to take this vessel, or even named her, but they both ran against the debtor, and all his goods and chattels. Such a sale has none of the characteristics of an admiralty sale, upon process *in rem*, after notice to all the world, to intervene for their rights or interests. As soon, therefore, as the sheriff had delivered this vessel to the purchaser, the marshal arrested her, to enforce the lien of these libellants; and the purchaser being well advised by counsel, has not contested the paramount right of the libellants to proceed against the vessel, and to have her sold under a decree of this court, for the payment of their claim.[1] The only question now made is as to the amount which should be decreed to the respective libellants.[2]

Decree for the libellant, Clark, for the sum of $102.18; and for Murphy, the sum of $71.50, and costs.

[1] The Royal Saxon, 1 Wall. Jr. 311; The Henrietta, Newb. 284; Steamboat Pilot No. 2, Newb. 215; The Julia Ann, 1 Spr. 382; The Grand Turk, Fed. Cas. No. 8800; The Sailor Prince, 1 Ben. 234, 239; Maxwell *v.* The Powell, 1 Woods, 99; The Caroline, 1 Low. 373, 374; The Lillie, 40 Fed. R. 367; The Cerro Gordo, 54 Fed. R. 391, 392 *Accord*.

Or a forfeiture to the state for a subservient illegal act of the shipowners. The Florenzo, Bl. & How. 52; North American Co. *v.* U. S. 81 Fed. R. 748; reversing s. c. 74 Fed. R. 246.

Similarly a maritime lien survives a sale under foreclosure of a mortgage. The William T. Graves, 14 Blatchf. 189.

Or a sale in bankruptcy proceedings. The Charles Amelia, L. R. 2 A. & E. 330.

But a sale under a common law execution against part-owners of a vessel cuts off the liens claimed by the part-owners for services rendered by them as seamen. Galletin *v.* The Pilot, 2 Wall. Jr. 592.

So also a sale under execution at common law debars the judgment creditor from asserting a maritime lien which he might have enforced by proceeding in admiralty instead of at common law. The Mary Morgan, 28 Fed. R. 196. — Ed.

[2] The remainder of the opinion relating to this question is omitted. — Ed.

THE TRENTON.

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, NOVEMBER 29, 1880.

[*Reported in* 4 *Federal Reporter*, 657.]

IN Admiralty.

This was a libel for supplies and materials furnished at Cleveland, the home port of the vessel in 1876, for which a lien was claimed under the law of the State of Ohio. The present owner of the schooner, appearing as claimant, pleaded in substance that in July, 1878, the libellants caused the vessel to be seized at Toronto, Ontario, by virtue of a warrant issued by the maritime court of Ontario, upon a petition filed by the libellants for the same cause of action for which their libel was filed in this court; that in August, 1878, one Michael Gallagher intervened with a claim for wages as watchman and ship-keeper from December 1, 1877, to June 27, 1878; that about the same time one William McAllister also intervened with a claim for wages as mate from April 4 to May 4, 1877, to the amount of $52.50; that the two last-mentioned claims were consolidated, and on September 25, 1878, the vessel was condemned and ordered sold to satisfy these claims; that upon such sale she was purchased by the claimant for $1000, and she has since been registered at the custom-house in Toronto; that notice of the pendency of these proceedings, and of the sale, was given by publication, pursuant to the practice of the court, and by the arrest and detention of the vessel; that the maritime court of Ontario had jurisdiction of these causes and authority to direct the sale, and that claimant became the owner of the vessel, discharged of all liens.

It appeared, from the proceedings in the Canadian case, that a demurrer was interposed to libellants' petition, upon the ground that the maritime court had no jurisdiction to enforce a claim for necessaries supplied to an American vessel in a port in the United States. This demurrer was sustained by the court, and libellants' petition dismissed. The vessel was sold, as above stated, by virtue of a decree rendered upon the consolidated claims of Gallagher and McAllister. The question in this case was whether this sale was sufficient to divest the libellants of their claim for necessaries.

Moore and *Canfield*, for libellants. *Wisner* and *Speed*, for claimant.

BROWN, D. J.[1] That the sale of a vessel, made pursuant to the decree of a foreign court of admiralty, will be held valid in every other country, and will vest a clear and indefeasible title in the purchaser, is entirely settled, both in England and America. Story on Conflict of Laws, § 592; Williams *v.* Armroyd,[2] The Tremont,[3] The Mary,[4] The

[1] A small portion of the opinion is omitted. — ED.
[2] 7 Cr. 423. [3] 1 W. Rob. 163. [4] 9 Cr. 126.

Amelie, The Granite State.[1] In the case of The Helena,[2] this doctrine was carried so far as to sustain a sale made after a capture by pirates. See, also, Grant *v.* McLaughlin.[3]

These cases fully establish the doctrine stated by Mr. Justice Story (Conflict of Laws, § 592), that "whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country where the same question comes directly or indirectly in judgment before any other foreign tribunal. This is very familiarly known in the cases of proceedings *in rem* in foreign courts of admiralty, whether they are causes of prize, or of bottomry, or of salvage, or of forfeiture, or of any of the like nature over which courts have a rightful jurisdiction, founded upon the actual, rightful, or constructive possession of the subject-matter." This is not the law of England and America alone. The commercial code of France contains similar provisions regarding the judicial sale of ships.

Article 193: "The liens of creditors shall be extinguished, independently of the general methods of extinguishing obligations, by a judicial sale made according to the forms established by the following title, or when, after a voluntary sale, the ship shall have made a voyage at sea under the name and at the risk of the purchaser, and without opposition on the part of the creditors of the vendor."

In commenting upon this article, Dufour observes (2 Droit Maritime, 47): "Moreover, the sale upon seizure has always had the effect, in our law, of purging the encumbrances with which the property was charged." "The decree clears all liens," said Loysel. "We perceive the reason of this. These kinds of sales are made notoriously and publicly. The creditors are perfectly advised of what is passing. It is for them to take precautions to assure their payment from the price of the ship; but if they persist in remaining unknown their negligence ought not to prejudice the purchaser. To these general reasons we ought to add another peculiar to the maritime law. He who buys at a judicial sale must pay his price upon the spot. He is not bound to wait until the creditors are made known to pay into their hands. He ought, then, to be protected against their claims. Otherwise the judicial sale, instead of offering security which attracts buyers, would be only a snare from which they would eagerly escape. For these reasons, according to our article, the purchaser at a judicial sale receives the vessel free and clear of all encumbrances." Page 53. "Moreover, it would not follow that the creditors are entirely disarmed by this result. On the one hand their debt, in effect, subsists; and, on the other, nothing is easier than to transfer the entire amount, with the lien which it draws after it, to the price of the ship."

Article 766 of the German Mercantile Code expressly provides that the lien of the ship's creditors upon the vessel becomes void: (1) "By a compulsory sale of the vessel in a home port the purchase-money takes the place of the ship, as regards the ship's creditors. The

[1] 1 Sprague, 277. [2] 4 Rob. Adm. 4. [3] 4 John. 34.

ship's creditors must be publicly summoned to protect their rights. In other respects the provisions regulating the proceedings for a sale are reserved to the laws of the various countries." The 600th article of the Spanish Code is equally explicit: "If the sale takes place at public auction and with the intervention of judicial authority, according to the formulas prescribed by article 608, every responsibility of the ship in favor of its creditors is extinguished from the moment in which the written evidence of sale is agreed to." Similar provisions are found in article 1398 of the Portuguese, article 193 of the Belgian, article 290 of the Italian, article 840 of the Chilian, and article 477 of the Brazilian Code. In short, the doctrine that the sale of a vessel by a court of competent jurisdiction discharges her from liens of every description is the law of the civilized world.

Such sales, however, may be impeached by the owner or other person interested by showing (1) that the court or officer making the sale had no jurisdiction of the subject-matter by actual seizure and custody of the thing sold. Rose *v.* Himely,[1] Bradstreet *v.* The Neptune Ins. Co.,[2] The Mary,[3] Woodruff *v.* Taylor,[4] Daily *v.* Doe.[5] Whether it be not also essential that there should have been proper judicial proceedings upon which to found the decree, and personal or public notice of the pendency of such proceedings, it is unnecessary here to determine, since it appears that sworn petitions were filed, and notice of the pendency of the proceedings given through the newspapers, pursuant to the practice of the maritime court. (2) That the sale was made by a fraudulent collusion, to which the purchaser at such sale was a party. Parkhurst *v.* Sumner,[6] Annett *v.* Terry,[7] Castrique *v.* Imrie.[8] (3) That the sale was contrary to natural justice. The Flad Dyen,[9] Castrique *v.* Imrie. In case of sale by a master, the court will inquire into the circumstances and see whether it was necessary and for the interest of all concerned; but the effect of such sale to discharge liens is the same. The Amelie.

In the case under consideration none of these objections are taken to the validity of the sale, but it is insisted that it cannot be held to have discharged the vessel of liens which the court making the sale had no jurisdiction to enforce. I have found no case, except possibly that of The Angelique,[10] which lends countenance to this proposition. Upon principle, it seems to me wholly untenable. It is true the vessel was originally condemned, in part at least, upon a claim for shipkeepers' fees, which would not in this country be considered to import a maritime lien. The Thomas Scattergood,[11] The Havana,[12] The Island City,[13] The Sarah Jane,[14] Gurney *v.* Crockett.[15] But this was a question exclusively for the consideration of the maritime court under the laws of Canada, and the presumption is conclusive

[1] 4 Cranch, 241. [2] 3 Sumn. 601. [3] 9 Cranch, 126.
[4] 20 Vt. 65. [5] 3 Fed. R. 903. [6] 23 Vt. 538.
[7] 35 N. Y. 256. [8] L. R. 4 H. of L. 427. [9] 1 C. Rob. 135.
[10] 17 Law Rep. 104, since expressly overruled.
[11] Gilpin, 1. [12] 1 Sprague, 402. [13] 1 Low. 375.
[14] 2 Am. Law Rev. 450. [15] Abb. Ad. 493.

that the facts necessary to give that court jurisdiction existed. Hudson *v.* Guestier,[1] Comstock *v.* Crawford.[2] To say that the judicial sale of a vessel frees her only from such liens as the court making the sale had jurisdiction to enforce by original process, is a practical denial of the principle that such a sale vests a clear title in the purchaser. This would make the validity of the sale depend, not upon the power of the court to condemn and sell, but upon its authority to assume jurisdiction of all claims which, by the law of another country, might be liens upon her. There are probably no two countries in which the jurisdiction of the admiralty courts is identically the same. That of our own courts does not extend to all cases which would fall within such jurisdiction according to the civil law, and the practices and usages of continental Europe. By the codes of most civilized nations the cost of construction, the wages of ship-keepers, the rent of warehouses for the storage of her tackle and apparel, money lent to the captain for the use of the vessel, are all ranked among privileged debts. In England the court of admiralty is vested with jurisdiction, not only of ordinary collisions, but of damages done by a ship to wharves, breakwaters, and other fixtures annexed to the soil; while in this country it is limited to floating structures. In England a master has a remedy against the ship and freight for wages. In the United States he is confined to a proceeding *in personam*. By the law of continental Europe a lien arises for necessaries furnished in a home port, while in this country there is none unless created by a state statute, and none in England if an owner is domiciled within the kingdom. We also recognize liens for general average, wharfage, stevedores' wages, and premiums of insurance, none of which are within the jurisdiction of the admiralty division of the high court of justice. We also admit claims for damage to cargoes, while the English court can only proceed against the vessel where the cargo is brought into England or Wales, and no owner is domiciled therein. It may be added that the English admiralty has jurisdiction of accounts between part-owners, and may decree the sale of a share or shares in the ship, while we can only take cognizance of such disputes incidentally to the distribution of the proceeds.

Now, if the theory of the libellant be correct, a judicial sale of a vessel in one country would free her from none of the liens which the courts of that country were unable to enforce. A sale under such circumstances would be utterly destructive of the interests of owners and a complete sacrifice of the vessel. No one could possibly know the value of his purchase, for no one could foresee the amount of claims that might be made against the vessel in other countries. It would also compel us to inquire in each case whether such foreign court could have taken cognizance of the claim, either by original proceeding or by petition against the proceeds of sale, and, as the foreign law in each case must be proved as a question of fact, the errors and confusion into which we should fall will be readily appreciated.

[1] 6 Cr. 281. [2] 3 Wall. 396.

The truth is that all these liens are inchoate rights, subject to the contingency of loss in case of disaster to the vessel necessitating a sale by the master, or in case judicial proceedings are taken against her in a foreign country to subject her to claims recognized by the law of such country. The recognition of liens, and the order in which they shall be marshalled and paid, pertain to the remedy, and are administered according to the *lex fori*. When the courts of such country have obtained jurisdiction of the *res* by actual seizure, they have full power to dispose of the property and to transfer the title, and such transfer will ordinarily be respected in every other country. Nor is this power limited to the final determination of the case. The title to property sold *pendente lite* will be respected in another country, though the proceedings upon which the property was originally seized fail. Stringer *v.* The Marine Ins. Co.[1]

In these cases of judicial sales *in rem* the liens of creditors are not extinguished, but are merely transferred from the *res* itself to the fund in court.[2] The decree of the maritime court deprived the libellant in this case of no right of property. It was merely adjudged that his claim was not of that character which entitled him to set the machinery of the court in motion. It does not follow that the court would not have entertained a petition by the libellant for payment from the proceeds of sale, after the satisfaction of what under the laws of Canada are maritime liens, upon proof that by the *lex loci contractus* he was entitled to a lien. It is a constant practice in our courts of admiralty to decree the payment of surplus proceeds to mortgagees and others having liens which are not enforceable by original proceedings. As Mr. Justice Story observes (Conflict of Laws, § 322 b): "Where the lien or privilege is created by the *lex loci contractus*, it will generally, though not universally, be respected and enforced in all places where the property is found, or where the right can be beneficially enforced by the *lex fori*. And on the other hand, where the lien or privilege does not exist in the place of the contract, it will not be allowed in another country, although the local law where the suit is brought would otherwise sustain it." Section 323: "But the recognition of the existence and validity of such liens by foreign countries is not to be confounded with the giving them a superiority or priority over all other liens and rights justly acquired in such foreign countries under their own laws, merely because the former liens in the country where they first attached had there, by law or by custom, such a superiority or priority." In Harrison *v.* Sterry,[3] Chief Justice Marshall used the following language: "The law of

[1] L. R. 4 Q. B. 676.

[2] The Lottawanna, 20 Wall. 201, 221; The Granite State, 1 Spr. 277; The Garland, 16 Fed. R. 283 *Accord*.

In Sheppard *v.* Taylor, 5 Pet. 675 (see also Brown *v.* Lull, 2 Sumn. 443, 447) a vessel engaged in illicit trade was confiscated by the Spanish government, but restitution in money was afterwards made to the American owners. The liens against the vessel were adjudged to attach to the restitution money. — Ed.

[3] 5 Cranch, 289.

the place where the contract is made, is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and rather a personal privilege, dependent upon the law of the place where the property lies, and where the court sits which is to decide the cause."

It is believed to be the rule of the English as well as American courts of admiralty, after the payment of maritime liens, to direct the surplus proceeds to be paid over to any one who may have a lien upon such proceeds by the law of the place where the contract from which the lien arose is made; or, at least, to retain the fund in court until the court of chancery shall have made an order for its distribution. The Flora,[1] The Harmonie,[2] The Nordstjernen,[3] The Gustaf.[4]

But even if the foreign court should misjudge this question, and hold that, by the law of Ohio, the libellant had no lien at all upon the vessel, or should deny his petition for payment from the remnants in court, the sale would not thereby be invalidated, or the vessel remain subject to arrest in this country. This was the precise question decided in Castrique *v.* Imrie.[5] That was an action of trover by the assignee of a mortgagee for the conversion of the ship Ann Martin. Defendant claimed title as purchaser at a judicial sale in France. The question arose whether the proceedings in the French civil tribunal were *in personam* or *in rem*. It was held that the sale ordered was not of the interest of the owner in the ship, as upon execution, but of the ship itself; and that such sale divested the title of the plaintiff, although he had set up his mortgage in the French court, and that court had disallowed it under a misapprehension of his rights under the English law.

In delivering the opinion of the Court of Exchequer Chamber, on appeal from the common pleas, Mr. Justice Blackburn remarked: "We think the inquiry is — First, whether the subject-matter was so situated as to be within the lawful control of the state under authority of which the court exists; and, secondly, whether the sovereign authority of that state has conferred on the court power to decide as to the disposition of the thing, and the court has acted within its jurisdiction." The judgment of the Exchequer Chamber was affirmed by the House of Lords, their lordships holding that the error of the French court in construing the law of England did not render its judgment void in a foreign country, although it would have been otherwise in a case of fraud, and that they were bound to give it effect, at least so far as to sustain the validity of the sale.

The fact that the vessel in this case was sold for the small sum of $1000 is due to the multiplicity of causes, amongst others the uncertainty of the law; but in the absence of fraud it cannot be considered an element in the decision of the case. I am clearly of the

[1] 1 Hagg. 298.
[2] 1 W. Rob. 178.
[3] Swab. 260.
[4] 6 L. T. (N. S.) 660.
[5] L. R. 4 H. of L. 427.

opinion that the sale was valid, and vested a complete title to the property in the purchaser. The libel must be dismissed.[1]

THE AMELIE.

IN THE SUPREME COURT, UNITED STATES, DECEMBER, 1867.

[*Reported in* 6 *Wallace*, 18.]

APPEAL from the Circuit Court for the District of Massachusetts.

Fitz, of Boston, was owner of goods to the value of $8300, shipped at Surinam on board the Amelie, a Dutch vessel owned in Amsterdam, and to be delivered to him in Boston. The vessel when she left her port was apparently seaworthy and well provided, but having been struck with lightning in the course of her voyage, and encountering perils of the sea, was compelled to seek some harbor, and with difficulty she made Port au Prince. Here three successive surveys were made of the vessel. The last-appointed surveyors reported that the cost of repairs would exceed the value of the vessel after the repairs made, and advised that the voyage should be broken up, the vessel sold for the interest of *all concerned*, and the cargo transshipped to Boston.

The vessel was accordingly put up at public auction, and, after full notice, knocked down for $407 in gold, to one Riviere, who took possession.

The surveys seemed to have been carefully made, the second one having occupied two hours in the examination, and the third, or last, half a day. The reports were full and particular.

After the purchase of the vessel by Riviere, he repaired her, at a cost in gold of $1695.31, and sent her to Boston.

At the time that the master sold the vessel at Port au Prince, he sold also a part of the cargo, the property, as already mentioned, of Fitz, for the proceeds of which ($2441) he never accounted.

On the arrival of the vessel at Boston, Fitz libelled her; asserting a lien and claiming damages for the non-delivery of the cargo. The vessel having been sold by order of court, the purchaser made repairs to the extent of about $143, took off her copper, which he sold for $1157, and sent her to England with a full cargo. She was forty days on the passage; had a good deal of bad weather; showed no symptoms of weakness, and appeared stanch and strong.

On a claim made by Fitz to the proceeds of the vessel in the Registry, $2138, the District Court dismissed the claim; and this decree

[1] The Granite State, 1 Spr. 277 ; The Garland, 16 Fed. R. 283 *Accord.*

If a vessel is broken up, the liens against it will not follow portions of it which are used in the construction of a new vessel. The Collier, Fed. Cas. No. 13,272. — ED.

was affirmed in the Circuit Court. The matter was now here for review.[1]

Messrs. B. R. Curtis and *F. C. Loring*, for the appellants.

Mr. C. W. Loring, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The principle of maritime law which governs this controversy is too well settled for dispute. Although the power of the master to sell his ship in any case, without the express authority of the owner, was formerly denied, yet it is now the received doctrine of the courts in this country as well as in England, that the master has the right to sell in case of actual necessity.

We are not called upon to discuss the reasons for the rule, nor to cite authorities in its support, because it has repeatedly received the sanction of this court.[2]

From the very nature of the case (the court say), there must be this implied authority of the master to sell. The injury to the vessel may be so great and the necessity so urgent as to justify a sale, and under such circumstances the master becomes the agent of all concerned, and is required to act for their benefit. The sale of a ship becomes a necessity within the meaning of the commercial law, when nothing better can be done for the owner, or those concerned in the adventure. If the master, on his part, has an honest purpose to serve those who are interested in ship and cargo, and can clearly prove that the condition of his vessel required him to sell, then he is justified. As the power is liable to abuse, it must be exercised in the most perfect good faith, and it is the duty of courts and juries to watch with great care the conduct of the master. In order to justify the sale, good faith in making it and the necessity for it must both concur, and the purchaser, to protect his title, must be able to show their concurrence. The question is not whether it is expedient to break up a voyage and sell the ship, but whether there was a legal necessity to do it. If this can be shown, the master is justified; otherwise not. And this necessity is a question of fact, to be determined in each case by the circumstances in which the master is placed, and the perils to which the property is exposed.[3]

If the master can within a reasonable time consult the owners, he is required to do it, because they should have an opportunity to decide whether in their judgment a sale is necessary.[4] And he should

[1] The statement of the case is abridged, and a portion of the opinion relating to a question of fact is omitted. — ED.

[2] The Patapsco Ins. Co. *v.* Southgate, 5 Pet. 620; The Sarah Ann, 13 Id. 400; Post et al. *v.* Jones et al., 19 How. 157.

[3] Patapsco Co *v.* Southgate, 5 Pet. 604, 620, 621; The Sarah Ann, 13 Pet. 387, 402; The Julia Blake, 107 U. S. 418, 428; The Henry, Bl. & How. 465; Hall *v.* Franklin Co., 9 Pick. 466 *Accord.* — ED.

[4] The Julia Blake, 107 U. S. 418, 428; Astsrup *v.* Lewy, 19 Fed. R. 536 *Accord.*

The right of the master to sell the cargo turns upon the same considerations of necessity and inability to consult with the owner which control in his sale of the ship. The Gratitudine, 1 C. Rob. 240; Freeman *v.* E. I. Co., 5 B. & Al. 617; The Australasia Co. *v.* Morse, L. R. 4 P. C. 222; Acatos *v.* Burns, 3 Ex. Div. 282; Atlantic Co. *v.* Huth, 16 Ch. Div. 474;

never sell, when in port with a disabled ship, without first calling to his aid disinterested persons of skill and experience, who are competent to advise, after a full survey of the vessel and her injuries, whether she had better be repaired or sold. And although his authority to sell does not depend on their recommendation, yet, if they advise a sale, and he acts on their advice, he is in a condition to furnish the court or jury reviewing the proceedings strong evidence in justification of his conduct.

The facts of this case bring it within these well-settled principles of maritime law, and clearly show that the master was justified in terminating his voyage and selling his ship.

It is insisted, even if the circumstances were such as to justify the sale and pass a valid title to the vendee, he, nevertheless, took the title subject to all existing liens. If this position were sound, it would materially affect the interests of commerce; for, as exigencies are constantly arising, requiring the master to terminate the voyage as hopeless, and sell the property in his charge for the highest price he can get, would any man of common prudence buy a ship sold under such circumstances, if he took the title encumbered with secret liens, about which, in the great majority of cases, he could not have the opportunity of learning anything? The ground on which the right to sell rests is, that in case of disaster, the master, from necessity, becomes the agent of all the parties in interest, and is bound to do the best for them that he can, in the condition in which he is placed, and, therefore, has the power to dispose of the property for their benefit. When nothing better can be done for the interest of those concerned in the property than to sell, it is a case of necessity, and as the master acts for all, and is the agent of all, he sells as well for the lien-holder as the owner. The very object of the sale, according to the uniform current of the decisions, is to save something for the benefit of all concerned, and if this is so, the proceeds of the ship, necessarily, by operation of law, stand in place of the ship. If the ship can only be sold in case of necessity, where the good faith of the master is unquestioned, and if it be the purpose of the sale to save something for the parties in interest, does not sound policy require a clean title to be given the purchaser in order that the property may bring its full value? If the sale is impeached, the law imposes on the purchaser the burden of showing the necessity for it, and this he is in a position to do, because the facts which constitute the legal necessity are within his reach; but he cannot know, nor be expected to know, in the exercise of reasonable diligence, the nature and extent of the liens that have attached to the vessel. Without pursuing the subject further, we are clearly of the opinion, when the ship is lawfully sold, the purchaser takes an absolute title divested of all liens, and that the liens

Post *v.* Jones, 19 How. 150, 157; The Tilton, 5 Mas. 465; Pope *v.* Nickerson, 3 Story, 465; The Joshua Barker, Abb. Adm. 215; The C. M. Titus, 7 Fed. R. 826; Pike *v.* Balch, 38 Me. 302; Stephenson *v.* Piscataqua Co., 54 Me. 55; Butler *v.* Murray, 30 N. Y. 88, 99; Myers *v.* Baymore, 10 Pa. 114. — Ed.

are transferred to the proceeds of the ship, which, in the sense of the admiralty law, becomes the substitute for the ship.

The title of Riviere, the claimant, was questioned at the bar, because he did not prove the master executed to him a bill of sale of the vessel. We do not clearly see how this question is presented in the record, for there is no proof, either way, on the subject, but if it is, it is easily answered. A bill of sale was not necessary to transfer the title to the vessel. After it was sold and delivered, the property was changed, and no written instrument was needed to give effect to the title. The rule of the common law on this subject has not been altered by statute. The law of the United States, which requires the register to be inserted in the bill of sale on every transfer of a vessel, applies only to the character and privileges of the vessel as an American ship, It has no application to this vessel and this case.[1]

Decree affirmed.[2]

THE GENERAL SMITH. HOLLINS AND ANOTHER, CLAIMANTS.

IN THE SUPREME COURT, UNITED STATES, MARCH 10, 1819.

[*Reported in* 4 *Curtis's Decisions*, 440 ; 4 *Wheaton*, 438.]

APPEAL from the Circuit Court of the United States for the District of Maryland.

The libel alleged that stores and supplies had been furnished at Baltimore, to the ship General Smith. It appeared that when the supplies were furnished, the ship belonged to George Stephenson, a merchant of Baltimore, and was a registered vessel of the United States. There were other facts in the case, not considered by the court.

The District Court sustained the libel, and the Circuit Court affirmed the decree *pro forma*, and the claimants appealed.

Pinkney, for the appellant.

Winder, contra.

STORY, J., delivered the opinion of the court.

No doubt is entertained by this court, that the admiralty rightfully possesses a general jurisdiction in cases of material-men; and if this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the District Court.[3] Where, however, the proceeding is *in rem* to enforce a specific lien, it is incum-

[1] Wendover *v.* Hogeboom, 7 John. 308 ; Sharp *v.* United States Insurance Co., 14 Id. 201 ; Weston *v.* Penniman, 1 Mas. 306.

[2] The Raleigh, 37 Fed. R. 125 (affirming s. c. 32 Fed. R. 633 *Accord.* — ED.

[3] Andrews *v.* Wall, 3 How. 568, 573 (explaining Ramsay *v.* Allegre, 12 Wheat. 611); New Jersey Co. *v.* Merchants' Bank, 6 How. 344; Francis *v.* The Barque Harrison, 1 Sawy. 353, 355; Endner *v.* Greco, 3 Fed. R. 411; Davidson *v.* Baldwin, 79 Fed. R. 95, 97 *Accord.* — ED.

bent upon those who seek the aid of the court, to establish the existence of such lien in the particular case. Where repairs have been made, or necessaries have been furnished to a foreign ship, or to a ship in a port of the State to which she does not belong, the general maritime law, following the civil law, gives the party a lien on the ship itself for his security; and he may well maintain a suit *in rem* in the admiralty to enforce his right.[1] But in respect to repairs and necessaries in the port or State to which the ship belongs, the case is governed altogether by the municipal law of that State; and no lien is implied, unless it is recognized by that law. Now it has been long settled, whether originally upon the soundest principles it is now too late to inquire, that by the common law, which is the law of Maryland, material-men and mechanics furnishing repairs to a domestic ship have no particular lien upon the ship itself for the recovery of their demands. A shipwright, indeed, who has taken a ship into his own possession to repair it, is not bound to part with the possession until he is paid for the repairs, any more than any other artificer. But if he has once parted with the possession, or has worked upon it without taking possession, he is not deemed a privileged creditor, having any claim upon the ship itself.

Without, therefore, entering into a discussion of the particular circumstances of this case, we are of opinion, that here there was not, by the principles of law, any lien upon the ship, and consequently the decree of the Circuit Court must be reversed.

Decree reversed.[2]

[1] The Aurora, 1 Wheat. 96, 105; The St. Iago de Cuba, 9 Wheat. 409; Peyroux *v.* Howard, 7 Pet. 324, 341; The Virgin, 8 Pet. 538, 550; Thomas *v.* Osborn, 19 How. 22; The Grapeshot, 9 Wall. 129; The Lulu, 10 Wall. 192; The Kalorama, 10 Wall. 204; The Glide, 167 U. S. 606, 610; The Brig Eagle, Bee, 78; The New Jersey, 1 Pet. Adm. 223, 227; The William, Bl. & How. 66; The Hilarity, Bl. & How. 90; The Nestor, 1 Sumn. 73; The Davis, Crabbe, 185; Davis *v.* Child, 2 Ware, 71; The Chusan, 2 Story, 455; The Monsoon, 1 Spr. 37; The City of New York, 3 Blatchf. 187 *Accord.*

Loans to Master for Purpose of Repairs. — The lien is given also to one who, as in the principal case, advances money to the master to enable him to secure necessary repairs and supplies in a foreign port. The Sophia, 1 W. Rob. 368; The Onni, Lush. 154; Thomas *v.* Osborn, 19 How. 29; The Lulu, 10 Wall. 192; Davis *v.* Child, 2 Ware, 71, 75; Collins *v.* Ft. Wayne, 1 Bond, 476; The Union Express, Bro. Adm. 537; The Belle Lee, Fed. Cas. No. 7211; The Sarah Harris, 7 Ben. 28; The J. C. Williams, 15 Fed. R. 558; The Tangier, 2 Low. 7, 9; The Cumberland, 30 Fed. R. 449, 453. — Ed.

[2] The St. Iago de Cuba, 9 Wheat. 409; Peyroux *v.* Howard, 7 Pet. 324; People's Co. *v.* Beers, 20 How. 393, 402; The Lottawanna, 21 Wall. 558 (Clifford and Field, JJ., dissenting); The Edith, 94 U. S. 518; The J. E. Rumbell, 148 U. S. 1, 12; The President, 4 Wash. C. C. 453; The Robert Fulton, 1 Paine, 620; The Thomas Scattergood, Gilp. 1; The Hilarity, Bl. & How. 90, 92; A New Brig, Gilp. 473; Davis *v.* Child, 2 Ware, 71; The Hull of a New Brig, 1 Story, 244; The Marion, 1 Story, 68; The Hornet, Crabbe, 426 *Accord.*

The Sandwich, 1 Pet. Adm. 233 *Contra.*

Meaning of Home Port. — Under the doctrine of the principal case, supplies are furnished in the home port of a vessel, if the port of supply is in the same State in which her owner resides. Selden *v.* Hendricksen, 1 Brock. 396, 403; The Rattler, Taney, 456; The The Indiana, Crabbe, 479; The Eliza Jane, 1 Spr. 152; The Sarah Starr, 1 Spr. 453; The Plymouth, Newb. 56, 6 McL. 463; The Charles Mears, Newb. 197; The Golden Gate, Newb. 308; The Thomas Walker, 2 Fed. R. 716 (cited); The Mary Bell, 1 Sawy. 135; The Plymouth Rock, 13 Blatchf. 505; The Alice Tainter, 14 Blatchf. 41; The Albany, 4 Dill. 439; The E. A. Barnard, 2 Fed. R. 712; The Secret, 3 Fed. R. 665; The Mary Chilton, 4 Fed. R.

847; The Canada, 7 Fed. R. 119; The Rapid Transit, 11 Fed. R. 322; The Jennie B. Gilkey, 19 Fed. R. 127; The Mary McCabe, 22 Fed. R. 750; The Thomas Fletcher, 24 Fed. R. 375; The Lotus No. 2, 26 Fed. R. 637; The Chelmsford, 34 Fed. R. 399; The Havana, 54 Fed. R. 201, 64 Fed. R. 496; The H. C. Grady, 87 Fed. R. 232; Learned *v.* Brown, 94 Fed. R. 876.

The opinion expressed in The Loper, Taney, 500; The Indiana, Crabbe, 474; and The Favorite, 3 Sawy. 405, that the vessel's domicile depends upon the place of registration, is thoroughly discredited.

EQUITABLE OWNERSHIP. — In determining the home port of a vessel the residence of the legal owner is not necessarily controlling. One who has the equitable interest is to be treated as the owner, if he has possession and control of the vessel. The S. G. Owens, 1 Wall. Jr. 359; The Island City, 1 Low. 375; The Alice Tainter, 14 Blatchf. 41; The Guisbergh, 8 Ben. 407; The Union Express, Bro. Adm. 537; The Marion S. Harris, 86 Fed. R. 964; The Algonquin, 88 Fed. R. 318. But see *contra* The George T. Kemp, 2 Low. 477.

If, however, the legal owner is in possession and control of the vessel, although merely for the benefit of others, the residence of the legal owner should alone be considered. Accordingly, the domicile of a corporation owning a vessel is the place of its ownership, although all the shareholders are residents of a different State. The Havana, 54 Fed. R. 201, 64 Fed. R. 496.

OWNERSHIP *pro hac vice*. — If a vessel is chartered so as to give the charterer the temporary dominion of the vessel, his residence determines the domicile of the vessel during the period of the charter. The Golden Gate, Newb. 308; The S. G. Owens, 1 Wall. Jr. 359; The Metropolis, 8 Ben. 19; The Secret, 3 Fed. R. 665; Stephenson *v.* The Francis, 21 Fed. R. 715; The Norman, 28 Fed. R. 383, 6 Fed. R. 406; The Cumberland, 30 Fed. R. 449; The Pirate, 32 Fed. R. 486; The Aeronaut, 36 Fed. R. 497; The Samuel Marshall, 54 Fed. R. 396.

COÖWNERSHIP. — If a vessel is owned by several persons, residing in different States, supplies furnished in the State of any coöwner are furnished at the home port within the doctrine of the principal case. The Rapid Transit, 11 Fed. R. 322; Stephenson *v.* The Francis, 21 Fed. R. 715. But see *contra* The Ellen Holgate, 30 Fed. R. 125, and compare The Jennie B. Gilkey, 19 Fed. R. 127, and The Samuel Marshall, 49 Fed. R. 754, 756, 757.

ESTOPPEL AS TO OWNERSHIP. — If a domestic owner represents by words or conduct that his vessel is foreign, or *vice versa*, he will not be permitted to gainsay the representation as against persons who have acted upon it. St. Iago de Cuba, 9 Wheat. 409; The Sarah Starr, 1 Spr. 453; The Sam Kirkman, 1 Bond, 369; The Golden Gate, Newb. 308, 312; The Walkyrien, 11 Blatchf. 241, 3 Ben. 394; The Alice Tainter, 14 Blatchf. 41, 42; The George T. Kemp, 2 Low. 477, 480; The E. A. Barnard, 2 Fed. R. 712; The Mary Chilton, 4 Fed. R. 847; The Jennie B. Gilkey, 19 Fed. R. 127; The Francis, 21 Fed. R. 715, 717.

STATUTORY LIEN. — Statutes have been passed in many States giving a lien for supplies and materials furnished in the home port of the vessel, and this statutory lien is enforceable in the admiralty courts. Peyroux *v.* Howard, 7 Pet. 324; The St. Lawrence, 1 Black, 522; The Lottawanna, 21 Wall. 558; The J. E. Rumbell, 148 U. S. 1; The Kate, 164 U. S. 470; The Valencia, 165 U. S. 264; The Glide, 167 U. S. 610, and in the admiralty courts only, *supra*, 16, n. 2.

If the state statute gives or continues the lien only upon certain terms, the Federal courts will enforce the statutory lien only upon compliance with these terms. The Lottawanna, 21 Wall. 558; The Edith, 94 U. S. 518; The J. E. Rumbell, 148 U. S. 1, 20; The Guiding Star, 18 Fed. R. 263; The Canary No. 2, 22 Fed. R. 532; The Helen Brown, 28 Fed. R. 111; The Huron, 29 Fed. R. 183.

Although the state statute gives the lien in general terms, without mention of credit to the vessel, the statute is almost uniformly interpreted as meaning that the repairs and supplies must be furnished upon the mutual understanding that the vessel is pledged for payment. The J. E. Rumbell, 148 U. S. 1; The Valencia, 165 U. S. 264; The Columbus, 5 Sawy. 487; The Howard, 29 Fed. R. 604; The Samuel Marshall, 54 Fed. R. 396, 49 Fed. R. 754; The Kate, 56 Fed. R. 614; Lighters No. 27 and 28, 57 Fed. R. 664; The Templar, 59 Fed. R. 203; The Advance, 60 Fed. R. 766; The Lena Mowbray, 71 Fed. R. 720; The Electron, 74 Fed. R. 689, 56 Fed. R. 304; The Rosalie, 75 Fed. R. 29; The Westover, 76 Fed. R. 381; Davidson *v.* Baldwin, 79 Fed. R. 95, 97; The Ella, 85 Fed. R. 471, 476, 477; The Sappho, 89 Fed. R. 366, 373; 94 Fed. R. 545, 551. But see *contra* The Illinois, 2 Flip. 383. — ED.

THE EMILY SOUDER.

In the Supreme Court, United States, October, 1873.

[*Reported in* 17 *Wallace*, 666.]

Mr. Justice Field delivered the opinion of the court.[1]

The rule announced in The Grapeshot,[2] and there relieved from the supposed embarrassment of some previous decisions of this court, and repeated and affirmed in The Lulu,[3] and The Kalorama,[4] and followed in The Patapsco,[5] disposes of the main question in these cases. The steamer here had entered the port of Maranham, on the coast of Brazil, in distress; she had lost her propelling screw, and was towed into port by another steamer, for which she had signalled. The repairs there made to the vessel, and the supplies furnished to her, and the expenses incurred on her account, were necessary to render her seaworthy and enable her to leave the port and prosecute her voyage to New York. The captain was without adequate funds for these purposes, the whole amount in his possession being under $600, and that sum being insufficient to meet the contingent expenses of the vessel. Both he and the owners of the vessel were unknown in Maranham, and without credit there. It was under these circumstances that he requested the consul of the United States in that port to obtain for him a consignee who would attend to the business of the vessel and advance the requisite funds. And it was only after applying without success to several parties, that he succeeded in inducing the firm of Packenham, Beatty & Co., the libellants in one of these cases, to make the arrangement desired with the captain. The stipulation in the arrangement for five per cent. commission on the funds advanced, and five per cent. commission for attending to the business of the vessel was not unreasonable nor unusual. The steamer was detained at Maranham nearly five weeks, and the moneys advanced by the libellants, it is true, were not entirely for the repairs to the vessel and the supplies needed for the voyage; they were intended and applied in part to meet the expenses of her towage into port and of pilotage, and to pay the custom-house dues, consular fees, and charges for medical attendance upon the sailors. These various items, however, stood in the same rank with necessary repairs and supplies to the vessel, and the libellants advancing funds for their payment were equally entitled as security to a lien upon the vessel. The items were all submitted to the examination of the captain, and were approved by him before they were paid.

The drafts given by the captain upon the owners of the vessel in New York were not received by the libellants in discharge and satisfaction of the sums advanced. They were received only as condi-

[1] Only the opinion of the court is given. — Ed.
[2] 9 Wall. 129. [3] 10 Id. 192. [4] Ib. 204. [5] 13 Id. 329.

tional payment. Such would be the presumption of law in the absence of any direct evidence on the point. For by the general commercial law of the world, a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment; it is treated everywhere, in the absence of express agreement or local usage to the contrary, as conditional payment only. On principle nothing can be payment in fact except what is in truth such, unless specially agreed to be taken as its equivalent. But here the evidence of the libellants is direct and positive that the drafts were only taken as conditional payment, and on the trial they were produced and surrendered for cancellation.[1]

The consent of Pritchard, the libellant in one of the cases, to advance a portion of the funds after Packenham, Beatty & Co. had agreed to advance the whole, does not in our judgment in any respect affect the implied hypothecation of the vessel for the whole. The whole sum advanced was required, and the question is not whether it came from one or more parties, or whether the advances were made at one time or at different times, but whether they were made on the personal credit of the captain or of the owners, or were made on the credit of the vessel also. And upon this question there can be in this case no reasonable doubt. The presumption of law always is, in the absence of fraud or collusion, that where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage, and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners. It is not necessary to the existence of the hypothecation that there should be in terms any express pledge of the vessel, or any stipulation that the credit shall be given on her account. The presumption arises that such is the fact from the necessities of the vessel, and the position of the parties considered with reference to the motives which generally govern the conduct of individuals. Moneys are not usually loaned to strangers, residents of distant and foreign countries, without security, and it would be a violent presumption to suppose that any such course was adopted when ample security in the vessel was lying before the parties. The presumption, therefore, that advances in such cases are made upon the credit of the vessel is not repelled by any loose and uncertain testimony as to the suppositions or understandings of one of the parties. It can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses, or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry.[2]

[1] The Kimball, 3 Wall. 37; The Bark Chusan, 2 Story, 456.

[2] PRESUMPTION OF A LIEN. — For necessary repairs and supplies in a foreign port the master is presumed to have authority to pledge the vessel. The Belfast, 7 Wall. 624, 643;

In the cases at bar, the presumption is not only not repelled by any satisfactory evidence, but is supported by the positive testimony of the libellants. Beatty, who appears to have transacted the business of Packenham, Beatty & Co. with the captain, and Pritchard, both declare in the most emphatic manner that they made the advances on the credit of the vessel, and would not have made them on any other condition.

The evidence of the captain, it is true, is to some extent in conflict with their testimony, but considering the circumstances under which the advances were made, it is entitled, as against their direct and positive declarations, to little weight. Perhaps, as suggested by the Circuit Court in its opinion, the inferences of the captain were not the result of any intended untruth on his part, but were drawn from the fact that nothing was said during the negotiation for advances

The Grapeshot, 9 Wall. 129; The Lulu, 10 Wall. 192; The Kalorama, 10 Wall. 204; The Patapsco, 13 Wall. 329; Ins. Co. *v.* Baring, 20 Wall. 159; The Kate, 164 U. S. 458, 466; The Valencia, 165 U. S. 264, 267, 268; The Mary Bell, 1 Sawy. 135 (master also owner); The E. A. Baisley, 13 Fed. R. 703; The New Champion, 17 Fed. R. 816; The Charlotte Vanderbilt, 19 Fed. R. 219; The Comfort, 25 Fed. R. 158, 25 Fed. R. 159, 32 Fed. R. 327; The Cumberland, 30 Fed. R. 449; The Hiram R. Dixon, 33 Fed. R. 297; The Alvira, 63 Fed. R. 144, 150; The George Dumois, 68 Fed. R. 926 (reversing s. c. 66 Fed. R. 353) *Accord.*

The presumption of credit to the ship was thought to be rebutted by the evidence in The Camilla, Taney, 400; The Woodland, 7 Ben. 110; The William Cook, 12 Fed. R. 919; The Sulíote, 23 Fed. R. 919; Berwind *v.* Schultz, 25 Fed. R. 912; The Esteban de Antunano, 31 Fed. R. 920; The Advance, 63 Fed. R. 143; The St. John, 74 Fed. R. 842; The Bertha M. Miller, 79 Fed. R. 365. Compare The Gracie May, 72 Fed. R. 283 (supplies to owner and master of a yacht).

No Presumption, if Owner is Present at the Foreign Port. — If the owner is present at the foreign port the need of repairs does not create the presumption of a necessity to pledge the ship and of the consequent lien. The St. Iago de Cuba, 9 Wheat. 409, 416, 417; Thomas *v.* Osborne, 19 How. 22; The Kalorama, 10 Wall. 204, 214; The Valencia, 165 U. S. 264, 271; The Lady Horatia, Bee, 167; The Davis, Crabbe, 185, 201; The Golden Gate, Newb. 308, 313; The Metropolis, 8 Ben. 19 (owner *pro hac vice*); The Norman, 6 Fed. R. 4; Stephen *v.* The Francis, 21 Fed. R. 722; Neill *v.* The Francis, 21 Fed. R. 921 (owner *pro hac vice*); The Kingston, 23 Fed. R. 200; The Mary Morgan, 28 Fed. R. 196; The Stroma, 53 Fed. R. 281, 283; The Now Then, 55 Fed. R. 523, 50 Fed. R. 944; The Ella, 84 Fed. R. 471; The Havana, 92 Fed. R. 1007, 87 Fed. R. 487.

The evidence of a mutual understanding that credit should be given to the vessel was thought to be sufficient to establish a lien in The Guy, 9 Wall. 758 (affirming s. c. 5 Blatchf. 596, 1 Ben. 112); The Union Express, Bro. Adm. 537.

Similarly, if the owner is at the home port, the need of repairs will not give rise to the presumption of the necessity of the ship's credit. The Chelmsford, 34 Fed. R. 399; The Alliance, 63 Fed. R. 732; The Rosalie, 75 Fed. R. 29 (explaining The Alvira, 63 Fed. R. 144; but see The Templar, 59 Fed. R. 203); The Westover, 76 Fed. R. 381.

In the District of Massachusetts, the statutory lien upon a domestic vessel is presumed to arise by reason of the usages of the port. The Iris, 88 Fed. R. 902. See also The George T. Kemp, 2 Low. 477, 478.

No Presumption if Owner pro hac vice is present. — The presence of the owner *pro hac vice* operates like that of the general owner, to prevent the presumption of a pledge of the vessel. The Kate, 164 U. S. 458; The Valencia, 165 U. S. 264; The Golden Gate, Newb. 308, 313; Consolidated Co. *v.* The Secret, Fed. Cas. No. 3128 a; The William Cook, 12 Fed. R. 919; The Secret, 15 Fed. R. 480, 3 Fed. R. 665; Stephenson *v.* The Francis, 21 Fed. R. 715; The Norman, 28 Fed. R. 383, 6 Fed. R. 406; The Cumberland, 30 Fed. R. 449; The Pirate, 32 Fed. R. 486; The Aeronaut, 36 Fed. R. 497; The Samuel Marshall, 54 Fed. R. 396; The Stroma, 53 Fed. R. 281 (qualifying The City of New York, 3 Blatchf. 189, and The India, 16 Fed. R. 262); The Curlew, 54 Fed. R. 899, 900; The Kate, 56 Fed. R. 614; The Rosalie, 75 Fed. R. 29; The H. C. Grady, 87 Fed. R. 232. See also The Turgot, 11 Prob. Div. 21. See the analogous case, The Chilian, 58 Fed. R. 697. — Ed.

intimating in terms that the libellants were to have a lien upon the vessel.

The fact that the vessel was, at the time the advances were made, under mortgage to the claimants, does not subordinate the lien of the libellants to the claim of the mortgagees. Funds furnished in a foreign port, under the circumstances and for the purposes mentioned in this case, have priority as a lien upon the vessel over existing mortgages. Advanced for the security and protection of the vessel, they were for the benefit of the mortgagees as well as of the owners. If liens created by the necessities of vessels in a foreign port could be subordinated to or displaced by mortgages to prior creditors at home, such liens would soon cease to be regarded as having any certain value, or as affording any reliable security.

As the advances were in gold, and the drafts on the owners in New York show that the payment to the libellants was to be made also in gold, the court below ruled rightly in directing its decrees to be entered for the amount due them in like currency.[1]

Decree affirmed in both cases, with interest and costs.

THE VIGILANCIA. THE ALLIANCA.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, NOVEMBER 2, 1893.

[*Reported in* 58 *Federal Reporter*, 698.]

BROWN, District Judge. By the libels in the above cases a lien is claimed on the steamships above named for oleomargarine, or butterine, supplied for those steamers in 1892. The facts as to the supplies, and their amounts, are admitted. The conditions required for obtaining a statutory lien not having been complied with, the only question is, whether a maritime lien was acquired under the circumstances of an alleged sale and delivery of the goods in New Jersey.

The libellants are copartners, doing business at Jersey City, N. J. The steamers, at the time the supplies were furnished, were the property of the United States & Brazil Mail Steamship Company, a New York corporation, and lay at Roberts' Stores, Brooklyn, within the port of New York, their home port, where the goods were delivered on board. They were forwarded to the steamers from Jersey City, upon a written request, or message by telephone, sent in each instance from the general office of the steamship company in this city, by one of its office employes, known as the "port steward," calling for the supply of a certain amount of butter to the steamer named. Upon such orders, the libellants delivered the goods specified to truckmen employed by them in Jersey City, who took them over to the steamers

[1] Bronson *v.* Rodes, 7 Wall. 229; Trebilcock *v.* Wilson, 12 Id. 687.

at Roberts' Stores, Brooklyn, and there delivered them on board, and at the time of such delivery obtained an acknowledgment on behalf of the company of the receipt of the goods named, properly signed by one of the officers, or persons, on board the ship. The libellants had been accustomed to deal in this manner with the steamship company, and their vessels, for several years previous.

The sale of oleomargarine being prohibited by the laws of the State of New York, within the limits of the State, it was contended for the libellants that, by an arrangement between the libellants and the steamship company, the sale and delivery of the goods were intended to be complete, and were complete, in Jersey City, upon the delivery of the goods ordered to the truckmen there, so that the title to the goods passed in the State of New Jersey; and that the furnishing of the goods having been complete within the State of New Jersey, a maritime lien was acquired therefor. The truckmen, as I understand the evidence, were not in the general employment of the libellants, but were engaged by them to carry the goods to the steamers; they were paid, however, for the cartage, by the libellants. In the bills rendered to the company for the goods, there was no separate charge for cartage, because, as was testified, there had long been an understanding with the company that the prices at which the butterine was billed should include the cartage from Jersey City to the steamers. A maritime lien is claimed upon the contention that the delivery to and for the vessel was completed in Jersey City upon the delivery of the goods to the truckmen for the benefit of the ship.

I am unable to sustain the lien in these cases upon either theory that can be presented on behalf of the libellants. If the sale and delivery of the supplies to the steamship company were not complete until the delivery of the goods to the ship at Roberts' Stores, clearly no maritime lien arises; since, in that view, the supplies were wholly furnished in the vessel's home port.

If, on the other hand, the libellants' evidence be deemed sufficient to prove that the title to the property passed in Jersey City to the steamship company, and that the delivery to the truckmen there was, in law, a delivery to that company; still, that would not amount to a delivery, or to a furnishing of supplies to the ship in Jersey City; but only to a common law delivery to the company, sufficient to bind the company *in personam;* which is a very different thing from a delivery to the ship, or binding the ship *in rem.* The ship was not in Jersey City; but within a different jurisdiction, a mile or two away. There can be no delivery to the ship, in the maritime sense, whether of supplies or of cargo, so as to bind the ship *in rem,* until the goods are either actually put on board the ship, or else are brought within the immediate presence or control of the officers of the ship.[1] The Cabarga,[2] Pollard *v.* Vinton,[3] The Caroline Miller,[4] The Guiding Star,[5] and cases there cited.

[1] The Pacific, 1 Blatchf. 569 (*semble*); The Cabarga, 3 Blatch. 75 *Accord.* — Ed.
[2] 3 Blatchf. 75. [3] 105 U. S. 7, 9-11. [4] 53 Fed. 136. [5] Id. 936, 943.

Had the goods in question been lost while in transit from Jersey City to Roberts' Stores, where the ship lay, the steamship company might possibly have been personally liable for the goods; but plainly no lien for them could have arisen against the ship, because they would never "have come to the benefit of the ship." Per Nelson, J. (The Cabarga, *supra*). No lien, therefore, arose when the goods were delivered to the truckmen in Jersey City, since the ship had not yet received the goods, and might never receive them. Something more had to be done, viz., to deliver them to the ship. As that delivery was an act necessary to the creation of a maritime lien, it follows that the "furnishing to the ship," so as to acquire a lien, was only completed at the place where the ship herself actually was. As this was in the home port, no maritime lien could arise. The place where the ship is at the time the supplies reach her, is the test in all such cases. Accordingly, where the supplies have been ordered and sent from the home port, but are delivered to the ship while she is in a foreign port, a maritime lien arises.[1] The Sarah J. Weed,[2] The Agnes Barton,[3] The Huron,[4] The Chelmsford.[5] The cases of The Patapsco,[6] The Comfort,[7] The Havana,[8] cited for the libellants, are all cases in which the supplies were delivered on board the ship, while the ship was in a foreign port.

Holding, therefore, that the furnishing of supplies, for the purpose of obtaining a lien on the ship, is not performed until a delivery to the ship, or within the immediate control of her master, and that being done in these cases within the home port, it follows that the libels must be dismissed, with costs.

THE NEPTUNE.

In the High Court of Admiralty, February 17, 1824.

[*Reported in* 1 *Haggard, Admiralty*, 227.]

This case came on upon the summary petition of George Rounds, a seaman, claiming wages due to him from the master and sole owner of the Neptune. The petition alleged, that in February, 1823, the ship being then in the port of London, designed on a voyage to Rio de Janeiro, Hamburg, and London, Rounds was hired as a seaman by the master for such voyage, at £2 5s. per month, and entered on board her accordingly. On the 17th of February, 1823, he signed the usual ship's articles, and shortly afterwards the Neptune sailed with

[1] Even though the supplies are furnished under a contract with the owner. The Sarah J. Weed, 2 Low. 555; The Agnes Barton, 26 Fed. R. 542; The Huron, 29 Fed. R. 183; The Hiram R. Dixon, 33 Fed. R. 297; The Chelmsford, 34 Fed. R. 399; The Allianca, 63 Fed. R. 726, 732. — Ed.

[2] 2 Low. 555. [3] 26 Fed. 542. [4] 29 Fed. 183. [5] 34 Fed. 399.
[6] 13 Wall. 334. [7] 25 Fed. 159. [8] 54 Fed. 203.

her cargo to Rio de Janeiro, where she safely arrived in June, and discharged the same, thereby earning freight to a considerable amount. On the 4th of July she discharged the last package or part of her cargo. She then took on board a cargo for Hamburg, and proceeded on her voyage; but in October was driven by a gale of wind upon the French coast, and there stranded, so that only a part of the ship, and no part of the cargo, could be saved. That Rounds and the other mariners exerted themselves very laboriously in saving the masts, spars, rigging, some of the sails, the anchors and cables, and a considerable part of the hull, which were afterwards sold for much more than the wages of all the mariners who had sailed from Rio de Janeiro to the 6th of November, when Rounds and the other mariners were discharged by the master. And the petition contained the usual averments, that Rounds, while in the service of the ship, well and truly performed his duty. The balance of wages claimed by the petition amounted to £8 3s.[1]

Lord Stowell. This case comes before the court upon the summary petition of George Rounds, a seaman, who claims wages to be due to him upon the facts there set forth. The parties agree to take the judgment of the court, assuming the facts stated as not to be denied, upon this question of law, whether, in this admitted state, the conclusion follows in point of law — that mariners are entitled to wages out of the remains of a ship so preserved.

That they are not so entitled is, I think, contended principally (I had almost said exclusively) upon the ground of a maxim well known in our maritime law (indeed much more familiarly there than in any other system), that *freight is the mother of wages*. The case in Siderfin,[2] quoted in argument, relates to a total loss and perishment of the vessel, in which no part is saved; and the dictum in Molloy,[3] founded upon it (he himself not being a writer usually placed in the first class of authority upon such subjects), lie both out of the sphere of any just application to the present question. The maxim itself, a peculiar favorite of English maritime law, is, I think, to be taken upon the argument as the sole ground of a solid opposition to the claim of the mariners, if it be entitled to be so considered. For no freight was earned, and there was a forfeiture of freight, and therefore of wages, if this maxim governs this case.

The maxim, though generally received, like most other maxims delivered in figurative terms, certainly is not formed with real and strict accuracy. For the natural and legal parents of wages are the mariner's contracts, and the performance of the service covenanted therein; they in fact generate the title to wages. The rule that makes the payment of wages dependent on the earning of freight is an additional security to the safety of ship and cargo; and, as the Lord Chief Justice Abbott expresses it in his excellent publication,[4] was

[1] The arguments of counsel and a few lines of the judgment are omitted. — Ed.
[2] P. 179.
[3] P. 245, ed. 1707.
[4] P. 435, 3d ed.

framed in order to stimulate the zeal and attention of this class of persons engaged in very perilous service. The payment of wages is made by the policy of maritime states to depend on the successful termination of the voyage, entitling the owner to his freight, though in other commercial contracts the workmen are entitled to their stipulated wages, though a losing concern does not supply a fund to the merchant adventurer himself for the payment.

At the same time, although the rule so introduced prevails generally, it by no means follows universally, *e converso*, that where no freight is due, no wages are due also. Mr. Jacobsen, in his laborious and comprehensive work,[1] "It is a general rule, that freight is the mother of wages; but to this there are several exceptions;" and he enumerates some of them.[2] There are others that are not so enumerated; as the cases of ships going out in pursuit of a freight and returning disappointed without a cargo, in which case it can never be said that the seamen are not entitled to their wages both on the outward and on the return voyage, though no freight whatever was earned.[3] A rule so evidently bending to reasonable exceptions, can never be considered as universally conclusive in the absence of all other confirmation, arising either from the institutions of nations, or from the decisions of their tribunals, and standing in opposition to reasonable principles of law and jurisprudence, and to public utility and convenience.

The practice, at least the modern practice, of the great maritime states shows a repugnance to the application of this particular rule, of total forfeiture of wages where parts and fragments of the vessel are preserved that can be applied to a total or partial satisfaction of them. The French, a great maritime state, enjoin expressly in their celebrated Ordinances of Louis the Fourteenth, that they shall be so applied. By the Ordinances of Spain of 1563, when that country was at its zenith of maritime glory, the same practice was enjoined. In Holland, a country the most exclusively maritime, the Ordinances of Rotterdam prescribe it. Such is likewise the rule of the Danish code, as may appear from Mr. Jacobsen, that if any part of the vessel is saved, the crew are to be paid out of the materials of the wreck which they have saved. So in the North American states, as I understand, *ex relatione* of a gentleman high in judicial station in one of the states, that he had never found any decision direct upon that point, but that such was the received understanding of the settled practice of that country (which has turned its attention successfully to questions of maritime law); and that understanding is there fortified by the general notion of its being the settled practice of their parent State, though they had not found such a written rule in our books, any more than in their own. Chief Justice Abbott, in his book, admits that he

[1] On Sea Laws.

[2] "As where the voyage is lost by the fault of the owners, as if the ship be seized for their debt, or on account of having contraband goods," p. 153.

[3] Worth *v.* Mumford, 1 Hilt. 1, 14, 15 (*semble*) *Accord.* — Ed. [Merchant Shipping Act, 1854, §§ 182, 183.]

had met with no decision upon the question in any English reports, and Mr. Bell, in his learned commentary on the Laws of Scotland,[1] remarks a similar absence of any recorded judgment in the reports of that country. However, it may safely be asserted, upon the enumeration already produced, that much the greater part of the eminent maritime states have adopted this rule.

Now such being the fact, I think I do not go too far in saying that it founds something of a presumption that, if nothing appears to the contrary in English statutes or English decisions, this great maritime state to which we belong is not more indifferent to the merits of its own seamen, — men who can certainly come into successful competition with that class of persons belonging to any other community. I take it without hesitation upon the authority of the Lord Chief Justice, that no adjudged cases are to be found in the reports of our courts of general jurisdiction. This may arise from one or two causes — either that the law was so generally understood one way or the other that it did not admit of controversy (for it is controversy that leads to decision); or that if there have been decisions upon the point, they have, like many other decisions upon many other points, escaped the attention of former reporters. It is but a late practice in this court to have its reports published;[2] the manuscript collections are but few, and I find no notice of any adjudication upon this matter in those which have fallen into my hands. Nor do I find any rule prescribed by any ordinance of the legislature. This dearth of any direct domestic authority of any species upon the subject drives us necessarily to the consideration of what is the most reasonable rule in principle, and the most useful and beneficial in practice; aided as it may be by the prevailing practice of other maritime states, adopting into their positive institutions rules derived from their ancient usage upon the subject, or from a more recent and correct consideration of it. Taking, as far as may be proper, the benefit of that collateral authority, I am of opinion, that private justice and public utility range themselves decisively on that side of the question which sustains the claim of the mariner.

What is the obligation which a mariner contracts with the ship in which he engages to serve? It is not only to navigate her in favorable weather, but likewise in adverse weather inducing shipwreck, to exert himself, as the chief justice expresses it, to save as much of the ship and cargo as he can. It is a part of his bounden duty in his character of a seaman of that ship. It is certainly a laborious, and probably a dangerous portion of his service, but certainly not less a service, and a meritorious service on those accounts. In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to that vessel which he contem-

[1] Vol. i. p. 504.

[2] It is almost superfluous to observe, that the public is indebted to the labors of the present king's advocate, Sir Christopher Robinson, for the establishment of the Admiralty Reports in 1798.

plated, and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages.

I ask, is he to have no recompense for this continuation of his service in its most formidable shape, which that service to that ship can assume? Nobody, I think, ventures to say that. But, say they, he should have it by way of salvage, or on a *quantum meruit*. There are, I think, decisive objections to both these views of the matter. The doctrine of this court is justly stated by Mr. *Holt* — that the crew of a ship cannot be considered as salvors. What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship. Not so the crew, whose stipulated duty it is (to be compensated by payment of wages) to protect that ship through all perils, and whose entire possible service for this purpose is pledged to that extent. Accordingly, we see in the numerous salvage cases that come into this court the crew never claim as joint salvors, although they have contributed as much as (and perhaps more than) the volunteer salvors themselves. I will not say that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce the court to open itself to their claim of a *persona standi in judicio*. But they must be very extraordinary circumstances indeed; for the general rule is very strong and inflexible that they are not permitted to assume that character. As the law stands, generally they are excluded from it upon just grounds.

A proceeding for salvage would be less beneficial and safe for the owners if permitted. In a salvage case you must take into consideration the quantum of personal danger incurred, the value of the property saved, and other circumstances which may influence the demand of salvage; whereas the rule of wages presents only a stipulated sum which in no case can be exceeded. By the same rule, every temptation to throw the ship into situations of danger with a view to an extravagant salvage is effectually removed; for no increase of danger can bring to the mariner an increase of profit. I may add from experience in such cases, that such experience does not invite the court to adopt a rule, which, in the conflict of numerous affidavits impossible either to be reconciled, or to receive a decided preference, too often leads to conclusions founded rather in the conjectures of an honest hope than in the confidence of a satisfactory judgment. To most of these objections the rule of *quantum meruit* is equally obnoxious, and they are both equally exposed to the inconvenience of driving the parties to sue for an unliquidated sum; the one party hardly guessing what is proper for him to ask, and the other equally ignorant what he ought to refuse; and the court having to find the proper liquidation, often on evidence sworn on both sides with equal intrepidity. On all views of the relative justice between the parties and of the public policy and convenience, there can be no doubt that

the rule of wages has the advantage upon the clearest grounds; but take it upon the most naked principles of law applying to it, the contract covers the whole ship, one part as well as another, and no one part more than another, with the mariner's lien. A part separated by a storm is not disengaged by that accident from that lien. If it be recovered, it is recovered as a part of the primitive pledge mortgaged to the mariner. Again, when does the authority of the master cease? His authority does not certainly merge in the misfortune, nor are the seamen at liberty, without staying a reasonable time for the recovery of parts of the ship and cargo (if there be any prospect in his judgment of such recovery), immediately to disperse themselves over the country on whose shores they have encountered the mischance, without some discharge from him. No such attempt was made in the present case; they received their discharge, and not till then considered themselves as emancipated from his authority. The duty of service survives as long as the rights of authority exist; their relations are created by the same contracts; they have a contemporary origin, and a corresponding termination on all just construction of that contract.

Upon all these grounds of the general practice of maritime states, upon the just policy of the rule, its simplicity and convenience, upon the legal nature and duration of the original contract, and upon the understanding of the law which has generally, though silently, prevailed, that adhere to the spirit, I had nearly said the letter, of what I am reminded of having said in a former case not exactly upon this question, "that a seaman had a right to cling to the last plank of his ship in satisfaction of his wages or part of them.[1] Be it remembered, that by the general and just policy of all maritime states, the total loss of the ship occasioned solely by the act of God visiting the deep with storms and tempests, brings with it the loss of all the earned wages (except advances), although the general rule of law is, that the act of God prejudices no man; and although the mariner has contributed nothing to the mischance, but exerted his utmost endeavors to prevent it; and although he is prohibited by law from protecting himself from loss by insurance, as his owner is empowered to do for his, it is surely a moderate compensation for these disadvantages, that he shall be entitled upon the parts saved, as far as they will go, in satisfaction of his wages already earned by past services and perils.

The court admitted the summary petition; and the owners discharged the wages according to the schedule annexed to it.[2]

[1] Sydney Cove, 2 Dod. 13.

[2] The Lady Durham, 3 Hagg. 196, 202 (*semble*); The Reliance, 2 W. Rob. 119 (seamen drowned — remnants saved by others than the crew); The Florence, 16 Jur. 572, 573 (*semble*); Blaine *v.* The Charles Carter, 4 Cranch, 328, 332 (*semble*); Weeks *v.* The Catharine Maria, 1 Pet. Adm. 424; Giles *v.* The Cynthia, 1 Pet. Adm. 204; Taylor *v.* The Cato, 1 Pet. Adm. 48 (entitled as salvors); The Two Catharines, 2 Mas. 319 (entitled as salvors. But see The John Perkins, Fed. Cas. No. 7360, Lewis *v.* The Elizabeth, 1 Ware, 33, 41 (*semble*); The Sophia, Gilp. 77 (*semble, contra* to The Reliance, *supra*); The Hercules, Gilp. 184; Reed *v.* Hussey, 12 Bl. & How. 525, 543 (on *quantum meruit*); Pitman *v.* Hooper, 3 Sumn. 50, 60 (*semble*); The Dawn, 2 Ware, 121 (as salvors more than wages); The John Taylor,

THE ACORN.

In the United States District Court, Western District of Pennsylvania, August 31, 1887.

[*Reported in* 32 *Federal Reporter*, 638.]

In Admiralty. *Sur* exceptions to libel.

Geo. C. Wilson, for exceptants.

E. J. Smail, for libellants.

Acheson, J. According to the allegations of the libel, which for the present must be accepted as true, the libellants were hired as firemen on the steamboat Acorn, for a trip from Pittsburg to Cincinnati or Louisville, at certain wages; and, pursuant to the terms of the hiring, presented themselves at the wharf where the boat lay, ready and desirous to perform their part of the contract, but were refused admission to the boat, without good reason, other persons having been hired in their places. It was then too late for the libellants to procure employment on that rise upon any other boat, and thus they lost a trip. The Acorn made the voyage for which the libellants were hired.

Upon such a state of facts, why may not the libellants proceed *in rem* against the boat in this court for redress? They sue, not, as is supposed, for damages for breach of the contract, but for their stipulated wages, to which they are as much entitled as if there had been actual performance on their part. Kirk *v.* Hartman.[1] If, after a voyage has begun, it is lost or abandoned by the wrongful act of the owner or master, it is not to be doubted that the seamen are entitled to full wages, recoverable in admiralty by suit *in rem*. Sheppard *v.* Taylor.[2] It has been distinctly held, also, that where a mariner has been improperly discharged from a vessel after shipping articles have been signed, but before the commencement of the voyage, he may sue in admiralty for his agreed wages, the voyage for which he was engaged having been prosecuted. The City of London.[3] To the like effect was the ruling in the case of The Dolphin.[4] I deem it unimportant that the libellants did not actually enter upon any maritime service, since they were wrongfully prevented by the owners of the boat or their agent from going aboard the Acorn.

The exceptions to the libel are overruled.[5]

Newb. 341 (as salvors); The Massasoit, 1 Spr. 97; The Holder Borden, 1 Spr. 144; The Niphon, Brunner, 577 (*semble*); The America, Newb. 195 (remnants not saved by the seamen); The John Perkins, Fed. Cas. No. 7360 (*semble*); Flaherty *v.* Doane, 1 Low. 148; The Davidson, 9 Biss. 275; Hart *v.* The Oakland, 32 Fed. R. 234; Frothingham *v.* Prince, 3 Mass. 563, 2 Dane Ab. 462 s. c.; Coffin *v.* Storer, 5 Mass. 252, 254 (*semble* as salvors); Dunnett *v.* Tomhagen, 3 Johns. 154 (only as salvors); Hart *v.* The Oakland, 32 Fed. R. 234 *Accord*.

Henop *v.* Tucker, 2 Paine, 151 *Contra*. — Ed.

[1] 63 Pa. St. 97. [2] 5 Pet. 675, 710. [3] 1 W. Rob. 88. [4] 6 Ben. 402.

[5] The Alanson Sumner, 28 Fed. R. 670; The City of New Orleans, 33 Fed. R. 683 *Accord*.

Extra Pay and Viaticum.— The mariner's lien covers extra pay and expenses of jour-

THE WILLIAM M. HOAG AND THE THREE SISTERS.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF OREGON, SEPTEMBER 24, 1895.

[*Reported in* 69 *Federal Reporter*, 742.]

BELLINGER, District Judge. The most important question in these cases, and one that is common to them all, is the question whether a seaman can acquire a lien on a vessel by reason of services rendered while employed by a receiver who has charge of such vessel, and is employing it in navigation under the orders of the court appointing him. It is argued against the lien that no lien can attach to property in the custody of the law, and therefore no lien can attach to property in a receiver's hands; that to authorize a lien the employment must be made or authorized by, and the service must be for the benefit, actual or constructive, of, the owner; that the relation of the owner to the transaction must be of such a character that a right of action *in personam* can be maintained against him to recover the debt sought to be enforced as a lien against his property, and that it is against the policy of the law to allow admiralty to interfere with the operation of a vessel by a court having jurisdiction to operate it through a receiver. The holding in The Esteban de Antunano,[1] and in The Augustine Kobbe,[2] is that, when a vessel is in the custody of the law by an officer having her in possession under process, the authority of her owners and of their agents, the master and ship's husband, to thereafter affect the ship by any conduct or contract to result in a lien on the ship, is ended. In Parker *v.* The Little Acme,[3] it is held that when a sheriff having possession of a vessel by virtue of a writ of execution ran the boat a few days without the knowledge or consent of the

ney home whenever he is entitled to these. The Brig Blohm, 1 Ben. 228; The Charles L. Baylis, 25 Fed. R. 862.

LIEN HOLDS AGAINST VESSEL UNDER CHARTER. — The vessel is bound to the mariners although it was chartered and the charterer, to the knowledge of the seamen, was to pay all wages. The Louisa, 2 Wood. & M. 48; The Canton, 1 Spr. 437; Flaherty *v.* Doane, 1 Low. 148; The Bambard, 8 Ben. 493; The Enterprise, Fed. Cas. No. 6151; The Montauk, 10 Ben. 455; The Samuel Ober, 15 Fed. R. 621; The International, 30 Fed. R. 375; The L. L. Lamb, 31 Fed. R. 29; The Atlantic, 53 Fed. R. 607.

MARINERS. — For illustrations of the scope of the term mariners, see in addition to the cases cited *supra*, 52, n. 1, the following: The May Queen, 1 Spr. 588 (mate and engineer); The Highlander, 1 Spr. 510 (divers and wreckers); The Wanderer, 20 Fed. R. 655 (purser); The Louie Dole, 11 Biss. 479 (engineer); The Murphy Tugs, 28 Fed. R. 429, 430 (engineer); The International, 30 Fed. R. 375 (engineer); Johnson *v.* Hall, 38 Fed. R. 258 (cook); Steam Dredge No. 1, 87 Fed. R. 760 (foreman on dredge); The Georgian, 34 Fed. R. 79 (quarantine commissioners, statutory); The M. M. Morrill, 78 Fed. R. 509 (sealers).

CREDIT EXCLUSIVELY PERSONAL. — If by the clear understanding of the parties and by a fair bargain the ship was not to be pledged for the wages, there is no lien. The Louisa, 2 Wood. & M. 48; The Highlander, 1 Spr. 510; Scott *v.* Failes, 5 Ben. 82; The Bambard, 8 Ben. 493; The Sirocco, 7 Fed. R. 599. — ED.

[1] 31 Fed. 920. [2] 36 Fed. 702. [3] 43 Fed. 925.

owner no lien would exist in favor of one who acted as master and pilot during the time, but such person must look to the sheriff for his compensation. In The Young America,[1] the general and well-understood rule was applied that when a vessel is arrested in admiralty the law requires that she be safely kept by the marshal, and that such officer has no authority to create or permit charges upon the property beyond such as are necessary for its due care and preservation. These cases are relied upon by the claimants as embodying principles necessarily decisive of the cases on trial. The rule of these cases is against a lien as a result of an unauthorized employment of a vessel by an officer having her in charge. The cases are those of legal custody for safe-keeping or for sale under process. The employment of a vessel in such a case by the officer is not authorized. But when the custody is for the purpose of operating the property, of navigating a vessel by a court having jurisdiction, there is no reason to distinguish it from any other authorized employment. The receiver stands in the relation of owner. The expenses of his administration of property managed by him is always paid out of the assets in his hands, and constitute a first charge upon it. The court appointing a receiver may incumber the property in its custody by the issue of receiver's certificates, or may otherwise apply it in its operation. The owner's control is, therefore, not necessary in such a case to the creation of an obligation enforceable against his property. The objection urged in these cases has reference to the rights of the owner; but the owner's rights are subordinate to the authorized contracts and obligations of the receiver in any case, so that the enforcement of a claim for wages by a proceeding *in rem* does not prejudice the owner in any right which he otherwise has.

Does the fact that the wages are earned in an employment by a receiver take the case out of the general rule which confers jurisdiction upon the admiralty courts for any reason? It is urged that the court appointing the receiver is competent to protect the mariners' rights, and that by taking jurisdiction a court of admiralty interferes in the administration of the receivership. Maritime liens grow out of the necessities of commerce, and when they are for services they depend upon the character of the employment, and these are not affected by the fact of a receivership. The character of the ownership or control of a vessel cannot in any case affect its liability nor lessen the necessity for that credit which the law of maritime liens supplies, nor render less meritorious the services which that law compensates. Whether the court appointing the receiver might have provided for the payment of these claims, or had the power to do so, is not material. It has not done so, and the property is no longer in its custody. The right is a subsisting one under the law, and this court cannot properly refuse to enforce it.[2]

Objection is made to the claims of Young and Raabe on the ground that the services rendered by them were as masters, and that for such

[1] 30 Fed. 790.

[2] See The Resolute, 168 U. S. 437. — Ed.

services a lien does not exist. Such is the general rule in admiralty.[1] The state statute, however, provides for a lien without exception as to masters of vessels. I cannot extend the admiralty exception to a case like this created by the state statute, unless the case is within the reason that authorizes such exception. The services in this case were upon a vessel plying between points in the river, at which agents were stationed by the receiver, who were clothed with authority to conduct the business of the vessel; thus leaving to the master merely the ordinary duties of navigation. The master was not a representative of the ship, authorized to create liens, and is, therefore, not within the reason of the rule that leaves him no lien. Nor do I think that such lien is barred by the limitations of the state statute. That statute provides as follows: "All actions against a boat or vessel under the provisions of this title shall be commenced within one year after the cause of action shall have accrued." Hill's Ann. Laws Or. § 3706. This limitation applies to the procedure provided for by the state statute. It relates to the remedial provisions of the statute. It does not qualify the right of lien, nor constitute a condition of the lien. The statute provides for actions to enforce the liens it creates, and it limits the time within which such actions shall be brought. All these provisions which undertake to confer upon the state courts this right to bring actions to enforce the lien thus created are void. The Hine *v.* Trevor. And the limitation of such actions is therefore necessarily ineffectual and void.

It is contended that the assignee of the fireman's claim for wages for services on the Resolute cannot enforce the assigned claim; that the lien of a claim for mariners' wages is a personal privilege in the mariner, and for the mariner's protection, and is not assignable. The authorities are not in harmony upon this point. The assignment of a shipwright's lien for repairs is upheld in Park *v.* Hull of the Edgar Baxter,[2] and that of a mariner's lien for wages is upheld in The New Idea.[3] I am of the opinion that the lien of mariners for wages should stand upon the same footing with those of other laborers upon vessels

[1] Wilkins *v.* Carmichael, 1 Doug. 101; The Favourite, 2 C. Rob. 232; Hussey *v.* Christie, 9 East, 426; Smith *v.* Plummer, 1 B. & Al. 575; The Orleans, 11 Pet. 175, 184; Norton *v.* Switzer, 93 U. S. 355, 365 (Compare The William M. Hoag, 168 U. S. 443); The New Jersey, 1 Pet. Adm. 223, 228; The Grand Turk, 1 Paine, 73; The Thomas Scattergood, Gilp. 1; Lowell *v.* Bacon, 4 Cranch C. C. 97; Revens *v.* Lewis, 2 Paine, 202; The Leonidas, Olc. 12; The Eolian, 1 Biss. 321, 1 Bond, 267 (for services as pilot); The Dubuque, 2 Abb. U. S. 20; The Wyoming, Fed. Cas. No. 61; The Graf Klot Trautvetter, 8 Fed. R. 833; The Hattie Low, 14 Fed. R. 880; The Imogene M. Terry, 19 Fed. R. 463; The M. Vandercook, 24 Fed. R. 472; The John A. Morgan, 28 Fed. R. 895; The Carlotta, 30 Fed. R. 378; The J. L. Prendergast, 32 Fed. R. 415; Peterson *v.* Miller, 37 Fed. R. 217; The Atlantic, 53 Fed. R. 607 (*semble*); The Hattie Thomas, 59 Fed. R. 297; The Nebraska, 75 Fed. R. 598; The Ripon City, 102 Fed. R. 176, 180; Fisher *v.* Willing, 8 S. & R. 118 *Accord*.

The master is allowed a lien upon the vessel in continental Europe. The Graf Klot, 8 Fed. R. 833 (Germany); The Velox, 21 Fed. R. 479 (Holland); The Olga, 32 Fed. R. 330 (Italy); The Angela Maria, 35 Fed. R. 430 (Italy). In England he has a lien by statute. The Sabina, Lush. 545. There are similar statutes in several states, and the statutory lien is enforced in admiralty. — ED.

[2] 37 Fed. 219.

[3] 60 Fed. 294.

and of material-men. When the services are rendered, and the right is perfected, the assignability of a thing enhances its value, and a non-assignable character given to a mariner's lien is more likely to injure than protect the owner. When the services are rendered, and the right is perfected, there is no more reason to deny the mariner's right to dispose of this property than there is of any other belonging to him. The law guards him against imposition without imposing disabilities upon him in the enjoyment of his property and rights. Unless the assignee is a speculator, or there is other reason to question or suspect the fairness of the transaction, the lien for wages in the hands of the assignee should be enforced.

The exceptions to the libels are overruled.[1]

THE ANTELOPE. — MONTGOMERY *v.* TYSON.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, FEBRUARY, 1867.

[*Reported in* 1 *Lowell*, 130.]

LOWELL, J. This case was brought by the crew of the whaling bark Antelope against the oil which was saved and sent home from the wreck of the vessel.[2] The vessel, which was lost on the rocks of Nianteleck harbor, in Cumberland Inlet, on the night of the 5th of October last, had had a long and unsuccessful voyage, and had passed two winters in the ice. The amount of oil and bone taken were not sufficient to give either to owners or crew anything like a fair return upon their respective outlays of time, labor, and money. These circumstances are not the most propitious for the harmonious settlement of any joint enterprise.

Some doubt was expressed at the argument whether the seamen can proceed against the oil in the hands of the owners. It has long

[1] The Hull of a New Ship, 2 Ware, 199; The Cabot, Abb. Adm. 150; The Sarah J. Weed, 2 Low. 555; Ross *v.* Bourne, 14 Fed. R. 858, 861-862; The New Idea, 60 Fed. R. 294 *Accord.*

The A. D. Patchin, Fed. Cas. No. 10,794; The Æolian, 1 Bond, 267; The Freestone, 2 Bond, 234; The Gate City, 5 Biss. 200; The City of New Bedford, 4 Fed. R. 818, 827 *Contra.*

By U. S. Rev. St. § 4536 an assignment of his wages by a mariner is invalid. The M. M. Morrill, 78 Fed. R. 509.

Other maritime liens than those for seamen are assignable.

REPAIRS AND SUPPLIES. — The Wasp, L. R. 1 Ad. & Ec. 367; The Boston, Bl. & How. 309 (*semble*); The Panama, Olc. 343; The General Jackson, 1 Spr. 554; The Sarah J. Weed, 2 Low. 555; The Norfolk, 2 Hughes, 123; The American Eagle, 19 Fed. R. 879.

But see *contra*, Repper *v.* Robinson, Taney, 492; The Kensington, Fed. Cas. No. 6122; The Champion, Bro. Adm. 520; The N. W. Skillinger, 1 Flip. 436.

TOWAGE. — The Pride of America, 19 Fed. R. 607.

But see *contra*, The Napoleon, 7 Biss. 393, 396 (*semble*).

SALVAGE. — But see *contra*, The George Nichols, Newb. 449. — ED.

[2] Only a part of the opinion is given. — ED.

since been settled that the property in the oil is wholly in the owners of the vessel; and that the lays of the crew are only a mode of arriving at their wages. Many important consequences have followed from this doctrine; one of which is, that the sailors, not being partners nor part-owners, may sue at law for their wages, and are not obliged to go into equity for a settlement of accounts. The crew always have a lien on the freight for their wages;[1] and one usual mode of enforcing liens on freight, in the English practice, is by a warrant against the cargo, to detain it until the freight is paid into the registry: The Ringdove.[2] Where the owners of the vessel own the cargo, they would be liable for a reasonable freight in all controversies and adjustments in which that question became important; and no doubt the right might be enforced in any proper case against the cargo itself. In whaling voyages, it may almost be said that the cargo, to the extent of the owners' shares, represents freight exclusively, having been earned in a long cruise by the use of the vessel and her outfits. The doubt arises out of the terms of the articles, by which the owners have the right to sell the oil and bone. This agreement must undoubtedly confer upon them the right to give a good title, clear of all liens; and they might probably sell the oil and bone before its arrival home. But, until a sale is made, I am of opinion that the seamen have a lien upon the oil. Judge Sprague appears to have understood the matter in this way in his remarks in Hussey *v.* Fields,[3] and such a libel was brought in Two Hundred and Ninety Barrels of Oil.[4] If the question were between shipper and ship-owner, the master's lien for freight would be lost by any agreement in the charter-party or bill of lading inconsistent with his retaining the cargo for the freight. But the master's lien for freight has been decided by the Supreme Court of the United States to depend entirely on possession; that of the seaman for wages has no relation whatever to possession, which he never has, either of ship or freight.

The libellants will recover, in this case, their extra wages, and their lays, if any.

THE LARCH, Parker Fall, Claimant.

In the United States Circuit Court, First Circuit, September Term, 1855.

[*Reported in* 2 *Curtis*, 427.]

This was an appeal from a decree of the District Court which established a lien on the brig Larch for expenditures made by the master and part-owner. The facts briefly were, that Haskell, being master and owner of one half of the brig, contracted, in the autumn of 1853,

[1] Poland *v.* Preight, 1 Ware, 134 *Accord.* — Ed.
[2] Swabey, 312.
[3] 1 Sprague, 396.
[4] 1 Sprague, 475.

with his coöwner to take and employ her, on shares, in the business of freighting. From the autumn of 1853 the brig was variously employed and carried freight. In October, 1854, she sailed from Pictou with a cargo of coal, bound for Nantucket, got ashore and was found to be seriously injured by worms. Being incapable of carrying forward the cargo, it was discharged. The libellant was employed till December in getting the vessel off the shore and bringing her home. The libel was filed to recover the expenses of relieving and restoring the vessel, and included a great variety of claims for disbursements, as well as for the personal services and expenses of the libellant.

CURTIS, J. The libellant asserts a lien on this vessel for his disbursements in three capacities, — as master, as part-owner and ship's husband, and as charterer.

First, as master. The question is, whether for disbursements made by the master abroad he has a lien. It is definitely settled in England that he has not. In Smith *v.* Plummer,[1] the cases are reviewed, and the decision then made is considered to have fixed the law of that country. Atkinson *v.* Cotesworth,[2] Gibson *v.* Ingo.[3]

It is said by Chancellor Kent (3 Com. 167), that the question is still a vexed and floating one in our own maritime law. The decisions made in the United States are: —

1. That the master has not a lien on the ship for his wages. The Grand Turk,[4] Fisher *v.* Willing,[5] Steamboat Orleans *v.* Phœbus,[6] Willard *v.* Dorr,[7] Phillips *v.* The Thomas Scattergood.[8]

2. That he has a lien on the freight for his disbursements. Lewis *v.* Hancock,[9] Ingersoll *v.* Van Bokkelin.[10] See, also, Lane *v.* Penniman,[11] Shaw *v.* Gookin,[12] Newhall *v.* Dunlap.[13] And in Drinkwater *v.* The Spartan,[14] Judge Ware held that there was no sound distinction between wages and disbursements, and the master had a lien on the freight for both.

3. In Gardner *v.* The New Jersey,[15] Judge Peters declared that a master who paid claims which were liens on the vessel became substituted in place of the lien creditors, and acquired a lien on the vessel, even though paid in the home port. He says, in a note, the allowance to the master was not opposed. The allowance was out of remnants in the registry. It is to be observed that Judge Peters did not consider that the master had a lien in his own right, but only as succeeding to the privilege of creditors who had liens. With great respect for that eminent admiralty judge, I do not think such substitution can be maintained.

I am not aware that the general maritime law contains any particular rules or principles concerning substitution, unless we should except abandonments; and even these cannot be said to be independent

[1] 1 Barn. & Ald. 575. [2] 3 B. & C. 647. [3] 6 Hare, 112; Ab. on Sh. 420.
[4] 1 Paine C. C. R. 73. [5] 8 Serg. & R. 118. [6] 11 Pet. 175.
[7] 3 Mas. 91. [8] Gilpin's R. 1. [9] 11 Mass. R. 72.
[10] 7 Cowen, 670; s. c. 5 Wend. 313. [11] 4 Mass. R. 92.
[12] 7 N. H. R. 19. [13] 14 Maine R. 183.
[14] Ware's R. 145. [15] 1 Pet. Ad. R. 226.

of the laws of particular countries, for not only their forms and ceremonies, but the cases in which they may be made, are not alike everywhere. In general, I think it is true, that the question whether a substitution can be asserted without an actual assignment by the creditor, must depend in courts of admiralty upon the municipal law of the country. If, therefore, it could be maintained that, under the Roman law, a master who should pay a debt for which the vessel and owners were liable, would by the mere force of such payment be substituted in place of the creditor, and acquire his lien, it would not follow that the same substitution would be allowed by a court of admiralty. Substitution, though by a fiction of the Roman law it is worked out by allowing the person paying to act as the attorney of the creditor (Pothier's Des Arrêts, etc., n. 66–68), is not a matter of remedy merely, nor does it arise from any law of procedure. It is an equitable right, which the law recognizes and gives effect to, and unless that equity law, which courts of admiralty administer, has recognized and defined this right, those courts have no power to allow it. To a certain extent, the right of substitution has been recognized and allowed in our equity law. But in one particular, and that decisive of this inquiry, it differs from the Roman law. By the latter, if a payment extinguished the debt and thus put an end to the security which the creditor held for its payment, there could be no substitution. D. 46, 3, 76. Otherwise, if the security was of such a nature as still to subsist after payment. And in order to prevent the operation of this principle, a fiction was introduced, according to which, in certain cases, the creditor was deemed to have sold his rights to the person paying, although in point of fact it was a true payment, and no such sale or assignment was made. Pothier's Des Arrêts, etc., n. 66–68; Domat, Part I., B. 3, § 6, n. 9 (Cushing's ed. n. 1787). No such fiction exists in our law. And I consider it to be true, that when a payment by a surety or other third person extinguishes a debt, and thereupon the lien or incumbrance ceases to exist, there can be no substitution. It is otherwise where the legal title still remains in the creditor, or where from any cause the security may still subsist. Copis *v.* Middleton,[1] Jones *v.* Davids,[2] Hodgson *v.* Shaw,[3] Wiggin *v.* Dorr.[4] The debt being extinguished, the lien is extinguished also, and no right remains to which the master can succeed.[5]

A case is stated by Emerigon (Con. a la Grosse, ch. 12, § 3, vol. 2, pp. 596, 597), against the right of a part-owner who pays privileged claims, to succeed to the privilege of workmen or material-men; and such is evidently his own opinion. In the case of The Ship Packet,[6] Mr. Justice Story, in reasoning on the duty of the master to use his own funds rather than borrow on bottomry, suggests a possibility that the master in such a case would have a lien on the ship. But it

[1] 1 Turn. & Russ. 224.
[2] 4 Russ. R. 277.
[3] 3 M. & K. 183.
[4] 3 Sumn. 410.
[5] For a criticism of Mr. Justice Curtis's opinion on this point of subrogation, see the Tangier, 2 Low. 7, 12, and The Sarah J. Weed, 2 Low. 555, 562.—Ed.
[6] 3 Mason's R. 263, 264.

is quite obvious that learned judge did not there intend to express any opinion on the point, and he does not cite the leading cases which affect it. (See 3 Kent's Com. 168, note.)

The result of this examination of American authorities is, that it has never been decided in this country, that the master has a lien on the ship for his disbursements; and that the authorities bearing in that direction go no further than to assert his lien on the freight. How strong a bearing they have to show that he has also a lien on the ship, depends on the principles, or grounds of the lien which they establish, and their application to the ship as well as the freight. Now, the Supreme Court of Massachusetts, in Lewis *v.* Hancock, consider the right of the master, as against the owner, to collect the freight and reimburse himself for advances, to be the same as that of a factor or consignee who has sold the merchandise of his principal and has not yet received payment.

And this seems to be adopted by the Supreme Court of New York, in Ingersoll *v.* Van Bokkelin. No other ground is stated in their opinion. This is intelligible, and may be sound; but it has no application to the vessel. It proceeds on the ground, that a promise has been made to an agent to pay him a sum of money on account of a consideration coming from him as agent; that his personal services, or advances, or both, have contributed to that consideration; and his principal cannot interpose and prevent the performance of that promise to the agent, to the injury of the agent.

In the court of errors, the chancellor, in his opinion, declares that the lien on the freight is incident to the lien on the ship; and being met with the difficulty that it is settled law that there is no lien on the ship for wages, he declares that there is also no lien on the freight for wages, because they are due by a personal contract with the owner, by which the master can well enough provide for his own security, without the aid of a lien. I concur in opinion with Judge Ware, in Drinkwater *v.* The Spartan, that this distinction is unsound. Indeed, if the lien on freight money is like the right of a factor, on what ground shall he exclude the compensation for the master's services, by the aid of which that money is earned? And as to the ability of the master to protect himself against the insolvency of the owner during his absence abroad, it is difficult to perceive how it is greater in case of wages than disbursements; and it would seem from the passage of the Act of 7 and 8 Vict. ch. 112, that experience had shown the practical necessity in England of protecting wages rather than disbursements; since that act has enabled masters to sue *in rem* for their wages, in case of the bankruptcy or insolvency of the owner.

To allow to a master a lien on the ship for his advances abroad is not unattended with practical objections. It would put into his hands the means of acting directly against the title and interest of his owner in distant ports, where the owner had no representative but himself, even to the extent of procuring a judicial sale of the vessel to satisfy those advances. And if the lien were a true common law lien, a right

of detention, it would prevent the owner from displacing him abroad, however great his misconduct might be, without yielding to claims which could not be properly investigated there, or would occupy an inconvenient length of time in their investigation.

But I do not feel at liberty to go into such considerations on such a question, as I have had occasion repeatedly to declare. (See The Kiersage.[1])

A lien being an exception to the general rule which entitles all creditors to participate equally in all the property of their debtor, and a maritime lien being also a *jus in re*, which goes with the thing into the hands of purchasers and so is embarrassing to commerce, it is *stricti juris;* must be derived from some provision of positive or customary law, which clearly confers it in the case in judgment; and it cannot be made out by way of argument from analogy, nor from considerations of convenience. Such considerations are for the legislator alone.

I am unable to find any rule, either of the common or maritime law of this country, creating such a lien. It is true, the maritime laws of the continental states allow the master a privilege on the vessel, even for his wages. But the maritime law of England, from which we derive nearly all our own, has been much more sparing in the allowance of privileged liens than the law of the continent. Though our maritime law is not necessarily identical with that of England, and has been modified in important particulars by our own usages, yet, so far as I know, not in this particular; and I know not on what ground I should be authorized to declare, that while, by the maritime law of England, the master has no lien on the ship for his wages or advances, by the maritime law of the United States he has a lien for his advances, though not for his wages.

I desire to be understood as not intending to question the correctness of the decisions, that the master has a right, as against the owner, to collect enough of the freight to reimburse himself for his advances.[2] I express no opinion thereon. I do not think they have any just bearing on the question before me. An assumption that because he has this right he also has a lien on the ship, is wholly inadmissible, in my judgment. The distinction between equitable rights to have the freight of a ship applied to pay the expenses incurred in earning it, and a lien on the ship itself, is clear.[3] The cases on this

[1] 2 Curt. 421.

[2] The master's lien on the freight for advances has been often recognized. The Packet, 3 Mas. 264; The Spartan, 1 Ware, 149; *Ex parte* Clark, 1 Spr. 69; Newhall *v.* Dunlap, 14 Me. 180; Lane *v.* Penniman, 4 Mass. 91; Lewis *v.* Hancock, 11 Mass. 72; Richardson *v.* Whiting, 18 Pick. 530, 532; Shaw *v.* Gookin, 7 N. H. 16, 19; Van Bokkelin *v.* Ingersoll, 5 Wend. 315, 7 Cow. 670.

His lien on the freight for wages also has been allowed. The Spartan, 1 Ware, 149, 161; Lane *v.* Penniman, 4 Mass. 91. But see *contra* Van Bokkelin *v.* Ingersoll, 5 Wend. 315, 7 Cow. 670.

[3] The Tangier, 1 Low. 7, 11, 12; The Sarah J. Weed, 2 Low. 555, 562 *Accord.*

The New Jersey, 1 Pet. Adm. 223, 227; *Ex parte* Clark, 1 Spr. 69 (overruled); The Eliza Jane, 1 Spr. 152, 156 (*semble*) *Contra.* — ED.

subject are collected and reviewed by the vice-chancellor in Green *v.* Briggs.[1]

The next question is whether the libellant had a lien as part-owner and ship's husband. I do not propose to go into a critical examination of the cases, beginning with Boddington *v.* Hallet,[2] where Lord Harwicke held in favor of the lien, and *Ex parte* Harrison,[3] and *Ex parte* Young,[4] where Lord Eldon overruled Doddington *v.* Hallet. (See, also, 2 Ves. & Bea. 242.) That the latter decision is the law of England, I take to be clear. There has been some diversity of decision in this country; but I think it has proceeded from diversity in the views taken of the particular facts of the cases, rather than from any real difference in principles. That the owners of a vessel may be copartners in respect to that as well as any other property, and that when they are so each has a lien, cannot be doubted. But where no such special relation exists, where they are merely part-owners, and as such tenants in common, that one has no lien on the share of another for advances, I believe to be equally clear.[5] And when this distinction is attended to, the diversity between the cases is much lessened, if it be not entirely removed. Nicoll *v.* Mumford,[6] Patton *v.* The Randolph,[7] Greene *v.* Briggs,[8] Lamb *v.* Durant,[9] Merrill *v.* Bartlett,[10] Braden *v.* Gardner,[11] French *v.* Price;[12] 3 Kent's Com. 41; Story on Part. 584. There is no ground for maintaining in this case that these persons were partners. As owners of the vessel merely they were not so. The agreement to run the vessel on shares did not make them partners. Webb *v.* Pierce,[13] and cases there cited. Nor had the libellant any lien on the vessel as ship's husband.[14] *Ex parte* Young;[15] Story on Part. § 433.

There is another view of this subject which would be fatal to the jurisdiction of this court. If it were admitted that a part-owner was

[1] 6 Hare, 395. [2] 1 Ves. 497. [3] 2 Rose, 76. [4] Ib. 78, n.

[5] Macy *v.* DeWolf, 3 Woodb. & M. 193, 205; The Randolph, Gilp. 457; Kellum *v.* Emerson, 2 Curt. 79, 85; The Reliance, 1 Woods, 284; The Coal Bluff No. 2, 3 Fed. R. 531; The Queen of St. Johns, 31 Fed. R. 24; The Daniel Kaine, 35 Fed. R. 785; The H. E. Willard, 53 Fed. R. 599 (affirmed 52 Fed. R. 337); The Lena Mowbray, 71 Fed. R. 720; The M. M. Morrill, 78 Fed. R. 509, 510 (*semble*); Nelson *v.* White, 83 Fed. R. 215, 221 (*semble*) *Accord.*

The Pilot No. 2, Newb. 215; The Charles Hemje, 5 Hughes, 359; The Shrewsbury, 69 Fed. R. 107 (statutory lien). *Contra.* — ED.

[6] 4 Johns. Ch. R. 526; s. c. 20 Johns. 611.

[7] Gilpin's R. 457.

[8] 6 Hare, 395.

[9] 12 Mass. R. 54.

[10] 6 Pick. 46.

[11] 4 Ib. 456.

[12] 24 Ib. 14.

[13] 1 Curt. 111.

[14] The Thales, Fed. Cas. No. 13,894; The Cabot, Abb. Adm. 150; The Sarah J. Weed, 2 Low. 555; The J. C. Williams, 15 Fed. R. 558; White *v.* $292,300, 19 Fed. R. 785; The Esteban de Antunano, 31 Fed. R. 920; The Raleigh, 32 Fed. R. 633; The Daniel Kaine, 35 Fed. R. 785; The Ripon City, 102 Fed. R. 176, 180; Hopkins *v.* Forsyth, 14 Pa. 38 *Accord.* — ED.

West Priorland, Lowell, 454; The Feronia, 3 Mass. Cas. 54; The Joseph Dexter, 3 Mass. Cas. 248; The Underwriter, 1 Asp. M. L. C. 172; The Jenny Lind, 1 Asp. M. L. C. 294.

[15] 2 Ves. & Beames, 242.

in equity entitled to a lien on the vessel, for what should prove to be due to him on taking an account, it would not follow that a court of admiralty could take that account and enforce the lien. It is not one of those maritime liens which are peculiarly within the jurisdiction. (See the case of The Young Mechanic.[1]) And a court of admiralty has not jurisdiction to take an account between part-owners. (See Kellum *v.* Emerson,[2] and cases there cited.) In this case, before it could be ascertained what, if anything, is due to the libellant, an account must be taken, not only of his advances, but of the gross earnings of the vessel, and the charges and deductions therefrom under the contract to run the vessel on shares. In my opinion, the court has not jurisdiction to take such an account in order to enforce what is termed, in a court of chancery, a lien, but which is in truth merely an equity, worked out through a constructive trust which is a creature of that court.

Some reliance was placed on the fact that the libellant was in possession of the vessel. But I do not think the mere possession of one tenant in common can give him any rights adverse to his co-tenant. *Ex parte* Machel.[3]

As charterer merely, the libellant has no lien. Indeed, it has not been attempted by his counsel to maintain his claim on this ground, for he admits that before the expenses in question had been incurred, the vessel had become incapable of performing the service for which she was chartered, and that the advances ought not to be considered as made by the libellant in the character of charterer, but of master or part-owner.

The decree of the District Court is reversed, and the libel dismissed.

THE CANAL-BOAT KATE TREMAINE.

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, MARCH, 1871.

[*Reported in* 5 *Benedict*, 60.]

BENEDICT, J.[4] This is a proceeding *in rem* to enforce a lien for wharfage against the canal-boat Kate Tremaine.

It is admitted that the vessel in question was employed in transporting freight between the cities of New York, Brooklyn, and Albany, in the State of New York, and Jersey City, in the State of New Jersey; that, in the course of such employment, she was moored at the libellant's wharf, on the Brooklyn side of the East River, and there discharged cargo, whereby the libellant became entitled to the wharfage now sought to be recovered. It is also admitted

[1] 2 Curt. 404. [2] 2 Curt. 79. [3] 2 Ves. & Bea. 216; s. c. 1 Rose, 44.
[4] Only so much of the opinion is given as relates to the wharfage lien. — ED.

that the vessel was then owned by a citizen of the State of New York, and was enrolled in that State, and that she has no masts nor sails, nor any motive power of her own.

Upon these admitted facts, the libellant asks for a decree, while the claimants deny that the vessel became subject to a lien by reason of the facts admitted, and deny the jurisdiction of the court.

It must be held, on principle and authority, that the demand in question is maritime in its character, within the meaning of the Constitution, and, accordingly, within the jurisdiction of the district courts. The contract being maritime, and made by the master for the advantage and safety of the vessel, it is within the rule of the maritime law, which implies a lien upon the ship from every lawful contract of the master, made for the benefit of the ship. I know of no principle of the maritime law which will permit, nor any binding authority which should compel me to deny a lien to such a creditor as the present. Certainly, if a lien be given to any one dealing with the vessel, it should be to the wharfinger; for, under ordinary circumstances, he has no option, but must render the service, because the law gives a license to the vessel to use the wharf. In such a case common justice requires it. And so is the weight of authority. The maritime codes and decided cases, already cited, all recognize the existence of the lien. In the case of The St. Jago de Cuba, the Supreme Court expressly recognize it, and hold a payment on account to be appropriated to this item, because it carried a lien.

It is said, however, that this is a domestic vessel. So was the St. Jago de Cuba; and my researches, so far as I have been able to extend them, have failed to discover, in the maritime law, any general distinction between foreign and domestic vessels, in respect to demands like this. No such distinction appears in the Consulato del Mare, which was not a local enactment, but a declaration of the maritime law as then recognized by all maritime nations. The Marine Ordinance made no such distinction, nor did the Code de Commerce. Even the English common law courts conceded that, by the maritime law, a lien followed every contract of the master, made for the benefit of the ship. The same result has attended the research of counsel of our own day, learned in the law (O'Connor's Arg.;[1] see, also, Woodbury, J., in Waring *v.* Clark[2]).

In cases of tort, of damage arising from the negligence of the master, which the owners cannot prevent, no such distinction has ever been made. There the liability of the owner, and of the ship, are declared convertible terms (The China[3]). Why is there not the same rule in cases of contracts of the master, to which the owners assent?

But the case of the General Smith, and cases which have followed it, are cited.

The results which have attended the doctrine declared in the case of The General Smith will, I judge, be conceded not to have been

[1] 20 How. 394. [2] 5 How. 475. [3] 7 Wall. 66.

sufficiently beneficial to call for any extension of the rule of that case. It has given rise to numerous attempts to create state admiralty proceedings, framed for no other purpose than to avoid its effect, and which have proved to be snares.[1] Taken in connection with other subsequent causes, it has compelled the decision that a maritime lien may exist without any right to a proceeding *in rem*. (The Bark Harrison, Hoffman, J., Sept. 26, 1870.) It declares an exceptional doctrine, which is at war with all the analogies of the maritime law, and which has been continually assailed as without support in authority, and without foundation in reason, and which, I think, must in fairness be said to have failed to secure a resting-place in the maritime law of America. It belongs elsewhere, for the maritime law deals not with local laws. "The truth is, that the admiralty and maritime jurisdiction of the courts of the United States given by the Constitution covers not merely the cognizance of the case, but the jurisprudence and principles by which it is to be administered. It covers the whole maritime law applicable to the case in judgment, without the slightest dependence upon or connection with the local jurisprudence of the State on the same subject." (Story, J., The Bark Chusan;[2] see, also, Pardessus, preliminary chapter, p. 4.) Says Judge Woodbury,[3] "The civil law gives a lien on domestic vessels, but the Supreme Court has not felt justified in doing so without a statute, *because not done in England*." And according to Dr. Bell,[4] the rule was a deviation in England from the maritime rule prevailing in other nations, which proceeded rather from peculiar notions of jurisdiction than from any general principles of law or experience.

These peculiar notions of jurisdiction have at last been expelled from the jurisprudence of America, and the opinion is widely expressed that their offspring should follow them. The courts will then be relieved from the necessity of holding that the residence of the ship-owner, which is considered immaterial as affecting the master's contracts of affreightment, or his contracts with the tug or the pilot or the crew, becomes all at once very material, when his contract is for the food of the master, pilot, and crew; and it will then no longer be necessary judicially to declare that the New York owner, if he conclude to sleep and vote in Jersey City, thereby transforms his vessel to a foreign ship. Certainly, it is no time to extend such a doctrine.

Thus far, this doctrine has been applied by the Supreme Court only to the contracts of material-men. The present is not the case of a material-man, but of a wharfinger. A wharfinger is not a material-man. His demand is of a different character, and is given a different rank in the order of payment. This has been several times adjudged (The Highlander;[5] Davis *v.* Child;[6] The Asa R. Swift.[7])

[1] See 1 Ben. p. 155, n.
[2] 2 Story, 464.
[3] 5 How. 475, Waring *v.* Clarke.
[4] 1 Bell's Com. 527.
[5] Betts, J., MSS.
[6] Davies R. 31, 74.
[7] Newberry R. 354.

The Supreme Court, in passing upon the demand of Despreux, in the case of The St. Jago de Cuba, adjudicated upon a claim for wharfage as differing from the claim of a material-man.

I therefore conclude that, according to the maritime law, an implied lien upon this vessel was created by the contract of the master with the wharfinger, and the contract being maritime, the right to a proceeding *in rem* follows of course.[1] (Davis *v.* Child.[2]) A lien being implied by law, it is regarded as in effect an element of the original contract (The Maggie Hammond[3]); and it must be admitted, that when such a lien exists, a proceeding *in rem* may be had. The sole object of a proceeding *in rem* is to give effect to a maritime lien (The Mayurka[4]). It is a proceeding peculiar in character, and having effects not attainable by any other form of proceeding (The Young Mechanic[5]). It cannot be truly said to be simply a remedy, but becomes part of the contract — a substantial right — of which, if a party be deprived, he in effect loses his lien.

A maritime lien is a *jus in re*. It is an appropriation of the thing, made by the law, to the end that debts of a certain class be always secured. It is not a security collateral to the liability of the owner, but a special property in the ship, which practically can be realized in no other way than by a proceeding *in rem* against the ship; and

[1] WHARFAGE LIEN. — *Foreign Vessel.* The lien for wharfage upon a foreign vessel is everywhere conceded. *Ex parte* Easton, 95 U. S. 68; The New Jersey, 1 Pet. Adm. 223, 228; *Ex parte* Lewis, 2 Gall. 483; The Phebe, 1 Ware, 354. *Domestic Vessel.* In accordance with the principal case allowing a lien on a domestic vessel are One Covered Scow, 30 Fed. R. 269; The Allianca, 56 Fed. R. 609 (*semble*); The Seguranca, 58 Fed. R. 908 (*semble*); The Advance, 60 Fed. R. 766 (*semble*); The C. Vanderbilt, 86 Fed. R. 785; The Scow No. 15, 92 Fed. R. 1008, 88 Fed. R. 305.

But see *contra Ex parte* Lewis, 2 Gall. 483; The Asa R. Swift, Newb. 553; The Thomas, Fed. Cas. No. 3769; The John Shellcross, 35 Ind. 19. The question was left open in The John M. Welch, 2 Fed. R. 364 (correcting the misinterpretation of *Ex parte* Easton in The Bob Connell, 1 Fed. R. 218).

In The Virginia Rulon, 13 Blatchf. 519, and The Shrewsbury, 69 Fed. R. 1017, a lien was allowed under a state statute.

TOWAGE, PILOTAGE, AND SALVAGE. — No distinction is made between domestic and foreign vessels as to liens for towage, pilotage, and salvage. Accordingly the lien was allowed on domestic vessels for *Towage*. The John Cuttrell, 9 Fed. R. 777; The Mystic, 30 Fed. R. 73; The Engines of The Greenpoint, 38 Fed. R. 671, 672; The Allianca, 56 Fed. R. 609, 613. *Pilotage*. The Engines of The Greenpoint, 38 Fed. R. 671, 672; The Allianca, 56 Fed. R. 609, 613. *Salvage*. The Engines of The Greenpoint, 38 Fed. R. 671; The Allianca, 56 Fed. R. 609, 613.

LOCKAGE. — The lien for lockage would seem to be analogous to liens for wharfage. A lien for lockage on a domestic vessel was denied, however, in The Bob Connell, 1 Fed. R. 218. But see The John M. Welch, 2 Fed. R. 364, 374.

STEVEDORE'S SERVICES. — The lien for stevedore's services was said in The Seguranca, 58 Fed. R. 908, 910, to be like that for wharfage, and therefore to attach to a domestic vessel. But unfortunately there are several cases *contra*. The Canada, 7 Fed. R. 119; The Wyoming, 36 Fed. R. 493; The Gilbert Knapp, 37 Fed. R. 209; The Mattie May, 45 Fed. R. 899; The Main, 51 Fed. R. 954; Norwegian Co. *v.* Washington, 57 Fed. R. 224.

The lien is allowed without question to-day against a foreign vessel. The Windermere, 2 Fed. R. 722; The Canada, 7 Fed. R. 119; The Hattie M. Bain, 20 Fed. R. 389; The Senator, 21 Fed. R. 191; The Velox, 21 Fed. R. 479; The Director, 34 Fed. R. 57, 67; The Scotia, 35 Fed. R. 916; The Mattie May, 45 Fed. R. 899; The Main, 51 Fed. R. 954; Norwegian Co. *v.* Washington, 57 Fed. R. 224. In several of these cases there was no allusion to any distinction between domestic and foreign vessels. — ED.

[2] Davies, 78. [3] 9 Wall. 450. [4] 2 Curt. 77. [5] 2 Curt. 412.

the liability of the ship was originally the primary liability, the liability of the owner being merely incidental to his ownership. (The Phebe.[1]) This special property, when once acquired, it has been held not competent for a court to impair or take away. (The Feronia.[2])

A decree will accordingly be entered in favor of the libellant, but without costs.[3]

H. T. BULKLEY, CLAIMANT, v. THE NAUMKEAG STEAM COTTON CO.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1860.

[*Reported in* 24 *Howard*, 386.]

MR. JUSTICE NELSON delivered the opinion of the court.[4]

This is an appeal from a decree of the Circuit Court of the United States, sitting in admiralty, for the district of Massachusetts.

The libel in the court below was against the barque Edwin, to recover damages for the non-delivery of a portion of a shipment of cotton from the port of Mobile to Boston. The facts upon which the question in this case depends are found in the record as agreed upon by the proctors, both in the district and circuit courts, and upon which both courts decreed for the libellant.

From this agreed state of facts, it appears that the master of the vessel, which was then lying at the port of Mobile, agreed to carry for the libellant 707 bales of cotton from that port to Boston, for certain freight mentioned in the bills of lading.

The condition of the bay of Mobile, which is somewhat peculiar, becomes material to a proper understanding of the question in this case.

Vessels of a large size, and drawing over a given depth of water, cannot pass the bar in the bay, which is situate a considerable distance below the city. Their cargo is brought to them in lighters, from the city over the bar, and then laden on board the vessels. Vessels which, from their light draft, can pass the bar in ballast, go up to the city and take on board as much of their cargoes as is practicable, and, at the same time, allow them to repass it on their return, and are then towed below the bar, and the residue of their load is brought down by lighters and put on board.

In either case, when the vessel is ready to receive cargo below the bar, the master gives notice of the fact to the consignor or broker, through whom the freight is engaged, and provides, at the expense of the ship, a lighter for the conveyance of the goods. The lighterman applies to the consignor or broker, and takes an order for the cargo to be delivered, receives it, and gives his own receipt for the same. On

[1] Ware, 371. [2] 17 L. T. R. 622. [3] See Brookman v. Hamill, 43 N. Y. Rep. 554.
[4] Only the opinion of the court is given. — ED.

delivering the cargo on board the vessel below the bar, he takes a receipt from the mate or proper officer in charge.

The usual bills of lading are subsequently signed by the master and delivered.

In the present case, the barque Edwin received the principal part of her cargo at the city, and was then towed down below the bar to receive the residue. The master employed the steamer M. Streck for this purpose, and 100 bales were laden on board of her at the city to be taken down to complete her load, and for which the master of the lighter gave a receipt; after she had passed the bar and had arrived at the side of the barque, but before any part of the 100 bales was taken out, her boiler exploded, in consequence of which the 100 bales were thrown into the water and the lighter sunk. Fourteen of the bales were picked up by the crew of the vessel, and brought to Boston with the 607 bales on board. Eighty bales were also picked up by other persons, wet and damaged, and were surveyed and sold; four remain in the hands of the ship broker, at Mobile, for account of whom it may concern; two were lost.

The master of the barque signed bills of lading, including the 100 bales, being advised that he was bound to do so, and that if he refused, his vessel would be arrested and detained. On her arrival at Boston, the master delivered the 607 bales to the consignees, and tendered the fourteen, which were refused.

A question has been made on the argument, whether or not the libellant could recover upon the undertaking in the bills of lading, they having been signed under the circumstances stated, or must resort to the original contract of affreightment between the master and the shipper. The articles in the libel place the right to damages upon both grounds. The view the court has taken of the case supersedes the necessity of noticing this distinction.

The court is of opinion that the vessel was bound for the safe shipment of the whole of the 707 bales of cotton, the quantity contracted to be carried, from the time of their delivery by the shipper at the city of Mobile, and acceptance by the master, and that the delivery of the hundred bales to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage in execution of the contract, the same, in judgment of law, as if the hundred bales had been placed on board of the vessel at the city, instead of the lighter. The lighter was simply a substitute for the barque for this portion of the service. The contract of affreightment of the cotton was a contract for its transportation from the city of Mobile to Boston, covering a voyage between these termini, and when delivered by the shipper, and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed — the one entitled to all the privileges secured to the owner of cargo for its safe transportation and delivery; the other, the right to his freight on the completion of the voyage, as recognized by principles and usages of the maritime law.

The true meaning of the contract before us cannot be mistaken, and is in perfect harmony with the acts of the master in furtherance of its execution.

Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in the city, and to be transported thence to the port of discharge. After the delivery and acceptance at the place of shipment, the shipper had no longer any control over the property, except as subject to the stipulated freight.

The contract as thus explained being made by the master in the course of the usual employment of the vessel, and in respect to which he is the general agent of the owner, it would seem to follow, upon the settled principles of admiralty law, which binds the vessel to the cargo, and the cargo to the vessel, for the performance of the undertaking, that the ship in the present case is liable for the loss of the hundred bales, the same as any other portion of the cargo.

It is insisted, however, that the vessel is exempt from responsibility upon the ground that the one hundred bales were never laden on board of her, and we are referred to several cases in this court and in England in support of the position. (18 How. 189; 19 Ib. 90; and 2 Eng. L. and Eq. R. 337; Grant and others *v.* Norway and others. 18 Eng. C. L. and Eq. 561; 29 Ib. 323.) But it will be seen, on reference to these cases, the doctrine was applied, or asserted, upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfilment on the part of the shipper, namely, the delivery of the cargo.

It was conceded no suit could have been maintained upon the original contract, either against the owner or the vessel; but as the bill of lading had been signed by the master, in which he admitted that the goods were on board, the question presented was, whether or not the admission was not conclusive against the owner and the vessel, the bill of lading having passed into the hands of a *bona fide* holder for value.

The court, on looking into the nature and character of the authority of the master, and the limitations annexed to it by the usages and principles of law, and the general practice of shipmasters, held, that the master not only had no general authority to sign the bill of lading, and admit the goods on board when contrary to the fact, but that a third party taking the bill was chargeable with notice of the limitation, and took it subject to any infirmity in the contract growing out of it.

The first time the question arose in England, and was determined, was in the case of Grant and others *v.* Norway and others, in the Common Pleas (1851), and was in reference to the state of facts existing in this and like cases, and in connection with the principles involved in its determination, that the court say the master had no

authority to sign the bill of lading unless the goods had been shipped; cases in which there had been no delivery of the goods to the master, no contract binding upon the owner or the ship, no freight to be carried, and, in truth, where the whole transaction rested upon simulated bills of lading, signed by the master in fraud of his owners.[1]

In the present case the cargo was delivered in pursuance of the contract, the goods in the custody of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it.

The argument urged against this lien of the shipper seems to go the length of maintaining, that in order to uphold it there must be a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. The unlading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien, unless the delivery is to the consignee of the cargo, within the meaning of the bill of lading; and we do not see why the lien may not attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf or within the warehouse. In both instances the cargo is in the custody of the master, and in the act of conveyance in the execution of the contract of affreightment. We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope and extent of them; and, in this view, we think no well-founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made, after the lading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession; the

[1] The Schooner Freeman, 18 How. 182; Vandewater v. Mills, 19 How. 82; The Lady Franklin, 8 Wall. 325; The Keokuk, 9 Wall. 517; Pollard v. Vinton, 105 U. S. 9; Cranshaw v. Pearce, 37 Fed. R. 432; The Guiding Star, 53 Fed. R. 936 *Accord.* — Ed.

former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf.

The decree of the court below affirmed.[1]

THE MISSOURI.

IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, APRIL 1, 1887.

[*Reported in 30 Federal Reporter*, 384.]

COXE, J. The libel alleges that in November, 1885, the owner of the steam barge Missouri, by an agreement in writing, chartered her to the libellant to carry a cargo of lumber from Oscoda, Michigan, to Port Arthur, Ontario; that the owner wholly neglected and refused to perform the conditions of the charter-party. The voyage was not undertaken, and no part of the cargo was placed on board. The libel was filed September 9, 1886, and the vessel was seized while lying at the port of Buffalo. The claimant now files exceptions, disputing the jurisdiction of the court upon the ground that no maritime lien was created, and therefore the libellant is not in a position to proceed *in rem*. The sole question, therefore, is, can an action *in rem* be maintained for a breach of a charter-party, no part of the cargo having been delivered?

There can be no doubt that the negative of this proposition is sustained by a great preponderance of authority. The Keokuk,[2] The Freeman,[3] The Yankee Blade,[4] The Hermitage,[5] The General Sheridan,[6] The Chaffee,[7] The Monte A.,[8] The City of Baton Rouge.[9]

The cases holding a contrary doctrine have not been followed in recent years. As the question, so far as this court is concerned, is no longer an open one, an examination of it upon principle would be a pointless and unprofitable proceeding.

The exceptions are sustained.[10]

[1] Pollard *v.* Vinton, 105 U. S. 7, 9 (*semble*); The Oregon, Deady, 179; The Sunlight, 2 Hughes, 9; The Thomas Newton, 41 Fed. R. 106; The Guiding Star, 53 Fed. R. 936, 943–944 *Accord*.

The shipper's lien for breach of the carrier's duty of safe custody, due transport or right delivery, attaches as soon as the goods are on board or put within the control of the carrier. The Maggie Hammond, 9 Wall. 435; The Tribune, 3 Sumn. 149; The Phebe, 1 Ware, 263 (owner *pro hac vice* may pledge the vessel); The Casco, 2 Ware, 184; The Zenobia, Abb. Adm. 48; The R. G. Winslow, 4 Biss. 13; The Director, 26 Fed. R. 708; The Ripon City, 102 Fed R. 176, 181. — ED.

[2] 9 Wall. 517. [3] 18 How. 182. [4] 19 How. 82. [5] 4 Blatchf. 474.
[6] 2 Ben. 294. [7] 2 Fed. R. 401. [8] 12 Fed. R. 331. [9] 19 Fed. R. 461.

[10] The Cabarga, 3 Blatchf. 75 (refused to accept supplies ordered); The Winged Racer, Fed. Cas. No. 14,102; The Carrington, Fed. Cas. No. 6029; The General Sheridan, 2 Ben. 294; The Pauline, 1 Biss. 390; The William Fletcher, 8 Ben. 537 (refusal to deliver ship to charterer); The Ira Chaffee, 2 Fed. R. 401; The Prince Leopold, 9 Fed. R. 333 (refusal to tow); Maury *v.* Culliford, 10 Fed. R. 388; The Monte A., 12 Fed. R. 331; The City of Baton Rouge, 19 Fed. R. 461; The J. F. Warner, 22 Fed. R. 342; The Director, 26 Fed. R. 708,

4885 BAGS OF LINSEED.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1861.

[*Reported in* 1 *Black*, 108.]

THE parties did not dispute about the facts of the case. It appeared by their mutual admissions that the libellants were owners of the Bold Hunter, and, in October, 1856, chartered her to Tuckerman, Townsend & Co. for a voyage from Calcutta to Boston, at $15 per ton on whole packages, and half that rate on loose stowage. The charter-party contained the usual lien clause, with a stipulation that the freight should be paid in five and ten days after discharge at Boston, the credit not to impair the shipowner's lien for freight. On the ship's arrival at Calcutta, the charterers did not furnish an entire cargo, and procured some shipments on freights — among others, one to Augustine Wills — for which the master signed bills of lading, in the usual form, at various rates of freight, all less than the charter rates. These bills of lading were passed over to the libellants by Tuckerman, Townsend & Co. in part settlement of the charter money, and the libellants undertook to collect the freights. The ship arrived at Boston in October, 1857. The larger portion of the goods consigned to Wills were discharged by the consent of all parties, without being landed, into the ship Cyclone, bound to London, and the remainder were delivered to the claimant, who took them to the custom-house stores, and entered them in bond in the name of Augustine Wills. When the Bold Hunter arrived, Augustine Wills, the consignee, was sick, and he died before the goods were all discharged. Rufus Wills, the claimant, acted as his agent before his death, and was his administrator afterwards. The goods were discharged and delivered without qualification, and nothing was said about holding

710 (*semble*); The Eugene, 83 Fed. R. 222, 87 Fed. R. 100 (refusal to take passenger who had paid fare); The Humboldt, 86 Fed. R. 351, 352 (*semble*); The Bella, 91 Fed. R. 540 (refusal to take passenger who had paid fare); The Ripon City, 102 Fed. R. 176 (refusal to employ libellant as agent) *Accord*.

The Zenobia, Abb. Adm. 48 (for recovery of passage money) The Pacific, 1 Blatchf. 569 (for recovery of passage money); The Williams, Bro. Adm. 208 (but see explanation of this case in The Ira Chaffee, 2 Fed. R. 401) *Contra*; The James McMahon, 10 Ben. 103.

A lien was allowed in the following cases in which the breach occurred after the vessel had entered upon the performance of the contract. The Flash, Abb. Adm. 67 (owner took part of cargo, refused to deliver it or to take the rest); The Baracoa, 44 Fed. R. 102.

HALF-PILOTAGE. — The pilot has a lien upon the vessel which wrongfully refuses to accept his services when offered. The George S. Wright, Deady, 591; The America, 1 Low. 176 (*semble*); The California, 1 Sawy. 463. But see *contra* The Robert J. Mercer, 1 Spr. 284.

ADMIRALTY JURISDICTION IN PERSONAM. — The absence of a lien does not affect the jurisdiction *in personam* for the breach of a contract wholly executory. Oakes *v.* Richardson, 2 Low. 173; Maury *v.* Culliford, 10 Fed. R. 388; The Monte A., 12 Fed. R. 331; The J. F. Warner, 22 Fed. R. 342; The Alberto, 24 Fed. R. 379; The Gilbert Knapp, 37 Fed. R. 209, 215; Boutin *v.* Rudd, 82 Fed. R. 685. See also *supra*, 109, n. 1. The Pauline, 1 Biss. 390, *contra*, is superseded. — ED.

them or any part of them for freight. The claimant, before the death of the consignee, paid $5000 on the freights, but afterwards declined to pay any more, saying that he did not know how the estate of Augustine Wills would turn out.

The District Court dismissed the libel, and the decree was afterwards affirmed by the Circuit Court. Whereupon the libellant took this appeal to the Supreme Court of the United States.[1]

Mr. Chief Justice TANEY. The rights of the parties in this case depend altogether on the contract created by the bill of lading. That instrument does not refer to the charter-party, nor can the charter-party influence in any degree the decision of the question before us. Augustine Wills was not a party to it, and it is not material to inquire whether he did or did not know of its existence and contents; for there is nothing in it to prevent Wills & Co., the sub-charterers, or Augustine Wills, the consignee, from entering into the separate and distinct contract stated in the bill of lading, and the assignees took the rights of Wills & Co. in this contract, and nothing more. The circumstance that it came to the hands of the shipowners by assignment from the sub-charterers, who knew and were bound by all the stipulations of the charter-party, cannot alter the construction of the bill of lading, nor affect the rights or obligations of Augustine Wills.

Undoubtedly the shipowner has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount; and, as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the shipowner may enforce his lien by a proceeding *in rem* in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the shipowner has parted from the possession, but is analogous to the lien given by the common law to the carrier on land, who is not bound to deliver them to the party until his fare is paid; and if he delivers them, the incumbrance of the lien does not follow them in the hands of the owner or consignee. It is nothing more than the right to withhold the goods, and is inseparably associated with his possession, and dependent upon it.[2]

The lien of the carrier by water for his freight, under the ordinary bill of lading, although it is maritime, yet it stands upon the same ground with the carrier by land, and arises from his right to retain the possession until the freight is paid, and is lost by an unconditional delivery to the consignee. It is suggested in the argument for the appellant, that, as a general rule, maritime liens do not depend on possession of the thing upon which the lien exists; but this proposition cannot be maintained in the courts of admiralty of the United States. And, whatever may be the doctrine in the courts on

[1] The statement of facts is slightly abridged and the arguments of counsel are omitted. — ED.

[2] The Bird of Paradise, 5 Wall. 545; The Eddy, 5 Wall. 481; The Spartan, 1 Ware, 149; The Salem's Cargo, 1 Spr. 389; The Eliza's Cargo, 1 Low. 83; 250 Tons of Salt, 5 Fed. R. 216; Clark *v.* 505,000 Feet of Lumber, 65 Fed. R. 236, 70 Fed. R. 1020 *Accord.* — ED.

the continent of Europe, where the civil law is established, it has been decided in this court that the maritime lien for a general average in a case of jettison, and the lien for freight, depend upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid. Rae *v.* Cutler,[1] Dupont de Nemours & Co. *v.* Vance and others.

In the last mentioned case, the court, speaking of the lien for general average, and referring to the decision of Rae *v.* Cutler on that point, said: "This admits the existence of a lien arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation, which, as is well known, is waived by an authorized delivery without insisting on payment."

After these two decisions, both of which were made upon much deliberation, the law upon this subject must be regarded as settled in the courts of the United States, and it is unnecessary to examine the various authorities which have been cited in the argument. But it may be proper to say, that while this court has never regarded its admiralty authority as restricted to the subjects over which the English courts of admiralty exercised jurisdiction at the time our Constitution was adopted, yet it has never claimed the full extent of admiralty power which belongs to the courts organized under, and governed altogether by, the principles of the civil law.

But courts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade. And it often happens that the necessities and usages of trade require that the cargo should pass into the hands of the consignee before he pays the freight. It is the interest of the shipowner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery. And it would be a serious sacrifice of his interests if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty. The consignee, too, in many instances, might desire to see the cargo unladen before he paid the freight, in order to ascertain whether all of the goods mentioned in the bill of lading were on board, and not damaged by the fault of the ship. It is his duty, and not that of the shipowner, to provide a suitable and safe place on shore in which they may be stored; and several days are often consumed in unloading and storing the cargo of a large merchant vessel. And if the cargo cannot be unladen and placed in the warehouse of the consignee, without waiving the lien, it would seriously embarrass the ordinary operations and convenience of commerce, both as to the shipowner and the merchant.

It is true that such a delivery, without any condition or qualification annexed, would be a waiver of the lien; because, as we have al-

[1] 7 How. 729.

ready said, the lien is but an incident to the possession, with the right to retain. But in cases of the kind above mentioned it is frequently, perhaps more usually, understood between the parties, that transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, and that the shipowner reserves the right to proceed *in rem* to enforce it, if the freight is not paid. And if it appears by the evidence that such an understanding did exist between the parties, before or at the time the cargo was placed in the hands of the consignee, or if such an understanding is plainly to be inferred from the established local usage of the port, a court of admiralty will regard the transaction as a deposit of the goods, for the time, in the warehouse, and not as an absolute delivery; and, on that ground, will consider the shipowner as still constructively in possession, so far as to preserve his lien and his remedy *in rem*.[1]

But in the case before us, there is nothing from which such an inference can be drawn. The goods were delivered, it is admitted generally, and without any condition or qualification. Upon such a delivery there could be neither actual nor constructive possession remaining in the shipowner; and, consequently, there could be no right of retainer to support his lien.[2]

The decree of the Circuit Court, dismissing the libel, must therefore be affirmed.

Decree affirmed.

THE HYPERION'S CARGO.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, DECEMBER, 1871.

[*Reported in* 2 *Lowell*, 93.]

LOWELL, J. The libellants' right to freight is not contested; but it is said that there can be no recovery for demurrage, because no express contract was made concerning it, and the law will not imply one against a consignee: Gage *v.* Morse[3] is cited as conclusive on this point. That case decided that a consignee, merely as such, does not, by accepting the goods, make an engagement with the master that he

[1] The Eddy, 5 Wall. 481; 151 Tons of Coal, 4 Blatchf. 368; 600 Tons of Iron Ore, 9 Fed. R. 595; The Giulio, 34 Fed. R. 909; Costello *v.* 734,700 Laths, 44 Fed. R. 105; Cuff *v.* 95 Tons of Coal, 46 Fed. R. 670; Wellman *v.* Morse, 76 Fed. R. 573, 577 (*semble*) *Accord.* — ED.

[2] Wilcox *v.* 500 Tons of Coal, 14 Fed. R. 49; Egan *v.* A Cargo of Spruce Lath, 41 Fed. R. 830 *Accord.*

The lien is waived, if by the terms of the contract of affreightment delivery of the goods is to precede the payment of the freight. Raymond *v.* Tyson, 17 How. 53; The Bird of Paradise, 5 Wall. 545.

In the following cases the contract was so construed as to preserve the lien. The Kimball, 3 Wall. 37; The Volunteer, 1 Sumn. 551; Certain Logs of Mahogany, 2 Sumn. 589. — ED.

[3] 12 Allen, 410.

will receive them at any particular time, unless there is something on the face of the bill of lading fixing the time. Judge Betts came to the opposite conclusion in a case in which the consignee was the owner of the cargo: Sprague *v.* West.[1] The case at bar resembles in its circumstances that before the court in New York; for I understand the title to this coal to have been in the claimants from the time it was loaded on board the Hyperion, if not before. But I am not concerned here with the question whether the claimants are personally responsible for demurrage, but with the liability of the cargo to such a demand. There is no doubt that the shipper of goods by an ordinary bill of lading impliedly agrees that they shall be received at the port of destination within a reasonable time after the arrival of the vessel, according to the usual course of the trade. By the common law the master has no lien upon the goods, as security for this obligation. In my opinion he has such a lien, or, more strictly speaking, such a privilege, by the maritime law, and that it may be enforced in the admiralty. It is a maxim of the general law-merchant that the ship is bound to the merchandise, and the merchandise to the ship. Pardessus, Droit Com. arts. 709, 961; Valin, Comment. book 3, tit. 1, arts. 11, 24; Boucher, Droit Marit. §§ 926–934. This reciprocal privilege appears to extend to all claims which may arise on the one side or the other out of the contract of affreightment. Thus, art. 308 of the French Code de Commerce declares that the captain is privileged before all creditors for the payment of his freight and the averages (*avaries*) that are due him. The word *avaries* I understand to include all damages which the master may lawfully demand in the premises. Indeed, the distinction between liquidated and unliquidated damages is unimportant in those jurisdictions in which the master's lien is a privilege to be enforced by the courts, and not a mere right of retainer; for the courts can deal as readily with the one kind of damages as with the other. I have found no exception of any class of charges or damages; and though the term *avaries* is the most common, yet, "debts" and "expenses" and some other expressions are used, showing that "averages" has no technical signification. See Pardessus, n. 6 to art. 24 of the Laws of Oleron, 3 Pard. Collect. 345; Id. Code of Charles XI. of Sweden, 3 Pard. Collect. 158. Indeed, the learned author whom I have so often cited says that the master contracts rather with the merchandise than with the shipper; and he has his privilege for the freight even against the true owner of the goods, though they had been stolen, Pard. Droit Com. art. 961; and Valin says, that the contrary opinion is absurd, Valin, *ubi supra*. I quote this example to show that the privilege does not depend on any doctrine of agency, as well as to fortify my opinion that the merchandise is liable for whatever the shipper is liable for.

When the common law of England was modified by the introduction of many rules from the law-merchant, the former law had no process for enforcing this reciprocal privilege of the ship and the

[1] Abb. Adm. 548.

goods, and had succeeded in repressing the only court that had the requisite modes of action; and was, therefore, obliged to say that it could not recognize the maxim, even when embodied in express contract, as it usually is in English charter-parties: Birley *v.* Gladstone,[1] Gladstone *v.* Birley.[2] From the time of those decisions to that of Gray *v.* Carr,[3] the history of this question in the courts of common law in England has been that of a struggle between shipowners to create liens by stipulation, especially liens for demurrage, and of the courts to narrow the stipulations by construction. See Phillips *v.* Rodie,[4] Faith *v.* E. I. Co.,[5] How *v.* Kirchener,[6] Tindall *v.* Taylor,[7] Bishop *v.* Ware.[8] In nearly all those cases the obvious intent of the parties has been disregarded, and a remedy refused for a violated right. In this country the courts of admiralty have retained their proper jurisdiction, and can enforce the privilege, by whichever party this action may be invoked. Dupont de Nemours *v.* Vance, The Belfast,[9] The Maggie Hammond.[10] Cases in which the cargo has been libelled for freight are numerous: The Volunteer,[11] Certain Logs of Mahogany,[12] The Spartan,[13] The Salem's Cargo,[14] The Eliza's Cargo,[15] and so of a contribution for general average and other demands, Cargo of the George,[16] Bags of Linseed, The Convoy's Wheat.[17] The only question of any difficulty is, whether the privilege extends to demurrage not expressly stipulated for in the bill of lading. Upon this point the cases at common law do not afford much aid; because they recognize no general responsibility of the goods to the ship, but only a right of retainer, which, they say, cannot be conveniently exercised in support of a demand for unliquidated damages, — a point of no consequence in the admiralty: Sprague *v.* West.[18] Nearly all salvage claims against cargo are unliquidated. We uphold libels against the ship every day in behalf of the merchant for unliquidated damages to his goods; and there is no reason for not doing so, on the other side, for damages in not receiving the goods in due season. My own conviction is that the privilege of the shipowner in the admiralty is not limited by the master's lien at common law, but depends on the law-merchant, and that by the law-merchant the privilege extends to all charges, damages, and expenses arising out of the affreightment.

The evidence in this case is plenary, that the cause of the delay at the wharf was the lack of cars to take away the coal; that it might easily have been taken out and received at the rate of one hundred tons a day, which is the rate usually agreed on in the trade, but that the consignees wished to receive it in the cars. They refused to receive it in any other way, and said they would pay the freight when it should all be out, but no demurrage. The master was justly angry at this language, and brought his libel. I am much inclined to think

[1] 3 M. & S. 205.
[2] 2 Meriv. 401.
[3] L. R. 6 Q. B. 522.
[4] 15 East, 547.
[5] 4 B. & Ald. 660.
[6] 11 Moore P. C. 21.
[7] 4 Ellis & B. 219.
[8] 3 Camp. 360.
[9] 7 Wall. 624.
[10] 9 Id. 450.
[11] 1 Sumn. 551.
[12] 2 Id. 589.
[13] 1 Ware, 134.
[14] 1 Sprague, 389.
[15] 1 Lowell, 83.
[16] Olcott, 89.
[17] 3 Wall. 225.
[18] Abb. Adm. 548.

his action for the freight was premature; though not for demurrage, which accrues from day to day; but as the claimants admit a liability for the freight, and the libellants admit that part of the demurrage they now ask for was not due when the libel was filed, it seems to me just to give to the libellants their whole damages, but without costs. A libel will not be dismissed merely because it was brought too soon, if substantial justice can be done, and ought to be done, under it: The Salem's Cargo,[1] The Isaac Newton,[2] The Magoun.[3] Here, as in the case before Judge Sprague, the cargo is now beyond the reach of process, and therefore the libel ought to be retained.

A specification of the libellants' damages, which was used at the trial, shows that they ask for twelve days' demurrage. Upon the evidence, it seems to me that the vessel was delayed at least that length of time by the want of cars, and I shall give damages at thirty dollars a day for the twelve days.

Decree for libellants.[4]

E. J. DUPONT DE NEMOURS & CO. *v.* J. VANCE AND OTHERS.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1856.

[*Reported in* 19 *Howard*, 162.]

MR. JUSTICE CURTIS delivered the opinion of the court.[5]

This is an appeal from a decree of the Circuit Court of the United States for the eastern district of Louisiana.

The libel alleges that the appellants shipped on board the brig Ann Elizabeth, at Wilmington, in the State of Delaware, a large quantity of gunpowder, to be carried to New Orleans, in the State of Louisiana; and that, on the shipment thereof, bills of lading, in the usual form, were signed by the master of the brig; that, according to the invoices of the merchandise specified in the bills of lading, its value

[1] 1 Sprague, 392. [2] Abb. Adm. 11. [3] Olcott, 55.

[4] Affirmed *sub nom.* Donaldson *v.* McDowell, 1 Holmes, 290. See to the same effect Stafford *v.* Watson, 1 Biss. 437 (*semble*. Lien waived by delivery); Barrels of Salt, 1 Biss. 459 (*semble*. Lien waived by delivery); 60,000 Feet of Yellow Pine, 2 Fed. R. 396; 500,000 Laths, 2 Fed. R. 607; Cargo of Brimstone, 3 Fed. R. 661 (*semble*); Certain Steel Rail Crop Ends, 3 Fed. R. 717; 410 Tons of Coal, 20 Fed. R. 799; 1310 Tons of Coal, 21 Fed. R. 681; The Giulio, 34 Fed. R. 909; Young *v.* 140,000 Hard Brick, 78 Fed. R. 149; Pioneer Co. *v.* McBrier, 84 Fed. R. 495.

In the following cases the lien was not allowed because there was no culpable delay on the part of shipper or consignee: Gronstadt *v.* Witthoff, 15 Fed. R. 265; The Elida, 31 Fed. R. 420; 3000 Railroad Ties, 38 Fed. R. 254; Bellatty *v.* Curtis, 41 Fed. R. 479; The J. E. Owen, 54 Fed. R. 185.

The lien for demurrage is lost by an unconditional delivery of the cargo to the consignee: Riley *v.* A Cargo of Iron Pipes, 40 Fed. R. 605; Pioneer Co. *v.* McBrier, 84 Fed. R. 495, 499, 500 (*semble*). — ED.

[5] Only the opinion of the court upon the question of the lien is given. Mr. Justice Campbell delivered a dissenting opinion in which Mr. Justice Catron concurred. — ED.

was $7233.73; that on the arrival of the brig at New Orleans the libellants required the delivery of the merchandise thus shipped, but they received only a part thereof; and that the part not delivered consisted of 1646 packages, which, according to the same invoice valuation, amounted to the sum of $5936.54.

The libel further alleges that no part of that sum has been paid to the libellants; and it prays process against the brig, and a decree for the damages thus demanded, and for such other relief as shall to law and justice appertain.

The master of the brig, intervening for his own interest and that of his part-owners, admits that the shipment of goods was made, as alleged in the libel; but propounds that in the course of the voyage it became necessary, for the safety of all concerned, through the perils and dangers of the seas, to make a jettison of that part of the libellant's goods which were shipped and not delivered.

The first question is whether the claimant has shown, in support of his defensive allegation, that the jettison was occasioned by a peril of the sea. If it was, then the carrier is exonerated from the delivery of the merchandise, and has only to respond for that part of its value which is his just contributory share towards indemnity for the common loss by the jettison. A jettison, the necessity for which was occasioned solely by a peril of the sea, is a loss by a peril of the sea, and within the exception contained in the bill of lading. . . .

We find, therefore, that the vessel is exonerated from the claim for the full value of the merchandise; and the remaining question is, whether the vessel is chargeable with any part of the value of the merchandise in this cause.

When a lawful jettison of cargo is made, and the vessel and its remaining cargo are thereby relieved from the impending peril, and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, he has a lien for that part of its value which the vessel and its freight are bound to contribute towards his indemnity for the sacrifice which has been made for the common benefit. And this lien on the vessel is a maritime lien, operating by the maritime law as a hypothecation of the vessel, and capable of being enforced by proceedings *in rem*.

The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment has very long existed in the general maritime law. It is found asserted in a variety of forms in the Consulado, the most ancient and important of all the old codes of sea laws (see chaps. 63, 106, 227, 254, 259); and the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law. (The Schooner Freeman,[1] The Ship Packet,[2] The Volunteer,[3] The Reeside,[4] The Rebecca,[5] The Phœbe,[6] The Waldo,[7] The Gold Hunter.[8])

[1] 18 How. 182. [2] 3 Mason, 261. [3] 1 Sum. 550. [4] 2 Sum. 467.
[5] Ware's R. 188. [6] Ib. 263. [7] Davies's R. 161. [8] 1 Blatchf. & How. 305.

Pothier declares (Treatise of Charter-parties, preliminary chapter on Average) that the right to contribution in general average is dependent on the contract of affreightment, which embraces in effect an undertaking, that if the goods of the shipper are damaged for the common benefit, he shall receive a due indemnity by contribution from the owners of the ship, and of other merchandise benefited by the sacrifice.

The power and duty of the master to retain and cause a judicial sale of the merchandise saved has also been long established. Consulado del Mare, ch. 51, 52, 53, and note 1 in vol. 3, p. 103 of Pardessus's Collection; Laws of Oleron, art. 9; Ord. de la Marine, liv. 3, tit. 8, sec. 21, 25; Nesbit on Ins. 135; Strong *v.* New York Firemen's Insurance Company;[1] Simonds *v.* White;[2] Loring *v.* The Neptune Insurance Company;[3] 3 Kent Com. 243, 244.) And this right to enforce a judicial sale, through what we term a lien *in rem*, is not confined to the merchandise, but extends to the vessel.

Emerigon (ch. 12, sec. 43), speaking generally of an action of contribution, says it is in its nature a real action. Cassaregis (dis. 45, N. 34), "*est in rem scripta.*"

It would be extraordinary if the right to a lien were not reciprocal; if it existed in favor of the vessel, when sacrifice was made of part or the whole of its value, for preservation of the cargo, and not against the vessel, when sacrifice was made of the cargo for preservation of the vessel.

By the ancient admiralty law, the master could bind both the ship and cargo by an express hypothecation, to obtain a ransom on capture. So he could, and still may, when the whole enterprise has fallen into distress which could not otherwise be relieved, hypothecate both the vessel and cargo to obtain means of relief. These are cases of express hypothecation made by the master, under the authority conferred on him by the maritime law; but he can also sell a part of the cargo to enable him to prosecute his voyage, or deliver a part of it in payment of ransom of his vessel, and the residue of the cargo, on capture; and when he does so, the law of the sea creates a lien on the vessel, as security for the reimbursement of the loss of the shipper whose goods have been sacrificed. (The Packet;[4] Pope *v.* Nickerson;[5] The Gold Hunter;[6] The Boston;[7] Consol del Mare, ch. 105; Laws of Oleron, art. 25; Ord. of Antwerp, art. 19; Emerigon, Con. a la Grosse, ch. 4, secs. 9, 11.)

The authority to make a jettison of cargo is derived from the same source; an instant necessity, incapable of being provided for save by a sacrifice of part of what is committed to the master's care, and the presumed consent of the owners of all the subjects at risk, that the loss shall become a charge upon what is benefited by the sacrifice. (The Gratitudine.[8]) If the sacrifice be made to enable the vessel to

[1] 11 John. R. 323.
[2] 2 B. & C. 805.
[3] 20 Pick. 411.
[4] 3 Mason, 255.
[5] 3 Story's R. 492.
[6] 1 Blatchf. & How. 300.
[7] Ib. 309.
[8] 3 Rob. 210.

perform the voyage, by paying what the owners are bound to pay to complete it, the charge is on the vessel and its owners. If it be made to relieve the adventure from a peril which has fallen on all the subjects engaged in it, the risk of which peril was not assumed by the carrier, the charge is to be borne proportionably by all the interests, and there is a lien on each to the extent of its just contributory obligation. This authority of the master to make the sacrifice, and this consent of the owners of the subjects at risk to have it made, and their implied undertaking to contribute towards the loss, are viewed by the admiralty law as sufficient to create an hypothecation of the subjects benefited, for the security of the payment of the several sums for which those subjects are respectively liable. In other words, as the master is authorized to relieve the adventurer from distress, by means of an express hypothecation, in case of capture or distress in port, or by means of a sale of part of the cargo, thereby creating a maritime lien on the property ultimately benefited, in favor of the owner of what is sold or hypothecated; so he may also, in a case of necessity at sea, make a jettison of cargo, and thereby create a lien on the property thus saved from peril. Pothier (Con. Mar. n. 34, 72) and Emerigon (Con. a la Grosse, ch. 4, sec. 9) say that the sale of part of the cargo in port, to supply the necessities of the ship, is a kind of forced loan. Though the sacrifice of part of the cargo at sea cannot be considered a loan, it is a forced appropriation of it to the general benefit of those engaged in a common adventure, under a contract of affreightment; and such use of the property of one, for the benefit of others, creates a charge on what was thus saved, for what may fairly be termed the price of that safety. (Abbott on Shipping, part 4, ch. 10, s. 6.)

In United States *v.* Wilder,[1] which was a case of general average, Mr. Justice Story likens it to a case of salvage, where safety is obtained by sacrifices of labor and danger, made for the common benefit; and he says the general maritime law gives a lien *in rem* for the contribution, not as the only remedy, but as in many cases the best remedy and in some cases the only remedy. In the district and circuit courts of the United States, this jurisdiction has been exercised, and some cases of this kind are found in the books, though most of their decisions are not in print. (The Mary;[2] The Cargo of the George;[3] Sparks *v.* Kittredge;[4] Dunlap's Ad. Pr. 57; 2 Browne's Civ. Ad. Law, 122; The Packet; The Gold Hunter; The Boston, above cited.) The restricted admiralty jurisdiction in England seems insufficient to enforce this lien. (The Constantia.[5])

Nor is there anything in the case of Rae *v.* Cutler, decided by this court in 1849, and reported in 7 How. 729, which conflicts with the view we have now taken.

That was a libel by the owner of a vessel against the consignee of cargo, to recover the contributory share of the average due from the

[1] 3 Sumn. 311. [2] 5 Law Reporter, 75; 6 Ib. 73. [3] 8 Law Reporter, 361.
[4] 9 Law Reporter, 349. [5] 2 W. Rob. 487.

goods which the master had voluntarily delivered to the respondent before the libel was filed. The court decided, that though the master, as the agent of the owner of the vessel in that case, had by the maritime law a lien upon the goods as security for the payment of their just contribution, this lien was lost by their voluntary delivery to the consignee; and that the implied promise to contribute could not be enforced by an action *in personam* against the consignee, in the admiralty. This admits the existence of a lien, arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation; which, as is well known, is waived by an authorized delivery without insisting on payment.

On full consideration, we are of opinion that when cargo is lawfully jettisoned, its owner has, by the maritime law, a lien on the vessel for its contributory share of the general average compensation; and that the owner of the cargo may enforce payment thereof by a proper proceeding *in rem* against the vessel, and against the residue of the cargo, if it has not been delivered.[1]

The remaining question is, whether the pleadings in this case are in such form as to present this claim for the consideration of this court, and entitle the libellant to assert a lien on the vessel for its contribution.

The rules of pleading in the admiralty are exceedingly simple and free from technical requirements. It is incumbent on the libellant to propound with distinctness the substantive facts on which he relies; to pray either specially or generally, for the relief appropriate to them; and to ask for such process of the court as is suited to the action, whether *in rem* or *in personam*.

It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defence, either in part or in whole, to the case made by the libel.

The proofs of each party must correspond substantially with his allegations, so as to prevent surprise. But there are no technical rules of variance, or departure in pleading, like those in the common law, nor is the court precluded from granting the relief appropriate to the case appearing on the record, and prayed for by the libel, because that entire case is not distinctly stated in the libel. Thus, in

[1] Ralli *v.* Troop, 157 U. S. 386, 400; The St. Joseph, 6 McL. 573; The Allianca, 64 Fed. R. 871, 79 Fed. R. 989; The Strathdon, 94 Fed. R. 206 *Accord.*

Beane *v.* Mayurka, 2 Curt. 72 *Contra.*

A lien is also given against goods saved. Strang *v.* Scott, 14 Ap. Cas. 601; Crookes *v.* Allan, 5 Q. B. D. 38, 42; Cargo of The George, Olc. 89; Wellman *v.* Morse, 76 Fed. R. 573.

But this lien against cargo, like the lien for freight and demurrage, *supra*, p. 145, n. 2, 149, n. 5, is lost by an unqualified delivery of the goods by the master to the owners. Cutler *v.* Rae, 7 How. 729; Wellman *v.* Morse, 76 Fed. R. 573.

Duty of Master to take Average Bond. If the master, without taking an average bond, surrenders to the owners goods subject to the lien for general average, the vessel is liable for this breach of duty of the master. The St. Joseph, 6 McL. 573, 574; Heye *v.* North German Lloyd, 33 Fed. R. 60; The Allianca, 64 Fed. R. 871, 872. — Ed.

cases of collision, it frequently occurs that the libel alleges fault of the claimant's vessel; the answer denies it, and alleges fault of the libellant's vessel. The court finds, on the proofs, that both were in fault, and apportions the damages.

Looking to this libel, we find it states that a contract of affreightment was made to transport these goods from Wilmington to New Orleans, on board this brig; that the goods were laden on board, and the brig had arrived, but only a part of the goods have been delivered. It states the value of the part not delivered, avers that the libellants have not been paid any part of that sum, prays for process against the brig, and a decree for the value of the merchandise not delivered, and also for such other relief as to law and justice may appertain.

The answer admits all the facts stated in the libel, but sets up, by way of defensive allegation, a necessary jettison of that part of the cargo not delivered. It is manifest, that though this answers, in part, the claim for damages made by the libel, it does not wholly answer it. It shows sufficient cause why the libellant should not assert a lien on the brig for the whole value of his merchandise, but at the same time shows that the libellant has a valid lien on the brig for that part of the value of the merchandise which the vessel is bound to contribute. While it asserts that the performance of the contract of affreightment by transportation of the merchandise to New Orleans was excused by a peril of the sea, it admits that an obligation arose out of the relations of the parties created by that contract of affreightment, and out of the facts relied on as an excuse for not transporting the merchandise; that this obligation was to pay to the shipper a part of the value of his goods; that it was the duty of the master, at the port of New Orleans, to ascertain what part of that value the vessel was bound to contribute, and that there is a lien on the vessel to secure its payment.

If the technical rules of common law pleading existed in the admiralty, there might be difficulty in admitting a claim for general average, in an action founded on a contract of affreightment; because, though the claim for such average grows out of the contract of affreightment, the implied promise to pay it is technically different from the promise on the face of a bill of lading. In the case of Pope *v.* Nickerson,[1] Mr. Justice Story went into a very extensive examination of such claims, under an agreed statement of facts, in an action of assumpsit on bills of lading; and it does not seem to have occurred, either to him or the counsel, that it was inconsistent with any substantial rule of the common law so to do.

But in the admiralty, as we have said, there are no technical rules of variance or departure. The court decrees upon the whole matter before it, taking care to prevent surprise, by not allowing either party to offer proof touching any substantive fact not alleged or denied by him.

[1] 3 Story, 465.

But where, as in this case, the defensive allegation of the respondent makes a complete case for the libellant, so that no evidence in support of it is required, and where that case is within the form of action and the prayer of relief, and the process used by the libellant, we think it not a sufficient reason for refusing relief, that the precise case on which the court think fit to grant it is not set out in the libel.[1]

We understand, that in the court below the libellants relied on the duty of the master to adjust and collect, and pay to them, the general average contributions, as precluding the defence of a necessary jettison. We think this defence was properly overruled. The libellants did not there insist on their lien on the vessel for its contribution. We do not consider their failure to do so precludes them from calling on this court to make that decree, to which the record shows they are entitled. In Finlay *v.* Lynn[2] this court was of opinion that the appellant, whose bill was dismissed by the Circuit Court, was entitled to an account, on a ground not assumed in the Circuit Court. This court said: "The plaintiff probably did not apply for this account in the court below, and it does not appear to have been a principal object of his bill. This court therefore doubted whether it would be most proper to affirm the decree dismissing the bill, with the addition that it should be without prejudice to any future claim for profits, and for the debt due from one store to the other, or to open the decree and direct the account. The latter is deemed the more equitable course. The decree, therefore, is to be reversed, and the cause remanded, with directions to take an account of the profits of the jewelry store, if the same shall be demanded by the plaintiff." But, as the libellants failed to call the attention of the Circuit Court to this view of their rights, and placed their claim there solely on the grounds that the jettison was unlawful, or, if lawful, could not be a defence, because the master had failed to do the duty incumbent on him in a case of general average, we think the decree should be reversed, without costs. The cause must be remanded to the Circuit Court, with directions to ascertain the amount of the lien of the libellants on the Ann Elizabeth, for the share to be contributed by the vessel towards the loss sustained by the libellants, and to enter a decree accordingly.

[1] The Rapid Transit, 52 Fed. R. 320; The E. A. Shores, Jr., 79 Fed. R. 987 *Accord.*

Lien for unpaid insurance premiums. — A maritime lien was allowed for unpaid insurance premiums in The Dolphin, 1 Flip. 580; The Illinois, 2 Flip. 383 (but lien was postponed to prior mortgage); The Guiding Star, 9 Fed. R. 521, 18 Fed. R. 263 (statutory lien).

But see *contra*, The John T. Moore, 3 Woods, 61; The Collier, Fed. Cas. No. 13,272; *In re* Ins. Co., 22 Fed. R. 109 (*semble*); The Jennie B. Gilkey, 19 Fed. R. 127 (*semble*); Learned Brown, 94 Fed. R. 876. — ED.

[2] 6 Cranch, 238.

CURRIE, APPELLANT, v. M'KNIGHT, RESPONDENT.

IN THE HOUSE OF LORDS, NOVEMBER 16, 1896.

[*Reported in Law Reports*, 1897, *Appeal Cases*, 97.]

LORD WATSON.[1] My Lords, the steamship Dunlossit was sold under a warrant issuing from the Sheriff Court of Lanarkshire, at the instance of Samuel M'Knight, a mortgagee, now deceased, whose executors have been made respondents in this appeal. The price of the vessel having been paid into court, a competition arose between the mortgagee and the present appellant, who holds a decree for damages against the registered owners of the Dunlossit in respect of which he claims a preferable lien attaching to the proceeds of her judicial sale as a surrogatum for the ship.

The findings of the decree upon which the appellant's claim is founded show that during a night in November, 1893, three vessels were moored alongside of an open quay at Port Askaig, in the Sound of Islay, where there is no harbor. The Dunlossit was in the centre of the tier, the steamship Easdale, belonging to the appellant, being outside of her, and moored to the quay by cables passing over the deck of the Dunlossit. There was a gale of exceptional violence during the night, which made the position of the vessels very insecure. In the morning the crew of the Dunlossit, which was in serious peril of damage from contact with the vessels between which she lay, and the possibility of another vessel moored in front of her coming into collision with her, got up steam, and, after notice of their intention, cut the mooring ropes of the Easdale, and stood out to sea. The Easdale was short-handed owing to the defection of two of her crew, and, being unable to get up steam, was driven ashore and damaged. The master of the Dunlossit acted solely for the protection of his ship against present and possible damage. The First Division of the court, reversing the decision of the Sheriff-Substitute, held that the cutting of the Easdale's ropes by the crew of the Dunlossit was a wrongful act, for which her owners were responsible. That decree is final, and I have no right to express, and am not to be understood as expressing, any opinion with regard to its merits.

The Sheriff-Substitute in the present suit sustained the appellant's claim, being of the opinion that, in the sense of law, the proceedings of the Dunlossit crew constituted an act of the ship which was sufficient to create a maritime lien for the damage thereby occasioned to the Easdale. His decision was reversed, on appeal, by the Second Division of the Court of Session, who dismissed the claim. Three

[1] The statement of the facts, the arguments, and the concurring judgments of Lord Halsbury, Lord Herschell, Lord Morris, and Lord Shand are omitted, together with a portion of Lord Watson's judgment. — ED.

of the learned judges held that, according to the law of Scotland, no lien attaches to a ship for damage wrongfully done by her to another vessel whether by collision or otherwise. Lord Rutherford-Clark abstained from expressing any opinion upon that point, which did not appear to him to arise for decision. All of the learned judges held that, assuming the same right of lien to exist in Scotland as in England, the injuries suffered by the Easdale were not due to the fault of the Dunlossit as a ship.

The Bold Buccleugh, which was decided by the Judicial Committee of the Privy Council affirming the judgment of Dr. Lushington, is the earliest English authority which distinctly establishes the doctrine that in a case of actual collision between two ships, if one of them only is to blame, she must bear a maritime lien for the amount of the damage sustained by the other, which has priority, not only to the interest of her owner, but of her mortgagees. The principle of that decision has been adopted in the American courts; and in the Admiralty Court of England it has for nearly forty years been followed in a variety of cases in which lien for damage done by the ship has been preferred to claims for salvage and seamen's wages, and upon bottomry bonds. In my opinion, the substantial question which your lordships have to determine in this case is whether The Bold Buccleugh was decided according to the maritime law of Britain. If it was, the rule which it lays down must apply to all maritime causes of a similar kind arising in the courts of Scotland.

It is unquestionably within the authority of this House to reconsider, and if necessary to overrule, the judgment of the Judicial Committee in The Bold Buccleugh; but it is no less clear that the opinions of the eminent judges who took part in the decision of that case ought not to be disregarded without good cause shown. To my mind, their reasoning is satisfactory; and the result at which they arrived appears to me to be not only consistent with the principles of general maritime law, but to rest upon plain considerations of commercial expediency. The great increase which has taken place in the number of sea-going ships propelled by steam power at high rates of speed has multiplied to such an extent the risk and occurrence of collisions, that it has become highly expedient, if not necessary, to interpret the rules of maritime liability in the manner best fitted to secure careful and prudent navigation. And in my opinion it is a reasonable and salutary rule that when a ship is so carelessly navigated as to occasion injury to other vessels which are free from blame, the owners of the injured craft should have a remedy against the corpus of the offending ship, and should not be restricted to a personal claim against her owners, who may have no substantial interest in her and may be without the means of making due compensation.[1]

[1] The Charles Amelie, L. R. 2 Ad. & Ec. 330; Mutual Co. v. Sherwood, 14 How. 351; The Rock Island Bridge, 6 Wall. 213, 215; The China, 7 Wall. 53; The Siren, 7 Wall. 152; The America, Fed. Cas. No. 288; The Robert F. Stockton, Crabbe, 580 *Accord.* — Ed.

The other point as to which the learned judges of the Second Division were unanimous relates to the limits of the shipping rule which was followed in the case of The Bold Buccleugh. I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequence of a wrongful act or manœuvre of the ship to which it attaches. Such an act or manœuvre is necessarily due to the want of skill or negligence of the persons by whom the vessel is navigated; but it is, in the language of maritime law, attributed to the ship because the ship in their negligent or unskilful hands is the instrument which causes the damage. In the present case, according to the findings of fact contained in the decree of the First Division, the injuries sustained by the Easdale were not owing to any movement of the Dunlossit; they were wholly occasioned by an act of the Dunlossit's crew, not done in the course of her navigation, but for the purpose of removing an obstacle which prevented her from starting on her voyage.

I am, therefore, of opinion that upon the second of these grounds the interlocutor appealed from ought to be affirmed.[1]

THE FLORENCE.

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, JUNE TERM, 1877.

[*Reported in* 2 *Flippin*, 56.]

LIBELLANT, being the owner of a lighter, averred that the master of the scow had, without authority, seized and used his lighter and neglected to return her, though requested so to do. He claimed $60 damage, and also the rental value of the lighter from the time of seizure, April 15, 1875, to the filing of his libel. Exceptions were taken to the jurisdiction on the ground that the facts did not constitute a lien upon the scow by the admiralty law. The facts were that while the vessel was in a sunken condition the claimant applied to a brother of libellant for permission to use the lighter in carrying off wood to the scow. This the brother, Wallace Lemaire, granted without authority. The

[1] Lord HERSCHELL said: "The doctrine [of lien] was originally asserted in cases of damage by collision with the vessel which was declared subject to the lien. It has since been applied in cases in which the damage did not result from a collision with the vessel in fault, but in which, owing to the negligent navigation of that vessel, the injured ship was driven into collision with some other vessel or object. . . . The ground of the decision was in all cases this, that the vessel on which the lien was enforced had, in maritime language, done the damage. Here the Dunlossit did no damage."

In the Anaces, 87 Fed. R. 565, a stevedore not employed by the master was not allowed to have a lien against a vessel for an injury caused by the careless operation of an engine used in hoisting and lowering bales of cotton. — ED.

claimant used her two or three days only; left her lying near the lake shore, where she pounded and became leaky.[1]

BROWN, J. The principal question discussed upon the argument related to the jurisdiction of the court. The libel sounds in *tort*, and it was strenuously insisted by claimant's advocate that no lien attached to the scow for the conversion of the lighter, both parties conceding that claimant took possession of her without authority from the owner. Cases of spoliation and damage are of admiralty and maritime jurisdiction. These include illegal seizures or depredations upon vessels or goods afloat. Every violent dispossession of property on the ocean is, *prima facie*, a maritime tort, and as such belongs to the admiralty jurisdiction. Benedict, §§ 310, 311. And the owners of a vessel are liable for torts committed by the master in the course of his employment.

There can be no doubt that if this were a case of contract — that is, if the agent of whom the claimant hired the scow, and whom claimant in good faith believed to have authority to loan it, had in fact possessed that authority, a libel *in rem* could have been sustained for the use of the lighter. A person furnishing a small boat or a lighter for the use of a vessel has as valid a lien upon her as though he had furnished an anchor, a compass, a chronometer, or any other of the articles usually denominated materials. In the case of The Dick Keys,[2] Mr. Justice McLean held that, where the master of a steamboat, on her behalf, agreed to pay $20 per day for the use of a barge, a libel might be maintained against the steamboat for the amount. Mr. Parsons says (2 Parsons on Shipping): "If a barge is necessary to a steamboat, its hire to it will be regarded as material furnished for its equipment;" citing Amis *v.* Steamboat Louisa,[3] Gleim *v.* Steamboat Belmont,[4] Steamboat Kentucky *v.* Brooks,[5] — cases which fully sustain the text of the learned commentator.

Now, upon principle, it is difficult to say why, if an action *in rem* will lie for the use or value of property *lawfully* obtained, a similar action will not lie for the use or value of property *unlawfully* obtained; in other words, where the wrong is greater, the remedy should not be less. The general rule with regard to torts seems to be, that the owners and the vessel are liable for all the acts of the master done in the execution of the business in which he may be employed, by which third persons are injured, whether the injury was occasioned by the unlawful acts or by the negligence or want of skill of the master. Dias *v.* The Revenge,[6] Dean *v.* Angus,[7] The Martha Ann.[8] The principle underlying these decisions is that, for torts committed in the business of the master as such, or in which the ship is the active, the injuring, or the benefited party, the injured party has his remedy as well against the vessel as against her owner and master. The mere

[1] The statements of facts is slightly abridged and a part of the opinion relating to the locality of the boat is omitted. — ED.

[2] 1 Bissell, 408. [3] 9 Mo. 621. [4] 11 Mo. 112.
[5] 1 Greene (Ia.) 398. [6] 3 Wash. 262. [7] Bee's Admiralty, 369.
[8] Olcott, 18.

fact that the person committing a tort is master of a vessel, of course, does not make her liable; but, if it be an act done in pursuance of his business as master, or is beneficial to the vessel, she becomes liable *in rem*. The English cases hold that the vessel is not liable for a wilful collision. This doctrine, however, is denied in the case of Ralston *v.* The State Rights,[1] where a libel was sustained for running down the libellant's vessel, done by the express direction of the master of the colliding vessel.

There is considerable conflict with regard to the value of the lighter; but, upon all the testimony, I think that $45 is as much as she is worth. There must be a decree for the libellant for this amount, with interest.

THE ELI WHITNEY.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, OCTOBER TERM, 1848.

[*Reported in* 1 *Blatchford*, 360.]

BALCHEN & SCHMIDT, of New York, filed a libel *in rem* in the District Court against the ship Eli Whitney, for an alleged breach of a charter-party for a voyage from New York to Bremen, in that the master had refused to receive on board the full amount of cargo that was stipulated for according to the terms of the charter-party. The decree of the District Court was against the libellants, and they appealed to this court.

THE COURT held that parol evidence was inadmissible to enlarge or vary the terms of the charter-party, there being no stipulation in it as to the precise amount of cargo to be carried, and that, in the case of a charter-party, a suit *in rem* was not maintainable for the misrepresentation or concealment of facts by the master or owner of a vessel in respect to her tonnage or capacity.[2]

Decree affirmed.

THE ST. JAGO DE CUBA.

IN THE SUPREME COURT, UNITED STATES, MARCH 15, 1824.

[*Reported in* 9 *Wheaton*, 409.]

MR. JUSTICE JOHNSON delivered the opinion of the court.[3]

This vessel, with her lading, found on board at the time of seizure,

[1] Crabbe, 22.

[2] The Baracoa, 44 Fed. R. 102, 103 (*semble*); The Elektron, *supra* (*semble*); The Normannia, 62 Fed. R. 469, 472 (*semble*) *Accord.* — ED.

[3] Only a portion of the opinion of the court is given. — ED.

were libelled for an infraction of the laws prohibiting the African slave trade.

The court below, having subjected the vessel to forfeiture, and the proceeds being in the registry, was then called on to distribute those proceeds among the various claimants, the seamen and material-men.[1]

The next question arises on the claims of the material-men, or rather of those whose claims were sustained in the court below.

On this point, the material facts are these: that this vessel, although appearing under the character of a foreign vessel, was, in reality, in her home port: and this, whether considered as the property of Gunn, or of Maher and Strike. The questions then arise, on what does the privilege of material-men depend? On the state of facts, or on their knowledge or belief of facts? On the actual absence of a vessel from her home port, or the power given to the shipmaster, in another port, to subject his vessel to admiralty process and implied lien, in favor of material-men? And, lastly, whether the prior forfeiture of the vessel to the United States precludes their general rights, and places them on the footing of subsequent purchasers, whether with or without notice of the forfeiture?

These questions are all solved by a reference to the nature, origin, and objects of maritime contracts. The precedence of forfeiture has never been carried further than to overreach common law contracts entered into by the owner; and it would be unreasonable to extend them further. The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete her voyage.

There are two considerations that fully illustrate this position. It is not in the power of any one but the shipmaster, not the owner himself, to give these implied liens on the vessel; and, in every case, the last lien given will supersede the preceding. The last bottomry bond will ride over all that precede it; and an abandonment to a salvor will supersede every prior claim.

The vessel must get on; this is the consideration that controls every other; and not only the vessel, but even the cargo, is *sub modo* subjected to this necessity.

For these purposes, the law maritime attaches the power of pledging or subjecting the vessel to material-men to the office of shipmaster; and considers the owner as vesting him with those powers by the mere act of constituting him shipmaster. The necessities of commerce require that when remote from his owner, he should be able to subject his owner's property to that liability without which, it is reasonable to suppose, he will not be able to pursue his owner's interests. But when the owner is present, the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived. From this view of the subject, this

[1] The claims of the seamen were rejected on the ground of complicity. — Ed.

court will be best understood, when it speaks of the home port of the vessel, an epithet which, it is very easy to perceive, has no necessary reference to state or other limits. And from this view of the subject it results, both that the forfeiture does not ride over the rights derived under maritime contracts, whether they be called liens or privileges, and that the real owners of a vessel, who have themselves contributed to give her a foreign aspect or character, hold out the foreign captain to material-men as one legally authorized to exercise the rights and powers over his vessel which appertain to a foreign vessel. They are thus precluded by their own act from denying her foreign character. In case of wreck and salvage, it is unquestionable that forfeitures would be superseded; and we see no ground on which to preclude any other maritime claim, fairly and honestly acquired.

We concur, then, in the opinion of the court below, that the fair claims of seamen, and subsequent material-men, are not overreached by the previous forfeiture;[1] and that, even in the home port, a vessel may be subjected to the liabilities of a vessel in a strange port, by being falsely held up as foreign by her owners.

THE J. E. RUMBELL.

IN THE SUPREME COURT, UNITED STATES, OCTOBER TERM, 1892.

[*Reported in* 148 *United States Reports*, 1.]

FINNEY and others appealed to the Circuit Court of Appeals, which certified to this court the following question: "Whether a claim arising upon a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a vessel in its home port in the State of Illinois subsequently to the date of the recording of the mortgage?"[2]

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

By the admiralty law, maritime liens or privileges for necessary advances made, or supplies furnished, to keep a vessel fit for sea, take precedence of all prior claims upon her, unless for seamen's wages or salvage. It is upon this ground that such advances or supplies, made or furnished in good faith to the master in a foreign port, are preferred to a prior mortgage, or to a forfeiture to the United States

[1] The Siren, 7 Wall. 152, 159 (*semble*); The Maria, Deady, 89, 102; 600 Tons of Iron Ore, 9 Fed. R. 595; The City of Mexico, 28 Fed. R. 207; The Jennie Hayes, 37 Fed. R. 373; North American Co. *v.* U. S. 81 Fed. R. 748 (*semble*) *Accord*. — ED.

MARITIME LIEN AGAINST VESSEL EMPLOYED BY RECEIVER. — If the receiver of a corporation keeps a vessel of the corporation in active service, a maritime lien for supplies in a foreign port may be enforced in a foreign jurisdiction. The Willamette Valley, 66 Fed. R. 565, 62 Fed. R. 293. — ED.

[2] The statement of facts and arguments are omitted. — ED.

for a precedent violation of the navigation laws. The St. Jago de Cuba; The Emily Souder.

In The St. Jago de Cuba, Mr. Justice Johnson, in delivering judgment, and speaking of the lien of material-men and other implied liens under maritime contracts, said: "The whole object of giving admiralty process and priority of payment to privileged creditors is to furnish wings and legs to" the vessel, "to get back for the benefit of all concerned; that is, to complete her voyage." "In every case, the last lien given will supersede the preceding. The last bottomry bond will ride over all that precede it; and an abandonment to a salvor will supersede every prior claim. The vessel must get on; this is the consideration which controls every other; and not only the vessel, but even the cargo, is *sub modo* subjected to this necessity."

In The Yankee Blade,[1] Mr. Justice Grier, speaking for this court, said: "The maritime privilege or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a *jus in re*, without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category." "These principles will be found stated, and fully vindicated by authority, in the cases of The Young Mechanic[2] and The Kiersage."[3]

Both the decisions of Mr. Justice Curtis, thus referred to, depended on a statute of Maine, giving in general terms a lien upon a vessel for labor performed or materials furnished in her construction or repair, without undertaking to fix the comparative precedence of such liens.

In The Young Mechanic, after elaborate discussion of the nature of such a lien, it was held to be a *jus in re*, a right of property in the thing itself, existing independently of possession; "an appropriation made by the law, of a particular thing, as security for a debt or claim; the law creating an incumbrance thereon, and vesting in the creditor what we term a special property in the thing, which subsists from the moment when the debt or claim arises, and accompanies the thing even into the hands of a purchaser." "Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledgee, or the lien of a bailee for work;" and is not "only a privilege to arrest the vessel for the debt, which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment." 2 Curtis C. C. 406, 410, 412.

[1] 19 How. 82, 89, 90.
[2] 2 Curtis C. C. 404.
[3] 2 Curtis C. C. 421.

In The Kiersage, Mr. Justice Curtis held that the lien for labor and materials in the home port had precedence over a prior mortgage; and, after observing that, as he had held in The Young Mechanic, this lien "was, in substance, a tacit hypothecation of the vessel, as security for the debt;" "a *jus in re*, constituting an incumbrance on the property by operation of law;" he added: "And there can be no doubt that it takes effect wholly irrespective of the state of the title to the vessel. Whether the vessel belongs to one or more persons — whether the title has been so divided that one is a special and another a general owner, and however it may be encumbered, the law gives the lien on the thing. The mortgagees can have no claim to be preferred over the lien-holder because of their priority in time; for their interest in the vessel is as much subject to the statute lien as the interest of any other party. It is not in the power of the owner, by his voluntary act, to withdraw any part of the title from the operation of the lien; if he could, he might altogether defeat it." 2 Curtis C. C. 422, 423.

It was assumed in each of those cases that a lien, given by the local law, for building a ship, stood on the same ground as a lien, under the same law, for repairing her. It has since been decided, and is now settled, that a contract for building a ship, being a contract made on land and to be performed on land, is not a maritime contract, and that a lien to secure it, given by a local statute, is not a maritime lien, and cannot, therefore, be enforced in admiralty. The Jefferson,[1] The Capitol,[2] Edwards *v.* Elliott.[3] That fact, however, does not affect the strength of the reasoning, or the justness of the conclusions, of Mr. Justice Curtis, as regards liens for repairs and supplies; and, in relation to such liens, his view has been generally accepted in the admiralty courts of the United States.

"A maritime lien, unlike a lien at common law, may," said Mr. Justice Field, speaking for this court, "exist without possession of the thing upon which it is asserted, either actual or constructive. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim for damages." "The only object of the proceedings *in rem* is to make this right, where it exists, available — to carry it into effect. It subserves no other purpose." The Rock Island Bridge.[4] And in The Lottawanna, Mr. Justice Bradley, speaking of a lien given by a statute of Louisiana for repairs and supplies, said "a lien is a right of property, and not a mere matter of procedure." 21 Wall. 558, 579.

In the admiralty and maritime law of the United States, as declared and established by the decisions of this court, the following propositions are no longer doubtful: —

1st. For necessary repairs or supplies furnished to a vessel in a foreign port, a lien is given by the general maritime law, following the civil law, and may be enforced in admiralty. The General Smith,

[1] 20 How. 393.
[2] 22 How. 129.
[3] 21 Wall. 532.
[4] 6 Wall. 213, 215.

The St. Jago de Cuba, The Virgin,[1] The Laura,[2] The Grapeshot,[3] The Lulu,[4] The Kalorama.[5]

2d. For repairs or supplies in the home port of the vessel, no lien exists, or can be enforced in admiralty, under the general law, independently of local statute. The General Smith, and the St. Jago de Cuba above cited; The Lottawanna,[6] The Edith.[7]

3d. Whenever the statute of a State gives a lien to be enforced by process *in rem* against the vessel, for repairs or supplies in her home port, this lien being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. The Planter,[8] The St. Lawrence,[9] The Lottawanna.[6] Rule 12 in Admiralty, as amended in 1872, 13 Wall. xiv.

4th. This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty. The Moses Taylor,[10] The Hine, The Belfast,[11] The Lottawanna,[6] Johnson *v.* Chicago Elevator Co.[12]

The fundamental reasons on which these propositions rest may be summed up thus: The admiralty and maritime jurisdiction is conferred on the courts of the United States by the Constitution, and cannot be enlarged or restricted by the legislation of a State. No state legislation, therefore, can bring within the admiralty jurisdiction of the national courts a subject not maritime in its nature. But when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a State, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure. See, in addition to the cases above cited, The Orleans,[13] *Ex parte* McNiel,[14] The Corsair.

The settled rules of jurisdiction and practice on this subject were stated by Mr. Justice Bradley in The Lottawanna as follows: "So long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each State by state legislation. State laws, it is true, cannot exclude the contract for furnishing such necessaries from the domain of admiralty jurisdiction, for it is a maritime contract, and they cannot alter the limits of that jurisdiction; nor can they confer it upon the state courts so as to enable them to proceed *in rem* for the enforcement of liens created by such state laws, for it is exclusively conferred upon the district courts of the United States. They can only authorize the enforcement thereof by common law remedies, or such remedies as are equivalent thereto. But the district courts of the United States, having jurisdiction of the contract as a maritime

[1] 8 Pet. 538, 550. [2] 19 How. 22. [3] 9 Wall. 129.
[4] 10 Wall. 192. [5] 10 Wall. 204. [6] 21 Wall. 558.
[7] 94 U. S. 518. [8] 7 Pet. 324. [9] 1 Black, 522.
[10] 4 Wall. 411. [11] 7 Wall. 624. [12] 119 U. S. 388, 397.
[13] 11 Pet. 175, 184. [14] 13 Wall. 236, 243.

one, may enforce liens given for its security, even when created by the state laws." 21 Wall. 580.

By the Revised Statutes of Illinois of 1874, c. 12, § 1, every sailing vessel, steamboat, or other water craft of above five tons burthen, used or intended to be used in navigating the waters of the State, or used in trade and commerce between ports and places within the State, or having her home port in the State, "shall be subject to a lien thereon" for all debts contracted by her owner or master on account of supplies and provisions furnished for her use, or of work done or services rendered on board of her "by any seaman, master, or other employé thereof," or "of work done or materials furnished by mechanics, tradesmen, or others, in or about the building, repairing, fitting, furnishing, or equipping such craft," and also for sums due for wharfage, towage, or the like, or upon contracts of affreightment, and damages for injuries to persons or property. By §§ 3, 4, the lien may be enforced by a petition filed in a court of record in the county where the vessel is found, within five years, but cannot be enforced "as against or to the prejudice of any other creditor, or subsequent incumbrancer or *bona fide* purchaser," unless the petition is filed within nine months after the debt accrues or becomes due. By §§ 5–8, upon the filing of the petition, and of a bond from the petitioner to the owner of the vessel to prosecute the suit with effect, or, in case of failure to do so, to pay all costs and damages caused to the owner or other persons interested in the vessel by the wrongful suing out of the attachment, a writ of attachment is to issue to the sheriff to seize and keep the vessel. By §§ 10, 11, notice is to be given to the owners in person, and by publication to all other persons interested, and they may intervene to protect their interests. By §§ 15–17, the vessel may be delivered up to the owner, or to any other person interested, upon his giving bond, or making a deposit of money. By § 19, the owner and other claimants are to file answers. By §§ 21–27, upon judgment for the petitioner, the vessel, if remaining in custody, is to be sold by the sheriff; and the proceeds (deducting certain costs) are to be applied, first, to the wages due to seamen, including the master, for certain periods, and then to all other claims, filed before the distribution, on which judgment has been rendered in favor of the claimant, and to any balance due to seamen; and any remnant is to be applied, first, to all other liens enforceable under the statute before distribution; second, to all mortgages or other incumbrances of the vessel by the owner, "in proportion to the interest they cover and priority;" third, to judgments at law or decrees in chancery against the owner; and any surplus to the owner.

It thus appears that, for all supplies or provisions furnished for the use of a vessel, or for work done and materials furnished in repairing her, in her home port, the statute gives a lien upon the vessel, to be enforced by proceedings *in rem*, analogous to such proceedings in admiralty.

In the present case, the District Court has found and adjudged that

the sums claimed by the appellants for supplies, repairs, and services were due to them; and the Circuit Court of Appeals has stated in its certificate that for these supplies, repairs, and services there was a lien upon the vessel under the laws of the State of Illinois; and has certified to this court the single question "whether a claim arising upon a vessel mortgage is to be preferred to the claim for supplies and necessaries furnished to a vessel in its home port in the State of Illinois subsequently to the date of the recording of the mortgage."

It must be assumed, therefore, for the purpose of deciding this question, that all the claims of the appellants for supplies and repairs were contracted under such circumstances, that a lien upon the vessel for their payment existed under the statute of Illinois, and should be enforced in admiralty by the courts of the United States against the proceeds of the vessel, unless the mortgagees are entitled to priority in the distribution.

An ordinary mortgage of a vessel, whether made to secure the purchase-money upon the sale thereof, or to raise money for general purposes, is not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it. The John Jay, The Eclipse.[1] But it has jurisdiction, after a vessel has been sold by its order, and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the material-men in this case. The Globe,[2] The Angelique,[3] The Lottawanna.[4] Rule 43 in Admiralty.

The appellees rely on section 4192 of the Revised Statutes of the United States, which substantially reënacts the act of July 29, 1850, c. 27, § 1 (9 Stat. 440), and is as follows: "No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is registered or enrolled. The lien by bottomry on any vessel, created during her voyage, by a loan of money or materials, necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section."

The appellees contend that no lien created by the legislature of a State can override a prior mortgage recorded under this act of Congress.

But that enactment is a mere registry act, intended to prevent mortgages and other conveyances of vessels from having any effect (which they might have had before) against persons other than the grantor or mortgagor, and those claiming under him, or having actual

[1] 135 U. S. 599, 608.
[2] 3 How. 568, 573.
[3] 19 How. 239.
[4] 21 Wall. 558, 582, 583.

notice thereof, unless recorded as therein provided. White's Bank *v.* Smith,[1] Aldrich *v.* Ætna Co.[2] It manifests no intention to confer upon the mortgagee any new right, or to make the mortgage a maritime contract, or the lien created thereby a maritime lien, or in any way to interfere with maritime contracts or liens, or with the jurisdiction and procedure in admiralty. The only mention of any other lien on the vessel is of a bottomry bond, in the latter part of the section, originally inserted in the form of a proviso, and with the obvious purpose of precluding the possibility of construing such a bond to be an hypothecation, within the meaning of the previous clause, and therefore required to be recorded. And, as was well observed in The William T. Graves,[3] by Judge Johnson: "If this proviso be construed to mean that such a lien only is out of the purview of the statute, and that all other liens are postponed to that of a mortgagee, then the claims of salvors, and all those having other strictly maritime liens, would be thus postponed, to the subversion of the whole principle upon which efficacy is given to such claims, and the overthrow of the best settled and most salutary principles of the maritime law. Indeed, any principle, upon which this statute can be expounded to give such a priority to a recorded mortgage, would also extend to bills of sale and other conveyances recorded under the same law, and thus practically overthrow the whole scheme of maritime law upon the subject of maritime liens."

In The Lottawanna, the mortgage was preferred to the claim of the material-men in the home port, only because the latter had not recorded their lien as required by the law of the State to make it valid; and it was clearly implied in the opinion of the court, delivered by Mr. Justice Bradley, as well as distinctly asserted in the dissenting opinion of Mr. Justice Clifford, that their lien, if valid, would take precedence of the mortgage. 21 Wall. 578, 579, 582, 608. And, as already stated at the outset of this opinion, the same rule was laid down in the opinion of Mr. Justice Curtis in The Kiersage,[4] approved by this court in The Yankee Blade.[5]

The appellees rely on a line of cases in the courts of the United States held in Illinois, beginning with a decision of Judge Drummond in 1869, and upon similar cases in the Supreme Court of the State, as establishing, as a rule of property, that a mortgage takes precedence of a lien for supplies afterwards furnished to a vessel in her home port under the statute of Illinois. The Grace Greenwood, (1869),[6] The Skylark (1870),[7] The Kate Hinchman (1875),[8] and (1876),[9] The Great West No. 2 *v.* Oberndorf (1870),[10] The Hilton *v.* Miller (1871).[11]

But the question in controversy depends upon principles of general jurisprudence, and upon the true construction of an act of Congress,

[1] 7 Wall. 646.
[2] 8 Wall. 491.
[3] 14 Blatchf. 189, 195.
[4] 2 Curtis C. C. 421.
[5] 19 How. 82.
[6] 2 Bissell, 131.
[7] 2 Bissell, 251.
[8] 6 Bissell, 367.
[9] 7 Bissell, 238.
[10] 57 Illinois, 168.
[11] 62 Illinois, 230.

and arises in the courts of the United States exercising the admiralty and maritime jurisdiction exclusively vested in them by the Constitution. Upon such a question, neither the decisions of the highest court of a State nor those of the circuit and district courts of the United States can relieve this court from the duty of exercising its own judgment. Liverpool Steam Co. *v.* Phenix Ins. Co.,[1] Andrews *v.* Hovey.[2]

Moreover, the rule preferring the lien for repairs or supplies in a home port to a prior mortgage was recognized, even in the Seventh Circuit, by Judge Dyer in the District Court of the United States for the Eastern District of Wisconsin in 1874, in The J. A. Travis,[3] and it appears to prevail in every other judicial circuit of the United States.[4]

According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by the statute of a State, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage, that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship, on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit of all having any title or interest in her. Each creates a *jus in re*, a right of property in the vessel, existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry after all maritime liens have been satisfied.

It would seem to follow that any priority given by the statute of a State,[5] or by decisions at common law or in equity, is immaterial; and that the admiralty courts of the United States, enforcing the lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of the maritime and admiralty law.

As was forcibly said by Mr. Justice Matthews, in The Guiding Star, above cited, "In enforcing the statutory lien in maritime causes, admiralty courts do not adopt the statute itself, or the construction placed upon it by courts of common law or of equity, when they apply it. Everything required by the statute, as a condition on which the lien arises and vests, must, of course, be regarded by courts of

[1] 129 U. S. 397, 443.

[2] 124 U. S. 694, 717.

[3] 7 Chicago Legal News, 275.

[4] The learned judge here cited numerous decisions in which a mortgage was postponed to a subsequent statutory maritime lien. — Ed.

[5] See *contra*, The Island City, 1 Low. 375, 379; The Marcelia Ann, 34 Fed. R. 142. — Ed.

admiralty; for they can only act in enforcing a lien when the statute has, according to its terms, conferred it; but beyond that the statute, as such, does not furnish the rule for governing the decision of the cause in admiralty, as between conflicting claims and liens. The maritime law treats the lien, because conferred upon a maritime contract by the statute, as if it had been conferred by itself, and consequently upon the same footing as all maritime liens; the order of payment between them being determinable upon its own principles." 18 Fed. R. 268.

It is unnecessary, however, in this case, to dwell upon that consideration, inasmuch as the lien in question is given precedence over mortgages, by the express terms of the statute of Illinois, as well as by the principles of the maritime law and the practice in admiralty.

The decisions in the Privy Council of England in The Two Ellens,[1] and The Rio Tinto,[2] cited by the appellees, in which the claims of prior mortgagees were preferred to claims of material-men in the home port, cannot affect our conclusion. Those decisions proceeded upon the ground that the material-men had no *jus in re*, because there was, by the law of England, no maritime lien for supplies, and because the acts of Parliament were construed as having given no lien for them until the arrest of the ship by admiralty process. The essential difference, in its very nature, between the right of material-men in a court of admiralty, under the law and statutes of England as judicially declared and expounded, and their right by virtue of a local statute giving a maritime lien and a *jus in re*, as recognized in our own jurisprudence, is yet more clearly brought out in a later case, in which the Court of Appeal and the House of Lords held that, even for supplies furnished in an English port to a foreign vessel, there was no lien, but a mere right to seize her upon process in admiralty. The Heinrich Bjorn.[3]

No question as to the lien of the master, or as to the comparative rank of various maritime liens *inter sese*, is presented by this case, in which the only question certified by the Circuit Court of Appeals, or within our jurisdiction to consider, as the case stands, is whether a claim arising under a mortgage of the vessel is to be preferred to the claim for supplies and necessaries furnished in her home port in the State of Illinois since the mortgage was recorded. This question must, for the reasons above stated, be

Answered in the negative.[4]

[1] L. R. 4 P. C. 161.

[2] 9 App. Cas. 356.

[3] 10 P. D. 44, and 11 App. Cas. 270.

[4] The Glide, 167 U. S. 606, 622-623; The Kiersage, 2 Curt. C. C. 421; Srodes *v.* The Collier, Fed. Cas. No. 13,272; The Island City, 1 Low. 375, 379; The St. Joseph, Bro. Adm. 202; Whittaker *v.* The J. A. Travis, Fed. Cas. No. 17,599; The William T. Graves, 8 Ben. 568, 14 Blatchf. 189; The Raleigh, 2 Hughes, 44; The Alice Getty, 2 Flipp. 18; The Hiawatha, 5 Sawy. 160; The Illinois, 2 Flipp. 383, 433; The City of Tawas, 3 Fed. R. 170; The General Burnside, 3 Fed. R. 228; The Guiding Star, 9 Fed. R. 521, 18 Fed. R. 263, 269; The Canada, 7 Sawy. 173; The Venture, 26 Fed. R. 285; The Wyoming, 35 Fed. R. 548; Clyde *v.* Steam Co., 36 Fed. R. 501; The Madrid, 40 Fed. R. 677 (overruling The John T. Moore, 3 Woods, 61; The Bradish Johnson, 3 Woods, 582; The Josephine Spangler, 9 Fed. R. 773, 11 Fed. R. 440; The De Smet, 10 Fed. R. 483); The H. N. Emilie, 70 Fed. R. 511.

The following cases *contra* may be disregarded: The Grace Greenwood, 2 Biss. 131; Scott's Case, 1 Abb. U. S. 336; The Skylark, 2 Biss. 251; The Kate Hinchman, 6 Biss. 367, 7 Biss. 238; The Superior, Newb. 176; The Favorite, 3 Sawy. 405; The Great West *v.* Oberndorf, 57 Ill. 168; The Hilton *v.* Miller, 62 Ill. 230.

EQUALITY OF DOMESTIC AND FOREIGN LIENS FOR REPAIRS AND SUPPLIES. — The lien given by a local statute for supplies and repairs in the home port ranks equally with the similar lien given by admiralty without a statute to the foreign creditor. Accordingly, when liens for supplies furnished during a certain interval, for example, during the same season in lake navigation, are treated as concurrent and entitled to share *pro rata*, it makes no difference whether such liens are domestic or foreign. The General Burnside, 3 Fed. R. 228; The Delos De Wolf, 3 Fed. R. 236; The Guiding Star, 18 Fed. R. 263, 9 Fed. R. 521; The J. W. Tucker, 20 Fed. R. 129; The Grapeshot, 22 Fed. R. 123; The Arctic, 22 Fed. R. 126; The Daisy Day, 40 Fed. R. 538.

The following decisions and *dicta* to the contrary may safely be disregarded. The Superior, Newb. 176; The St. Joseph, Bro. Adm. 202; The John T. Moore, 3 Woods, 61, 64 (*semble*); The E. A. Barnard, 2 Fed. R. 712; The City of Tawas, 3 Fed. R. 170; The Athenian, 3 Fed. R. 248; The Woodward, 32 Fed. R. 639 (*semble*); The Augustine Kobbe, 39 Fed. R. 696.

In The General Burnside, *supra*, Baxter, C. J., said, p. 233: "I find, on examination, that in every commercial country excepting the United States this distinction between foreign and home liens has been entirely ignored; that it does not exist anywhere else, and that it does not exist in the United States as it does in England, and that it exists here only in a modified form. Various reasons have been given for drawing a distinction between a home port and a foreign port in the English admiralty law. It is supposed by some that the distinction is founded upon the fact that the owner of the vessel is presumed to have credit in his own port, and that, therefore, the credit is given to the owner and not to the vessel. But the true reason, I think, is very plain, and grew out of the contest that was waged for a long time between the admiralty and common law jurisdictions of England, in which the common law courts prevailed, and settled and determined all cases of admiralty jurisdiction, unless the question arose with reference to matters which occurred upon the high seas, asserting that no maritime liens could attach except upon the high seas, as they were not maritime transactions. When our own courts began the administration of the admiralty law they departed from this practice and adopted the opposite doctrine, asserting the admiralty jurisdiction upon all waters, including the interior navigable rivers and lakes, disregarding the criterion of tide-water, etc.; and, if I may be permitted to say so, necessarily, and, I think, upon principle, placed themselves in a position which should have induced them to adopt the theories of other commercial countries, which ignored distinctions made between home and foreign ports. Our commercial marine is a national affair. It is made so by the Constitution. Exclusive jurisdiction in admiralty is given to the federal courts, and it ought to be treated as a national affair and delocalized. But we have fallen into a kind of mongrel system, between the civil and English admiralty practice, and have adopted the idea that a vessel, owned and registered in one State, is as to another State a foreign vessel, and has given to our commercial marine a double character, national in one respect and local in another.

I am aware of the fact that many decisions have been made in cases of this kind, upon the precise question upon which I have to pass, to the effect that the lien of a creditor from another State is entitled to preference over the lien of the home creditor. . . . In this particular case, however, I hold that I am at liberty to look to and decide upon first principles, considering the question as an open one. In administering the law upon this question I have determined to mete out equal justice to every one, and to recognize the claims which the laws of the State give to parties. It cannot be said that when a law of Michigan confers upon or invests a party with a good and valid lien, that that lien, thus created, cannot assume an equality of right with liens arising by implication of law. If I should make a mistake in thus holding, it will not affect a great deal in this particular case, and perhaps the decision may attract some attention from Congress, inducing some legislation reconciling this conflict and establishing a uniform national code. I think a point has been reached where we can only get out of these numerous difficulties, originating, I think, in an erroneous holding in the beginning of our government, by congressional legislation." — ED.

THE CONSTANCIA.

In the High Court of Admiralty, November, 14, 1845.

[*Reported in* 2 *William Robinson*, 404.[1]]

In this case three bonds of bottomry were granted upon this ship.

The first bond was executed upon the 27th of February, 1845, and hypothecated the ship only; the second bond, bearing the same date, hypothecated the cargo only; and the third bond, dated the 9th of April, was upon the ship alone. The validity of the several bonds was not disputed, and the ship having been sold under a decree of the court, the question arose as to the funds out of which the several bonds should be paid.

Judgment. — Dr. Lushington.

The validity of these bonds is not disputed, and the question which I have to determine is confined to the consideration of the funds out of which the several bonds are to be defrayed. The vessel, it appears, was bound on a voyage from Lima to London with a cargo of silver and guano, and having met with damage at sea was compelled to put into Bahia to refit. The silver on board was applied in the first instance in payment of the repairs; but not being sufficient to cover the whole of the expenses, the master was obliged to take up money on bottomry, for which he executed a bond bearing date the 27th of February, 1845, and which bond is upon the ship alone. Subsequent to the departure of the vessel from Bahia, she met with a collision, and was compelled to return to that port for further repairs. For the payment of these repairs further advances of money were required by the master, and a second bond of bottomry was executed by him upon the cargo only. A third bond was also given, dated the 9th of April, 1845, and this bond purports to hypothecate the ship, without any reference to the freight or the cargo on board.

Now, with respect to these bonds, I am of opinion, that the bond of the 9th of April, being the last in point of date, is entitled to the priority of payment,[2] and that the payment thereof must be defrayed

[1] 4 Notes of Cases, 285 s. c. — Ed.

[2] The Rhadamanthe, 1 Dod. 201; The Betsey, 1 Dod. 289; The Sydney Cove, 2 Dod. 1; The Eliza, 3 Hagg. 87; The Jerusalem, 2 Gall. 345, 350 (*semble*); The Sloop Mary, 1 Paine, 670, 676 (*semble*); The Paragon, 1 Ware, 326, 336 (*semble*); The America, 1 Fed. Cas. No. 288, p. 613; The Magoun, Olc. 55; The William T. Graves, 8 Ben. 568, 571 (*semble*); The J. W. Tucker, 20 Fed. R. 129, 132 (*semble*); The Olga, 32 Fed. R. 329 *Accord*.

A bottomry bond outranks a prior mortgage. Duke of Bedford, 2 Hagg. 294; The Mary, 1 Paine, 671; The Brig Magoun, Olc. 55.

Or a lien for prior supplies. The William F. Safford, Lush. 69; The Thomas Fletcher, 24 Fed. R. 375.

Or prior salvage. The Selina (*infra*, p. 174).

Or a prior collision. The Aline, 1 W. Rob. 111.

Bonds, although of different dates, if given near together and for the same necessity are treated as contemporaneous. The Exeter, 1 C. Rob. 173; The Dora, 34 Fed. R. 343. — Ed.

exclusively out of the proceeds of the ship. I conceive also that the original bond of the 27th of February must likewise be defrayed out of the same proceeds; and if these proceeds should prove insufficient to cover the two bonds, the loss must fall upon the bondholders, — and for this obvious reason, viz. that they have themselves chosen to limit their security to the ship alone; and there is no principle of law which will enable them to extend that security beyond the express terms in which the instrument of hypothecation is couched. With respect to the remaining bond, which is upon the cargo only, although in the present instance its validity is not contested, I can only pronounce that it is valid in point of law, upon the assumption that the hypothecation of the ship, freight, and cargo were contemplated by the contracting parties when the bond was executed. The ship and freight undoubtedly form the primary resources for the discharge of all bottomry bonds, and the cargo is only liable when these resources are exhausted. This doctrine was laid down by Lord Stowell, in the case of the Gratitudine, and in deciding the present question I shall adhere to the authority of that decision.

If then the proceeds of this ship should be exhausted in the present instance in the payment of the two bonds of the 27th of February and the 9th of April, the intermediate bond, which is upon the cargo, must be satisfied in the first instance out of the proceeds of the freight; and when these are expended, the bondholder will be entitled to fall back upon the cargo. I make this decision upon the principle that, where there are several bonds upon different securities, I am bound so to deal with the assets that one security should not be exhausted at the expense of the other, but that the claims of all the creditors, if possible, should be satisfied.

THE UNION.

In the High Court of Admiralty, July 28, 1860.

[*Reported in Lushington*, 128.]

This was an action for seamen's wages against the French ship Union and freight; the plaintiffs were some of the vessel's late crew, and the French consul suing in respect of other seamen, some deceased, some discharged unpaid, and some who had deserted during the voyage. The ship left Bordeaux on the 8th of June, 1858, on a voyage to the west coast of South America, and thence to the port of Liverpool. She took in a return cargo at Valparaiso, and proceeded on her homeward voyage, but was forced to put into Rio de Janeiro for repairs. At Rio de Janeiro, on the 22d of November, 1859, the master bottomried, by acts in the Chancery of the French legation, and in the French form, the ship and cargo, for a sum amounting,

with maritime interest, to £10,369. The ship arrived in Liverpool on the 24th of January, 1860, and was arrested with the freight by the bondholders. On the 15th of March the ship was sold by decree of the court, and the proceeds, together with the freight, amounting in all to £4715, were paid into the registry. On the 17th of February, the master discharged the seamen, but without paying their wages.[1]

RIGHT HON. DR. LUSHINGTON. It is certainly without precedent in this court for the owner of cargo to appear to resist a claim of mariners suing ship and freight for their wages. But as the facts show that the owner of the cargo has an undoubted interest in the administration of the fund by the court, I admit that he is entitled by virtue of that interest to appear and contest the mariners' claim.

Stress, however, has been laid upon the rule that where a bottomry bond is on ship, freight, and cargo, ship and freight must be exhausted before cargo is touched, and the case of the Priscilla was very properly cited. It was there held that the owner of the cargo, bottomried with ship and freight, appealing to this rule, had a superior claim to the holder of a previous bond on ship and freight only, who, if this rule were enforced, would receive nothing. The distinction between that case and the present is this, that there the claim on the ship and freight by the holder of the first bond was inferior to the claim on ship and freight of the holder of the second bond; but is that so here? Is there any ground for saying that the bondholder here (through whom the owner of the cargo claims) has a distinct preferential right over the claims of the seamen suing for wages earned previously to the date of the bond?

That leads me to the question which has been argued at so much length, whether the right of precedence is to be determined by the French law or the law of this court. Now I am clearly of opinion upon the authorities cited, and upon the usual practice of this court, as well as upon every consideration of convenience, that this question of the precedence of liens must be determined by the *lex fori*.[2] To hold otherwise might lead to very great confusion. I shall look to the law in this court only. What, then, is the law in this court as to the relative rights of a bondholder, and a seaman suing for wages earned before the bond? I have in the cases quoted, The Mary Ann,[3] The Janet Wilson,[4] and Jonathan Goodhue,[5] intimated an opinion that the bondholder ought to be preferred, because the bond has been auxiliary to the saving of the wages, because it has saved the fund to which the seaman is resorting. I have, however, never decided the

[1] The arguments of counsel are omitted, and the statement of the case and the judgment are abridged. — ED.

[2] As between foreign lienholders not competing with domestic lienholders, the priorities will be adjusted according to the foreign law. The Wexford, 7 Fed. R. 674; The Velox, 21 Fed. R. 479; The Olga, 32 Fed. R. 329; The Angela Maria, 35 Fed. R. 577.

But a lien given by the foreign law competing with a domestic lien will be ranked according to the *lex fori*, regardless of the foreign law. The Selah, 4 Sawy. 40; The Wexford, 3 Fed. R. 577, 580; The Graf Klot Trautvetter, 8 Fed. R. 833; The Olga, 32 Fed. R. 329; The Angela Maria, 35 Fed. R. 430. — Ed.

[3] L. R. 1 A. & E. 8. [4] Swab. 261. [5] Swab. 524.

THE ELIN.

In the Probate, Divorce, and Admiralty Division, August 1, 1882.

[*Reported in* 8 *Probate Division Reports*, 39.]

Sir Robert Phillimore.[1] This is a special case stated in order to obtain a decision between two competing maritime liens on the proceeds of a vessel sold by the marshal of this court. The facts are shortly as follows: The Russian barque Elin came into collision with the English barque Paria in November last, and both vessels sustained injury. After the collision salvage services were rendered to the Elin, and she was safely brought into the port of London by her own crew with the assistance of the salvors. Shortly afterwards four actions were brought against the Elin, the first by the owners of the Paria for damage caused by the collision, the second and third, which were consolidated, by two sets of salvors respectively, and the fourth by her own master and crew for wages earned both before and after the collision, for ten days' double pay, and the expenses of their journey home. In the first action the owners of the Elin admitted liability for the damages proceeded for, and the vessel was on the application of the owners of the Paria sold by the marshal and the proceeds paid into court. In the consolidated salvage actions, judgment was given against the Elin, and the amount has been paid out of the aforesaid proceeds of sale. In the action of wages, the crew obtained judgment for their wages, and ten days' double pay and their expenses home, and the master obtained judgment for his expenses home only. The proceeds of sale are insufficient to satisfy the amounts awarded by the court both to the owners of the Paria and to the master and crew of the Elin. It is admitted that the claim of the Paria takes precedence over the claim of the master and also over that of the crew so far as regards wages earned before the collision;[2] but a question has been raised as to whether the owners of the Paria can demand priority over the wages earned by the crew after the collision, the ten days' double pay due to them, and the expenses of their journey home. It is to decide this point that the special case has been stated in which it is agreed that the questions for the deci-

[1] Only the judgment of the court is given. — Ed.

[2] Affirmed 8 Prob. Div. 129. See, to the same effect, The Benares, 7 Notes of Cases, Supp. 51; The Linda Flor, Swab. 309, 6 W. R. 197 s. c.; The Chimæra, Coote, Adm. Pr. 121, n.; The Duna, 5 L. T. Rep. 217, 6 Ir. Jur. n. s. 358 s. c.; The Panthea, 1 Asp. Mar. C. 133, 135 (*semble*); Norwich Co. *v.* Wright, 13 Wall. 104, 122 (*semble*); The Freestone, 2 Bond, 234; The Enterprise, 1 Low. 455; The Maria and Elizabeth, 12 Fed. R. 627; The F. H. Stanwood, 9 U. S. Ap. 15, 49 Fed. R. 577 s. c. (but *aliter* and *contra* to prior cases as to subsequent wages); The Nettie Woodward, 50 Fed. R. 224 *Accord*.

The America, 1 Fed. Cas. No. 288; The Grapeshot, 22 Fed. R. 123; The Amos D. Carver, 35 Fed. R. 665; The Orient, 10 Ben. 620; The Samuel J. Christian, 16 Fed. R. 796 (negligent towage); The Daisy Day, 40 Fed. R. 538 *Contra*. — Ed.

sion of the court are, first, whether the owners of the Paria are entitled to have their claim satisfied out of the balance of the said fund in court in priority to the wages of the crew of the Elin earned subsequently to the date of the collision, their ten days' double pay, and their expenses home, or in priority to any and which of these sums; secondly, how the costs of and incidental to this case are to be borne. Various decisions were cited to me as bearing upon the subject; some of them relate to questions of civil contracts such as bottomry, and not to liabilities arising out of a delictum such as damage occasioned by a collision. But there is one case which seems to me directly in point, and the authority of which is binding upon me, that is the case of the Linda Flor, decided by Dr. Lushington after careful consideration in 1857, and reported by Dr. Tristram in the sixth volume of the Weekly Reporter, p. 197, and in Swabey's Reports, p. 309. In that case the facts were very similar to those of the present case, priority for wages earned both before and after the collision being claimed over damages occasioned by the collision. In that case Dr. Lushington said: "This is a foreign vessel proceeded against in a cause of damage and condemned to pay that damage. The master and crew have commenced proceedings for their wages, the owner of the vessel and cargo receiving the damage object because the proceeds are insufficient to satisfy all the claims, and therefore the consequence would be, that those who have suffered from a wrongdoing would recover less than their loss. The same question was agitated in the case of The Chimæra,[1] and I was then of opinion that the mariner could not maintain his claim to the prejudice of the parties damnified by the collision. I adhere to this opinion, and I do so especially for the following reasons: that by the maritime law of all the principal maritime states the mariner has a lien on the ship for his wages against the owner of that ship; that he has also a right of suing the owner for wages due to him; that some uncertainty may exist as to the mariner's lien when in competition with other liens or claims, and amongst these I might instance the case of a ship in the yard of a shipwright. In such a case I should have no difficulty in saying that the lien of the shipwright would be superior to the lien of the mariner. That in the case of a foreign ship doing damage and proceeded against in a foreign court the injured party has no means of obtaining relief, save by proceeding against the ship itself, and that I apprehend is one of the most cogent reasons for all our proceedings *in rem*. That in a case where the proceeds of a ship are insufficient to compensate for damage done, to allow the mariner to take precedence of those who have suffered damage would be to exonerate so far the owner of the ship, to whom the damage is imputed, at the expense of the injured party — the wrongdoer at the expense of him to whom wrong has been done. Then, as to the mariner, what is the hardship to which he is exposed? It is true he is debarred from proceeding against the ship, but his right to sue the owner remains unaffected.

[1] Not reported.

It is, however, not to be forgotten that in all these cases of damage, or nearly all, the cause of the damage is the misconduct of some of the persons composing the crew; this is not the case of a bankrupt owner; it will be time to consider such case when it arises."[1] The authority of this case has never been questioned, and has always been treated as undoubted law.

In The Duna,[2] a case decided in the Irish admiralty court in 1861, The Linda Flor[3] was followed, and an elaborate judgment was delivered, in which the principles on which that decision rested were fully set forth, and the distinction was pointed out between an obligation *ex contractu*, which is the basis of an action for wages, and an obligation *ex delicto*, upon which the liability for damage is founded. I observe that in last year's edition of Maude and Pollock's Law of Merchant Shipping the decision in The Linda Flor is quoted and treated as settled law.

The question, therefore, is not *res integra*, and it is not my duty to consider whether, if it were so, the priority of the seamen's lien ought to be established. I consider myself bound by the decision of The Linda Flor,[3] and I decide on all the points raised in the special case in favor of the owners of the Paria.[4] I shall leave each party to bear their costs of the special case.

THE JOHN G. STEVENS.

In the Supreme Court, United States, April 18, 1898.

[*Reported in* 170 *United States Reports*, 113.]

In a pending appeal in admiralty by Edward H. Loud and others, owners of the schooner C. R. Flint, from a decree of the District Court of the United States for the Eastern District of New York in favor of Frederick H. Gladwish and others, coal merchants under the name Gladwish, Moquin & Company, the Circuit Court of Appeals for the Second Circuit certified to this court a question of the priority of maritime liens on the steam tug John G. Stevens, arising, as the certificate stated, upon the following facts: —

"The home port of the tug was New York. Between December 7, 1885, and March 7, 1886, Gladwish, Moquin & Company furnished coal to the tug in her home port, and filed notices of liens therefor under the laws of the State of New York of 1862, chapter 482, thereby creating statutory liens on her. On March 8, 1886, the tug John G. Stevens was employed in the port of New York to tow the schooner

[1] 6 Weekly Reporter, 197. [2] 5 L. T. 217. [3] Swab. 309.

[4] Affirmed in 8 Pr. Div. 129. See, to the same effect, The Linda Flor, Swab. 309, 6 W. R. 197, s. c.; The Duna, 5 L. T. Rep. 217, 6 Ir. Jur. N. s. 358 s. c. *Accord.* The F. H. Stanwood, 9 U. S. Ap. 15, 49 Fed. R. 577 s. c. *Contra.* — Ed.

C. R. Flint through the waters of said port, and, while towing, negligently allowed the C. R. Flint to collide with the barque Doris Eckhoff in tow of the tug R. S. Carter.

"On March 16, 1886, Loud and others, owners of the C. R. Flint, libelled the John G. Stevens and the R. S. Carter in admiralty, in the District Court of the United States for the Eastern District of New York, for the collision damage. On March 16, 1886, Gladwish and others libelled the John G. Stevens, in the same court, to enforce their supply lien under the state law. The Loud libel resulted in a decree condemning both tugs for damages exceeding $15,000. The Gladwish libel resulted in a decree condemning the John G. Stevens for the coal supplied, and costs, in all $218.07.

"The District Court awarded priority to the supply lien, which exhausts the fund resulting from the sale of the John G. Stevens, leaving the Loud decree unsatisfied." 58 Fed. R. 792.

Upon these facts, the Circuit Court of Appeals desired the instruction of this court upon this question of law: "Is the lien for the damages occasioned by negligent towage, which arose on March 8, 1886, to be preferred to the previous state lien for supplies, the libel for supplies being filed last?"

Mr. Harrington Putnam for appellants.

Mr. Mark Ash and *Mr. J. Parker Kirlin* for appellees. *Mr. J. H. Lichliter* was on *Mr. Ash's* brief.

Mr. Justice Gray, after stating the case, delivered the opinion of the court.[1]

The question presented by this record is whether a lien upon a tug, for damages to her tow by negligent towage bringing the tow into collision with a third vessel, is to be preferred, in admiralty, to a statutory lien for supplies furnished to the tug in her home port before the collision.

This question may be conveniently divided, in its consideration by the court, as it was in the arguments at the bar, into two parts: First. Is a claim in tort for damages by a collision entitled to priority over a claim in contract for previous supplies? Second. Is a claim by a tow against her tug, for damages from coming into collision with a third vessel by reason of negligent towage, a claim in tort?

In the case of The Bold Buccleugh, decided in 1852 by the Judicial Committee of the Privy Council, upon appeal from the English High Court of Admiralty, and ever since considered a leading case, both in England and in America, it was adjudged that a collision between two ships by the negligence of one of them created a maritime lien upon or privilege in the offending ship, for the damage done to the other, which attached at the time of the collision, and might be enforced in admiralty by proceedings *in rem* against the offending ship, even in the hands of a *bona fide* purchaser.

The decision in The Bold Buccleugh has never been departed from in England, but has been constantly recognized as sound law in the

[1] The opinion of the court is slightly abridged. — Ed.

courts exercising admiralty jurisdiction. The Europa,[1] The Charles Amelia,[2] The City of Mecca,[3] The Rio Tinto,[4] The Dictator (1892).[5] And in a very recent case in the House of Lords, that decision has been deliberately and finally declared to have established beyond dispute, in the maritime law of Great Britain, that a collision between two vessels by the fault of one of them creates a maritime lien on her for the damage done to the other. Currie *v.* McKnight.

It has been generally laid down in the English text-books that a maritime lien for damages by a collision takes precedence of all earlier maritime liens founded in contract. Abbott on Shipping (Shee's ed.), pt. 6, c. 4, § 2; Coote's Admiralty Practice, 118; Maclachlan on Shipping, c. 15; Foard on Shipping, 217; Marsden on Collisions (3d ed.), 82. And the English and Irish courts have even held that a claim for damages from a collision by the negligence of a foreign ship creates a lien upon the whole value of the ship and freight, without deduction for seamen's wages, because, it has been said, the owner of the ship, being personally liable to the seamen for their wages, should not be permitted to deduct expenses for which he is liable, and thus benefit the wrongdoer at the expense of him to whom the wrong has been done. The Elin, and cases there cited.

There can be no doubt, therefore, that in the English admiralty courts the lien for damages by collision would take precedence of an earlier claim for supplies.

In this country, the principle, applied in the case of The Bold Buccleugh to a claim for damages by collision, that a maritime lien is created as soon as the claim comes into being, has long been held to be equally applicable to all claims, which can be enforced in admiralty against the ship, whether arising out of tort or of contract. General Ins. Co. *v.* Sherwood,[6] The Creole,[7] The Mayurka,[8] The Young Mechanic,[9] The Kiersage,[10] The Yankee Blade,[11] The Rock Island Bridge,[12] The China,[13] The Siren,[14] The Lottawanna,[15] The J. E. Rumbell, The Glide.[16]

Accordingly, in our own law, it is well established that a maritime lien or privilege, constituting a present right of property in the ship, *jus in re*, to be afterwards enforced in admiralty by process *in rem*, arises, not only from a collision and for the damages caused thereby; General Ins. Co. *v.* Sherwood, The Rock Island Bridge, The Siren and The China, above cited; but also for necessary supplies or repairs furnished to a vessel, whether under the general maritime law in a foreign port, or according to a local statute in her home port. The Young Mechanic, The Kiersage, The Lottawanna, The J. E. Rumbell, and The Glide, above cited.

By our law, then, a claim for damages by collision, and a claim for

[1] Brown. & Lush. 89, 91, 97; s. c. 2 Moore P. C. (N. S.) 1, 20.
[2] L. R. 2 Ad. & Ec. 330, 333.
[3] 6 P. D. 106, 113, 119.
[4] 9 App. Cas. 356, 360.
[5] P. D. 304, 320.
[6] 14 How. 351, 363.
[7] 2 Wall. Jr. 485, 518.
[8] 2 Curt. 72, 77.
[9] 2 Curt. 404.
[10] 2 Curt. 421.
[11] 19 How. 82, 89.
[12] 6 Wall. 213, 215.
[13] 7 Wall. 53, 68.
[14] 7 Wall. 152, 155.
[15] 21 Wall. 558, 579.
[16] 167 U. S. 606.

supplies, are both maritime liens. The question of their comparative rank is now for the first time presented to this court for adjudication; and it has been the subject of conflicting decisions in other courts of the United States, and especially in those held within the State of New York.

In The America (1853), Judge Hall, in the Northern District of New York, appears to have held liens for collisions and those for supplies to be of equal rank, without regard to the date when they attached to the ship. 16 Law Reporter, 264. A claim for damages by collision has been postponed to an earlier claim for supplies, by Judge Brown, in the Southern District of New York, in The Amos D. Carver;[1] but has been preferred to such a claim, by Judge Benedict, in the Eastern District of New York, and by Mr. Justice Blatchford on appeal, in The R. S. Carter & The John G. Stevens.[2] And, in an earlier case, a claim for collision had been allowed by Judge Benedict a like preference over a previous bottomry bond. The Pride of the Ocean.[3]

The preference due to the lien for damages from collision, over earlier claims founded on contract, has been carried so far as to allow the lien for damages to prevail over the claim of seamen for wages earned before the collision, by Judge Lowell, in the District of Massachusetts, in The Enterprise;[4] by Judge Nixon, in the District of New Jersey, in The Maria & Elizabeth;[5] by Judges Gresham and Jenkins, in the Circuit Court of Appeals for the Seventh Circuit, in The F. H. Stanwood;[6] and by Judge Swan, in the Eastern District of Michigan, in The Nettie Woodward.[7] The opposite view has been maintained, in the Southern District of New York, by Judge Choate, in The Orient,[8] as well as by Judge Brown, in The Amos D. Carver,[9] above cited; and in the Eastern District of New York, by Judge Benedict, in The Samuel J. Christian,[10] and in the Western District of Michigan, by Judge Severens, in The Daisy Day.[11]

The case at bar, however, presents no question of the comparative rank of seamen's wages, which may depend upon peculiar considerations, and which, according to the favorite saying of Lord Stowell and of Mr. Justice Story, are sacred liens; and, as long as a plank of the ship remains, the sailor is entitled, against all other persons, to the proceeds as a security for his wages. The Madonna D'Idra,[12] The Sydney Cove,[13] The Neptune, Sheppard *v.* Taylor,[14] Brown *v.* Lull,[15] Pitman *v.* Hooper;[16] Abbott on Shipping, pt. 4, c. 4, § 8; 3 Kent Com. 197. Yet see Norwich Co. *v.* Wright.[17]

Nor does this case present any question between successive liens for

[1] 35 Fed. R. 665.
[2] 38 Fed. R. 515, and 40 Fed. R. 331.
[3] 3 Fed. R. 162. To the same effect see The Aline, 1 W. Rob. 111. — Ed.
[4] 1 Low. 455.
[5] 12 Fed. R. 627.
[6] 9 U. S. App. 15.
[7] 50 Fed. R. 224.
[8] 10 Benedict, 620.
[9] 35 Fed. R. 665.
[10] 16 Fed. R. 796.
[11] 40 Fed. R. 538.
[12] 1 Dod. 37, 40.
[13] 2 Dod. 11, 13.
[14] 5 Pet. 675, 710.
[15] 2 Sumn. 443, 452.
[16] 3 Sumn. 50, 58.
[17] 13 Wall. 104, 122.

repairs or supplies, the general rule as to which is that they are to be paid in inverse order, because it is for the benefit of all the interests in the ship that she should be kept in condition to be navigated. Abbott on Shipping, pt. 2, c. 3, § 32; The St. Jago de Cuba, The J. E. Rumbell, The Fanny.[1]

Nor does it present a question of precedence between two claims for distinct and successive collisions, as to which there has been a difference of opinion in the Southern District of New York; Judge Choate, in the District Court, giving the preference to the later claim, upon the ground that the interest created in the vessel by the first collision was subject, like all other proprietary interests in her, to the ordinary marine perils, including the second collision; and Mr. Justice Blatchford, in the Circuit Court, reversing the decree, because the vessel libelled had not been benefited, but had been injured, by the second collision. The Frank G. Fowler.[2]

Nor yet does it present the question whether a lien for repairs made after the collision, so far as they increase the value of the vessel, may be preferred to the lien for the damages by the collision, in accordance with the English cases of The Aline[3] and The Bold Buccleugh.

But the question we have to deal with is whether the lien for damages by the collision is to be preferred to the lien for supplies furnished before the collision.

The foundation of the rule that collision gives to the party injured a *jus in re* in the offending ship is the principle of the maritime law that the ship, by whomsoever owned or navigated, is considered as herself the wrongdoer, liable for the tort, and subject to a maritime lien for the damages. This principle, as has been observed by careful text writers on both sides of the Atlantic, has been more clearly established, and more fully carried out, in this country than in England. Henry on Admiralty, § 75, note; Marsden on Collisions (3d ed.), 93.

The act of Congress of December 22, 1807, c. 5, laid an embargo on all ships and vessels, within the limits and jurisdiction of the United States, bound to any foreign port or place; and the supplemental act of January 9, 1808, § 3, provided that any ship or vessel proceeding, contrary to the provisions of the act, to a foreign port or place, should be forfeited. 2 Stat. 451, 453. Upon the trial of a libel in the Circuit Court of the United States to enforce the forfeiture of a vessel under those acts, Chief Justice Marshall said: "This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner." The Little Charles.[4]

Upon a libel of information for the condemnation of a piratical vessel, under the act of Congress of March 3, 1819, c. 77, continued in force by the act of May 15, 1820, c. 113 (3 Stat. 510, 600), Mr. Justice

[1] 2 Low. 508, 510.
[2] 8 Fed. R. 331, and 17 Fed. R. 653.
[3] 1 W. Rob. 111.
[4] 1 Brock. 347, 354.

Story, delivering the opinion of this court, and referring to seizures in revenue causes, said: "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the admiralty." The Palmyra.[1]

In The Malek Adhel,[2] Mr. Justice Story, in delivering judgment, stated the principle more fully, saying: "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party." And, after quoting the passages above cited from the opinions in The Little Charles and in The Palmyra, he added: "The ship is also, by the general maritime law, held responsible for the torts and misconduct of the master and crew thereof, whether arising from negligence or a wilful disregard of duty; as, for example, in cases of collision and other wrongs done upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, upon the general policy of that law, which looks to the instrument itself, used as the means of the mischief, as the best and surest pledge for the compensation and indemnity to the injured party."

In The China,[3] by the application of the same principle, a ship was held liable for damages by collision through the negligence of a pilot whom she had been compelled by law to take on board; and Mr. Justice Swayne, in delivering judgment, said: "The maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors." "According to the admiralty law, the collision impresses upon the wrongdoing vessel a maritime lien. This the vessel carries with it into whosoever hands it may come. It is inchoate at the moment of the wrong, and must be perfected by subsequent proceedings."

The same principle has been recognized in other cases. The John Fraser,[4] The Merrimac,[5] The Clarita & The Clara,[6] Ralli *v.* Troop.[7]

That the maritime lien upon a vessel, for damages caused by her

[1] 12 Wheat. 1, 14.
[2] 2 How. 210, 233, 234.
[3] 7 Wall. 53, 68.
[4] 21 How. 184, 194.
[5] 14 Wall. 199.
[6] 23 Wall. 1.
[7] 157 U. S. 386, 402, 403.

fault to another vessel, takes precedence of a maritime lien for supplies previously furnished to the offending vessel, is a reasonable inference, if not a necessary conclusion, from the decisions of this court, above referred to, the effect of which may be summed up as follows: —

The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision. The offending ship is considered as herself the wrongdoer, and as herself bound to make compensation for the wrong done. The owner of the injured vessel is entitled to proceed *in rem* against the offender, without regard to the question who may be her owners, or to the division, the nature, or the extent of their interests in her. With the relations of the owners of those interests, as among themselves, the owner of the injured vessel has no concern. All the interests, existing at the time of the collision, in the offending vessel, whether by way of part-ownership, of mortgage, of bottomry bond, or of other maritime lien for repairs or supplies, arising out of contract with the owners or agents of the vessel, are parts of the vessel herself, and as such are bound by and responsible for her wrongful acts. Any one who had furnished necessary supplies to the vessel before the collision, and had thereby acquired, under our law, a maritime lien or privilege in the vessel herself, was, as was said in The Bold Buccleugh, before cited, of the holder of an earlier bottomry bond, under the law of England, "so to speak, a part-owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury done, without reference to his claim."

We are then brought to the question, whether a claim by a tow against her tug, for damages from coming into collision with a third vessel because of negligent towage, is a claim in tort, standing upon the same ground as a claim of the third vessel for damages against the tug.

Upon this question, again, there have been conflicting opinions in the District Courts of the United States.

On the one hand, it has been held by Judge Benedict, in the Eastern District of New York, in several cases, including the case at bar, that a claim by a tow against her tug for damages caused by the negligence of the latter is founded on a voluntary contract between the owner of the tow and the owner of the tug, and should be postponed to a claim against the tug for necessary supplies or repairs furnished before the contract of towage was made. The Samuel J. Christian,[1] The John G. Stevens,[2] The Glen Iris.[3] The same conclusion has been reached by Judge Brown, in the Southern District of New York, proceeding upon the hypothesis that the security for the maritime obligation created by the contract of towage is subject to all liens already existing upon the vessel, and upon the theory that, by the general mari-

[1] 16 Fed. R. 796. [2] 58 Fed. R. 792. [3] 78 Fed. R. 511.

time law, liens *ex delicto*, including all liens for damage by collision, are inferior in the rank of privilege to liens *ex contractu*. The Grapeshot,[1] The Young America,[2] The Gratitude.[3]

On the other hand, the claim by a tow against her tug for damages caused by negligent towage has been held to be founded in tort, arising out of the duty imposed by law, and independent of any contract made, or consideration paid or to be paid, for the towage, by Mr. Justice Blatchford, when District Judge, in The Brooklyn,[4] and in The Deer;[5] by Judge Lowell, in The Arturo;[6] and by Judge Swing, in the Southern District of Ohio, in The Liberty.[7] In The Arturo, Judge Lowell said: "These cases of tow against tug are, in form and fact, very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet. There is, therefore, an analogy between the two classes of cases so close that the tow may sue, in one proceeding for damage, her own tug and a strange vessel with which there has been a collision." 6 Fed. R. 312. And it has accordingly been held, by Judge Nixon, and by Judge Severens, that such a claim by a tow against her tug is entitled to priority of payment over liens on the tug for previous repairs or supplies. The M. Vandercook,[8] The Daisy Day.[9]

The decisions of this court are in accordance with the latter view, and are inconsistent with any other.

It was argued that the liability of a tug for the loss of her tow was analogous to the liability of a common carrier for the loss of the goods carried. But even an action by a passenger, or by an owner of goods, against a carrier, for neglect to carry and deliver in safety, is an action for the breach of a duty imposed by the law, independently of contract or of consideration, and is therefore founded in tort. Philadelphia & Reading Railroad *v.* Derby,[10] Atlantic & Pacific Railroad *v.* Laird.[11]

In Norwich Co. *v.* Wright,[12] Mr. Justice Bradley, referring to Maclachlan on Shipping (1st ed.), 598, laid down these general propositions: "Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, etc. But they stand on an equality with regard to each other if they arise from the same cause." Although these propositions went beyond what was required for the decision of that case, which was one of a collision between two vessels, owing to the fault of one of them, causing the loss of her cargo, as well as of the other vessel and her cargo, yet the very point adjudged was that the lien on the offending vessel for the loss of her own cargo was a lien for reparation of damage, and therefore was upon an equality with the lien upon her for the loss of the other vessel and her cargo.

This court, more than once, has directly affirmed that a suit by the

[1] 22 Fed. R. 123. [2] 30 Fed. R. 789. [3] 42 Fed. R. 299.
[4] 2 Ben. 547. [5] 4 Ben. 352. [6] 6 Fed. R. 308.
[7] 7 Fed. R. 226, 230. [8] 24 Fed. R. 472, 478. [9] 40 Fed. R. 538.
[10] 14 How. 468, 485. [11] 164 U. S. 393. [12] 13 Wall. 104, 122.

owner of a tow against her tug, to recover for an injury to the tow by negligence on the part of the tug, is a suit *ex delicto* and not *ex contractu*.

In The Quickstep,[1] a libel by the owner of a tow against her tug set forth a contract with the tug, for a stipulated price, to tow directly, and a deviation and unreasonable delay in its performance, and that the tug negligently backed into the tow and injured her. An objection that the libel could not be maintained, because the contract alleged was not proved, was overruled by this court. Mr. Justice Davis, in delivering judgment, said: "The libel was not filed to recover damages for the breach of a contract, as is contended, but to obtain compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libellant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep."

Again, in The Syracuse,[2] which was a libel by a tug against her tow for negligently bringing her into collision with a vessel at anchor, the court, speaking by the same justice, said: "It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that by special agreement the canal-boat was being towed at her own risk, nevertheless the steamer is liable, if, through the negligence of those in charge of her, the canal-boat suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require, on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences." And see The J. P. Donaldson.[3]

The essential likeness between the ordinary case of a collision between two ships, and the liability of a tug to her tow for damages caused to the latter by a collision with a third vessel, is exemplified by the familiar practice in admiralty (followed in the very proceeding in which the question now before us arose), which allows the owner of a tow, injured by a collision caused by the conduct of her tug and of another vessel, to sue both in one libel, and to recover against either or both, according to the proof at the hearing. The Alabama & The Gamecock,[4] The Atlas,[5] The L. P. Dayton,[6] The R. S. Carter & The John G. Stevens.[7]

The result of applying to the case at bar the principles of the maritime law of the United States, as heretofore declared by this court, is that the lien for the damages occasioned by negligent towage must be preferred to the previous lien for supplies.

In the argument of this case, copious references were made to foreign codes and commentaries, which we have not thought it important to consider, because they differ among themselves as to the compara-

[1] 9 Wall. 665, 670. [2] 12 Wall. 167, 171. [3] 167 U. S. 599, 603.
[4] 92 U. S. 695. [5] 93 U. S. 302. [6] 120 U. S. 337.
[7] 38 Fed. R. 517, and 40 Fed. R. 331.

tive rank of various maritime liens, and because the general maritime law is in force in this country, or in any other, so far only as administered in its courts, or adopted by its own laws and usages. The Lottawanna,[1] The Belgenland,[2] Liverpool Steam Co. *v.* Phenix Ins. Co.,[3] Ralli *v.* Troop.[4]

Question certified answered in the affirmative.[5]

THE BRIG OMER.

IN THE UNITED STATES DISTRICT COURT, EAST DISTRICT OF VIRGINIA, FEBRUARY, 1875.

[*Reported in* 2 *Hughes*, 96.]

THE vessel is libelled by Staples, Peed & Co., of Norfolk, for supplies, etc., disbursed to her to the amount of $4012.80, to enable her to complete her voyage from Baltimore to Demerara, after putting in at Norfolk.

The house of Loud, Claridge & Co., of Baltimore, come in by petition, claiming to be paid $1128.09; the balance of an account due them for disbursements in Baltimore, in part for fitting her out for said voyage.

The Omer sailed in ballast from Baltimore to Norfolk, where she received from Peters & Reed a cargo for Demerara.

After taking on her cargo here, the brig set sail for her destination. But she encountered bad weather when several days out from the Virginia capes, fell into distress, and was obliged to put back into Norfolk. She here was obliged to discharge her cargo, and the libellants, Staples, Peed & Co., were employed by her master, with knowledge of her owners and of Loud, Claridge & Co., to repair and refit and supply her for the renewal and completion of her voyage. The libellants took possession of her for that purpose, which they held until the libel was brought. The cost of the repairs and disbursements made by Staples, Peed & Co., under the eye and approval of the master, was $4012.80, and are conceded to be just.[6]

HUGHES, J. The vessel has, by consent, been sold by the marshal for $3100.

[1] 21 Wall. 558, 572. [2] 114 U. S. 355, 369.
[3] 129 U. S. 397, 444. [4] 157 U. S. 386, 407.
[5] The America, Fed. Cas. No. 288, p. 613; The Freestone, 2 Bond, 234; The Pride of the Ocean, 7 Fed. R. 247; The M. Vandercook, 24 Fed. R. 472 (negligent towage); The R. S. Carter, 38 Fed. R. 515, 40 Fed. R. 331; The Daisy Day, 40 Fed. R. 538 (negligent towage) *Accord*.

The Grapeshot, 22 Fed. R. 123 (negligent towage); The Young America, 30 Fed. R. 789 (negligent towage); The Amos D. Carver, 35 Fed. R. 665; The Gratitude, 42 Fed. R. 299 (negligent towage); The Glen Iris, 78 Fed. R. 511 (negligent towage) *Contra*. — ED.

[6] The statement of facts and the opinion are slightly abridged. — ED.

The petitioners claim to share as material-men *pro rata* in the fund to be distributed, with Staples, Peed & Co.

It is insisted by the libellants that their claim is superior to that of Loud, Claridge & Co., because they contributed "most immediately" to the completion of the voyage.

It cannot be questioned that, as a general rule, this latter principle is a good one. It is certainly good in this case. They had possession of the vessel on which they had disbursed the amount for which they libel her. By right of that possession and of the primary lien which they had for the disbursement, they could have enforced the payment to themselves of their claim, before she could have been released under the bottomry bond for which advertisement was made. They brought their libel to enforce the lien which they held by virtue of their possession, and by virtue of having contributed *last* to fitting the vessel for the voyage. Even if Loud, Claridge & Co. had taken a bottomry bond for their claim when the vessel was in Baltimore, yet Staples, Peed & Co.'s lien for their subsequent disbursements would have been good against such a bond. See The Jerusalem.[1] The case of The Paragon [2] is to the same effect, Judge Ware expressly holding that among material-men the one contributing "most immediately," that is to say, at the latest stage of the voyage, to enable the vessel to complete it, has preference over those who contributed at an earlier stage of the voyage.

Staples, Peed & Co. may have a decree for the whole fund left after satisfying costs and seamen's wages.[3]

[1] 2 Gall. 345.

[2] 1 Ware, 326.

[3] The Paragon, 1 Ware, 322, 336 (*semble*); The America, Fed. Cas. No. 288, p. 613 (*semble*); The Fanny, 2 Low. 508; The Melita, 3 Hughes, 494, 501; The E. A. Barnard, 2 Fed. R. 712, 719 (*semble*); The Frank G. Fowler, 8 Fed. R. 331, 333 (*semble*); The Rapid Transit, 17 Fed. R. 322, 334, 335; The J. W. Tucker, 20 Fed. R. 129, 132 *Accord*.

The Augustine Kobbe, 39 Fed. R. 559 *Contra*.

But supplies for the outfit of the ship for the same voyage, although furnished at different times, rank *pari passu*. The William F. Safford, Lush. 69; The Superior, Newb. 176; The Fanny, 2 Low. 508; The E. A. Barnard, 2 Fed. R. 712; The Frank G. Fowler, 8 Fed. R. 331; The J. W. Tucker, 20 Fed. R. 129.

The same is true of claims for repairs growing out of the same necessity. The Desdemona, Swab. 158.

Ordinary supplies and repairs furnished during the same season of lake navigation, although at different dates, are treated, for the purpose of ranking, as creating concurrent liens. The Buckeye State, Newb. 111; The Superior, Newb. 176, 185, 186; The City of Tawas, 3 Fed. R. 170; The Delos De Wolf, 3 Fed. R. 236; The Athenian, 3 Fed. R. 248; The Arcturus, 8 Fed. R. 743, 746; The J. W. Tucker, 20 Fed. R. 129.

Liens for supplies to harbor boats in harbors open the year through hold their rank for forty days, and those arising within that interval are treated as contemporaneous. The Proceeds of The Gratitude, 42 Fed. R. 299; The Samuel Morris, 63 Fed. R. 1014; The Glen Iris, 78 Fed. R. 511; The Restless, 78 Fed. R. 927. But see The Grapeshot, 21 Fed. R. 123; The Arctic, 22 Fed. R. 126.

The lien for repairs and supplies outranks a prior bottomry bond: The Jerusalem, 2 Gall. 345; The Aina, 40 Fed. R. 269; or a prior lien for insurance premiums: The Daisy Day, 40 Fed. R. 538; or a prior mortgage: The Granite State, 1 Spr. 277; The Alice Getty, 2 Flip. 18; The Norfolk, 2 Hughes, 123; The George Creek, 3 Hughes, 584; The Guiding Star, 9 Fed. R. 521; The Charlotte Vanderbilt, 19 Fed. R. 219.

Services on a footing with repairs and supplies. — The following claims have been treated as belonging in the same class of liens as those for repairs and supplies. (1) Hospital

THE SARACEN.

In the Privy Council, February 19, 1847.

[*Reported in* 6 *Moore, Privy Council Cases*, 56.]

This was an appeal from a judgment by Right Hon. Dr. Lushington, in the High Court of Admiralty.[1]

Their Lordships reserved judgment, which was now delivered by

Lord Langdale.[2] This is a case of collision between The Saracen and The Diligent, in which The Diligent and her cargo were lost.

On the 25th of February, 1845, an action for damage was commenced in the High Court of Admiralty, against the owners of The Saracen, by the respondents, the owners of The Diligent, and the owners of part of her cargo.

A warrant to arrest The Saracen (a foreign ship) was issued, and on the 19th of March was returned duly executed.

On the 12th of March another action against the owners of The Saracen was commenced, by the owners of other parts of the cargo of The Diligent; but this action was afterward abandoned, and no effective proceedings were had therein.

The action of the respondents was duly prosecuted, and, on the

charges for treatment of seamen. The Aina, 40 Fed. R. 269. (2) Surveys to ascertain condition of ship. The Aina, 40 Fed. R. 269. (3) Cabling condition to owners. The Aina, 40 Fed. R. 269. (4) Consulage. The Aina, 40 Fed. R. 269. (5) Services incident to entry of ship at custom-house. The Aina, 40 Fed. R. 269. (6) Towage. The Sea Witch, 3 Woods, 75; The City of Tawas, 3 Fed. R. 170; The Athenian, 3 Fed. R. 248; The J. W. Tucker, 20 Fed. R. 129, 135. But see The Mystic, 30 Fed. R. 72. (7) Pilotage. The Sea Witch, 3 Woods, 75; The Wexford, 7 Fed. R. 674.

Miscellaneous cases of ranking of liens. — A general average lien is preferred to a prior bottomry bond. The Dora, 34 Fed. R. 343. See also The Dolphin, 1 Flip. 580.

Pilotage, light dues, and dock dues outrank prior bottomry bond. The St. Lawrence, 5 Prob. Div. 250; The Irma, 6 Ben. 1 (as to pilotage); *Ex parte* Lewis, 2 Gall. 483 (as to wharfage); The Angela Maria, 35 Fed. R. 430.

In The Olga, 32 Fed. R. 329, and The Angela Maria, 35 Fed. R. 430, the liens were ranked as follows: Costs of libellant, port dues, pilotage and compulsory towage, provisions for support of crew during discharge of cargo, wages of seamen, voluntary towage, stevedore's services in unloading, and other liens arising since the arrival of the ship in port; bottomry bonds, master's lien for wages under Italian law.

A prior mortgage is postponed to all maritime liens; *e. g.*: Bottomry. The James L. Pendergast, 30 Fed. R. 717. Shipper's lien. The E. M. McChesney, 8 Ben. 150; The Hendrik Hudson, Fed. Cas. No. 6358; The Arbusta, Fed. Cas. No. 7689. Towage. The Mystic, 30 Fed. R. 73. Wages. The Live Oak, 30 Fed. R. 78. See also The Emma, Fed. Cas. No. 18,218; The Melita, 3 Hughes, 494.

Lien of cargo owner for proceeds of cargo sold to save ship outranks a prior lien for supplies. The Grapeshot, 2 Ben. 527.

Lien for freight is preferred to a *respondentia* bond. Cargo ex Galam, Br. & L. 167.

Shipwright's possessory lien. — In The Gustaf, Lush. 506, and The Immacolata Concezione, 9 Prob. Div. 37, the possessory lien of the shipwright was postponed to antecedent maritime liens, but preferred to subsequent liens. — Ed.

[1] Reported in 2 W. Rob. 451. — Ed.

[2] The statement of facts, the arguments, and a part of the judgment are omitted. — Ed.

6th of May, 1845, an interlocutory decree, having the force of a definitive sentence in writing, was made therein; and, by such decree, the court pronounced for the damage proceeded for in that cause; condemned the ship and freight therein and in costs; referred the damages, together with the accounts, to the registrar and merchants; and decreed a commission for appraisement and sale of The Saracen, her tackle, apparel, and furniture.

On the same 6th of May, a new action for damage was commenced against the owners of The Saracen, by the appellants, owners of part of the cargo of The Diligent.

The proceeds arising from the sale of The Saracen were brought into the registry; and the appellants, whose action was commenced on the 6th of May, claimed to be entitled to participate in the proceeds of the ship Saracen, remaining in the registry. After a full discussion, the judge, on the 25th of March, 1846, rejected the claim.

The appeal is from that decision; and, in support of the appeal, it was argued: —

First. That the High Court of Admiralty has an equitable jurisdiction, in the exercise of which, in a case like the present, it ought to proceed in the same manner as a court of equity would proceed in the administration of assets, or in the distribution of any common fund, which is to be distributed *pro rata* among several persons interested in or having claims upon it.

Second. That the statute 53 Geo. III. c. 159, confers on the court a jurisdiction which ought to have been exercised for the benefit of the appellants. And,

Third. That the agreement between the parties precluded the respondents from claiming the whole fund for themselves.

In the course of the argument we expressed our opinion, that no effect can, on this occasion, be given to the alleged agreement.

First. With respect to the equitable jurisdiction, it is true that, in the decisions of cases properly within the jurisdiction of the Court of Admiralty, equitable considerations ought to have their weight; but it does not thence follow that the Court of Admiralty has jurisdiction to do all that courts of equity may do, in suits instituted by persons suing, either for themselves, or on behalf of themselves and others, for the administration of assets or the distribution of a common fund, in which several persons are interested, or upon which they have claims. No instance of the exercise of any such jurisdiction has been cited; and, in the absence of any authority, it does not appear to us that there is any such jurisdiction.

It was suggested that the bail bond, required on payment of money to a claimant for damage, shows that other claims than those upon which the payment is made have to be provided for; and, perhaps, it may be so. But there may be claims paramount, such as claims for wages; and, at the time when the form of the bond was settled, the claims of material-men, etc., may have been considered to require attention. The bail bond may, therefore, be well understood as provid-

ing for paramount claims. There seems to be no reason to conclude that the bond is applicable to claims merely coördinate with those of the party who obtained the sentence. Moreover, as no instance has been shown of the exercise of any such jurisdiction, it seems unreasonable to infer that there is such jurisdiction because such a bond is taken.

We are of opinion that the sentence of the 6th of May, 1845, is to be considered as a definitive sentence in favor of the respondents; and that the appellants, whose suit was not commenced till after the sentence was pronounced, are not entitled to participate in the proceeds of the ship in common with the respondents, by whose diligence, and at whose risk and expense, the damage had been pronounced for, the ship condemned, and the proceeds realized.[1]

We shall, therefore, report to her Majesty that, in our opinion, the appeal ought to be dismissed, and the sentence affirmed, with costs.

THE ARCTIC.

In the United States District Court, Northern District of New York, July 18, 1896.

[*Reported in* 75 *Federal Reporter*, 601.]

This was a libel *in rem* by Cornwall Bros. and Walter Fox for materials furnished to the steam barge Arctic and for money advanced by libellants upon the order of her master to pay the wages of the crew of the Arctic while lying at her home port, Alexandria Bay, New York, within the Northern District of New York. The answers dispute so much of the claim of Cornwall Bros. as relates to the payment of the wages of the crew — in all $61.38 — and the entire claim of Fox, $78.50. The respondent insists that the said sums were advanced upon the credit of the owner and master and not upon the credit of the barge, which was at her home port, and that the libellants acquired no lien therefor upon the barge.

[1] The Clara, Swab. 1; The William F. Safford, Lush. 69; The Markland, L. R. 3 A. & E. 340 (*semble*); The America, 1 Fed. Cas. No. 288, p. 65 (*semble*) *Accord.*

The Fanny, 2 Low. 508; The Battler, 67 Fed. R. 251 (*semble*) *Contra.*

Compare Woodworth *v.* Ins. Co., 5 Wall. 87; The Battler, 67 Fed. R. 251.

But priority of suit will give no advantage as among claimants of equal rank, who begin their proceedings before decree obtained. The Desdemona, 1 Sw. 158; The America, 1 Fed. Cas. No. 288; The Fanny, 2 Low. 508; The Arcturus, 18 Fed. R. 743; The J. W. Tucker, 20 Fed. R. 129; The Lady Boone, 21 Fed. R. 731; The Julia, 57 Fed. R. 233. The decisions to the contrary in The Triumph, 2 Blatchf. 433 n.; The Globe, 2 Blatchf. 427; The Adele, 1 Ben. 309; The Pathfinder, Fed. Cas. No. 10,797, are no longer followed.

Costs of libellant initiating the suit. — If, however, a vessel is sold and the proceeds are to be divided among several claimants, the libellant at whose suit the sale was brought about is entitled to his costs in preference to the claims of other lienholders. The Panthea, 1 Asp. Mar. Cas. 133; The John T. Moore, 3 Woods, 61; The Kate Hinchman, 6 Biss. 367; The Fanny, 2 Low. 508; The Delos De Wolf, 3 Fed. R. 236; The Olga, 32 Fed. R. 329. — Ed.

Anson Harder, for libellants.

William J. Kernan, for respondent.

COXE, District Judge. The facts are undisputed. The sums in controversy were advanced to pay mariners' wages upon the order of the master and credit of the barge. In the case of FOX the engineer was about to file a libel for his wages when FOX advanced the necessary sum, thus enabling the barge to proceed on her voyage. Mariners have always been regarded as under the special protection of the court. They are given a lien of the highest character for their wages by the law maritime, — a lien which takes precedence of nearly every other. The law seems to be well settled that, where money is advanced in circumstances like the present, the lender is subrogated to the rights of the lienholder and acquires a privilege of equal rank with the one which secured the debt which his money has adjusted.[1] The Guiding Star,[2] The Thomas Sherlock,[3] The New Idea,[4] The Dora,[5] The Emily Souder, The William M. Hoag. It follows that the libellants are entitled to decrees for the amount of their respective claims with interest and costs.

THE PRISCILLA.

IN THE HIGH COURT OF ADMIRALTY, DECEMBER 2, 1859.

[*Reported in Lushington*, 1.]

BOTTOMRY. In September, 1858, the Priscilla, then lying in Constantinople, was chartered for a voyage to Odessa and thence to England; whilst lying at anchor there she was run into by a vessel called The African, and to repair the damages a bond (bond No. 1) was given on the ship and the freight to grow due on the chartered voyage. This bond was dated 12th October, 1858, and was for 500*l.* and interest. The Priscilla then sailed to Odessa and took in a cargo of peas for England. Shortly after leaving Odessa she was forced to put back damaged by a gale, and a bond (bond No. 2) for 120*l.* was, on the 11th December, 1858, given on ship and cargo. The ship again sailed, and in the course of the voyage was obliged to be put into Syra to be repaired, and a bond (bond No. 3) for 261*l.*, 1s., also on ship and cargo was there given, dated 12th January, 1859. On final arrival in this country actions were brought on the several

[1] The William F. Safford, Lush. 69; The St. Lawrence, 5 Prob. Div. 250; The A. R. Dunlap, 1 Low. 350, 360, 361; The Tangier, 2 Low. 7; The J. A. Brown, 2 Low. 464; The General Tompkins, 9 Fed. R. 620; The Guiding Star, 18 Fed. R. 263; The Isaac May, 21 Fed. R. 687; The Thomas Sherlock, 22 Fed. R. 253; The Dora, 34 Fed. R. 348 *Accord.* — ED.

[2] 9 Fed. 521, affirmed 18 Fed. 263.

[3] 22 Fed. 253.

[4] 60 Fed. 294.

[5] 34 Fed. 349.

bonds, the ship was sold, the cargo (value 600*l.*) was released on bail, and the freight, 108*l.*, brought into court. Bond No. 1 was partly paid by damages received from the owners of The African. Actions of wages and pilotage were also brought, after payment of which there remained as proceeds of ship and freight the sum of 410*l.* There then remained the following claims on the several bonds: —

Bond No. 1 (action against proceeds and freight)	£387	12	11
Bond No. 2 (action against ship, freight, and cargo)	120	0	0
Bond No. 3 (action against ship and cargo)	261	1	0
Total,	£766	13	11

Dr. Lushington.[1] A motion is made on behalf of the holder of bond No. 3, to be paid out of ship and freight. This is opposed on behalf of the holder of bond No. 1, who says that bond No. 3 should be paid out of cargo; and the motion is in turn supported by the owners of the cargo, who are clearly the parties interested.

The demands are, in round numbers, for the three bonds, 768*l.* The fund available from the proceeds of the ship and freight is 410*l.* The deficiency, therefore, if the cargo is not made at all liable, will be 358*l.* The sum due on the last bond (bond No. 3) is 261*l.* Assuming that it is paid out of the ship and freight, there will remain out of the ship and freight 149*l.* applicable to the discharge of bond No. 2. Bond No. 2 is for 120*l.*, and, therefore, for bond No. 1 there will remain only 29*l.*; in fact, nothing at all, for the costs will have amounted to a very much larger sum than that small balance; bond No. 1 will be unpaid.

The effect then of granting this motion, if a similar course is taken with bond No. 2, will therefore be that nothing will be left for the satisfaction of bond No. 1, and that the cargo will be wholly exonerated from any payment to any of the bonds. The substantial question, then, is, whether the cargo ought not to be made to discharge the two last mentioned bonds, so as to leave a fund for the payment of the first executed bond.

Now the cargo was not laden until November, 1858, after the execution of the first executed bond, and previous to the other two. This circumstance would be perfectly fatal to the holders of bond No. 1 asking to be paid out of the cargo, which was not hypothecated to them; but they make no such demand; they only ask that the cargo shall be made applicable to the payment of bond No. 3, which does bind the cargo as well as the ship. Several cases were cited in argument, to which I will now shortly advert. The first is The Dowthorpe.[2] That was a most complicated case, raising many questions, and some of them of difficulty; but upon a consideration of all that is reported, it does not appear to me to have any stringent bearing on the present question. The dispute there was as to the payment of a bottomry bond on ship and freight, and certain other charges, as

[1] The arguments of counsel and a small portion of the judgment are omitted. — Ed.
[2] 2 Not. of Cas. 264.

wages and pilotage; there was no reference whatever to any demands which could affect the cargo. The case is only useful for the present purpose as containing a report of The Prince Regent.[1] The case of The Constancia was also a most peculiar one. There were three bonds: first, on ship alone; second, on cargo alone; third, on ship alone. The case was brought on by motion only. The decision in that case cannot affect the present. If there were doubtful questions, they were whether the court was right in giving preference to the first bond over the second, because the ship was not mentioned in the second bond; and whether the court was right in holding the ship and freight tacitly hypothecated in the second bond: both very difficult questions, but not *hujus loci*. I see no reason to depart from what I said in that case, but I cannot apply it to the present. The Trident[2] was also cited. The main question in that case was wholly different from the present; it was whether a bond granted at Plymouth on a vessel belonging to an owner resident in Scotland was valid; but certain observations incidentally falling from the court are reported at page 35, which have a bearing upon the present question. These observations did not apply to the main question, but had reference to an argument that other bonds might be prejudiced. It may be that in declaring the general principle by which the court would be guided, namely, that of marshalling the assets where I could lawfully do so, I illustrated my opinion without sufficient accuracy. I did not bear in mind the case of The Prince Regent. I am of opinion that the principle of marshalling the assets ought to prevail in this court whenever it can be carried into effect without violating other rules entitled to preferential observance.[3] But the question now before me is, whether the present case falls within this principle, and the court ought to compel the holders of the last bond to resort to the cargo. If the holders of the last bond, which is upon ship and cargo, have the same and equal right to proceed against the cargo as against the ship and freight, I should be disposed to hold that in equity they should be compelled to proceed against both, and in aid of the other bonds to resort in the first instance to the cargo. But I apprehend that, upon the authority of The Prince Regent, and the reasoning of Lord Stowell's judgment in The Gratitudine, the holders of the last bond have no such right against the cargo; they cannot make the cargo answerable until the ship and freight have been exhausted. The owners of the cargo have a perfect right to avail themselves of the principle of that decision. They have a right to say that by law the cargo, though legally hypothecated, cannot be touched till the ship and freight have been exhausted. They are strangers to all previous bonds on ship and freight. The result is, that the holders

[1] Id. 272. [2] 1 W. Rob. 29.

[3] The Prince Regent, 2 W. Rob. 83 (cited); The Trident, 1 W. Rob. 29, 35 (*semble*); The Dowthorpe, 2 W. Rob. 73 (*semble*); The Mary Ann, 9 Jur. 94 (*semble*); The Sailor Prince, 1 Ben. 461, 466 (*semble*); The Orient, 10 Ben. 620, 624 (*semble*); The Adolph, 7 Fed. R. 501, 504 (*semble*); The Olivia A. Carrigan, 7 Fed. R. 674; The Amos D. Carver, 35 Fed. R. 665, 669 (*semble*) *Accord.* — Ed.

of the last bond, who are entitled to be paid in priority, are thrown on ship and freight exclusively. This motion must be granted.[1]

THE EDWARD OLIVER.

In the High Court of Admiralty, June 20, 1867.

[*Reported in Law Reports, 1 Admiralty, 379.*]

Dr. Lushington.[2] This was a motion on behalf of the master of the Edward Oliver, for payment of his wages and disbursements out of the proceeds of the ship and freight, under the following circumstances: —

Four causes had been instituted against the Edward Oliver: one by the master John Lucas Follett, for wages and disbursements; two by bottomry bondholders, the bonds in each case being upon ship, freight, and cargo, and stating the master to be personally liable; and the fourth for towage. The owners of the ship had not appeared: the owners of the cargo had appeared and given bail for the payment of the bottomry bonds. Freight had been paid into court and the vessel had been sold. The court, reserving all question of priorities, had pronounced in favor of the master's claim; and with respect to the bonds had pronounced in favor of their validity, and had condemned the proceeds of the vessel and freight in the amount and in costs, and had condemned the owners of the cargo and their bail in the balance, if any, due on the bonds, after the proceeds of ship and freight had been exhausted, and in costs. The amounts of the claims were as follows: —

Cause 3689, master's claim . . .	£1281 9 4
Cause 3709, bottomry	1162 6 2
Cause 3744, bottomry	3486 18 6
Cause 3972, towage	

exclusive of costs in each cause.

To meet these charges there were the following funds: —

Vessel, gross proceeds	£2310 0 0
Freight paid into court	350 0 0
	2660 0 5
Deduct marshal's fees	207 13 4
Balance in registry	£2452 6 8

[1] A point not observed in this case is whether the last bond is entitled to absolute priority over bonds earlier in date. For if not, and only entitled to priority when, if postponed, it could not be satisfied, the last bond in the present case had no good claim of priority; and by concurrent application for payment of the previous bonds, the above motion might have been resisted upon the equitable principle, without infringing the rule laid down in the judgment.

[2] The arguments of counsel are omitted. — Ed.

It appears that the amount of proceeds of ship and freight is insufficient not only to pay both the master's claim and the bonds, but even the bonds alone. The bondholders, however, are secure, because they have the bail of the owners of cargo to fall back upon, but the master's lien for wages and disbursements extends only to ship and freight. The motion to the court is to pronounce the master entitled to priority of payment out of the proceeds of ship and freight now in the registry. If this motion is refused the ship and freight will be exhausted in payment of the bonds (and indeed will have to be supplemented by the cargo), and the master, who has no claim against the cargo, will lose his remedy *in rem* altogether. If, on the other hand, it is granted, the result will be that the master will first be paid out of ship and freight; then the remainder of the proceeds of ship and freight will be exhausted in part payment of the bonds, and the balance will be paid by the owners of cargo. This balance, as compared with the balance in the other alternative, will of course be greater by the exact sum paid out of the proceeds of ship and freight to the master. In either case the bonds would be paid in full. The contention is solely between the master and owners of cargo.

The owners of the cargo contend that the rule of the court — established in the case of The Jonathan Goodhue [1] — that the holder of a bottomry bond, upon which the master has made himself personally liable, is paid out of the proceeds of ship and freight before the master,[2] is an *absolute* rule. In support of this contention, reference was made to the case of The Priscilla.

In that case there were two bonds, one upon ship and freight only, and the other, of posterior date, on ship, freight, and *cargo;* and the rule that a posterior bond takes precedence over an earlier bond was enforced, although the enforcement of the rule was not necessary for the protection of the posterior bond, and resulted in the earlier bond being left unpaid. For the effect of precedence being given to the posterior bond, coupled with the rule that ship and freight must be exhausted before cargo is resorted to in payment of bottomry bonds, was that the whole of the proceeds of ship and freight were exhausted in payment of the posterior bond, and nothing was left to satisfy the

[1] 1 Swa. 524.

[2] The William, Swab. 346; The Salacia, Lush. 545 (*semble*); The Jonathan Goodhue, Swab. 524; The Daring L. R. 2 Ad. 260, 262; The Eugenie, L. R. 4 Ad. 123 (*semble*); The Olga, 32 Fed. R. 329 *Accord.*

Similarly the master's claim for wages is postponed to that of seamen to whom he is liable for their wages. The Salacia, Lush. 545; to that of a watchman to whom he is liable, The Erinagh, 7 Fed. R. 231; and to claims of material-men and others to whom he is chargeable. The Jenny Lind, L. R. 3 Ad. 531; The Selah, 4 Sawy. 40; The Wexford, 3 Fed. R. 577; The Olga, 32 Fed. R. 329. On the same principle, if one of two vessels is sunk by a collision, due to the fault of each, the owners of the vessel destroyed can recover nothing from the other until all claims for injury to persons, baggage, and cargo are satisfied. The Eleonora, 17 Blatchf. 88; The Catskill, 95 Fed. R. 700.

Similarly part-owners cannot enforce a lien upon the vessel in competition with other lienholders to whom they are themselves liable as part-owners. The Bicknell, 1 Bond, 267; The Melita, 3 Hughes, 494, 496; The Coal Bluff, 3 Fed. R. 531; The Rapid Transit, 11 Fed. R. 322; Learned *v.* Brown, 94 Fed. R. 876. In some cases part-owner has been denied any lien. Kellum *v.* Emerson, 2 Curt. 79; The Reliance, 1 Woods, 284. — Ed.

earlier bond. Whereas, if the earlier bond had been paid out of proceeds of ship and freight, the remainder, supplemented by the cargo, would have been enough to discharge the second bond in full. The point, however, as to whether the rule gave an *absolute* priority does not seem to have been raised in argument.

Mr. Clarkson further directed the attention of the court to a well-known rule of equity, that no marshalling is permitted to the prejudice of third parties. In the present instance it was alleged that marshalling of assets between the master who has ship and freight as his only securities, and the bondholders who have ship, freight, and cargo, would work to the injury of the owners of cargo, who would thus become charged with a larger sum than they would otherwise be liable to; and further, that this additional charge would be improperly saddled upon the cargo, because, though nominally due under a bond affecting cargo, it would really represent a burden to which cargo is not liable, viz., wages and disbursements of master.

On the other hand, it is argued for the master, that the master's lien on ship and freight for wages and disbursements in general takes precedence of a bottomry bond, and though this lien is liable to be postponed to a bottomry bond, for which the master has made himself personally liable, there is no absolute rule to this effect; that it is a rule made only for the protection of the bondholder, and consequently does not obtain where the bottomry bondholder does not need such protection. That in this instance the bottomry bonds will certainly be paid in full out of cargo, if not out of ship and freight; that the holders, therefore, have no interest in claiming to be paid out of ship and freight before the master, and that the owners of cargo have no equity to insist upon the holders of the bonds pressing their claim.

This is the first time the point has been raised. The general principle is clear. If a master, by the terms of the bottomry bond, has bound himself as well as ship and freight for the payment of the bond, it would be manifestly wrong that in defeasance of his own contract he should not only not pay the bond himself, but obtain out of the proceeds of ship and freight payment of his own claims against the owners, leaving the bottomry bondholder unpaid. Hence the rule by which the master's claim is liable, under those circumstances, to be postponed. But this rule frequently operates with great severity against the master, depriving him of his real remedy for recovering his wages and disbursements, and certainly ought not to be carried beyond the exigency of the case; that is, ought not to be extended to circumstances where the bottomry bondholder would not be prejudiced by the master being paid before him. I see no reason why the owners of cargo should be benefited at the expense of the master; for the master, though he may have bound himself for the payment of the bond to the holder thereof, has made no such contract with the owners of cargo, and they are not entitled to invoke a rule made only for the protection of the bondholder.

The court will therefore pronounce the proceeds of the ship and freight to be first applied in payment of the master's claim for wages and disbursements.[1]

IN RE BANK OF NOVA SCOTIA.

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, JULY 28, 1880.

[*Reported in 4 Federal Reporter*, 667.]

BENEDICT, D. J. The question presented by this petition arises as follows: The master and crew of the brig Lillian libelled that vessel, and also the freight earned upon her last voyage, to recover their wages. The vessel has been seized and sold, the proceeds amounting to $4000. The freight proceeded against, amounting to $1095.96, has also been attached. The master has obtained a decree by default for his wages, amounting to $270.41, against both the vessel and the freight. The seamen have obtained a decree for their wages, amounting to the sum of $264.30; also against both vessel and freight. Several other claims were presented which are not in dispute; but, after paying all liens but those of the master and seamen, there remain of the proceeds of the vessel in court more than sufficient to pay their wages without resort to the freight, and of the freight more than sufficient to pay the wages without resort to the vessel. The Bank of Nova Scotia now makes it appear that they have a mortgage upon the vessel exceeding in amount the whole of the proceeds now remaining in the registry, and having made due proof of their mortgage, and the amount due thereon, they apply to the court, by petition, for an order directing that the wages of the master and crew may be paid out of the freight, and that the whole of the proceeds of the vessel remaining in the registry may be paid to them in satisfaction *pro tanto* of their mortgage.

James A. Moran also makes it appear that the freight in question was made payable to him, by the bill of lading, as security for certain advances made by him to pay expenses of the vessel incurred in fitting out and performing the voyage in which the freight now in the registry was earned, which advances he has shown amount to more than the amount of the freight in the registry, whereupon he asks to

[1] The Daring, L. R. 2 Ad. 260; The Eugenie, L. R. 4 Ad. 123 *Accord*.

In The Eugenie, Sir Robert Phillimore said, p. 126: "I am unable to distinguish this case from The Edward Oliver, and, as far as general equity is concerned, I think it is in favor of the master's claim. The cargo owner may recover against the shipowner: Benson *v.* Duncan ([1]); and it is by the skill and exertion of the master that the ship has been safely navigated and the cargo brought to its destination. . . . The money is not raised for the benefit of the master, but of the ship, freight, and cargo; they are the principals; he the surety." Compare The Chioggia, 1597, Prob. 1. — ED.

([1]) 3 Ex. 644.

have the wages of the master and crew paid out of the proceeds of the vessel, and the amount of the freight in the registry paid over to him.

In this controversy the owners of the vessel have not appeared, and no claim has been made, on their behalf, to any part, either of the proceeds of the vessel or the freight. No defence was made to the demand of the master and crew, either by the owners or by the Bank of Nova Scotia, or any other person, and accordingly the master as well as the seamen have obtained decrees for their wages against both the ship and the freight. As the demands of the master and crew can be paid in full, either out of the freight or out of the proceeds of the vessel, they care not to which fund they resort for the satisfaction of their decrees, and make no opposition to any order that may be made respecting the payments of their demands. It is thus seen that this is a controversy between two creditors, one of whom has made advances on the security of the ship, the other on the security of the freight.

It has been contended, in behalf of the holders of the mortgage upon the ship, that Moran acquired no lien upon the freight by reason of his advances, and, therefore, inasmuch as his right is simply that of an assignee of the shipowner, that the question at issue is the same as if the controversy were between the shipowner and the mortgagee, in which case, as the master and crew can resort to either the ship or the freight for the satisfaction of their demand, while the mortgagee can resort to the ship alone, the wages should be satisfied out of the freight, in accordance with a familiar rule in equity. This contention is partly right and partly wrong. It is undoubtedly true that Moran acquired no lien upon the freight for his advances. His right depends upon the contract made with him by the shipowner, that the freight should be collected by him and applied to him to repay whatever might be due him for the moneys he had advanced. His interest in the freight must, therefore, be subject to that of the seamen. But it does not follow that he is thereby eliminated from this controversy, as the mortgagee contends. If he were, the same reasoning would eliminate the mortgagee. The shipowner is the one that has been eliminated, leaving the mortgagee of the ship and the assignee of the freight the only parties to the controversy, and their right and their equities alone to be considered.

It has been urged in behalf of the assignee of the freight that his advances were made for the purpose of enabling the ship to earn the very freight which he now claims, and a superior equity arises in his favor out of that fact. But, as before stated, the law gave him no lien upon the freight for his advances, and I am unable to see that the fact that the money was applied to payments for the outfits of the vessel for this voyage gives him any greater equity in the freight than that acquired in the ship by the mortgagee of the ship, through his advances. As between these two parties the equities are equal.

If the holder of the mortgage upon the ship has no equity superior to that of the assignee of the freight, his application to have the wages paid out of the freight cannot be granted, unless it can be held, as matter of law, that the lien of the seamen does not attach to the ship when there is freight sufficient to pay the wages, and available to the seamen for that purpose. Manifestly, no such proposition can be sustained. The seamen have a right in the freight, and at the same time a lien upon the ship. The ship is as much bound for the payment of the wages as is the freight. The seamen may resort to either fund in the first instance, and, that proving insufficient, they may resort to the other; or, as here, they may proceed against both at the same time. When, however, they do proceed against both, and, as here, either proves sufficient, the court has the undoubted right to control the method of satisfying their decrees. And when there are two creditors whose equities are equal, one of whom is entitled to the surplus of the freight and the other to the surplus proceeds of the ship, the only equitable method is to direct that the wages be charged against both funds *pro rata*. That is to say, that out of the freight shall be paid the master and crews, upon their decrees, a sum bearing the same proportion to the whole amount of the wages as the amount of the freight bears to the balance of the proceeds of the ship in the registry, and that the remainder of the wages shall be paid out of the proceeds of the ship. The freight moneys in court after such deduction may then be paid to Moran, upon his filing his petition therefor, and the proceeds of the ship remaining after such deduction may then be paid to the Bank of Nova Scotia, upon the present petition.

THE NEBRASKA.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, OCTOBER 7, 1895.

[*Reported in* 69 *Federal Reporter*, 1009.]

APPEAL from the District Court. On the 27th day of July, 1892, the vessel was arrested on a libel exhibited by the Milwaukee Dry Dock Company for repairs made since May 1st, 1892, and amounting to more than $14,000. Soon after the arrest of the vessel, Comings, the owner and mortgagor of the vessel, gave a bill of sale of it to Hume, Galvin & Tyler, the mortgagees, and the latter executed and delivered to the Milwaukee Dry Dock Company their three promissory notes, — one for $5545.53 payable on or before July 1, 1893, one for $5000, payable on or before September 1, 1893, and one for $5000 payable on or before December 1, 1893; each of such notes containing the following: "It is agreed and understood by and between the makers and payee of this note that the same is given in consideration

of work and material furnished and done for the propeller Nebraska, for which material and labor the Milwaukee Dry Dock Company has a lien for the value thereof. And it is further agreed by and between the makers and payee that the payee, by accepting this note and extending time of payment of their demand, in no wise waives its lien upon said vessel for said work and labor." These notes were secured by a mortgage upon the vessel. The libel of the Milwaukee Dry Dock Company was thereupon dismissed and the vessel surrendered to Hume, Galvin & Tyler. The steamer continued to run in and out of the port of Chicago until July 3, 1893, when a libel was exhibited against her by one Frank Hoffman to recover for supplies furnished the vessel in April and May, 1893. The steamer was sold under process of court, September 19, 1893, for $13,000. Other claims were filed for supplies furnished after August 20, 1892, and on October 11, 1893, the Milwaukee Dry Dock Company filed its intervening petition setting forth its claim as above stated. To the master's adverse report the Milwaukee Dry Dock Company filed exceptions insisting that its claim should be classed as a foreign demand, and rank as a maritime lien against the fund, and be preferred to all claims and demands except those of equal rank contracted during the season of 1892 in the port of Milwaukee. The court overruled the exceptions.[1]

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after statement of the foregoing facts, delivered the opinion of the court.

Upon the assumption that the contract with respect to the repairs and alterations of the Nebraska was maritime in character, and that by express agreement with the owner the appellant was accorded a maritime lien upon the vessel therefor, — questions which we do not determine, — and that the work was performed in a foreign port, we are yet of the opinion that the appellant, under the circumstances of the case, ought not to be permitted to share in the distribution of the proceeds arising from the sale of the vessel, upon equality with claims subsequently arising against the vessel. There are certain principles established in the admiralty by which, as we think, the allowance or disallowance of this claim should be judged, and which should be stated and considered before passing to the peculiar circumstances under which this claim is presented.

It is to be observed that continuing secret liens upon vessels are discouraged in the admiralty, because they tend to encumber commerce. While doubtless such liens are necessary aids of navigation, it is equally true that they should not be permitted to be unduly and unnecessarily extended, nor allowed to remain dormant and unknown, to the injury of innocent third persons. It was asserted by Judge Betts, more than half a century ago, "that it is a principle common to the maritime law, wherever it is administered, that all liens upon vessels are temporary and evanescent, and cannot be continued any

[1] The statement of the case has been abridged. — ED.

longer than until a reasonable opportunity has been offered for their enforcement." The Utility.[1] Courts of admiralty, equally with courts of equity, demand vigilance in the assertion of rights. Where the rights of others have intervened, a claimant may not remain inactive with respect to the assertion of his claim, and cannot be permitted to unduly extend the time of its payment. He cannot be allowed, by his conduct or by his silence, to induce or allow innocent parties to part with their property upon the credit of the vessel, and as against such claims to assert a dormant lien. It was well asserted in The Lillie Mills,[2] that "when the rights of third persons have intervened the lien will be regarded as lost, if the person in whose favor it existed has had a reasonable opportunity to enforce it and has not done so. It is the well-settled rule in admiralty." So, also, the principle is declared in The Key City,[3] that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence. The effect to be given to the delay depends upon the peculiar circumstances of the case. The cases are numerous which support and follow this doctrine.[4] Many of them will be found assembled in The Bristol.[5]

[1] 1 Blatchf. & H. 218, Fed. Cas. No. 16,806.

[2] Spr. 307, Fed. Cas. No. 8352.

[3] 14 Wall. 653, 660.

[4] In the following cases, by reason of laches, the maritime lien ceased to be enforceable against a subsequent *bona fide* purchaser or incumbrancer: The Charles Carter, 4 Cranch, 328 (execution creditor — two voyages); The Utility, Bl. & How. 218 (2 years); The Louisa, 2 Woodb. & M. 48 (3 years); The Medora, 2 Woodb. & M. 92 (13 months); The Eliza Jane, 1 Spr. 152 (9 months); The General Jackson, 1 Spr. 554 (20 months); The Lillie Mills, 1 Spr. 307 (2 years); The Buckeye State, Newb. 111 (3 years); The Admiral, Fed. Cas. No. 84 (2 years); The D. M. French, 1 Low. 43 (4 years); The Favorite, 1 Biss. 525 (attaching creditor — 3 years); The John Lowe, 2 Ben. 394 (16 months); The Dubuque, 2 Abb. U. S. 20 (3 years); The Nevada, 2 Sawy. 144 (2 years); The Detroit, Bro. Adm. 141 (16 months); The Harriet Ann, 6 Biss. 13 (3 years); The Hercules, Bro. Adm. 560 (13 months — lake navigation); The Artisan, 8 Ben. 538 (3½ years); The Columbia, 13 Blatchf. 521 (5 years); The Wexford, 7 Fed. R. 674 (attaching creditor — 3 years); The Robert Gaskin, 9 Fed. R. 62 (6 years); The Bristol, 11 Fed. R. 156, 20 Fed. R. 800 (4 years); The Amos D. Carver, 35 Fed. R. 665, 666 (subsequent lienholder — more than 1 year); The Lyndhurst, 48 Fed. R. 839 (1 year); The Tiger, 90 Fed. R. 826 (17 months); The F. W. Vosburgh, 93 Fed. R. 481; The Hercyna, Stuart, Vice-Adm. R. 274 (13 months). The life of the lien is not prolonged by the fact that the subsequent purchaser took from his vendor a warranty against liens. The Detroit, Bro. Adm. 141; The Hercules, Bro. Adm. 560; The Bristol, 11 Fed. R. 156, 20 Fed. R. 800.

In the following cases the delay in enforcing the lien was not such as to forfeit the lienholder's right against a subsequent purchaser or incumbrancer: The Europa, Br. & Lush. 89 (lien, December, 1859 — libel, January, 1863); The Charles Amelia, L. R. 2 A. & E. 330; The Passport, 8 Prob. Div. 48 (lien, July, 1881 — libel, November, 1881); The Mary, 1 Paine, 180 (lien, August, 1819 — libel, July, 1820); The Eastern Star, 1 Ware, 185; The Rebecca, 1 Ware, 189 (lien and libel in same season); The Atlantic, Crabbe, 440 (lien, October, 1839 — libel, August, 1841); The Chusan, 2 Story, 455; The Robert Stockton, Crabbe, 580 (lien, March 11 — libel, May 5); The Eliza Jane, 1 Spr. 152 (lien, January, 1846 — libel, July, 1846); The Bolivar, Olc. 480 (libel on first return of vessel to the state); The Prospect, 3 Blatchf. 526; The Boston, 3 Fed. R. 807; The John Dillon, 46 Fed. R. 527.

Although the holder's delay would have forfeited his lien as against a *bona fide* purchaser, it will continue against a purchaser with notice. The Key City, 14 Wall. 653; The Argo, 7 Ben. 304; The Atalanta, Bro. Adm. 489; The Melissa, Bro. Adm. 476; The Carrie,

[5] 11 Fed. 156.

It is true that it has been held that one does not waive his lien by the mere fact of taking the promissory note of his debtor for the claim. Most of the cases to which we were referred upon that point seem to proceed upon the doctrine that, to enable the claimant under such circumstances to assert his lien, the note received should be surrendered (Ramsey *v.* Allegre,[1] Andrews *v.* Wall,[2] The Kimball,[3] The Emily Souder, The St. Lawrence,[4] The Eclipse[5]), unless possibly the note is valueless (The Bird of Paradise[6]). We cannot perceive the force of the reason for the surrender of the note, since, if the note be not taken in payment, but merely as collateral and further security for the debt, there would seem to be no propriety, as against other claims upon the vessel, in allowing the secured claimant to share in the proceeds upon surrender of his additional security, because such surrender can in no way benefit the other claimants upon the proceeds, and operates only to release the additional debtor. It would, we think, be more equitable to require such secured creditor first to pursue and exhaust his collateral security. However that may be, we think the rule declared should be qualified in this, that the time of payment granted by the note should not extend the term of payment of the debt beyond the

46 Fed. R. 796; The A. J. Murray, 60 Fed. R. 926, 63 Fed. R. 270; The Ella, 84 Fed. R. 471, 493.

Or against a prior mortgagee. The Live Oak, 30 Fed. R. 78; The H. N. Emilie, 70 Fed. R. 511.

STATUTE OF LIMITATIONS. — The usual statutes of limitations do not apply in terms to admiralty suits. But admiralty follows the spirit of those statutes. Accordingly if the delay beyond the statutory period is excusable, the claim, whether *in rem* or *in personam*, will not be barred. The Kong Magnus, 1891, Prob. 223; Brown *v.* Jones, 2 Gall. 477; Willard *v.* Dorr, 3 Mas. 161; Joy *v.* Allen, 1 Spr. 130, 2 Woodb. & M. 303.

If there is no excuse for the delay, the claim will be barred after the lapse of the statutory period. The Mentor, 1 C. Rob. 179 (12 years); The Rebecca, 5 C. Rob. 102; Jonge Jan, 1 Dod. 453; The Sarah Ann, 2 Sumn. 206 (*semble* 6½ years); Smith *v.* Sturgis, 3 Ben. 330 (6½ years); Scull *v.* Raymond, 18 Fed. R. 547; Coburn *v.* Factors Co., 20 Fed. R. 644 (9 years); Southard *v.* Brady, 36 Fed. R. 560 (7½ years); The Amboy, 36 Fed. R. 925 (6½ years); The Mentor, 1 C. Rob. 102 (12 years); The Rebecca, 5 C. Rob. 102; Jonge Jan, 1 Dod. 453.

The claim is not proved in admiralty before the expiration of the statutory period. The Key City, 14 Wall. 653; Bailey *v.* Sundborg, 49 Fed. R. 38 (5 years, 11 months, and some days); The Queen, 48 Fed. R. 155 (last day of period); Pacific Co. *v.* Bancroft Co., 94 Fed. R. 188 (last day of period); The H. B. Foster (1 year); The Platina, 3 Ware, 180, 182 (4 years); The Frank Moffatt, 2 Flip. 291 (2 years); The Blenheim, 5 Sawy. 192 (4 years); Saunders *v.* Buckup, Bl. & How. 264 (3½ years); The Martino Cilento, 22 Fed. R. 589. In The Amboy, 36 Fed. R. 926, Brown, J., said: "As the statute is not strictly applicable to suits in admiralty, there is no doubt of the discretionary right of the court to give relief in a proper case after the expiration of the statutory period of limitation upon common law suits of a similar nature. But the general course of the admiralty is to shorten, not to lengthen, the statutory period as respects the enforcement of secret liens. This is done in the interest of subsequent purchasers, mortgagees, or lienors who are prejudiced by secret incumbrances. The general rule, therefore, is that, as respects such *bona fide* incumbrances, liens must be prosecuted with reasonable promptness or they will be lost. But when no subsequent *bona fide* liens have arisen, there is no good reason why a suitor should not be permitted to proceed *in rem* in courts of admiralty, so long as he may sue *in personam*, or maintain a suit at law for the same debt."

Special state statutes for maritime liens are ignored in admiralty. Pacific Co. *v.* Bancroft Co., 94 Fed. R. 180; The Queen, 78 Fed. R. 155, 61 Fed. R. 213; The William M. Hoag, *supra*, 125 (69 Fed. R. 123). — ED.

[1] 12 Wheat. 611. [2] 3 How. 573. [3] 3 Wall. 45.
[4] 1 Black, 523, 531. [5] 3 Biss. 99, Fed. Cas. No. 4268. [6] 5 Wall. 545, 561.

period within which by the law the lien should be prosecuted; for, if the lienor may be indulged in granting such time of payment as he may elect, he would thereby be permitted to retain a dormant lien upon the vessel, to the injury of the subsequent lienors, and to the sustaining of stale demands. If, therefore, time of payment be granted beyond the time declared by statute or general law for the assertion of the lien, the lienor has disqualified himself to prosecute the lien within the permitted time, and it is gone. Peyroux *v.* Howard,[1] The Highlander,[2] Green *v.* Fox,[3] Bailey *v.* Hull,[4] Schmidt *v.* Gilson,[5] Dey *v.* Anderson.[6]

It has also been held that the mere taking of a mortgage upon the *res*, to secure the note given for the claim, may not be, of itself, a waiver of the claim. The D. B. Steelman.[7] It may seem somewhat inconsistent to accept a subordinate for a superior lien, retaining at the same time a claim for the superior. In Kornegay *v.* Styron,[8] it was held that the taking of the mortgage was a waiver of the lien, and estopped the lienor to assert the lien. We need not here determine the question. It is sufficient to say that in The D. B. Steelman, *supra*, Judge Hughes, reviewing the decisions in The Ann C. Pratt,[9] Stapp *v.* The Swallow,[10] and Dudley *v.* The Superior,[11] distinguished the case then in hand from those, pointing out the fact that there the claimant had taken notes for the amount of his lien, extending the time of payment for a period not exceeding four months, and a mortgage upon an undivided one half interest in the vessel, and observes:

"If, however, the taking of the mortgage be attended by acts inconsistent with the lien, or prejudicial to other maritime creditors (for instance, if the credit given by it be so long as to make the claim it is intended to secure stale, in the sense of the maritime law), or if the execution of the mortgage be in manner such as to make it conflict with the rights of maritime creditors whose claims are of equal dignity with that secured by the mortgage, then it would be inequitable to allow to the mortgage the benefit of two remedies against the ship, and his taking the mortgage would be held as waiving the maritime lien."

And he further observes, with respect to the case there involved, that: —

"It is not the case of a voluntary abandonment of the remedy in admiralty for a resort to the inconsistent and different remedy of attachment and personal judgment in a state court. Nor, in this case, has there been a sleeping by the claimant upon his mortgage so long as to allow his claim to grow stale, to the prejudice of the rights of maritime lien creditors whose claims are fresh."

The period within which a maritime lien should be enforced has not

[1] 7 Pet. 324.
[2] 4 Blatchf. 55, Fed. Cas. No. 6475.
[3] 7 Allen, 85.
[4] 11 Wis. 289.
[5] 14 Wis. 514.
[6] 39 N. J. Law, 199.
[7] 48 Fed. 580.
[8] 105 N. C. 14, 11 S. E. 153.
[9] 1 Curt. 340, Fed. Cas. No. 409.
[10] 1 Bond, 188, Fed. Cas. No. 13,805.
[11] 1 Newb. 176, Fed Cas. No. 4115.

been determined with precise definiteness. The subject has, however, frequently been under deliberation, and the considerations which should induce to a short period of limitation have been strongly presented. A longer period is allowed as against the owner of the vessel than as against a subsequent innocent purchaser or subsequent innocent lienor. With respect to vessels navigating the high seas, from an early time the limit has been by the voyage. The Charles Carter,[1] And liens for wages, supplies, and bottomry arising upon a subsequent voyage are given priority to those arising upon a previous voyage, unless peculiar circumstances should demand equality in their payment. The Paragon,[2] Porter *v.* The Sea Witch.[3] But with respect to lake and harbor navigation a different rule has prevailed. Upon the Great Lakes the time has been limited by the seasons of navigation, and not by the voyage, and claims of equal rank arising during each season are paid *pro rata*, without respect to the particular voyage. In the open harbors, where there is no close of the season of navigation, a limit of 40 days has been determined. Stillman *v.* The Buckeye State,[4] The Detroit,[5] The Hercules,[6] The Dubuque,[7] The Delos de Wolf,[8] The J. W. Tucker,[9] The Proceeds of The Gratitude,[10] The Samuel Morris.[11]

The rule with respect to the Great Lakes and harbors is a modification of the general maritime law, which adjusted liens by the voyage. The rule is somewhat arbitrary, as would be any rule that was a departure from the rule of the general maritime law. It was, however, rendered necessary in the interest and for the protection of maritime liens, and because of the shorter voyages upon the lakes; and the rule as applied to the Great Lakes commends itself to our judgment as wise and proper. In these days of swift and easy communication by telegraph and telephone between all ports of our country, the reasons upon which maritime claims are upheld have lost somewhat of their cogency, and while it is not within our province to disturb the settled law of the admiralty, as held in this country, we think we should be doing violence to the spirit of the law and the genius of the times by extending, instead of restricting, the period within which secret liens upon vessels may be asserted.

Coming now to the consideration of the facts in this case, and judging them in the light and spirit of the principles which have been stated, we observe that from the first the appellant distrusted the responsibility of Comings, and insisted that for the repairs and alterations which should be made the appellant should have a lien upon the vessel. We need not stop to consider the nature of the lien that was in the contemplation of the parties, for we proceed upon the assumption that it was a maritime lien that was contemplated. It is also

[1] 4 Cranch, 332.
[2] 1 Ware, 331, Fed. Cas. No. 10,708.
[3] 3 Woods, 75, Fed. Cas. No. 11,289.
[4] Newb. 111, Fed. Cas. No. 13,445.
[5] 1 Brown, Adm. 141, Fed. Cas. No. 3832.
[6] 1 Brown, Adm. 560, Fed. Cas. No. 6400.
[7] 2 Abb. (U. S.) 20, 32, Fed. Cas. No. 4110.
[8] 3 Fed. 236, 239.
[9] 20 Fed. 129, 134.
[10] 42 Fed. 299.
[11] 63 Fed. 736.

manifest that the appellant did not propose to allow the vessel to get beyond the reach of process from the courts of the district within which repairs were made. The repairs were completed on the 21st day of July, 1892. On the 27th of July the appellant exhibited a libel against the vessel under which she was arrested and held in the custody of the marshal until the 20th day of August. Up to this time there was exhibited upon the part of the libellant a determined, energetic prosecution of its claim. At this date the mortgagees appeared upon the scene, and an arrangement was arrived at, in effect that Comings, the owner, should, and he did, execute a bill of sale of the vessel to the mortgagees, and that the mortgagees should, and they did, execute their notes to the appellant for the amount of their claim, secured by mortgage upon the vessel. There was also an agreement between Comings and the mortgagees by which the vessel should be operated by Comings in connection with the Columbian Exposition, so long as it should prove profitable, but that the financial affairs of the vessel should be conducted by the original mortgagees, now owners of the boat, and that the net proceeds of operation should be paid over to a trustee for the payment of the note given by Hume, Galvin & Tyler to the appellant. It is in dispute whether the appellant was informed of the agreement between Hume, Galvin & Tyler and Comings. It does not appear, however, that the appellant knew that Galvin or Tyler were to give their personal attention to the management of the boat and its finances. Upon the consummation of the agreement the appellant voluntarily dismissed the libel which it had exhibited, and consented to the release of the vessel by the marshal, and its surrender to Hume, Galvin & Tyler. The notes which the appellant accepted extended payment of the debt, — a portion until July 1, 1893, a portion until September 1, 1893, and another portion until December 1, 1893. We have thus the case where one, having a maritime lien for the enforcement of which he had invoked the power of a court of admiralty, caused the vessel to be taken and held in custody, and then voluntarily surrendered his position and the custody of the vessel which the court had taken, and permitted its surrender to the original mortgagees, accepted their notes in payment of the debt, extended payment for a period of about 15 months, on the average, and placed himself in such position that he could not assert his lien, if he had one, until the close of the second season of navigation after the work was done. We think that, under such circumstances, the appellant ought not to be permitted to assert its claim against subsequent innocent lienors. We do not think it our duty in the interest of commerce thus to foster the maintenance of secret liens. We do not think it right, when one has thus invoked the power of the court to enforce an asserted right, and had voluntarily abandoned the proceeding, accepting the obligation of third parties for the debt, — parties who are not satisfactorily shown by any means to be unable to meet their obligation in whole or in part, — that he should be allowed to be reinstated in his original right, to the detriment of those who have subsequently

and innocently furnished supplies for the operation of the vessel, contemplated and made possible by his action. The case is somewhat analogous to the case of a vessel libelled, and released upon stipulation to pay the debt. In such case, as against subsequent parties, courts remand the claimant to his remedy upon the stipulation.

We have not failed to consider that by the notes received it was stipulated that their acceptance should not be construed as a waiver of the appellant's lien upon the vessel, but we do not think that that stipulation should be permitted to avail as against subsequent innocent purchasers or lienors, however valid and effectual it might be as against the owner and mortgagees of the vessel. The appellant certainly held itself out to the world as abandoning its lien, and the assertion of it in the courts of admiralty, and as willing to accept for the debt the notes of Hume, Galvin & Tyler, with their mortgage upon the vessel as security. This mortgage was silent as to the stipulation for retention of the lien. It gave no notice of it, and its existence was hidden in the breasts of the contracting parties. It cannot be permitted that one may thus play fast and loose with the rights which the law accords him. It cannot be allowed that a lienor, under the circumstances here disclosed, may surrender the possession of the vessel, accept a mortgage upon it for his claim, and the notes of third persons extending the time of payment beyond the period which the law permits for the enforcement of the right, and still retain his lien. To uphold such conduct would, in our judgment, work great injustice, and prove most injurious to commerce.

The decree will be affirmed.

CHAPTER III.

BOTTOMRY AND RESPONDENTIA OBLIGATIONS.

THE JAMES OF MALDON.

IN THE HIGH COURT OF ADMIRALTY, 1526.

[*Reported in Select Pleas in the Court of Admiralty (Selden Society)*, 29.]

BILL for money lent at lender's risk.

BILLA PALMER.

This bill made the iij day of May in the yere of our lord God m^{l}v^{c}xxvjth wytnes that I John Palmer of Maldon merchaunt owes unto Peter Wyldank of London brewer the sume of xxv^{li} sterling the wyche the said Peter doth bere the ventre in a shipp called or named the James of Maldon from Maldon to Sheytland and from Sheitland to Maldon or any other port ther it shall fortune the said shipp to dyscharge her ladying frome all manner of mischaunce And I the said John Palmer byndeth me and my shipp and all my goods by this bill to paie the said Peter his executors or assynes xxv^{li} sterling mony within v weeks after the said ship called the James of Maldon come in sayff into any porte of Reyne of Yngland And in witnes of the trewth I the said John Palmer hath subscribed my name and sett my seal ẖeren the daye and yere above writtyn

per me John Palmer

THE ATLAS.

IN THE HIGH COURT OF ADMIRALTY, FEBRUARY 27, 1827.

[*Reported in* 2 *Haggard*, 49.]

THIS was a case of bottomry promoted by Fletcher, Alexander & Co., agents of Messrs. Alexander & Co., of Calcutta, the holders of a bottomry bond, against James Inglis and Robert Spankie, the executors of the will of Patrick Chalmers, deceased, whilst living the sole owner of The Atlas.

The bond was of the tenor following: —

Know all men by these presents, that I, William Clifton, now residing in

Calcutta, master of the ship Atlas, of the burthen of 411 tons, am held and firmly bound unto James Young, Thomas Bracken [and others], of Calcutta, merchants, carrying on business together under the firm of Messrs. Alexander & Co., in the penal sum of Sicca rupees 132,000 of lawful money of Bengal, for the payment of which, well and truly to be made, unto the said James Young, &c., their attorneys, heirs, &c., I hereby bind myself, my heirs, executors, and administrators, firmly by these presents. Sealed with my seal. Dated this 12th of March, 1824.

Whereas, the said ship Atlas, bound on a voyage from the port of London, in Great Britain, to Calcutta, and from thence home to the port of London, lately arrived in the river Hoogley on her said voyage, and was there wrecked and sunk, and received great damage, and at a considerable expense was raised and recovered; and whereas, the said William Clifton, being such master and commander of the said ship, now lying in Vrignon's Dock, has been unable to raise and procure on the security of the said ship, or otherwise, sufficient sums of money fully to repair the said vessel so as to enable her immediately to proceed in the completion of her voyage to London; and whereas, for the preservation of the vessel, and to enable her ultimately to proceed on her said voyage, and to complete the same, considerable and immediate repairs were absolutely necessary to be done to the ship, before sufficient funds can be obtained to complete her repairs and refit the ship; and whereas, the said William Clifton hath taken up and received of the said firm of Alexander & Co. the full and just sum of Sicca rupees 66,000 of lawful money of Bengal, for the purpose of such necessary and immediate repairs, and other charges and expenses necessary for the said ship, and of enabling her ultimately to complete her voyage, which sum is to run at *respondentia* on the block and homeward freight of the said ship from the port of Calcutta, on her return voyage to the port of London, or other port in Great Britain, at the rate of premium of twelve per cent. for the said voyage; and for the better security of said James Young, &c., the said William Clifton hath agreed to mortgage and assign, and doth by these presents mortgage and assign over to the heirs of the said James Young, &c., their heirs, executors, administrators, and assigns, the said ship Atlas and her freight for the said homeward voyage, together with all her tackle, apparel, and so forth. And it is hereby declared and agreed that the said ship, and her freight as aforesaid, is thus assigned over for the security of the moneys aforesaid, taken up by the said William Clifton to run at *respondentia* as aforesaid, and shall be delivered to no other purpose or use whatsoever until payment and satisfaction of this bond be first made, with the premium that may become due thereon. Provided always, that nothing herein contained shall be construed to destroy, or in any manner affect, any lien upon the said ship to which the said James Young, &c., may be entitled for the money so lent and advanced by them as aforesaid. And whereas the said William Clifton has undertaken to the said James Young, &c., that the said ship shall, with all reasonable speed, be fully and adequately repaired for the completion of her said voyage; and, being so repaired, shall, within fifteen months from the date of these presents, set sail and depart from Calcutta upon and for the completion of her said voyage to the port of London, and, barring the perils and accidents of the sea, shall duly complete her said voyage. Now the condition of this obligation is such, that if the said ship being fully repaired for the completion of her said intended voyage, shall, within fifteen months from the date of these presents, set sail and depart from Calcutta, upon and for the completion of her voyage to London, and, barring the perils and accidents of the sea, shall duly complete her said voyage, and if the above-named William Clifton shall and do

well and truly pay, or cause to be paid, unto the said James Young, &c., or their attorneys legally authorized to receive the same, or to their executors, administrators, or assigns, the full sum of Sicca rupees 66,000, being the principal of this bond, together with the premium which shall become due thereon at the rate of twelve per cent. as aforesaid, at or before the expiration of thirty days after the safe arrival of the said ship in the river Thames, or other port in Great Britain; or, in case of the loss of the ship Atlas, then within thirty days next after the account of such loss shall have been received in Calcutta or London, then this obligation to be void and of no effect, otherwise to remain in full force.

Signed, sealed, and delivered in the presence of J. Thuoult.

WILLIAM CLIFTON. (L. S.)

JUDGMENT.[1]

LORD STOWELL. I have reconsidered this question, and I have to communicate the final result of my considerations upon it. It certainly appears to me to be a case which the powers of this court do not enable me to conduct to any satisfactory result either of jurisdiction or of merits, being very unsettled in the first of these qualifications, and very much out of the reach of legal inquiry in the latter. With respect to the first matter, that of jurisdiction, it at the very first outset occurred to me, as open to a very important doubt, whether the contract was of that nature which is subject to the established cognizance of this court. The bond is executed in the East Indies, and calls itself an hypothecation or bottomry bond, but it is certainly of a very different nature from bonds which are so estimated and denominated in the proceedings of this court. Having already described the distinctions between them, I shall shortly repeat the description of those distinctions. The hypothecation or bottomry bond known to the civil law, and acted upon with an undoubted authority by this court, is a bond whereby the captain of a vessel, not having any credit in the port, is enabled to obtain money for the repair of the ship, and its equipment for the voyage, upon what is called maritime interest. In the Roman law, in which it was familiarly known, it was called *usura maritima* or *fœnus nauticum*. The extent or value of this security for repayment was not limited, for it was not certain, but only eventual, dependent upon the safe accomplishment of the intended voyage. If the ship arrived safe, the title to repayment became vested: but if the ship perished *in itinere*, the loss fell entirely upon the lender. Upon that account, the lender was entitled to demand a much higher interest than the current interest of money in ordinary transactions. It partook of the nature of a wager, and therefore was not limited to the ordinary interest; the danger lay not upon the borrower, as in ordinary cases, but upon the lender, who was therefore entitled to charge his *pretium periculi*, his valuation of the danger to which he was exposed. A contract similar to this, upon the cargo of the ship, is called a *respondentia*, but is of rarer occurrence.

Such hypothecation bonds upon the ship are frequent in this court,

[1] Only a portion of Lord Stowell's judgment is given. — ED.

though, from the diffusion of British capital and credit over every part of the navigable globe, less frequent in British use, in consequence of less frequent necessity, than in the courts of other maritime nations. But the contract, which is the subject of the present contest, is of a very different nature; it is independent of all contingency. The interest is to be paid whether the ship arrives or not: not only the ship, but the whole property, of the party, is equally pledged, that upon land as well as that upon sea; and it is pledged, not for the payment of a *fœnus nauticum*, but for an interest not uncommonly given in common transactions in that country.[1] Payment in the different events is expressed in one and the same sentence, whether the ship sinks or swims, with a mere difference in point of time of payment, arising from absolute necessity; and the ship, in either case, is not more pledged than the whole property of the individual, whether upon land or sea, and independent of any casualty. It happens, however, in the practice of that quarter of the world, to be called a hypothecation bond, but no instance has occurred of that denomination in the practice of this court during my long attendance in it, excepting one, The London,[2] in which I was concerned as counsel, but which cannot certainly be in any manner considered decisive in the matter of jurisdiction.

However, in the situation in which I find myself, I think the fairest method of relieving myself, under those difficulties, will be to dismiss the suit on account of the doubts I entertain respecting jurisdiction. The party affected by that sentence may appeal to the Court of Delegates for a decisive solution of those doubts.[3]

[1] Although it is unusual, a bottomry bond may be given on the legal rate of interest. The Emancipation, 1 W. Rob. 124, 130; The Royal Arch, Swab. 269, 280, 281; The Laurel, Br. & Lush. 317; The Grapeshot, 9 Wall. 129, 135; Robertson *v.* U. S. Co., 2 Johns. Cas. 250; The Pride of the Ocean, 3 Fed. R. 162. But see *contra*, The Medora, 2 Woodb. & M. 92, 107 (*semble*). Or even without any interest. The Cecilie, 4 Prob. Div. 210.

In extreme cases the court may reduce the maritime interest. The Isabel, 1 Dod. 273, 277; The Zodiac, 1 Hagg. Adm. 320, 326; The Cogniac, 2 Hagg. 337; The Packet, 3 Mas. 255, 260; The Hunter, 1 Ware, 249.

If the bond is not paid when due, principal and maritime interest are added, and legal interest given on the total amount from that time. The Packet, 3 Mas. 255; The Magoun, Olc. 55, 66. — Ed.

[2] The London. Pasmore. July 16, 1787.

[3] The sentence was affirmed by the Court of Delegates.

For lack of a maritime risk in the following cases the instrument was not a bottomry contract. Busk *v.* Fearon, 4 East, 319; The Emancipation, 1 W. Rob. 124; The Indomitable, Swab. 446; Simonds *v.* Hodgson, 6 Bing. 114; Stainbank *v.* Fenning, 11 C. B. 51; Stainbank *v.* Shepard, 13 C. B. 418, 442; The Heinrich Bjorn, 10 Prob. Div. 44; Rucher *v.* Conyngham, 1 Pet. Adm. 295, 303; The William and Emmeline, Bl. & How. 66; The Hilarity, Bl. & How. 90; The Medora, 2 Woodb. & M. 92, 107; Greely *v.* Smith, 3 Woodb. & M. 236; The Atlantic, Newb. 514; The E. A. Barnard, 2 Fed. R. 712; The Sophie Wilhelmine, 58 Fed. R. 890 (*semble*); Greely *v.* Waterhouse, 19 Me. 9; Jennings *v.* Ins. Co., 4 Binn. 244. See The Robert L. Lane, 1 Low. 388.

In the following cases the bonds, being thought to make the liability turn upon the completion of the voyage, were upheld as bottomry bonds. The Nelson, 1 Hagg. Ad. 169, 177; Simonds *v.* Hodgson, 3 B. & Ad. 50; The Elpis, L. R. 4 Ad. 1; The Edward Albro, 10 Ben. 668; The Robert L. Lane, 1 Low. 358. — Ed.

THE BARK IRMA.

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, MARCH, 1872.

[*Reported in* 6 *Benedict*, 1.]

BENEDICT, J.[1] The cases against this vessel have been brought before me, on an application for an order determining the priority of the respective demands in the distribution of the proceeds of the vessel, which are insufficient to pay all the claims against her. The only question which calls for any particular examination has arisen between the libellants, Timothy Darling & Co., whose libel is filed to recover the amount of a bottomry bond executed by Cummings, as master of the vessel, and Cummings himself, who has filed his libel to recover a balance due him for his own wages and for advance of wages made by him to the crew. If the demand of Cummings be paid out of the proceeds of the vessel, in preference to the bottomry bond, the remainder will be insufficient to pay the bottomry bond in full, and therefore the bottomry lenders contest the right of the master of the vessel to priority over the bottomry bond. The position taken is, that the master is personally liable to the bottomry lenders for the sum borrowed, and that, supposing that he has a lien for his demand, he cannot be paid in preference to the bottomry bond, when such payment will create a deficiency in the bond, which he is liable to make good.

The contract of bottomry, which is not only a contract of great sanctity, but also of great peculiarity, is not a mere agreement for security. "It is neither a sale, nor a partnership, nor a loan, properly speaking, nor insurance, nor a compound of different constructions — *undique collatis membris* — but it is a contract having a specific name (*un contrat nommé*), and a character peculiar to itself." (Emerigon, Contrat a la Grosse, ch. 1, § 2.) When once the bottomry risk has attached, the creditor becomes a bottomry lender, and nothing else. "He who lends money on bottomry makes a contract which is to be followed out in all its remedies as such." (Curtis, J., The Brig Ann C. Pratt;[2] Brady *v.* Bates;[3] The Ann C. Pratt.[4]) The holders of a bottomry bond are, therefore, not holders of a mortgage, and the rules applied in cases of mortgage have little or no application here.

Reference is made to the general principle of the maritime law, according to which the master of the ship is presumed to bind himself personally in every contract made on behalf of the ship, as showing the existence of such a liability in the contract of bottomry. But if such were the rule in all other cases, it would afford little reason for supposing the liability to exist in a contract of bottomry,

[1] Portions of the opinion are omitted. — ED.
[2] 1 Cur. C. C. 351.
[3] 9 Met. 250.
[4] 18 How. 83.

for bottomry is a contract "resembling nothing and being consistent with nothing but itself" (Curtis, J.);[1] and I am of the opinion that the reasons, on which the general rule rests, will be found to be for the most part wanting in the case of bottomry. Take, for instance, the reasons which led to the personal liability of the master to the crew. The master is personally liable to the seamen; for sailors, because of well-known traits, must have every security possible to prevent them from losing their wages and becoming objects of charity. They naturally look for their wages in the first instance to the master, who commands them during the voyage, who provides them their food, who cures them when sick, and punishes them when they disobey; and from long usage he thus becomes personally bound for their wages. Another instance is the personal liability of the master for the bills of material-men, and for advances of money. Obligations of this class derive their distinctive character from the fact that they are generally made in foreign ports, where they are to be discharged, and where the owners are not; and it is therefore permitted to look to the master, who is present, leaving him to reimburse himself from the owners, when he returns home. Considerations of this character, coupled perhaps with the fact, that in the earlier history of navigation, as well as afterwards on the revival of commerce in the Middle Ages, the master almost invariably was an owner, unless he was a slave (MacLachlan on Shipping), led to the establishment of the presumption of personal liability on the part of the master in contracts made for the ship, as a "usage and custom of the seas." But it will be difficult to find in the maritime law any trace of such a presumption in cases of bottomry; and the considerations which press in favor of it, on other occasions have in such contracts little force.. The lender on bottomry is not ignorant and poor like the sailor. He becomes beneficially interested in the voyage. His loan is never to be repaid in the foreign port, where it is effected, but on the contrary is payable where the owners are supposed to be, or to have funds; and the ship is specifically bound. No necessity therefore exists for the personal responsibility of the master. Furthermore, great injustice must follow, if such a personal responsibility, on the part of the master, be attached by the law to the contract of bottomry, because the master is without remedy over against the owners of the ship, for any sum thus extracted from him, notwithstanding the fact that the owners receive the benefit of the loan. This results from the character of the transaction, and the nature of the liability on the part of the shipowner, which grows out of it. The owner of a ship is indeed said to be liable for a bottomry bond as well as the ship, if the ship arrives safe; but this is not a liability arising from a contract of the owner, made by the hand of his agent, the master, with the bottomry lender. It is not within the scope of the shipmaster's authority, as the agent of the owners, to bind them person-

[1] 1 Cur. C. C. R. p. 350.

ally as his principals, by a bottomry contract.[1] This peculiarity in the liability of the shipowner, growing out of bottomry, is pointed out by the Supreme Court of the United States, in the case of The Virgin,[2] where the court says: "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; 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 this case, the proceeding against them is rather in character of possessors of the thing pledged, than strictly as owners." Not only is such the law in England and America, but the same law exists upon the continent.

If, then, the owners of a ship are not rendered directly liable by a contract of bottomry made by the master, they cannot be rendered indirectly liable, through a liability on their part to the master for any sum exacted of him by reason of the contract. And if the master be without remedy over against the owner of the ship, it is not to be supposed that he can be held personally liable, and thus compelled to bear, without recourse, the burden not only of a loan effected solely for the benefit of the shipowner, but also of the maritime interest; and that, too, when he is compelled by the responsibility of his office to effect the loan, whether willing or not to assume such a burden. The unjust effect of such a rule warrants the supposition that it does not exist in the maritime law. Aside from its injustice, there is reason against it, founded in public policy; for to make the master by operation of law liable for the payment of the bottomry bond, or even for the deficiency after the ship and freight are exhausted, is to offer him an inducement to lose the ship, inasmuch as her safe arrival will cast upon him a responsibility which he escapes if she does not arrive. A rule which would in any case place the interest of the mariner in opposition to the welfare of the ship, would be contrary to the whole spirit of the maritime law.

My conclusion, therefore, is, that in the present case no personal liability for any part of the loan has attached to the shipmaster, and the bottomry lender and the master must, therefore, in respect to order of payment upon this motion, be declared to be subject to the general rule by which wages are entitled to be paid in preference to a bottomry bond.[3]

[1] The Tartar, 1 Hagg. Adm. 1, 13; The Nelson, 1 Hagg. Adm. 169, 176; The Jonathan Goodhue, Swab. 524, 528; Benson *v.* Duncan, 3 Ex. 644, 656; The Virgin, 8 Pet. 538, 554; Naylor *v.* Baltzell, Taney, 55 *Accord.*

In Benson *v.* Duncan, *supra*, Patteson, J., said, p. 656: "Certainly the master could not, by any bottomry bond, pledge the shipowner to the lender of the money beyond the value of the ship. By such a bond he gives a remedy *in rem* only, and not a personal remedy against the shipowner." — Ed.

[2] 8 Pet. 538, 554.

[3] The Salacia, Lush. 548; The Serapis, 37 Fed. R. 437 *Accord.* — Ed.

THE GRATITUDINE.

In the High Court of Admiralty, December 18, 1801.

[*Reported in 3 Christopher Robinson*, 240.]

Judgment.[1]

Sir W. Scott. This case has been learnedly argued; and I have thought it due, not only to the arguments, but also to the extreme importance of the question, as affecting the commerce of this country, to take some time for deliberation in forming my judgment upon it. The case comes on, upon petition, which states, "That the imperial ship, The Gratitudine, having on board a cargo of fruit, and bound from Trieste, Zante, and Cephalonia, to London, met with extremely tempestuous weather, and sprung a leak, whereby the cargo sustained considerable damage; that the master was obliged, for the safety of the ship and cargo, and for the preservation of the lives of the crew, to put into Lisbon, and unlade; that the master applied for advice and assistance to F—— Calvert who was the correspondent of Mr. —— Powell, one of the principal consignees in England; that Mr. Calvert wrote a letter to Mr. Powell, advising him of the misfortune which had befallen the cargo, and the steps which had been taken, and desiring his directions for their further conduct; that in answer to that application he received a letter from Mr. Powell, stating, 'That to the master it belonged exclusively to adopt every necessary measure for the preservation of the cargo, and that if it was necessary to unlade, the master alone was to judge of the propriety of such a measure.' That the master, being in want of money to defray the charges of repairing the vessel and of unlading the cargo, borrowed of the aforesaid F. Calvert the sum of 527*l.* 12*s.* on a certain bottomry bond, bearing date 31st January, 1801, binding the ship and appurtenances, cargo, and freight, to pay the said sum of 527*l.* 12*s.* within twenty-four hours after the arrival of the said ship in the port of London, or any other port; that the said bond had been duly presented to the master, who refused to discharge it; that the holder had no other means of recovering his debt than by proceeding against the ship, freight, and cargo, and prayed the court to decree a monition against the bail given to answer the action in respect to the cargo and freight, for payment of the balance due, after payment of the proceeds of the sale of the ship."

On the other side it is alleged, "That the master had not, under the circumstances stated, a right to hypothecate the cargo for the repairs of the ship; for payment whereof the ship, her master, owners, and freight are liable; that the cargo is by law only subject to pay an average proportion of the charges, to which the cargo laden in the said ship was liable, for the unlading and reshipping the cargo and other

[1] Only the judgment of the court is given. — Ed.

expenses relating thereto; all which, with the freight, the parties had always been and were willing to pay."

The proposition contained in the act does not go the length of asserting universally, that the master has not a right to hypothecate his cargo in any possible case, but denies the power of the master to hypothecate it under the circumstances of this particular case. In the course of the discussion, however, the argument has been carried to the entire extent, and it has been contended, that the master has no right to bind the owners of the cargo in any case — upon this ground, that although he is the agent and representative of the ship, and by virtue of that relation may bind the ship and its owners, he is not the agent of the proprietors of the cargo, and therefore cannot bind it. It is said that he is the mere depository and common carrier, as to the cargo, and that the whole of his relation to the goods is limited to the duties and authorities of safe custody and conveyance. This position, that, in no case has he a right to bind the owners of the cargo, is, I think, not tenable to the extent in which it has been thrown out; for though in the ordinary state of things he is a stranger to the cargo, beyond the purposes of safe custody and conveyance, yet in cases of instant and unforeseen and unprovided necessity, the character of agent and supercargo is forced upon him, not by the immediate act and appointment of the owner, but by the general policy of the law; unless the law can be supposed to mean that valuable property in his hand is to be left without protection and care. It must unavoidably be admitted, that in some cases he must exercise the discretion of an authorized agent over the cargo, as well in the prosecution of the voyage at sea, as in intermediate ports, into which he may be compelled to enter.

The case of throwing overboard parts of the cargo at sea is of that kind. Nothing can be better settled than that the master has a right to exercise this power in case of imminent danger. He may select what articles he pleases; he may determine what quantity; no proportion is limited; a fourth, a moiety, three fourths, nay, in cases of extreme necessity, when the lives of the crew cannot otherwise be saved, it never can be maintained that he might not throw the whole cargo overboard. The only obligation will be, that the ship should contribute its average proportion. It is said this power of throwing over the whole cannot be but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is. So, likewise, with respect to any proportion, he can be justified only by that necessity; nothing short of that will do. The mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part. It must be a necessity of the same species, though perhaps differing in the degree.

Another case is that of ransom; in which, it is well known, that by the general maritime law, a master could bind by his contract the whole cargo, as well as the ship. He could not go beyond the value of the goods, but up to the last farthing of their entire value there is

not a doubt but he might bind the cargo as well as the vessel. A very modern regulation of our own private law, founded on certain purposes of policy, has put an end to our practice of ransoming; but I am speaking of the general maritime law and practice, not superseded by private and positive regulation.

These are instances of authority at sea. There are other cases also in port, in which the master has the same authority forced upon him. Suppose the case of a ship driven into port with a perishable cargo, where the master could hold no correspondence with the proprietor; suppose the vessel unable to proceed, or to stand in need of repairs to enable her to proceed in time. In such emergencies the authority of agent is necessarily devolved upon him, unless it could be supposed to be the policy of the law that the cargo should be left to perish without care. What must be done? He must, in such case, exercise his judgment, whether it would be better to transship the cargo, if he has the means, or to sell it. It is admitted in argument that he is not absolutely bound to transship; he may not have the means of transshipment; but even if he has, he may act for the best in deciding to sell. If he acts unwisely in that decision, still the foreign purchaser will be safe under his acts. If he had not the means of transshipping, he is under an obligation to sell, unless it can be said that he is under an obligation to let it perish.

With respect to practice, I understand from a gentleman very conversant with the commerce of the West Indies, that it is by no means unfrequent for an application to be made to the vice-admiralty courts in that part of the world, for leave to empower the master to sell. I understand it likewise to be matter of complaint, that this power is sometimes abused by an improvident and collusive sale of cargoes, when no real necessity exists; that is, in other words, that the power is usurped in cases where the party does not legally possess it. But the very ground of the defect of power in such cases implies and affirms its existence in cases where the necessity is real.

In all these cases, the character of agent, respecting the cargo, is thrown upon the master by the policy of the law, acting on the necessity of the circumstances in which he is placed. But it is said that this can only be done for the immediate benefit of the cargo, and not for the repairs of the ship. It is very true that this involuntary agent ought, like an appointed agent, in all cases to act for the best respecting the property. Even in the case of an universal *jactus*, which appears least likely to conduce to the benefit of the cargo, still it is so; the ship is compelled in that case to pay an average, by which means the little which is to be taken as a remnant of the cargo is preserved; whereas, otherwise, both ship and cargo would have been totally lost. In the case of ransom, what was intended for the benefit of the cargo may eventually consume the whole; the proprietor will not be benefited in such a case, but he cannot be damnified. He will have had the chance of advantage, without the danger or possibility of loss; for he cannot suffer beyond the value of the

cargo, which, without such ransom, would have gone to the enemy *in toto*. It is the same consideration which founds the rule of law that applies to the hypothecation of a ship. In all cases, it is the prospect of benefit to the proprietor that is the foundation of the authority of the master. It is, therefore, true, that if the repairs of the ship produce no benefit or prospect of benefit to the cargo, the master cannot bind the cargo for such repairs.[1] But it appears to me that the fallacy of the argument that the master cannot bind the cargo for the repairs of the ship lies in supposing that whatever is done for the repairs of the ship is in no degree, and under no circumstances, done for the benefit, or with a prospect of a benefit to the cargo; whereas, the fact is, that though the prospect of benefit may be more direct, and more immediate to the ship, it may still be for the preservation and conveyance of the cargo, and is justly to be considered as done for the common benefit of both ship and cargo.

Suppose the cargo to be not instantly perishable, but that it can await the repair of the ship, what is the master to do in the situation before described, being a stranger in a foreign port, in a state of distress, without an opportunity of communication with the owners or their agent? What is his duty under such circumstances? It may be answered, generally, to look out for the means of accomplishing his contract, if possible; that is, the safe conveyance of the property intrusted to his care, in that same vehicle which he had contracted to furnish. It is admitted that, though empowered to transship, he is not bound to transship.[2] No such obligation exists, according to any known rule of the maritime law; and if it did, still he must be affected with the opportunity of transshipment, and with wilful neglect of such opportunity, for wilful neglect shall not be presumed. He may even be restrained from transshipment, if he has the means, by knowing that insurances were made on the original shipment, which might be avoided by such a change. Having the general duty of carrying the cargo to the place of destination imposed upon him, not being obliged to transship, and it not being shown that he has the opportunity of transshipment, he must be presumed to look out for the means of repairing his ship for the accomplishment of his contract. The first and most obvious fund for raising the money is the hypothecation of the ship. But the foreign lender has a right to elect his security, for he is not bound to lend at all. He may refuse to lend upon the security of the ship, or on that security alone; it is no injustice on his part; and, if he does so refuse, the state of necessity still continues.

The security of the ship not being sufficient, and the master not being able to raise money on that alone, what is he to do? It cannot be said that he is, in all cases, to wait till he hears from a distant country. The repairs may be immediately necessary; it may be hoped that the repairs will be far advanced before he can hear from the con-

[1] The Onward, L. R. 4 Ad. 38, 58; The Julia Blake, 107 U. S. 418 *Accord*. — Ed.

[2] The Lord Cochrane, 2 W. Rob. 320, 334; The Hamburg, Lush. 253, 263, 272; The Lizzie, L. R. 2 Ad. 254, 256; Pope *v.* Nickerson, 3 Story, 465, 501 *Accord*. — Ed.

signees; the master may not know the proprietors at all, but only the consignees; they may be mere consignees, and have no power to direct him, but in the single case of an actual delivery to them. If owners, they may be very numerous, — for in a carrier-ship there may be a hundred owners of the cargo; and the master may be in danger of receiving an hundred different opinions, supposing it were possible for him to apply to all. What does the necessity of such a case offer to be done? I conceive one of two things: to sell a part of the cargo, for the purpose of applying the proceeds to the prosecution of the voyage, by the repair of the ship; or to hypothecate the whole, for the same purpose. With respect to the former, the books overflow with authorities, many of which have been stated. They all admit that he may sell a part; some ancient regulations have attempted to define what part, others have not. The general law does not fix any aliquot part; and, indeed, it is not consistent with good sense to impose a restraint, or to fix any limitation to measure a state of things which is to arise only from necessity. It must, generally speaking, be adequate to the occasion. One limitation, however, the policy of the law necessarily prescribes, that the power of selling cannot extend to the whole; because it never can be for the benefit of the cargo that the whole should be sold, to repair a ship which is to proceed empty to the place of her destination. There will, in that case, be no safe custody and transmission; and, therefore, the power of selling, for the repairs of the ship, must be limited to the sale of a part, though it may not be possible to assign the exact part, except where positive regulations have fixed it.

But hypothecation may be of the whole, because it may be for the benefit of the whole that the whole should be conveyed to its proper market; the presumption being that this hypothecation of the whole, if it affects the cargo at all, will finally operate to the sale of a part, and this in the best market, at the place of its destination, and in the hands of its proper consignees. In the unfortunate case before us, in which there has been such a combination of calamitous circumstances as can hardly be expected to happen again, the loss of a part of a whole sold, in the hands of its proper consignees, is all the effect that will be produced; and it can hardly ever happen that the hypothecation will reach the total value of the cargo. On the other hand, the safe convenience of a valuable cargo may be, in many instances, of infinitely more value to the merchant than the whole expense of the repairs, if the whole could be devolved on the cargo. Generally it cannot be so; in the very form and structure of the bonds the ship and freight being usually the first things that are hypothecated; but if it were to happen that they were omitted, in the literal terms of the bonds, still they would be liable in contribution, to the extent of their value, although the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind. On principle, therefore, the right of hypothecation of the whole cargo is extremely natural; and if I am right in consider-

ing it as equivalent to a sale of a part, it is little more than what all the books of maritime jurisprudence direct to be done. It is, in truth, but a power to make a partial sale, conducted with greater probability of ultimate advantage to the whole; for as all must finally contribute in the case of an actual sale of a part, what new hardship is imposed? All contribute in this, as a portion of the whole value of the cargo is abraded for the general benefit, probably with less inconvenience to the parties than if any one person's whole adventure of goods had been sacrificed by a disadvantageous sale in the first instance.

Cross accidents may intervene in the sequel, to make the contract of hypothecation less beneficial than might have been expected at the time. In the present case, the ship was estimated, by public authority at Lisbon, at 2300*l.*; the freight amounted to as much; the sum, to which it is admitted the cargo is liable for its own proper charges, would have made up almost the whole of what remained, so that a very small part of the cargo would have been affected. It has happened, by subsequent accidents, that the matter has turned out so as to affect a larger portion of the cargo; but subsequent accidents, as it was observed in argument, cannot invalidate the original contract. The worst that can happen, and this only by a most perverse combination of circumstances, is, that the whole value of the cargo might be answerable; still I should say, speaking with all the caution that is due on such important interests, better is it that this should happen (if it can happen) in a very few eccentric and almost unnatural instances, than that the master should have no discretionary power to act for the preservation of the cargo, but that he should be compelled, in all cases and under all circumstances, to proceed to the sale of possibly a considerable part of his cargo, at a most improper port, for which his cargo is not adapted, as a distressed man, and as a man whose distresses are known to every person who has to deal with him in the purchase of those parts of his cargo.

An extreme case has been put by the King's Advocate, of a large and valuable ship, with a cargo of inconsiderable value, belonging to Dover, and falling into this distress in a neighboring port, as at Calais, and it is asked if it would be reasonable to consume a small cargo in the service of a ship so situated. It may be sufficient to answer, that it is not the case before the court; and that it differs from this case in the exact proportion of the difference of the distance between London and Lisbon, and of that between Dover and Calais. Supposing such a case, it would be expected, undoubtedly, that the master should use his utmost endeavors to correspond with the consignees or proprietors. But a case of instant necessity might occur even so near; the master might not be able to receive their directions; all communication might be interrupted, as it is, sometimes, for a fortnight, or three weeks, or more, in adverse or tempestuous weather, and then the same principle would apply. But whatever might be the objection to such a case, just the same objection would lie

against the known and admitted power of the master to hypothecate the ship, supposing the owner of that ship to live at Dover. If necessity was urgent, even that extreme case would come under the operation of the same principle.

So much upon mere principle. How does the matter stand with regard to authorities? In the first place, it is not improper to observe that the law of cases of necessity is not likely to be well furnished with precise rules. Necessity creates the law; it supersedes rules; and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects. In the next place, if I am right in considering hypothecation of the whole as equivalent to the sale of a part, then all authorities for a partial sale are authorities, also, for a total hypothecation. Thirdly, I must observe that it is not to be expected that the ancient codes should contain much precise regulation or direct authority on this subject, — this contract of bottomry being comparatively of later growth, and arising out of the necessities of an enlarged commerce. Bynkershoek expresses himself, I apprehend, with great historical accuracy on this subject, when he says: "Origo hujus contractus ex jure Romano, sed quae ibi legimus vix trientem absolvunt totius argumenti. Adeo tenuia etiam apud nos fuerunt ejus contractus initia, ut non nisi mutuum significaverit, quo magistro peregre agenti permissum est, navem ex causa necessitatis obligare." But still I think authorities are not wanting from the ancient codes. The passage which has been cited from the Consolato, art. 105, is applicable. There it is said that a merchant, being on board a ship with his goods (which was the custom, according to the simplicity of ancient commerce), having money, was obliged to advance it for the necessities of the voyage; and if he had not money, the master might sell a part of his lading. The ordinance of Antwerp, likewise, seems expressly to recognize it; and the passage of Bynkershoek, which has been cited, seems to me to be capable of no other interpretation. The passage is very general in its terms, and is by no means limited to the peculiar case in which the owner of the ship is likewise owner of the cargo. The *dictum* is perfectly unqualified in describing the authority of the character of master.

So far for foreign authorities. Upon the authorities of our own law, it is to be observed, that the power of hypothecation has been but incidentally noticed in the books of the common law, because such bonds are exclusively proceeded upon in the courts of admiralty, which can alone give the possession of the *res*, which is the actual security in dispute.[1] . . .

I find from the list that has been returned to me, that there has been in later times at least, a constant practice of proceeding upon such bonds, as well against the cargo as the ship. How early this practice may have prevailed, or what may be the most ancient in-

[1] Lord Stowell here cited in support of his judgment certain *dicta* in Buxton *v.* Snee, 1 Ves. Sen. 155; Justin *v.* Ballam, 1 Salk. 34. — Ed.

stances of it, to be found in these records, has not been ascertained; but I find two instances in the year 1750, and from that time downwards there is a list of twenty-three or twenty-four cases, in which the proceeding has been, in some, against the cargo only, in others (and much more generally) against the ship and cargo together. In some of these cases protests have been entered, almost to the extent of the present protest, denying the power of the master to bind the cargo under the circumstances of those cases; but these protests have been either waived or overruled. In the year 1786 there was the case of The Vier Gebroeders, in which I was of counsel, and although the decision, as it is said by the King's Advocate, proceeded on other grounds, the fact appeared that the master had exercised this power, and it seemed to be admitted, tacitly at least in the argument, that he possessed generally such a power. It is likewise something in addition to the practice of this court, that such bonds are frequently occurring in the practice of merchants, being notoriously given and taken; and the practice of merchants in such a matter goes a great way to constitute that *lex mercatoria* which all tribunals are bound to respect, wherever that practice does not cross upon any known principle of law, justice, or national policy. Adverting, therefore, to the fair foundation of the general principle, and to the authority of the maritime law, as it has been for some years practised in this court, and countenanced in all the instances in which it has been brought to the notice of the courts of common law, — adverting also to the practice of what I may call the *lex mercatoria*, I think I am warranted in pronouncing for the power of the master to bind the cargo for the repairs of the ship, in order to effect the prosecution of the voyage, in such a manner as to entitle the party who advances the money to sue for the enforcement of his bond in the Court of Admiralty. At the same time I think myself bound to observe, that it is perhaps the first instance in which a judgment has been demanded upon this point; and, as I cannot but feel, with peculiar weight, the insufficiency of the opinion of any one individual, to decide on such extensive interests as may depend on this question, in such a commercial country as this, it becomes me to suggest that it may perhaps be not improper that a resort should be had to the collective wisdom of another jurisdiction.

It remains to consider whether the situation of the master was such as to authorize the exercise of this power, which, I have said, only in the case of a severe necessity may belong to him; and 2dly, whether the lender has at all acted unfairly under that necessity by taking undue advantage, so as to vitiate the contract either in the whole or in part; for it must be proved upon the lender that he has taken such undue advantage. It will not be sufficient, either upon principle or upon determinations of the court, that the master has taken undue advantage against his employer; that is a matter between him and his employer, with which the third person has nothing

to do, unless personally implicated by the facts of the transaction in the fraud that may have been practised.[1]

Bond enforced against the cargo.[2]

G. A. BRETT and Others v. J. VAN PRAAG.

In the Supreme Judicial Court, Massachusetts, September 10, 1892.

[*Reported in* 157 *Massachusetts Reports*, 182.]

Contract, in two counts, to recover freight and demurrage under a charter-party.

Lathrop, J. It is not disputed that the plaintiffs are entitled to recover the freight on the outward voyage, less advances on account thereof, unless this freight is included in the bottomry bond, and rightly included, with interest. The principal questions in the case are whether the master in fact did include the outward freight in the bottomry bond, and whether he had a right so to include it. By the terms of the charter-party, the vessel was to proceed from Brunswick, Georgia, to Surinam, in South America, and back to New York or Boston. The defendant was to furnish at Brunswick a full cargo of lumber, and at Surinam sufficient cargo or ballast for the voyage. The defendant was also to pay, "for the use of the vessel during the voyage aforesaid," certain charges and fees, and fifteen dollars and a half "for each and every thousand feet, superficial inch invoice measure, delivered at Surinam, which shall be in full for the voyage out and home, two hundred dollars in specie to be advanced the captain at Surinam, free of premium, exchange, or commission, the balance payable on return of vessel and proper discharge of cargo. If vessel should be lost after discharge of outward cargo, one half of this charter shall be considered due and payable at Boston."

[At Surinam the master borrowed of M. S. Praag & Co., the agents of the defendant, $2650, for necessary repairs of the vessel, and to secure the payment of the same, executed on December 15, 1880, a bottomry bond. On December 17, 1880, the bond was duly assigned to the defendant. The vessel finished loading her homeward cargo

[1] On these two questions of fact Lord Stowell found in favor of the lender. His discussion of these points is omitted. — Ed.

[2] The power of the master to bind the cargo by a bottomry bond has been frequently recognized. Hussey *v.* Christie, 13 Ves. 594, 599; Benson *v.* Duncan, 3 Ex. 644; Anderston Co. *v.* Law (Court of Sess., May 28, 1869), 7 R. 836; Dymond *v.* Scott (Court of Sess., Nov. 23, 1877), 5 R. 196; Ins. Co. *v.* Gossler, 96 U. S. 645, 651; The Packet, 3 Mas. 255; The American Co. *v.* Coster, 3 Paige, 323, and cases cited. *Infra.* n.

"But there is no authority for giving a bottomry bond on cargo before it is put on board. It is the necessity of the cargo, and the required completion of the voyage which has been interrupted, which warrant the bond to extend to cargo." *Per* Dr. Lushington in The Jonathan Goodhue, Swab. 355, 357. — Ed.

about the middle of December, being detained, by default of the defendant or his agent, thirty-two days, for which demurrage, according to the terms of the charter-party, amounted to $960. Encountering heavy weather the vessel sprung a leak and was obliged to make St. Thomas for repairs, where a board of surveyors recommended her sale. She was sold at auction, and the proceeds, $800, were applied in paying the seamen. The cargo was transshipped and arrived safely at Boston.[1]]

By the terms of the bottomry bond, the "vessel, her tackle, apparel, furniture, and freight, as per charter-party," were hypothecated.

If we assume, in favor of the defendant, that the master of the vessel intended to include in the bottomry bond the entire freight payable for the round voyage, we are still of opinion that the master had not the power to include it, since it was not liable to the danger of perishing by reason of a maritime risk. The language of the charter-party is peculiar. The parties evidently intended to provide for two contingencies, the arrival of the vessel and its non-arrival. On the facts of the case we have no doubt that the vessel was "lost," within the meaning of that term in the charter-party, although, very possibly, we might be constrained to hold that the bond could be enforced against salvage of the wreck, if any could be found. Insurance Co. *v.* Gossler.[2]

In The Staffordshire,[3] it was held by the Privy Council, after much consideration, that freight to be earned on a voyage entered upon after the maturity of the bond could not be hypothecated. It was said by Lord Justice Mellish: "By the very nature of a bottomry bond the person who takes it is to become liable for the maritime risk, and therefore nothing can be hypothecated, except something which is in danger of perishing by maritime risk during the time that the bond is running."[4] See also The Brig Draco,[5] The Indomitable.[6]

For the same reason, if freight is pledged, the charterer is entitled as against the bondholder to deduct from the freight payable at the end of the voyage any advances that have been made before the making of the bond.[7] The Karnak; The John;[8] The Cynthia.[9]

The principal case upon which the defendant relies in support of his contention is that of The Schooner Zephyr.[10] In that case the vessel was bound on a voyage from Messina to Boston, with a cargo of fruit. On the way she was compelled by sea perils to put into Lisbon for repairs; and there a bond was given on the ship and freight. In the District Court an allowance of freight for the voyage from Lisbon to Boston was made, excluding what might be considered a *pro rata* freight from Messina to Lisbon. This was reversed by Mr. Justice

[1] This abridgment of the statement of facts, together with the opinion of the court, gives all the essential facts. — Ed.

[2] 96 U. S. 645. [3] L. R. 4 P. C. 194. [4] L. R. 4 P. C. 210.

[5] 2 Sumn. 157, 186. [6] Swab. 446.

[7] The Catherine, Swab. 263; The Karnak, *infra*, 231; The Anastasia, 1 Ben. 166 *Accord.* — Ed.

[8] 3 W. Rob. 170. [9] 16 Jur. 749. [10] 3 Mas. 341.

Story in the Circuit Court, and it was held that the bond covered freight for the whole voyage; and that learned jurist said: "Upon any other construction, where the vessel is repaired at an intermediate port, without any change of her cargo, no freight at all would be hypothecated; for no distinct freight would grow due for the voyage from the port of repairs. The freight ultimately paid would not be divisible; it would be the entire freight for the fulfilment of the original contract for the whole voyage, and not a *pro rata* freight, as upon a receipt and delivery at the intermediate port. When the parties pledge freight, it must, in the absence of all other counter proofs, be presumed that they mean the freight to be earned by the ship in the course of the voyage, which has been interrupted by the disaster."

In the case of The Schooner Zephyr, there having been no delivery of goods at the intermediate port and acceptance by the owner, the doctrine of freight *pro rata itineris* was not applicable; and the entire freight, being at risk, was held to be covered by the bond.

In the case of The Eliza's Cargo,[1] on which the defendant also relies, the vessel was chartered for a voyage from Boston to Aux Cayes, in St. Domingo, and back to Boston, at twelve hundred dollars for the round voyage, one half of the charter to be earned on delivery of the cargo at Aux Cayes. The question was whether the master of the vessel had a lien on the homeward cargo for the entire charter, the goods having been shipped on a bill of lading by the terms of which freight was payable "as per charter-party." It was held that he had such a lien. In regard to the clause "one half the charter to be earned," etc., Judge Lowell said: "The agreement that one half the freight should be earned at the out port, is intended to regulate the rights of the parties between themselves and with underwriters of freight, in case of a loss of the vessel. One half of the freight is put at risk on each trip."

We have no occasion to question the correctness of the point decided; and the words last quoted are in favor of our view that only the freight of the homeward voyage was at risk when the bond in the case at bar was given; and we are of opinion that only the homeward freight could be included in the bond.

The next question is as to demurrage. The defendant's contention is, that, as "demurrage is only extended freight," it is included in the bond under the clause "freight as per charter-party." That "demurrage is only an extended freight" was said by Mr. Justice Heath in Jesson *v.* Sully;[2] and this remark has been frequently repeated since. Hall *v.* Barker;[3] Sprague *v.* West;[4] Donaldson *v.* McDowell.[5] Hawgood *v.* Tons of Coal;[6] The Giles Loring.[7] These were all cases against the owner or the consignee of cargo for the improper detention of the vessel. See also Coggeshall *v.* Read.[8]

No case has been called to our attention by the learned counsel for

[1] 1 Low. 83.
[2] 4 Taunt. 52.
[3] 64 Maine, 339, 343.
[4] Abb. Adm. 548, 554.
[5] Holmes, 290, 292.
[6] 21 Fed. R. 681, 686.
[7] 48 Fed. R. 463, 473.
[8] 5 Pick. 454, 460.

the defendant, where a sum due for demurrage has been held to be included in a bottomry bond under the name of freight. The demurrage provided for by the charter-party had been earned before the bond was executed, and cannot be said to have been at risk. Moreover, we should be slow to hold, where the charter-party contained specific clauses relating to both freight and demurrage, and the bond hypothecated the "freight as per charter-party," that the parties intended to include the demurrage.

As to the advances at Surinam on account of the freight, we are of opinion that they are to be deducted from the outward freight.

The result is that the judgment entered in the Superior Court must be set aside; and a judgment entered in accordance with this opinion.

So ordered.[1]

THE PONTIDA.

In the Court of Appeal, July 28, 1884.

[*Reported in Law Reports, 9 Probate Division*, 177.]

Brett, M. R.[2] In this case the plaintiffs brought an action in the Admiralty Court against the owners of cargo lately laden on The Pontida, on a bottomry bond by which the master bound the cargo. The bond was held to be a valid bond; the items were referred to the registrar and merchants. Objection was taken and allowed before them, and such objection was supported by the learned judge on appeal, that the circumstances did not give, as to three items, namely, charges for metal and felt supplied to The Pontida, agent's commission, and the premium on the bond, authority to the master to bind the owners beyond a certain extent.

When an action is brought on a bottomry bond, the first question is whether the court will decree for the bond at all. It does not follow that because the bond exists the court will recognize its validity, for this depends on the preliminary inquiry whether the bond was entered into in a manner to bind the owners at all. This jurisdiction of the court has been of extreme importance to shipowners and cargo-owners, for a long series of cases has shown that if the court exercises its jurisdiction with laxity, the shipowners and cargo-owners will in some circumstances be practically robbed. There are some small foreign ports in which a ship may find herself in need of repairs, in which every one considers that he is entitled to get as much out of that ship as possible. It has been found, under such circumstances, that it is useless to rely on a local surveyor or ship-

[1] Although it is customary to include the ship with the freight in a bottomry bond, the bond may cover the freight alone. The Sophie Wilhelmine, 58 Fed. R. 890; The Eliza Lines, 61 Fed. R. 308, 319 (*semble*). — Ed.

[2] Only the judgment of the court is given.

wright or consul. Therefore, the court has always looked strictly into a bottomry transaction, and has refused to pronounce for the validity of the bond unless it was entered into in good faith. It is as to this good faith that the question of an inquiry by the lender is material, for if no such inquiry has taken place, this is evidence of an absence of good faith on the part of the lender, which might cause the court to give judgment against the bond. But Dr. Phillimore has argued that even assuming the things supplied not to be necessary for the ship, the fact that the lender has made reasonable inquiries is sufficient to make the bond valid for its whole amount. But suppose certain necessary things done to a ship, and that reasonable charges were made in respect of them, but that there was an agent in the port whose duty it was to pay for these things, and that nevertheless the master entered into a bottomry bond. The court has declared a bond given under such circumstances to be void.[1] See Gunn *v.* Roberts.[2] But according to Dr. Phillimore's argument, the lender might have admitted the truth of these facts, but have said that he did not know, although he had made inquiries, that there was an agent of the ship in the port, and that the captain had told him there was none. Such a view has never before been put forward. To take another illustration: as that a ship requires coppering to a certain extent in order to enable her to complete her voyage, and the master thinks it better to have five times as much work done as is actually required, in order, by so doing, that she may be reclassed. The lender on bottomry, according to the arguments we have heard, if he does not suspect fraud, and has made some inquiries, has obtained a valid bottomry bond for the whole cost of all the work done. But no authority has been cited which carries the law to this length. A bond under such circumstances would be pronounced invalid whether the lender knew or did not know that the repairs were for reclassing the vessel. The question of *bona fides* affects only the primary question whether the bond is at all valid or not. But if the bond has been pronounced to be valid, then the case is referred to the registrar and merchants to say how much of it is in respect of necessaries, and it will be bad as regards each item to the extent by which such item exceeds the amount which was actually necessary. The registrar and merchants have to decide to what extent the master was authorized to incur each particular item, and that depends on its necessity. It was for the purpose of seeing how much should be allowed that the bond has been referred for investigation to the registrar and merchants. The

[1] In Gunn *v.* Roberts there was no bottomry bond. The case turned on the power of the master to bind the owner personally for ship's necessaries, when there was an agent of the owner at the port ready to provide for such necessaries. Brett, M. R., said, p. 337: "In these cases attempts have been made to contend that if the person advancing money did not know that the owner or his agent was at hand, he was entitled to charge the owner, on the order of the captain as a general agent; but it has invariably been held that the absence of knowledge on the part of the person making the advance was immaterial." — ED.

[2] Law Rep. 9 C. P. 331.

question of reasonable inquiry by the lender has never been the test of the liability of the shipowner. I think, with deference to the Privy Council, that their language in The Prince of Saxe Coburg[1] was not quite so precise as could have been wished; I think that the language in that case applies to the *bona fides* of the lender as affecting the validity of the bond *ab initio*, and whether it should be pronounced for at all. For if a bond is entered into without the least care or inquiry, or with the intention of imposing on the shipowner, it justifies the court in declaring it to be void. But the rule that a bond, though valid, is so only to the extent to which money is needed for the actual necessities of the ship, is founded on the doctrine that by the law of England the master in a foreign port has no authority to bind the shipowner or cargo-owner, except in case of necessity. The rule should be even more stringent as regards the cargo-owner, for the master does not take goods on board as his agent, and is not his agent at all, unless an overruling necessity arises during the voyage. To assent to the argument urged on the part of the appellants would be to cut away the whole ground on which the authority of the master is based in a foreign port.

I am also of opinion, though I do not base my decision on this ground, that there was in this case no evidence of any inquiry on the part of the lender. As to the items for commission and for the premium on the bond, the court does not interfere with the finding of the registrar and merchants except on a matter of principle, and therefore, in the matter of this commission and bottomry premium, there is no ground for asking us to reverse the judgment of the learned judge affirming their decision. The appeal must be dismissed with costs.

BOWEN, L. J. I am of the same opinion. Shortly expressed, the rule of law is, that the master is only the agent to bind the cargo-owner in the hour of necessity, and his authority must be measured by this principle. But if this appeal were allowed the rule would be altered, because not the necessity of the hour but that which the lenders thought would then constitute the test of the validity of a bond. The entire current of the common law authorities is against such a view as this. We have been pressed with the judgment of the Privy Council in The Prince of Saxe Coburg,[2] in which it is suggested that a lender may recover against a ship if reasonable inquiries have been made, but the opinion of the lender cannot extend the authority of the master. Read, however, by the Master of the Rolls' interpretation of the judgment, the expression ceases to raise a difficulty. But even were the law as it has been stated by Dr. Phillimore, there is, in my opinion, no evidence of such inquiries as would justify the lenders entering into the bond to the extent to which they did.

FRY, L. J. I concur in the conclusion of the other members of the court, but not without some little doubt. It arises because in this case it was merchants having nothing to do with the supplies to the

[1] 3 Moo. P. C. 1. [2] Id.

vessel who made this loan, and because of expressions in The Prince of Saxe Coburg[1] and in The Royal Stuart.[2] For the rule, as stated in those cases, seems more elastic than that enunciated by the Master of the Rolls.[3]

However, in my opinion, it is unnecessary to decide the point, because the appellants have not shown that reasonable inquiries were made. In the first place, the lenders should have inquired if the repairs were more than were necessary for the purposes of the voyage; next they were bound to make some inquiries as to the price of materials. If they had done so, they would have found that the copper was charged for at an exorbitant rate. On this point, therefore, I agree that this appeal fails.

Appeal dismissed.

THE BARKANTINE KATHLEEN.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, JUNE, 1868.

[*Reported in* 2 *Benedict*, 458.]

THE libel filed by John Taylor, of Halifax, in Nova Scotia, averred that the Barkantine Kathleen, while on her voyage from Halifax to New York, in May or June, 1865, ran on shore at Little Dover, and was greatly injured; that she was taken off at considerable expense, and put into Ship Harbor, in the Strait of Canso; that heavy expenses were incurred in getting her off and repairing her, and making her fit to continue the voyage, and in discharging the lien thereon for said expenses and repairs; that Henry Barthe, the master and part-owner of the vessel, being a stranger at Halifax, and being in want of

[1] 3 Moo. P. C. 1. [2] 2 Spks. 258.

[3] "If the master takes up money from a person who knows that he has a general credit in the place, or at least an empowered consignee, or agent, willing to supply his wants, the giving a bottomry bond is a void transaction, — not affecting the property of the owner, — only fixing loss and shame on the fraudulent lender; but where honorably transacted, under an honest ignorance of this fact, an ignorance that could not be removed by any reasonable inquiry, it is the disposition of this court to uphold such bonds, as necessary for the support of commerce in its extremities of distress, and as such recognized in the maritime codes of all commercial ages and nations." *Per* Lord Stowell in The Nelson, 1 Hagg. Adm. 169, 176. Lord Lyndhurst expressed a similar view in Heathorn *v.* Darling, 5 Moo. P. C. 5, 14.

The rule in this country is stated as follows by Chase, C. J., in The Grapeshot, 9 Wall. 129, 141:—

"The ordering, by the master, of supplies or repairs upon the credit of the ship, is sufficient proof of such necessity to support an implied hypothecation in favor of the materialman, or of the ordinary lender of money, to meet the wants of the ship, who acts in good faith.

"To support hypothecation by bottomry, evidence of actual necessity for repairs and supplies is required, and, if the fact of necessity be left unproved, evidence is also required of due inquiry and of reasonable grounds of belief that the necessity was real and exigent." See to the same effect the statement of Story, J., in The Fortitude, 3 Sumn. 228, 249, 250. — ED.

money to pay for the repairs of the vessel and fit her for sea, and furnish her with provisions and other supplies necessary for the prosecution of his intended voyage, and having no other means of procuring the same, borrowed from the libellant, with the commission thereon, $3240, lawful money of Nova Scotia, upon the bottomry of the vessel, and that said sum was advanced and paid accordingly; that the said sum of $3240 was advanced and paid by the libellant to the master for said purpose, and was necessary therefor, and that the vessel could not otherwise have sailed from Ship Harbor; and that the vessel arrived at New York on the 19th of July, 1865. The libel was sworn to and filed on the 7th of August, 1865.

The other half-owner of the vessel was a person named Lucia, of Sorel, in Canada.

The ground taken in defence was, that no necessity was shown for the advance of the money, and that the master did not send to Canada to see if he could procure the money he needed, and that, as the vessel was a British vessel, in a British port, the master belonging in Montreal, the bottomry was not authorized.[1]

BLATCHFORD, J. The master had an undoubted right to create a bottomry on his own interest in the vessel, without the existence of any necessity for doing so.[2] 1 Parsons's Mar. Law, 410, 411, and cases there cited. So far as the interest of his co-owner was concerned, the evidence shows that the repairs, fitments, and supplies were necessary for the vessel; that the money was lent on the bottomry bond in good faith, for the purpose of paying for those repairs, fitments, and supplies, and the necessary wages of the seamen, and was applied to those purposes; that the debts to which the money was applied were incurred on the credit of the vessel; and that the loan was indispensable to relieve her from the charges. Therefore, it is no objection to a recovery on the bond, that the loan was effected after the repairs and fitments were made and the supplies were furnished (The Yuba[3]).

The evidence shows that the master communicated from Halifax by telegraph with his friends in Canada, to see if he could procure the funds he needed, but that he was unable to do so except by resorting to the bottomry. I think that the bottomry was justifiable, although the vessel was a Canadian vessel in the British port of Halifax. No evidence has been introduced on the part of the claimant to show that the money could have been obtained in some other way. The

[1] The statement of the case is somewhat abridged. — ED.

[2] A shipowner may give a bottomry bond for any purpose and in any port, domestic as well as foreign. The Smilax, 1 Pet. Adm. 295, *n.*; The Hannah, Bee, 348; The Mary, 1 Paine, 671; The Hilarity, Bl. & How. 90, 93; The Draco, 2 Sumn. 157 (discrediting The John, 1 Wash. C. C. 393); The Panama, Olc. 343; The Charlotte Minerva, Fed. Cas. No. 4483; Freights of the Kate, 63 Fed. R. 707, 713; Greely *v.* Waterhouse, 19 Me. 9 *Accord.*

Greely *v.* Smith, 3 Woodb. & M. 236 (*semble*); The Attila, Crabbe, 326 (*semble*) *Contra* — ED.

The cargo-owner may also give a *respondentia* bond. Conard *v.* Atlantic Co., 1 Pet. 386; The Bridgewater, Olc. 35.

[3] 4 Blatchf. C. C. R. 352.

necessity for the repairs and supplies being shown, it is for the claimant to establish such a defence.[1] The reasonableness of the maritime rate of interest, 20 per cent., stipulated for by the bond, is sufficiently shown by the evidence.

The libellant is entitled to a decree for the $2700 advanced by him, with 20 per cent. interest thereon, being in all $3240, lawful money of Nova Scotia, with interest thereon at the rate of 7 per cent. per annum, from July 29th, 1865, being ten days after the vessel arrived at New York.

THE KARNAK.

In the High Court of Admiralty, June 9, 1868.

[*Reported in Law Reports, 2 Admiralty*, 289.]

This was a cause of bottomry upon ship, freight, and cargo. The amount of money borrowed under the bond was 3228*l.* 7*s.* 2*d.*, and, no opposition having been offered to the bond by the owner of the ship, the ship had been sold and produced 512*l.* 11*s.* 9*d.* The freight amounted to the sum of 1356*l.* 16*s.* The defendants in this suit, the owners of the cargo, paid into court the sum of 628*l.* 15*s.* 2*d.*, and still retained in their hands the sum of 727*l.* 19*s.* 2*d.*, which they claimed to deduct, on the following grounds: namely, the sum of 632*l.* 14*s.* 2*d.*, in respect of an alleged advance of freight made to the master of the Karnak, at Galveston, and the sum of 61*l.* 6*s.* 9*d.*, for the interest and insurance on the said alleged advance; and the sum of 33*l.* 18*s.* 4*d.*, as being due to the defendants for commission on the said charter-party.

The defendants also denied altogether the validity of the bond as far as it affected the cargo.

The facts of the case were as follows: The brigantine Karnak, of 267 tons, sailed from Galveston in Texas, for Liverpool, on the 24th of December, 1866, laden with 270 bales of cotton, under a charter-party from Droege & Co., of Galveston, whereby the vessel was consigned to the order of Messrs. Droege & Co., of Manchester, a firm bearing the same name; and before sailing the master received the sums of money from Messrs. Droege & Co., claimed as advances of freight.

After leaving Galveston he was compelled by bad weather, during which he lost nearly all his sails, spars, and rigging, to put into Bermuda on the 17th of January, 1867. Acting on the advice of Hyland & Co., agents for the American Lloyd's, he had the ship and cargo surveyed, after which 580 bales of cotton were landed and warehoused, and the ship was put upon a slip and caulked all over. The master

[1] The Virgin, 8 Pet. 538; The Grapeshot, 9 Wall. 129, 139, 140; The Fortitude, 3 Sumn. 228 *Accord* — Ed.

wrote to the managing owner of the ship, and there was a conflict of evidence as to whether or not he had also communicated with the agent for the owner of the cargo; and the court came to the conclusion that the captain had attempted to give him notice by letter, and that, at all events, the agent was aware of the facts that the Karnak had met with a disaster and had put into Bermuda in distress, and that the cargo had been unshipped; that the expenses would be very great, and that there was a chance of the vessel being condemned. From the captain's evidence it further appeared that he gave orders for the repairs several days after the survey. The repairs were nearly completed in the beginning of April, and then, but not till then, Messrs. Hyland & Co. issued circulars bearing the master's signature, inviting tenders for a loan on bottomry on ship, freight, and cargo. The charges were not more than the usual charges there; and after the master had communicated with the managing owner in New York, he had expected to receive money from him, and it was not till after he had written several letters and received no answer that he felt under the necessity of borrowing money on bottomry. It was then too late to get money from England, even if he had known from whom to get it; and he could not have raised the money on ship and freight only, and the vessel would have been arrested and sold for payment of the charges incurred.[1]

SIR ROBERT PHILLIMORE. In this, I believe, as in almost all the reported cases, the court has to deal, not with the authority of the owner, but of the master, to make a bottomry bond.

This power of the master arises out of his relation as agent both to the owner of the ship and to the owner of cargo. A material distinction, indeed, exists between his authority as agent for the one and as agent for the other, but in both cases his power to hypothecate, like his power to sell, arises out of the necessity of the case.

Lord Stowell says, "Necessity creates the law. It supersedes the rules, and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subjects."

Upon this cardinal principle, that necessity is the foundation of the master's authority in the matter, several limitations of that authority, as the law has been developed, have been established.

Among them the following are preëminent: —

The master must endeavor to raise funds on the personal credit of the owners. The authority of the master is derived *ex tacito mandato*, as Bynkershoeck says; and if the owner be on the spot, according to the general law, the master has no authority to bottomry[2] (Boulay-

[1] The statement of facts is taken from 37 L. J. Ad. 41. A portion of the judgment is omitted. — ED.

[2] The Golden Rose, Bee, 131; Rucher *v.* Conyngham, 1 Pet. Adm. 295; Selden *v.* Hendrickson, 1 Brock. 396 (*semble*); The Randolph, Gilp. 457 *Accord*.

Nor has the master authority to execute a bottomry obligation in the home port. The Emperor, Bee, 339; The Hannah, Bee, 348; The A. E. I., Bee, 250; The Lavinia, 1 Wash. C. C. 49; Rucher *v.* Conyngham, 1 Pet. Adm. 295; Selden *v.* Hendrickson, 1 Brock. 396 (*semble*); The M. P. Rich, 1 Cliff. 308.

Paty, 11, 271); and if the owner be absent, it is the duty of the master to endeavor to communicate with him before bottomry be resorted to.[1]

The money must be raised to defray the expense of necessary supplies or repairs of the ship, or to enable — and this, it will be seen, is a wider and more difficult proposition — the ship to leave the port in which he gives the bond, and to carry the cargo to its destination.

With reference to this proposition much discussion has arisen whether the liability of the ship to detention, according to the *lex loci*, justifies a master in giving a bottomry bond, and the authorities upon this point are supposed to be conflicting. And, again, there arises a question whether the liability to detention must not be on account of necessaries furnished to the ship in order to enable her to prosecute her homeward voyage, or whether this liability may arise from any other cause, such as for old debts incurred antecedently to the voyage, or for damage done to the outward cargo in unloading at the port, or in some other manner; and, again, whether the liability of the master to personal detention justifies the creation of the bond.[2]

Another important principle established by the judgments is sometimes expressed in this language — that the money must have been advanced in contemplation of a bottomry security, or, in other words, "upon the credit of the ship." The Alexander.[3]

This proposition appears to me to have been somewhat loosely stated, for, apart from verbal or written statement or agreement, it would seem difficult to prove whether the lender or the borrower did or did not mentally contemplate hypothecation at the time when the expenses were incurred.

It must, however, be taken to be ruled law that a creditor who has furnished repairs upon personal credit cannot afterwards convert the personal debt into a bottomry transaction;[4] and, on the other hand, that a bond executed after advances have been made, if in pursuance of an agreement for bottomry, is valid,[5] and that an agent who has

[1] La Ysabel, 1 Dod. 273 (*semble*); The Oriental, 7 Moo. P. C. 398; The Panama, L. R. 3 P. C. 199; The Circassian, 3 Ben. 398; The Edward Albro, 10 Ben. 668; The Archer, 15 Fed. R. 276, 277; The Giulio, 27 Fed. R. 318; The Mauna Loa, 76 Fed. R. 828 *Accord*.

Glasscott *v.* Lang, 2 Ph. 310 (*semble*) *Contra*.

The English rule does not obtain in Italy. The Gaetano, 7 Prob. Div. 137.

The law in this country, notwithstanding the cases cited in the preceding paragraph, must be regarded as still unsettled. See *infra*, 239, n. 2. — Ed.

[2] A bottomry bond given to procure the release of the master from arrest is invalid. The Hersey, 3 Moo. P. C. 79; The Prince George, 4 Moo. P. C. 21. — Ed.

[3] 1 Dodson, 278.

[4] The Augusta, 1 Dod. 283; The Vibilia, 1 W. Rob. 1 (*semble*); The Hersey, 3 Moo. P. C. 79; The Royal Arch, Swab. 269, 278; The Empire of Peace, 39 L. J. Ad. 12; The North Star, Lush. 45; The Laurel, Br. & Lush. 191, 198; The Hunter, 1 Ware, 249; The Medora, 2 Woodb. & M. 92; The Circassian, 3 Ben. 398; The Edward Albro, 10 Ben. 668, 683, 684 (*semble*) *Accord*. — Ed.

[5] La Ysabel, 1 Dod. 273; The Alexander, 1 Dod. 278; The Vibilia, 1 W. Rob. 1; The Trident, 1 W. Rob. 29; The Prince George, 4 Moo. P. C. 21; The Laurel, Br. & Lush. 191, 196; The Virgin, 8 Pet. 538, 552; The Magoun, Olc. 55; The Panama, Olc. 343, 350; The

advanced money upon personal credit may take a bottomry bond for advances subsequently supplied. There is more difficulty as to the law in the case of a bottomry bond for money already supplied without any previous agreement at all; but I am of opinion that, in the absence of all evidence, the presumption must be that the foreign lender made the advances in contemplation of a bottomry security, and that this presumption is increased where the *lex loci* empowers the lender to arrest the ship in satisfaction of his demand.

I will now endeavor to apply some of these principles of law to the circumstances of the case before me, and I will take the arguments advanced by the counsel and the various cases adverted to in what appears to me to be their natural order. I will address myself first to those which relate to the validity of the bond so far as it affects the ship and freight, and next as to the validity of the bond in its relation to the cargo.

First. Is this bond bad because there was no necessity to raise money on bottomry, on the ground that it could have been obtained on the personal credit of the owner? I am of opinion that, according to the evidence before me, he could not have raised the necessary funds except on bottomry bond. It has not, I think, been contended that the repairs and supplies were not necessaries.

Secondly. Is the bond bad because given for the purpose of raising money to pay for repairs already executed? or, as the same proposition was stated in another form, does the fact that these repairs were already executed take them out of the category of necessaries for which it is competent to the master to bottomry his ship? I am of opinion that the bond is not bad upon this ground. The tradesmen who effected the repairs or furnished the supplies were not the takers of the bond, nor is there any question in this case whether a transaction done on personal credit can be converted into bottomry. If there were, I should hold, on the authority of The Augusta;[1] The Vibilia;[2] The North Star;[3] that the bond was bad. The question here is whether the master, having failed to obtain funds from the owner to pay for repairs which the necessaries of the ship compelled him to order, was not warranted in raising money for this purpose from a person other than that or those who had supplied such repairs. Upon principle it would appear to me that it must be competent for him to do so;[4] an incalculable amount of inconvenience and injury to commerce would flow from an opposite doctrine. It was the master's duty to place his vessel upon the slip, and to cause her repairs to be begun at the earliest possible moment. How could he, or any other master in his position, foretell the exact amount of expense which such repairs would entail? Or if, by survey, he could have ascertained a probable estimate of the gross expense, it could only have

M. P. Rich, 1 Cliff. 308, 315; The Yuba, 4 Blatchf. 352; The Edward Albro, 10 Ben. 668, 683, 684 *Accord.* — Ed.

[1] 1 Dod. 287. [2] 1 W. Rob. 8. [3] Lush. 45.

[4] The Hebe, 2 W. Rob. 412, 4 Notes of Cases, 361, 10 Jur. 227 s. c.; The North Star, Lush. 45, 50 *Accord.* — Ed.

been a probable estimate, and many items of expense must always be incurred which such an estimate cannot cover.

The case of The Hebe,[1] it is admitted, is a direct authority in favor of the proposition that a bottomry bond for the purpose of obtaining money for the payment of debts for necessaries previously incurred on personal credit, may be legally given to a person who has not supplied such necessaries. It has been attempted, but I think unsuccessfully, to impugn the authority of that case. I have examined it minutely: it has been very carefully reported, both in the Notes of Cases, vol. iv. p. 361 (A. D. 1846), and in the 10th volume of the Jurist, p. 227; and it is not unimportant to observe that the following cases were cited in argument. The Augusta;[2] The Zodiac;[3] The Hersey;[4] The Vibilia;[5] The Lochiel.[6]

The case appears to have been well argued and deliberately decided in the year 1846; and it derives confirmation from the decision of the same learned judge who, in the case of The North Star,[7] in the year 1860, said: "Can a right of personal action only be the foundation of a bottomry bond? The general rule is that they cannot, except preceded by the promise of a bond; but we must bear in mind the distinctions applicable to such cases. A master entering a foreign port in need of necessaries, from distress or otherwise, may incur debts for repairs or necessaries. Those debts may be purely personal; but he may borrow money on bottomry from any one not his creditor to pay such debts. On the other hand, The Augusta[2] has settled that a personal debt cannot be converted into a bottomry transaction."

The high authority of Mr. Justice Story, as will presently be seen, appears to be in favor of the doctrine contained in The Hebe[1] and The North Star.[7]

I should observe that I have considered the case of The Hersey,[4] referred to in The Ariadne;[8] and looking to the facts of The Hersey, I am of opinion that it in no way interferes with the decision in The Hebe.

The Hersey was cited, I observe, in the argument which preceded the judgment in The Hebe.

I must now draw attention to another fact proved in this case, and having an important bearing upon the law which must decide it. It is in evidence that, by the law in Bermuda, those who supplied the necessaries had a lien upon this ship, and could have arrested her.

In 1838 Dr. Lushington decided the case of The Vibilia,[5] and in the course of his judgment he said: "With regard to the further objection that has been urged in the argument, that it was not until after the responsibility had been incurred by Mr. Baldwin that a bottomry bond was agreed upon, I am of opinion that such objection has been disposed of by the judgment of Lord Stowell in the case of The Alexander. He says: 'The question is whether so induced they (the consign-

[1] 2 W. Rob. 146.
[2] 1 Dod. 283.
[3] 1 Hagg. 320.
[4] 3 Moo. P. C. 79.
[5] 1 W. Rob. 1.
[6] 2 W. Rob. 34.
[7] Lush. 50.
[8] 1 W. Rob. 411.

ees) did not make these advances on the credit of the ship? Against the proprietors of the cargo they had no direct demand for repairs done to the ship, and as they had no knowledge of the owners of the ship, it must have been that they looked to the ship itself as their security. Some of the advances were made before the master was appointed, and these it is said could have had no reference to a bond of hypothecation. But what could they look to but the ship? For of the owners of the ship they had no knowledge: the bond was not perhaps noticed at first; because in Pernambuco, as in other foreign states, there is no necessity for an instrument of this kind, for by the general maritime law the ship itself is *ipso facto* liable for repairs. There was no necessity, therefore, for having recourse to a bond till the ship was coming to this country, where from peculiar motives of policy, a special hypothecation is required.'

"It is evident, therefore, that in the opinion of Lord Stowell, it is competent for the foreign merchant, without any express agreement for a bottomry bond, to make advances on the security of the ship, that is, upon the faith of a lien given by the law of his own country, and it is not necessary for him to have a bond of bottomry, or an agreement for such a bond, until the ship is about to sail. This is the real substance of the case of The Alexander, and constitutes the important distinction between the cases of The Alexander and The Augusta, which applies only to the conversion of an advance on personal security into a bottomry transaction."

In the case of The Prince George,[1] it is said: "If it had been proved that the law of New York gave the lien upon the ship as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money, which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship, this power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arises from such a demand, or to pay for repairs, stores, or port duties."

It has been said that this passage contains a mere dictum, that it has not been acted upon, and has indeed been discountenanced by the subsequent judgment of Dr. Lushington in The Osmanli.[2]

It is true that in his judgment in that case the learned judge seems at that time to have supposed that the passage in The Prince George was uttered *per incuriam*, and without sufficient attention to Lord Stowell's judgment in The Augusta. That case was, however, cited by counsel in the case of The Prince George, the judgment in which was delivered by Lord Campbell (the other members of the Judicial Committee being Lord Wynford, Lord Brougham, and Mr. Justice Erskine); and I must consider the decision of The Prince George [1] to be binding upon the court. I observe that in a later judgment, delivered in 1861, in the case of The Edmond,[3] in which The Prince George [1]

[1] 4 Moo. P. C. 25. [2] 3 W. Rob. 198. [3] Lush. 220.

had been cited for another point, and it had been replied that The Osmanli [1] and The North Star,[2] and subsequent decisions of the Admiralty Court, were at variance with The Prince George, Dr. Lushington denied the variance, but he also said: "Cases decided by myself have been cited, which it has been argued conflict with this doctrine. The answer, if that is so, is short and conclusive. I must obey the Judicial Committee, and not adhere to what must, if different from their doctrine, be considered my own errors."

The Hebe was decided in 1846, four years after The Prince George, in 1842. Dr. Lushington glanced at this liability to detention [3] in a way which indicates that he then inclined to the opinion that such liability would warrant a bottomry bond. The same inclination of opinion is to be discovered in The North Star,[2] and in The Laurel;[4] this inclination seems to have become much stronger and more decided, and more at variance with The Osmanli.[1] In The Laurel [4] the learned judge says: —

"Now the court, from the case of The Augusta to the cases up to the present day, has good reason to conclude that in almost all foreign countries, if not in all, merchants who supply money to defray the necessary expenses of the ship, tradesmen who do the necessary repairs or furnish the necessary articles, have a right of arresting the ship to satisfy their demands, if such right of arrest, *per se*, renders valid any bottomry bond, though there was no agreement or understanding that such bond would be required, it follows that under such circumstances, in all cases a bond, and a valid bond, may be executed, though the master never made any such agreement, never contemplated the granting a bottomry bond, and if he had suspected a bond would have been required, might have hesitated before he received such assistance; might have sought for it in other quarters, or in some cases have waited for instructions from owners or consignees. These are very serious considerations, which would make the court pause before it gave its assent to such doctrine; still it may be that such state of the *lex loci*, though not perhaps sufficient to bring about all those consequences attributed to it, may be an important ingredient assisting to support the validity of the bond."

And the learned judge continues: "I think that the effect of the observations is, that such *lex* is important as regards the intention to advance on the credit of the ship, but not conclusive that the *lex loci* alone would render a bond, otherwise void, valid."

For the purpose of this case it would, I think, be sufficient to accept this modified opinion of Dr. Lushington. But I must repeat that I consider the opinion expressed in The Prince George [5] as binding upon this court.

It is observable that in The Hersey [6] (1840) the Privy Council, confirming a judgment which set aside a bottomry bond, dwelt upon the circumstances that the vessel in that case could not have been de-

[1] 3 W. Rob. 198. [2] Lush. 45. [3] 4 N. of C. 368.
[4] Br. & Lush. 191. [5] 4 Moo. P. C. 21. [6] 3 Hagg. Adm. 404.

tained. As these questions of bottomry bonds belong, like other questions of commercial law, to the *jus gentium*, it is satisfactory to be able to cite the authority of Story, both upon the point of the lawfulness of a bond given to a person advancing money to pay off debts already contracted for the supply of necessaries to the ship, and on the point of the liability of the ship to arrest warranting a bottomry bond to redeem her from that peril.

"It is undoubtedly true that material-men and others who furnish supplies to a foreign ship, have a lien on the ship, and may proceed in the Admiralty Court to enforce that right; and it must be admitted that in such a case a *bonâ fide* creditor, who advances his money to relieve the ship from an actual arrest on account of such debts, may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other sufficient funds or credit to redeem the ship from such arrest. But it would be too much to hold, as was contended for by the counsel for the appellants, that a mere threat to arrest the ship for a preëxisting debt would be a sufficient necessity to justify the master in giving a bottomry interest, since it might be an idle threat which the creditor might never enforce, and until enforced the peril would not act upon the ship itself; and, even supposing a just debt might in such a case be a valid consideration to sustain a bottomry interest in favor of a third person, such an effect never could be attributed to a debt manifestly founded in fraud or injustice. Nor does it by any means follow, because a debt sought to be enforced by an arrest of the ship might uphold an hypothecation in favor of a third person, that a general creditor would be entitled to acquire a like interest. It would seem as against the policy of the law to permit a party in this manner to obtain advantages from his contract for which he had not originally stipulated. It would hold out temptations to fraud and imposition, and enable creditors to practice gross oppressions, against which even the vigilance and good faith of an intelligent master might not always be a sufficient safeguard in a foreign country." [1] The Aurora.[2]

I have hitherto considered the validity of this hypothecation in relation to the ship and freight, the defendants, the owners of the cargo, having, as it was quite competent for them to do, denied, even in this relation, the validity of the bond.

But they have more especially contended against the validity of it with respect to the cargo, maintaining that the bond may be valid as it affects the ship and freight, and yet invalid as it affects the cargo.

In the recent case of The Lizzie,[3] I stated at length my view of the law which has been laid down with respect to the duty of the master to communicate with the owner of the cargo before he hypothecates it. That duty arises from the peculiar character of his relation as agent for the shipper, a relation forced upon him for the nonce by

[1] The Ida, L. R. 3 Ad. 542; The Boston, Bl. & How. 309, 324 (*semble*) *Accord.* — Ed.
[2] 1 Wheat. 104, 105.
[3] L. R. 2 Ad. 254.

a temporary necessity, and therefore different from his original and abiding relation as agent for the owner of the ship.

It must be observed, however, that the law does not say that the necessity of communicating with the owner of the cargo is different in kind from the necessity of communicating with the owner of the ship; but that there must be a separate communication, if in the circumstances it be feasible, with both.

Referring to my judgment in The Lizzie,[1] it is only necessary to state here that it is, generally speaking, the duty of the master to communicate, or to attempt to communicate, with the owner of the cargo. The law looks with jealousy upon the exercise of authority by the master over the cargo.[2]

It has been ruled that a master cannot, according to the law — which is perhaps not in harmony with the general maritime law on the point — legally give a bond on cargo alone, or on ship and cargo without freight, or if he does so the ship and freight must be exhausted before recourse can be had to the cargo; but, on the other hand, I believe that the usual form of bond is upon ship, freight, and cargo, and that according to the general maritime law the cargo is included in the bottomry bond.

In the present case the facts appear to me to establish the following propositions: First, that the master acted with perfect good faith throughout the whole of this transaction; secondly, that he did make an attempt to communicate with the owners of the cargo, which brings him within the principle of the cases decided by the Privy Council, to which I have adverted in my judgment in the case of The Lizzie;[1] thirdly, that having failed in this attempt, he acted on behalf of the cargo, as a prudent man, having in view the benefit of the proprietor, ought to have acted.

There is only one remaining question for the consideration of the court. The defendants have, as I have already observed, retained the sum of 727*l.* 19*s.* 2*d.* in their hands due from the freight.

There is some discrepancy in the evidence of the master and Bluck upon this matter, but, looking to the circular issued by the master, and more especially to the language of the receipt, I am of opinion that this advance of money must be legally considered as a loan, and not as an advance of freight.[3] I think the freight existed at the time the bottomry bond was given, and must be considered as being duly bound by that instrument.

[1] L. R. 2 Ad. 254.

[2] The Bonaparte, 8 Moo. P. C. 459; Cargo ex Sultan, Swab. 504; The Olivier, Lush. 484; The Hamburg, Br. & Lush. 253, 2 Moo. P. C. 289; The Lizzie, L. R. 2 Ad. 254; The Staffordshire, L. R. 4 P. C. 194; The Onward, L. R. 4 Ad. 38; Kleinwort *v.* Cassa Marittima, 2 App. Cas. 156 *Accord.*

Whether the English rule is the law of this country was left an open question in The Julia Blake, 107 U. S. 418; O'Brien *v.* Miller, 168 U. S. 287, 308; The Eureka, 2 Low. 417. In O'Brien *v.* Miller, *supra*, the court said that the absence of communication with the owner could not be considered unless specially pleaded. For authorities as to necessity of communication with the shipowner, see *supra*, 233, n. 1. — Ed.

[3] The judgment on this point was reversed by the Privy Council. L. R. 2 P. C. 505. — Ed.

I pronounce for the validity of this bond so far as it affects the cargo, and I direct the defendants to pay into court the sum of 727*l.* 19*s.* 3*d.*, now retained by them in part satisfaction of the claim under the bond.

I condemn the defendants and their bail in the sum which remains due in respect of the bond, with 4 per cent. interest from the time when it ought to have been paid, and in the costs of this suit.[1]

DEGUILDER *v.* DEPEISTER.

IN CHANCERY, BEFORE LORD GUILFORD, K., NOVEMBER 4, 1684.

[*Reported in* 1 *Vernon*, 263.]

THE case was upon a bottomry bond, whereby the plaintiff was bound in consideration of 400*l.*, as well to perform the voyage within six months, as at the six months end to pay the 400*l.* and 40*l.* premium, in case the vessel arrived safe, and was not lost in the voyage.

It fell out that the plaintiff never went the voyage, whereby his bond became forfeited; and he now preferred his bill to be relieved; and upon a former hearing, in regard the ship lay all along in the port of London, and so the defendant run no hazard of losing the principal; the Lord Keeper thought fit to decree, that the defendant should lose the premium of 40*l.* and be contented with his principal and ordinary interest; and now upon a rehearing he confirmed his former decree.[2]

FORCE *v.* THE SHIP PRIDE OF THE OCEAN.

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK, JUNE 26, 1880.

[*Reported in* 3 *Federal Reporter*, 162.]

BENEDICT, D. J. The ship Pride of the Ocean, previous to setting sail upon her last voyage for which she had then been chartered, was in need of supplies and repairs to enable her to undertake the voyage aforesaid, whereupon her master, being without money or credit to obtain the same, applied to one C. W. Bertaine for a loan of money upon the credit of said ship to enable him to procure such supplies and repairs. Bertaine agreed to make such loan, and accordingly, on the first day of August, 1879, advanced to the master of the ship, upon the

[1] Affirmed in the Privy Council. L. R. 2 P. C. 505. — ED.

[2] The Dante, 4 Notes of Cases, 408, 409, 2 W. Rob. 427 s. c. (*semble*) *Accord.* — ED.

agreement and for the purpose aforesaid, the sum of £736, and received from said master the following instrument: —

"£736 stg. NEW YORK, August 1, 1879.

"Ten days after arrival at port of destination of the British ship Pride of the Ocean, of which I am master, now lying at New York and loaded with refined petroleum, and ready to sail for London, I promise to pay to the order of C. W. Bertaine, Esq., £736 British sterling, in approved banker's demand bills on London, value received, for necessary disbursements of my vessel at this port, for the payment of which I hereby pledge my vessel and freight; and my consignees at the port of destination are hereby directed to pay the amount of this obligation from the first amount of freight received for account of my said vessel. Any other draft or obligation by me drawn at this port on said freight will be secondary to this.

[Signed] "THOMAS WELSH,
"Master of ship Pride of the Ocean."

This instrument was thereafter assigned to the present libellants, W. M. Force & Co., and the following day, being August 2, 1879, the ship sailed for London upon her voyage. On the next following day, being August 3, 1879, while the ship was prosecuting her aforesaid voyage, she collided with the schooner George W. Andrews. In the collision the schooner was sunk, and the ship so injured that she was compelled to put back to New York, where, upon her arrival, she was immediately seized, at the instance of the owners of the George W. Andrews, to recover for the loss of the schooner, condemned to be sold, and sold by order of the court as perishable. The proceeds of the sale, which were brought into the register, amount to $5500. The claim for damages caused by the collision was for $17,000.

Upon these facts the present libellants claim to be entitled to be repaid the amount of the loan out of the proceeds of the sale of the ship, and to be entitled to priority over the claim of the owners of the George W. Andrews, who have intervened and, by exceptions to the libel, have raised various questions.

It is next contended in behalf of the intervenors that upon the facts stated in the libel the loan has not become due, and, therefore, cannot be enforced against the ship.[1] The libel shows that the voyage described in the agreement has been broken up, not by any act of the lender, but because the borrower occasioned the loss of another man's vessel and omitted to pay therefor. The collision that gave occasion for the seizing of the ship has been held to have arisen from the negligence of the master of the ship. It was open to the borrower to prevent the condemnation of the ship by paying the damages caused by the collision or by substituting a stipulation in place of the ship. He elected to do neither, and the necessary result is to prevent the accomplishment of the voyage, upon the risk of which the money claimed

[1] Only so much of the opinion as relates to this question is given. The court decided that the lien for damages from the collision outranked the bottomry lien. — ED.

by the libellants was loaned. Under such circumstances it can hardly be doubted that the loan has become due and enforceable against the ship.[1]

THE GREAT PACIFIC.

In the Privy Council, June 15, 1869.

[*Reported in Law Reports, 2 Privy Council*, 516.]

Their Lordships' judgment was reserved, and now pronounced by Sir James W. Colville:[2] —

There is no contest concerning the facts out of which this appeal has arisen. The Great Pacific, having taken an outward cargo from Liverpool to Brisbane, was, after its discharge, chartered from the latter port by the Guano Consignment Company of Great Britain to sail to Callao, and thence to the Chinchas, where she was to load a cargo of Guano, and return therewith via Callao to such port or place within the United Kingdom as the charterers might select. Between Brisbane and Callao she was compelled to put into Sydney for repairs; and to defray the cost of these repairs the master raised the sum of 5037*l.* 13*s.* 5*d.* on bottomry; and on the 29th of March, 1867, executed a bottomry bond, hypothecating the ship and freight for that sum with maritime interest at 45 per cent.

The vessel then proceeded on her voyage, reached the Chinchas, took in her cargo there; but on her homeward voyage was obliged to put into Valparaiso in a damaged state, and was then sold for 3628*l.* 8*s.*, under circumstances which, it is admitted, would, as between assurers and assured, constitute a constructive total loss.

The money was paid into the Admiralty Court, and the holders of the bottomry bond (the respondents on this appeal) brought their suit to enforce their claim against it. The suit was defended only by the appellant, who, claiming to be a mortgagee of the vessel, intervened to protect his interest; and the sole question between the parties is, whether the respondents as bondholders are entitled to the whole, or to any, and what part of the sum of 3628*l.* 8*s.*

The appellant, in his answer, set forth the bond, with its condition, which, amongst other things, provided that the obligation should be void if the obligors should pay, "in case of the loss of the ship or

[1] Upon abandonment of, or deviation from, the stipulated voyage, the bottomry bond becomes immediately due. Western *v.* Wildy, Skin. 152; Williams *v.* Steadman, Skin. 345; The Armadillo, 1 W. Rob. 251, 255; The Helgoland, Swab. 491; London Bank *v.* Neilson, 1 Comm. Cas. 18; The Smilax, Pet. Adm. 295; The Draco, 2 Sumn. 157; Pope *v.* Nickerson, 3 Story, 465, 486. — Ed.

In Thorndike *v.* Hunt, 11 Pick. 183, the bond became payable, although the failure of the ship to complete the voyage was due to its attachment by the bondholder on an independent claim against the shipowner. — Ed.

[2] Only the judgment of the court is given. — Ed.

vessel, such an average as by custom should have become due on the salvage; or if, on the said voyage, the said ship or vessel should be utterly lost, cast away, and destroyed," in consequence of the perils of the sea. And the appellant insisted that, under these provisions, and upon the facts above stated, the bond had never become payable, and that nothing was due thereon; or that if it had become payable, the respondents were not entitled to the whole of the sum of 3628*l.* 8*s.*, but only to such an average as by custom should have become due thereon, and to no more.

To these defences the respondents took a proceeding in the nature of a demurrer, by moving that so much of the answer as set them up should be rejected. The learned judge of the Admiralty Court granted that application, and this appeal is brought against his decision.

It is obvious that, if either defence is to prevail, the constructive total loss involved in the sale of the vessel at Valparaiso must be treated as a "loss" within the meaning of that stipulation in the condition of the bond upon which the defence is founded. It was admitted at the bar, and could not have been disputed with effect, that the vessel cannot be said, by reason of what occurred at Valparaiso, to have been utterly lost, cast away, or destroyed; and consequently that the appeal cannot be supported in so far as it impugns so much of the learned judge's order as rejected the averment that nothing was due upon the bond. Therefore, the only question now to be decided is whether, on the true construction of the words "in case of loss of the ship or vessel such an average as by custom shall have become due on the salvage," and upon the admitted facts of the case, the respondents are entitled, not to the whole, but only to some undefined portion of the sum in court.

The general law is succinctly stated in Kent's Commentaries, vol. iii. § 359, p. 454 [11th ed.]. Speaking of a loan on bottomry he says: "There is not, in respect to the contract, any constructive total loss. Nothing but an utter annihilation of the subject hypothecated will discharge the borrower on bottomry. The property saved, whatever it may be in amount, continues subject to the hypothecation." In support of this he cites Thomson *v.* The Royal Exchange Assurance Company.[1] And the doctrine is supported by the modern admiralty cases of The Catherine,[2] and The Elephanta;[3] The Dante;[4] the American case, before Mr. Justice Story, The Draco,[5] and by other authorities. The first proposition is, moreover, admitted in this case by that abandonment of the principal ground of appeal which has already been mentioned.

The learned counsel for the appellant have, however, argued, on the authority of a passage in Valin, which is cited at page 183 of the 3d volume of Boulay-Paty's Cours de Droit Commercial Maritime, that

[1] 1 M. & S. 30.
[2] 15 Jur. 231.
[3] 15 Jur. 1185.
[4] 2 W. Rob. 427.
[5] 2 Sumner's Amer. Rep. 157.

when the vessel is lost, the lender on bottomry is entitled only to such a proportion of the value of the property salved as the sum lent bore to the value of the whole property hypothecated. Valin, it is to be remarked, is speaking of the hypothecation of a cargo; and it is not clear that his doctrine, if true, would apply to the proceeds arising from the sale of a ship or the débris of a ship. Boulay-Paty, however, goes on to show that this opinion of Valin was contested by both Pothier and Emerigon; that it was not received in France under the old law, and is certainly not recognized by the codes as part of the maritime law. The general rule undoubtedly is, that if the vessel is lost, the lender on bottomry, though his remedy is limited to the value of the property salved, is entitled to the whole of what is saved, provided it was included in his security. Therefore, that the bondholders in this case are, as between themselves and the shipowners, or a mortgagee of the ship (whose rights are as much bound in bottomry as those of the owner of a ship not mortgaged), entitled to the whole of the proceeds of the sale of the vessel, then existing as a vessel in specie, unless there be some special provision in this particular contract which qualifies that right, is a proposition which, in in their lordships' opinion, does not admit of reasonable doubt.[1]

It has, however, been argued that such a provision is to be found in the words now to be considered. It is contended that the "loss" of the vessel there spoken of, when contrasted with the words in the following sentence, which import its utter loss and destruction, must be taken to mean something short of such utter loss, and to include a constructive total loss; that the proceeds of the sale may be properly described as salvage; and consequently that the effect of this clause is to make those proceeds divisible between the bondholders and the shipowners in proportions to be ascertained according to some custom of the existence and nature whereof nothing in the shape of proof has been suggested. It does not, however, follow that because the words, "the loss of the vessel," mean something short of utter loss and destruction, they, therefore, include "a constructive total loss," which, as has already been shown, they would not include upon the construction of ordinary bottomry bonds. It is obvious that a vessel may be so wrecked as to be no longer a vessel in specie, and so as to become a mere congeries of planks, and yet that there may be salvage of its materials to a considerable amount. In the case of The Catherine,[2] Dr. Lushington says: "If a ship was once bottomried, the bond attached to the very last plank, and the holder might have that sold for his benefit." The clause under consideration may have been in-

[1] Thompson *v.* Royal Co., 1 M. & Sel. 30; The Dante, 2 W. Rob. 427, 4 Notes of Cases, 408 s. c.; The Catherine, 15 Jur. 231; The Elephanta, 15 Jur. 1185; Broomfield *v.* Southern Co., L. R. 5 Ex. 192; Insurance Co. *v.* Gossler, 96 U. S. 645, Holmes, 475; The Smilax, Pet. Adm. 295, 299; The Draco, 2 Sumn. 157; Pope *v.* Nickerson, 3 Story, 465; The Unicorn, 5 Hughes, 79; Force *v.* Providence Co., 35 Fed. R. 667, 671; Appleton *v.* Crowninshield, 3 Mass. 443, 461; Insurance Co. *v.* Duval, 8 S. & R. 138; Delaware Co. *v.* Archer, 3 Rawle, 216, 222 *Accord.* — Ed.

[2] 15 Jur. 232.

tended to secure that right by making it a condition for the avoidance of the bond that the obligors should account for such salvage. Again, it seems to be a forced and unnecessary construction of the clause to hold that it necessarily implies any division or apportionment between the bondholders and shipowners. That the former, who were entitled to the security of the whole ship when in a seaworthy condition, should contract that in the event of the deterioration of their security, by a constructive total loss or otherwise, they should share the proceeds with their debtors, is so improbable an hypothesis that the construction is only to be admitted if there is no escape from it. The clause, as Mr. Cohen showed, is not a special one; it is to be found in the form of a bottomry bond given in the appendix to Abbott on Shipping. Whatever it means, their lordships believe that it was intended to secure the payment to the bondholders of something which the obligors might become entitled to receive from third parties in respect of the ship, and not a division of the proceeds of the sale of the vessel between the bondholders and shipowners. It would meet the case suggested at the bar, in which the vessel having been voluntarily stranded with a view to the preservation of the cargo, general average upon the cargo salved might become due from the owners of that cargo to the owners of the ship. That such average would become due if the ship, failing to get off, is totally lost, seems to be a question upon which jurists are not agreed. See Abbott on Shipping [10th ed.], pp. 373, 375, and 2 Phillips on Insurance, § 1315; but the clause may, nevertheless, have been designed to cover such average, if the right to it existed.

Their lordships, however, think that they are not called upon to determine upon what particular subject the clause might operate, because it can have no operation in the present case unless there has been a *loss* of the vessel within the meaning of it.

For the reasons above given, they are of opinion that there has been no such loss; and, being of that opinion, they will humbly advise Her Majesty to affirm the order of the Admiralty Court, and to dismiss this appeal with costs.[1]

FRANCHIOTTIE *v.* SCHRODER.

In the High Court of Admiralty, 1593.

[*Reported in 2 Select Pleas in the Court of Admiralty (Selden Society)*, 175.]

. . . Therefore We, Julius Caesar . . . (in common form) . . . pronounce, decree, and declare that the aforesaid Conrad Schroder, in the months . . . of the year 1593 now current, was owner proprietor and lawful possessor of one fourth part of a certain ship called

[1] Insurance Co. *v.* Gossler, 96 U. S. 645 *Accord.* — Ed.

the 'Angel Michael' of Lubeck, and of all and singular the apparel and furniture in any way belonging and appertaining to the same in respect of the said fourth part, and was and is commonly called, held, deemed, named, and reputed, openly, publicly, and notoriously, as owner, proprietor and lawful possessor of a fourth part of the said ship; And We also pronounce, decree, and declare that the said Conrad Schroder, in one of the aforesaid months, proposed and intended and was minded to make a sea voyage with the said ship and with certain goods, things and wares laden on board her to parts over sea, and had fitted out and made ready the same ship to that intent with apparel, furniture, victuals and food, for the performance or accomplishing of such sea voyage; And that the same Conrad borrowed and had of the aforenamed Horatius Franchiottie £200 of current legal money, and from the said Bartholomew Corsinie £50 of like English money, for the equipping of the aforesaid ship and other things fit, suitable and requisite, for the accomplishing of said voyage, according to the admission of the same Conrad; And We also pronounce decree, and declare, that in some one of the aforesaid months it was determined, agreed, promised and contracted, between the said Horatius Franchiottie and Bartholomew Corsinie, in respect of the said sea voyage to be made and accomplished by the aforesaid ship, that, if and so far as the said Conrad Schroder should safely carry out the voyage undertaken, and the said ship should safely arrive at the appointed port in parts beyond sea, or at some other port beyond sea, that then the same Conrad should pay and discharge to the aforesaid Horatius Franchiottie the sum of £250 in respect and in the name of the said sum of £200 so lent as aforesaid, and should also [pay] to the said Bartholomew Corsinie the sum of £70; And further that it was determined, agreed, and contracted, between the aforesaid parties in respect of the said sum so lent as aforesaid for the aforesaid purpose, that, in case the said ship before she arrived at the parts appointed should suffer shipwreck or be sunk by storm and bad weather, or perish by any other misfortune whatsoever, so that the appointed voyage could not be accomplished, that then, as well the said Horatius, as the said Bartholomew, should bear or sustain the risk of the sums respectively lent by them, and should discharge the said Conrad Schroder from the repayment or making good of the aforesaid sums respectively lent; and that, if the same ship, or any part of her or her apparel, should be recovered or preserved, that then and in that case the said plaintiffs should have and enjoy rateable portions of the said ship or of the part of her [preserved], and of the apparel so recovered and preserved, according to the rateable amount of the sums by them respectively lent; as clearly appears and is manifest by two writings, or mercantile bills called in English bills of bottomry, entered in and made between the aforesaid parties respectively, and handed over and delivered as their deeds, and exhibited judicially before Us on behalf of the said plaintiffs, and by the confession of the said Conrad made judicially before Us: And that the

said Conrad Schroder hypothecated and pledged his ship and her apparel and furniture to the beforenamed Horatius and Bartholomew for the faithful performance of the agreement and of the sea voyage aforesaid; And We pronounce, decree, and declare, that, after the premises, or at least after the lending of the aforesaid moneys and before the said ship had sailed from the river Thames for the purpose of accomplishing the appointed voyage, or had commenced the maritime journey aforesaid, the said ship or the greater or some part of the same, together with the apparel and goods laden on board her, suffered shipwreck and was sunk, whereby the appointed voyage failed to be and could not be performed; And We pronounce, decree, and declare, that the said ship, though greatly shaken by the violence of the storm, and wholly sunk and spoiled, and certain parts of her apparel and furniture, were by the aid help and expense of the said plaintiffs or of others by their orders preserved and recovered from utter destruction; And that the same ship and some part of her apparel was raised and recovered from the stream or river Thames aforesaid; And that the plaintiffs laid out the sum of £40 of lawful English money in preserving and saving the aforesaid ship and apparel, and in raising or recovering the same from the river aforesaid; We therefore pronounce, decree, and declare by this Our definitive sentence or this Our final decree, which sentence We pass and promulgate in this writing, that the ship and her apparel and furniture aforesaid heretofore arrested by the authority of the said court of Admiralty of England at the instance of the said plaintiffs for their respective debts aforesaid, and remaining under such arrest, be appraised and assessed at their true value, under Our authority, by indifferent and fit men skilled in that behalf; And, that after such appraisement and assessment is made, that the same ship and her apparel be handed over and delivered to the beforenamed Horatio and Bartholomew, in payment and satisfaction of their respective debts (if they be sufficient for the same), but if they be not sufficient, then so far as their value extends.

JOHN AMYE JULIUS CAESAR

JOHN APPLETON *v.* GEORGE CROWNINSHIELD.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER TERM, 1811.

[*Reported in* 8 *Massachusetts Reports*, 340.]

PARKER, J.[1] In this case the principal facts are, that the plaintiff in 1793 loaned to the defendant five hundred dollars on a bottomry

[1] Only the opinion of Parker, J., is given. Sewall, J., delivered a concurring and Sedgwick, J., a dissenting opinion. — ED.

contract, on which he was to receive the principal, with three per cent. per month for marine interest, on the return of the vessel to Salem, from the voyage which he had undertaken; and in case of a loss of the vessel by perils of the seas, or by fire, or the enemies of the United States, the contract was to be void. The vessel arrived at the Island of Guadeloupe, discharged her cargo, took a return cargo, set sail for Salem, and was captured by a British ship of war, carried into St. Christopher, and there libelled and condemned. On an appeal to the lords commissioners of the admiralty, the decree of condemnation was reversed, and a restoration ordered; but the vessel had perished, or been converted to the use of the captors, so that a restoration could not be had. But under the treaty of 1794 full compensation for the vessel and freight, together with interest from the capture, was awarded by the commissioners under that treaty, and the amount thereof has been received by the defendant.

An action has since been brought upon the contract, but all these facts appearing on the pleadings, the plaintiff failed to recover, because the event, upon which the money was to be paid, had not occurred;[1] and the court felt themselves bound by the rules of law to decide that the subsequent indemnification of the defendant could not give effect to a contract which had been defeated by events, which appeared to be within the stipulations of the parties. That decision was founded upon a necessary adherence to technical rules, and not upon any apprehension that the defence set up to the bond was really meritorious.

An action for money had and received is now brought to recover the proportion, supposed to be due to the plaintiff upon equitable principles, of the money received by the defendant under the award of the commissioners; and the question is, whether any part of that sum ought *ex æquo et bono* to be paid over to the plaintiff.

Until I heard the very elaborate and learned argument by the defendant's counsel[2] against the action, I did not entertain a doubt upon this question. It appeared so clear that a part of the money received by the defendant was a compensation for the five hundred dollars, for which his vessel was pledged to the plaintiff, that I had no suspicion he would await a suit at law before he paid the money.

After a careful review of that argument, I remain of the same opinion; although I confess that some of the points on which I formerly placed it have been shaken. I do not know but it is proved by the argument that the doctrine of average and salvage, as applicable to bottomry contracts, instead of being the general maritime law, is the law of particular commercial countries; but on this point I give no decided opinion, because the present case does not require it.

Neither should I like to attempt a refutation of the argument

[1] Appleton v. Crowninshield, 3 Mass. 443. But the bondholder's right is not lost by the mere capture of the vessel. If, for instance, the vessel is recaptured, it is in a position to complete the voyage. The voyage was completed by the recaptured vessel and the bond enforced in Joyce v. Williamson, 3 Doug. 164. — Ed.

[2] Joseph Story. His argument is omitted on account of its length. — Ed.

against the apportionment of contracts. This might be a difficult task, and may be avoided in discussing the case before us. That a party, having a meritorious claim on another, secured by a sealed contract, which he cannot enforce for want of compliance with some stipulation, may nevertheless obtain what is justly due to him in another form of action, is settled by the case of Luke *v.* Lyde,[1] which has never been overruled in England, and has been frequently relied on as law in this country. Even in the case of Cook *v.* Jennings,[2] where the party failed to recover upon the charter-party, because he had not done what by his contract he had undertaken to do, it is strongly intimated by the court that he might obtain justice in an action of *assumpsit* upon the implied promise of the freighter to pay for the hire of his vessel *pro rata itineris.* It is enough to satisfy the nicety of technical rules, that a party seeking a remedy upon an express contract shall be held to show that he has performed the stipulation, which entitles him to be paid. At the same time it is happy that the law is liberal enough to provide that the man, who voluntarily receives part of a benefit which he had secured by a contract, should be considered as making a new contract to pay for the part which he so consents to receive.

But I do not know that it is necessary to establish even this principle, in order to maintain the present action. The broad basis of an action for money had and received is, that one man has actually received money belonging to another, or which, by the rules of common honesty, he ought to pay over to the other. The vessel of the defendant sailed to the West Indies, pledged to the plaintiff for the sum of five hundred dollars, and the interest which accrued thereon. At the time of the capture the plaintiff had an interest in the vessel to that amount, and the defendant's interest was less than the whole value by the same amount.

Had the vessel continued alive, and returned to Salem, or in any event except an actual loss of the vessel, the defendant would not have been restored to his ownership of the whole without paying to the plaintiff the sum loaned and interest; because the plaintiff had a lien upon her, irrevocable but by payment of the money. This lien would have followed her into whose hands soever she should have gone with the consent of the defendant; and when the decree of restoration passed, had the vessel been in being, the plaintiff's interest would have continued, and was defeasible only by the payment of the money for which it was pledged; and in such an event I do not see but marine interest would have been recoverable to the time of her actual arrival at Salem, her port of discharge.

Under these circumstances, when the two governments provided by treaty that all parties who had suffered by the unjust captures made by the British should be made whole, whatever was their interest, or in whatever form it existed, can it be doubted that the plaintiff was a suffering party within the meaning of the treaty? What prevented

[1] 2 Burr. 882. [2] 7 T. R. 381.

him from receiving the money upon his bond? Certainly the capture by the British. Who destroyed his pledge for the loan? Certainly the British. It was therefore proper that he should be indemnified; and the only question is, whether they have not intended to indemnify him.

Now, the whole value of the vessel has been paid for, as also her freight, and interest from the capture. This payment has been nominally awarded to the defendant; but it was substantially for the use of the plaintiff, and the former, in receiving it, was the agent of the latter. This principle was determined in the case of Heard *v.* Bradford,[1] in which it was declared by the court, that whoever had a legal interest in the property, the loss of which was compensated by the award, should be entitled to his proportion, in an action against the person in whose favor the award was nominally made. I consider that case as deciding every important question in this.

Upon the whole, I cannot see any fair principle, upon which a man who has borrowed money upon the pledge of his vessel, the payment depending upon a contingency, the happening of which is prevented by a third party, who, having destroyed the pledge, afterwards makes complete satisfaction for it in money, besides paying him damages for detention, can refuse to repay the money he so borrowed. I acquit, however, the defendant of any unfair intentions, because the zeal of the argument in favor of the principle, and the labor bestowed on it, shows a settled opinion of his counsel in his favor.

THE EMPUSA.

In the High Court of Justice, Admiralty Division, July 1, 1879.

[*Reported in Law Reports, 5 Probate Division*, 6.]

On the 24th of August, 1878, Elijah Nickerson, master of the British ship Commerce, then lying in the port of Philadelphia, requested from the agent of the Cassa Marittima of Genoa a loan of 598*l.* 1*s.* 4*d.* upon the security of the freight of the said ship to be earned on a voyage from Philadelphia to Antwerp.

The said loan was granted, and the said Elijah Nickerson signed the following instrument: —

"Fifteen days after arrival at the port of Antwerp or other intermediate port at which shall end the voyage of my vessel denominated the ship Commerce, I promise to pay to the order of the Cassa Marittima of Genoa the sum of five hundred and ninety-eight pounds one shilling and fourpence sterling, value received as loan on freight for the last expenses necessary to the undertaking of the voyage from

[1] 4 Mass. Rep. 326.

Philadelphia to Antwerp, Belgium, on the conditions of the regulations of the Cassa Marittima, of which I have received a copy, ship and freight being in accordance with such regulations liable for repayment with priority over every other credit."

The said loan was duly made, and the Commerce sailed in due course on her destined voyage from Philadelphia to Antwerp; but on the 26th day of September, while off Hastings, in the English Channel, the Commerce was run into and sunk by the steamship Empusa, and with her cargo and freight was totally lost.

The plaintiffs, who are owners of the steamship Empusa, admitted their liability for the damages occasioned by the said collision, and brought this suit to limit such liability in the manner provided by the statute in that behalf, and obtained a decree therein on payment into court of the amount of their statutory liability, and all claims in respect of the loss or damage occasioned by the said collision were referred to the registrar and merchants to report thereon.

Amongst other claims, the defendants, the owners of the Commerce, claimed the sum of 2148*l.* 13*s.* 6*d.* as damages for the loss of the freight to be earned by the said ship on the said voyage from Philadelphia to Antwerp, and were allowed the sum of 2088*l.* in respect of such freight, being the amount of such freight less the expenses of completing the voyage.

The Cassa Marittima of Genoa also claimed the sum of 598*l.* 1*s.* 4*d.* as the damages they had sustained by reason of the loss of the freight, which was pledged to them as security for the said advance, and their claim was disallowed by the registrar on the ground, among others, that the owner of the ship was the only person who could recover in respect of the freight, and that the Cassa Marittima were not entitled to claim in competition with the owners of the Commerce, that vessel having been lost.

The Cassa Marittima of Genoa contend that they are entitled to prove for the loss of the freight so far as it was pledged to them, and that the defendants are not entitled to recover as part of their damages the freight which would have to be paid to the Cassa Marittima if the Commerce had arrived at Antwerp, and that, the said freight having been allowed by the registrar as part of the claim of defendants, the owners of the Commerce, such owners ought to hold and receive the same as trustees for the Cassa Marittima, and are under an obligation to pay a proportion thereof to the said Cassa Marittima, or to allow the Cassa Marittima to receive the same out of court.

The questions for the opinion of the court are: First. Whether the Cassa Marittima, as against the owners of the Commerce, are entitled to prove against the fund paid into court by the plaintiffs for the said sum of 598*l.* 1*s.* 4*d.* as damages occasioned in respect of the said collision.

Second. Whether, if the Cassa Marittima are not entitled to prove for the said sum as damages against the fund paid into court by the plaintiffs, they are entitled as against the defendants, the owners of

the Commerce, to receive payment of the said sum out of court, or to an order that the said defendants, out of the moneys recovered by them as damages in respect of the loss of the said freight, should pay to the said Cassa Marittima the said sum for which the freight was pledged.

Third. Or, in the alternative, that the Cassa Marittima are entitled to receive out of the fund in court applicable to the payment of damages for loss of freight, or from the defendants, the owners of the Commerce, the same proportions of the sum of 598*l.* 1*s.* 4*d.* as the total sum apportioned in respect of the loss of freight bears to the whole freight of the said ship.

Myburgh, for the Cassa Marittima.

E. C. Clarkson, for the owners of the Commerce.

It would be contrary to all the principles by which the contract of bottomry has been considered to be governed to hold that, although this risk has gone against the bondholder, yet the amount lent should still be paid back. Not only has there been no arrival of the Commerce at any port at all, but it is by no means certain that, even if no collision had occurred, the voyage would have been completed in safety. Any damage which the Cassa Marittima can be said to have sustained by the collision must therefore be too remote to give a right to any share of the fund in court.

Sir Robert Phillimore. This is a case for which there is no legal precedent, but it is one that is to be decided on general principles of equity; and I decide that the Cassa Marittima is entitled to receive out of the fund in court applicable to the payment of damages for loss of freight the same proportion of the 598*l.* 1*s.* 4*d.* as the total sum apportioned in respect of the loss of freight bears to the whole freight of the ship. The actual apportionment will be made by the registrar.

In pursuance of this decision the following order, omitting immaterial parts, was drawn up in the registry: —

The judge having heard counsel on both sides on the special case filed herein, pronounced that the Cassa Marittima was entitled to 181*l.* 6*s.* 7*d.* out of the amount reported by the registrar as recoverable in respect of the total freight of the vessel Commerce, and he directed the costs relating to the said special case to be costs in the action.[1]

[1] In Miller *v.* O'Brien, 168 U. S. 287, 67 Fed. R. 605, 59 Fed. R. 621, a bottomry bond for 2599*l.* 8*s.* 9*d.* was given, binding the Johnson, cargo and freight, and also goods formerly on the Johnson, but transshipped to the Leslie. The Johnson and her cargo were lost in a collision with the Thirlwall. The latter being in fault, her owners were obliged to pay over 7000*l.* to the owners of the Johnson. The Leslie arrived safely at her destination. The shipper to obtain his goods on the Leslie had to pay the bottomry bond. He was allowed, however, to recover 1617*l.* 4*s.* 3*d.* as the due average proportion of the expenses at the port of refuge incurred for the benefit of the ship and freight, the shipowner not being permitted to claim the statutory exemption from liability, except upon surrender of the compensation money received for the Thirlwall. Whether the bondholder would have had any claim against this compensation fund, in case he could not have obtained payment through his lien on the goods arriving on the Leslie, was not decided. — Ed.

DUNCAN v. BENSON.

In the Exchequer, November 24, 1847.

[*Reported in* 1 *Exchequer Reports*, 537.]

The judgment of the court was now delivered by

Pollock, C. B.[1] This case, which is one of considerable importance, was argued for the second time in Easter Term last, before my Brothers Parke, Rolfe, and Platt, and myself, having been previously heard when my Brother Alderson was present. The question arises on a demurrer to a plea to the first count of a declaration in assumpsit, brought by the shipper of goods from Pernambuco to London, against the shipowner, to recover a compensation for the loss he had sustained, the master having, in consequence of damage to the ship by perils of the seas in a foreign port, properly hypothecated, for its necessary repairs, the ship, and also the freight and cargo, including the plaintiff's goods, by one bottomry bond; and the goods having become liable, on the deficiency of the ship and freight, to pay the difference, and the plaintiff having been compelled to pay it. The facts are stated at length on the record, and made the consideration for a promise by the defendant to indemnify, and the question on the declaration is, whether these facts raise an implied, or are a good consideration for an express, promise to do so.

There is a plea which states that the bottomry bond was executed by the master without the defendant's express authority, and when the costs and expenses exceeded in amount what would be the value of the ship when repaired, and its freight, and that the defendant, when he received notice, abandoned the ship and freight, and did not ratify the act of the master. But there is no doubt that, notwithstanding those circumstances, the bond was valid; for it is clear that a merchant advancing money on bottomry in a foreign port, though bound to show a reasonable case of unprovided necessity for the advance, from the want of repair or otherwise, is not bound to inquire into the expediency of incurring the expense of those repairs with reference to the interest of the owner. The Vibilia.[2] And on the argument *Sir F. Kelly* admitted the validity of the bond.

The question then is, whether, under the circumstances stated in the declaration, the defendant is responsible to the plaintiff for the sum he had been obliged to pay; and we are all clearly of opinion that he is.

It is the primary duty of the master, acting for the owner, to do his best to convey the cargo to its place of destination in the same ship, and in case of damage to repair it. "He ought to look out for the

[1] Only a portion of the judgment of the court is given. — Ed.
[2] W. Rob. 10.

means of accomplishing his own and his employer's contract; that is, the safe conveyance of the property entrusted to his care, and in the same vehicle which he had contracted to furnish." The Gratitudine.

The owner of the goods is under no obligation to contribute to any expenses, except such as constitute a general average, and that of the repairs in this particular case does not fall under that description.

To accomplish the object of repairing the vessel, the master is authorized to bind his owner, by causing the repairs to be done on his credit, in which case the tradesman may sue the owner; or by borrowing money on his credit where that is necessary, in which case the lender has his remedy against the owner; or by selling a portion of the cargo, which is in effect borrowing from the shipper through the medium of a sale, Richardson *v.* Nourse,[1] and in this case the shipper may sue the shipowner; or the master may hypothecate part or the whole of the cargo, which gives a right to the proprietor of it to recover a compensation from the owner of the vessel. All these are merely modes of raising money by the agent of the shipowner on his account, and for his use, to enable him to do his duty by repairing the vessel, and in all the shipowner must repay the lender. The agency to borrow by these various modes, and so to bind his employer to the lender, is cast upon the master by the necessity of the case.

That the shipowner was bound in all these cases to repay the money borrowed, was not disputed by *Sir F. Kelly;* but he argued that the bottomry of the ship by the master made all the difference, and had the effect of limiting the responsibility of the owner to the value of the ship and freight, and that to be enforced by a remedy against the ship only. He could not contend that if there was a sale or hypothecation *before* or *after* the bottomry the owner would not be liable for the amount borrowed by means thereof, and he was therefore obliged to limit the freedom from further responsibility to the single case where the hypothecation of the ship and cargo were effected by one instrument. For this position there is no principle, nor, when properly considered, any authority. The bottomry bond gives no remedy to the lender against the owner of the ship, nor against the owner of the cargo, personally; the remedy is *in rem* in both cases, but as between the freighter and shipowner, the cargo of the former is pledged to secure the debt of the latter; and when the former has been compelled to pay the debt through the medium of the pledge, he must be reimbursed. What difference can it make on principle, whether this liability of the ship by bottomry is by a separate instrument, or the same as that which attaches liability to the cargo?

We are all clearly of opinion that the plaintiff in this case is entitled to our judgment.[2]

Judgment for the plaintiff.

[1] 3 B. & Ald. 237.

[2] Affirmed in the Exchequer Chamber, Benson *v.* Duncan, 3 Ex. 644. The following is taken from the judgment of the court delivered by Patteson, J.: "In ordering the repairs of the ship, the master acts exclusively as agent of the owner of the ship. No other person but the owner of the ship, or his agent, can have any authority to order the repairs.

CARGO EX SULTAN.

In the High Court of Admiralty, August 11, 1859.

[*Reported in Swabey*, 504.]

Respondentia. In April, 1858, the Sultan, an American ship, sailed from New Orleans with a cargo, chiefly of cotton. On the 9th of May she was stranded on the Florida reef, and sustained great damage; was assisted by salvors and taken to Key West. A cause of salvage was promoted in the District Court of Florida, and the court decreed the sum of $18,000 as salvage on the ship and cargo, together with the expenses. The total amount attaching on the cargo was $28,648. The cargo having been landed, a small portion was found

The owner of the cargo cannot insist on such repairs being made, for the shipowner is absolved from his contract to carry, if prevented by the perils of the seas, and he is bound by it if prevented by inherent defects in the ship; in either case, if he does repair, he does so for the sake of earning freight, which the master is bound to enable him to do if he can. Being, then, the agent of the shipowner in ordering the repairs, how can he be the agent of any one else in borrowing money to pay for those repairs? If, in order to borrow that money, he is obliged to pledge, not only the ship, but the cargo, he, in effect, borrows money on the cargo for the benefit of the shipowner, just as much as he would have done had he sold a part of the cargo to raise the necessary funds; in which case it is not doubted that the shipowner must have indemnified the owner of the cargo. Certainly the master could not, by any bottomry bond, pledge the shipowner to the lender of the money beyond the value of the ship. By such a bond he gives a remedy *in rem* only, and not a personal remedy against the shipowner. But that circumstance in no way affects the rights of the owner of the cargo, as against the shipowner." See to the same effect Anderston Co. *v.* Law (Court of Sess., May 28, 1869), 7 R. 836. The law of France is opposed to Duncan *v.* Benson; Lloyd *v.* Guibert, L. R. 1 Q. B. 115. So is the law of Germany, Force *v.* Providence Co., 35 Fed. R. 767, 778; Miller *v.* O'Brien, 35 Fed. R. 779, 783. In Naylor *v.* Baltzell, Taney, 55, the personal liability of the shipowner to indemnify the cargo-owner was denied.

In Benson *v.* Duncan, 3 Ex. 644, the court upheld the plaintiff's claim to recover upon a second count based upon a breach of the contract of carriage, saying: "It remains to be considered whether the non-delivery of the goods by the plaintiff in error to the defendant in error was occasioned, mediately or immediately, by the perils of the seas, so as to be within the exception in the bills of lading. And we think that it was not; — not immediately most undoubtedly, for the goods arrived at their destination, and freight was earned by the shipowner; nor mediately, for although the occasion for repairs arose from the perils of the seas, yet there was no obligation on the shipowner, as between him and the owner of the cargo, to do those repairs; and if he chose to do them through his agent, the master, acting (as the jury have found) as a prudent uninsured owner would have done, he voluntarily incurred the expense of such repairs for his own benefit, and in pledging the cargo to obtain money to defray that expense, voluntarily put it out of his power to deliver the cargo, unless he paid so much to the lender of the money as would release the cargo from the liability which he had imposed upon it. His inability to deliver the cargo arose from his voluntary act in pledging it for his own benefit, — not even mediately from the perils of the seas, since he might have removed that inability by payment of the money for which the cargo was pledged, and which was, in truth, his debt as between him and the owner of the cargo. If the goods had been sold abroad, in order to raise money to repair the ship, and so had never arrived at their destination, the shipowner could not possibly have delivered them, and might have some ground for saying that he was prevented from doing so mediately, by perils of the seas; but they did arrive, and they might have been delivered if the shipowner had paid the debt with which he had charged them; and, therefore, it seems to us that their non-delivery must be treated as occasioned by his act, or rather his default, and nothing else." Compare O'Brien *v.* Miller, 168 U. S. 287. — Ed.

to be damaged, and was sold by order of the court. The master of the Sultan was of the opinion that it would be for the benefit of the owners of the cargo to transship the residue and forward it to Liverpool. He thereupon agreed with Preston A. Ames, of Boston, to advance the money to defray the salvage, so as to enable him to transship the cargo and forward it to its destination, Ames stipulating that his advance should be secured by respondentia on the whole cargo. The money was so advanced, and on the 25th of June paid to the marshal of the court. Part of the cargo (which still continued technically in the custody of the court, certain charges thereon being unascertained and unpaid) was then shipped on board the ship Otseonthe for Liverpool. The ship took fire and was destroyed, a great part of the goods shipped (constituting also a considerable portion of the Sultan's cargo) was consumed, and the remnant was so damaged as to render a sale necessary. The residue of the Sultan's cargo, amounting to about half of the original cargo, was then shipped on board the T. J. Roger, and was finally brought to Liverpool on the 30th of November.

The respondentia bond given by the master was upon the condition that, "if the said ship T. J. Roger do and shall depart from Key West, and sail to and arrive at Liverpool, and if the said John Berry shall pay unto the said Ames, or his legal representative, within ten days after such arrival, the full sum of $28,648.22, together with a premium thereon of fifteen per cent., or if in the said voyage an utter loss of the said ship by any perils of the sea, which are insured against under policies (a form whereof is hereto annexed) shall unavoidably happen, and the said Berry, or those for whom he acts, shall well and truly, without delay, account with the said Ames, or his representatives or assigns, for the just salvage which shall be received from and on account of the said hypothecated merchandise, and shall well and truly pay or deliver the same unto him or them, and shall not deliver the said merchandise to any other use whatsoever, without payment of the principal and interest and premium due on this bond, then this obligation shall be void, otherwise to remain in full force.

JOHN BERRY (L. S.)."

A salvage suit also arose in the Florida court out of salvage services rendered to the Otseonthe, the result of which was that the net proceeds of the cotton salved and sold, after deducting the proportion of salvage, amounted to $12,671. The court thereupon, 25th of April, 1859, upon consideration of all the circumstances of the case, and to do justice to all the parties, ordered this balance to be paid to the attorney for the owners of the cargo of the ship Sultan, upon producing satisfactory evidence to the court that the respondentia bond was satisfied; and, in default of such evidence being furnished before 25th of July, 1859, decreed the balance should then be paid to Ames in part satisfaction of the bond. The cotton brought home in the T. J. Roger was consigned to fifteen houses in Liverpool. The

present action was brought by the holders of the bond, and defended by the consignees of the cotton. The petition prayed the court to pronounce for the bond and to condemn the defendants therein and in costs.[1]

Dr. Lushington. It is stated on behalf of the opponents of the bond, that the bond in part covers property not exposed to maritime risk, namely, the part of the cargo which was shipped on board the Otseonthe. This is true; but this objection is not fatal to the whole bond, according to the well-settled principle of this court, that a bottomry bond may be good in part, and bad in part.[2]

What then is the real justice in this case? I apprehend it to be that the owners of this cotton, the present defendants, should pay according to the value of the property brought home, that is to say, that they should pay not the whole amount secured by the bond, but a proportion of that amount according to the value of the property delivered, and that the bondholder should seek his remedy for the remainder against the proceeds of the cotton at Key West. This, I think, is the justice of the case. By the judgment of the court in the United States, it is ordered that the proceeds of the cargo of The Otseonthe, amounting to $12,248, shall be paid to the bondholder, if, before the 25th of July of this year, it should not be shown that the bond has been paid, or security given to pay it. I cannot tell what has been done in this respect. I propose to pronounce for the bond, limiting the payment from the owners of the cotton at Liverpool as follows: That they should pay upon the bond whatever may be the amount thereof, in the proportion that the value of their property bears to the total value of the cargo upon which the bond was agreed to be given. That will be the principle governing my judgment; but it will probably be necessary to refer the calculation of exact amount to the registrar. Assuming that the whole sum in the registry of the court of Florida is paid over to Ames, he would still be a loser, but I am of opinion that he has no right to make the proprietors of the goods brought to Liverpool pay for losses sustained by the destruction of the cotton on board the Otseonthe. Nor have the proprietors of the cotton shipped on board the Otseonthe, so far as I am aware, any claim upon the Liverpool proprietors.

The bondholders are entitled to their costs.

[1] The statement of facts is abridged, and the arguments and a portion of the judgment are omitted. — Ed.

[2] The Tartar, 1 Hagg. Adm. 1, 13; The Nelson, 1 Hagg. Adm. 169, 176; The Osmanli, 3 W. Rob. 198, 218; The Ocean, 10 Jur. 504; The Virgin, 8 Pet. 538; The Ann C. Pratt, 18 How. 63; The Polly, Bee, 157; The Packet, 3 Mas. 255; The Bridgewater, Olc. 35; The Magoun, Olc. 55 *Accord.*

The bond may fail altogether as a bottomry bond, and yet the ship may be bound by the ordinary maritime lien for supplies and repairs. The William, Bl. & How. 66 (*semble*); The Eureka, 2 Low. 417 (*semble*); The Archer, 15 Fed. R. 276, 282; The Mauna Loa, 76 Fed. R. 829, 832. See The Ann C. Pratt, 18 How. 63, 67.

If, however, a bottomry bond is taken fraudulently for a larger amount than the actual advance, the lender will not only be unable to enforce the bond at all, but will also have no maritime lien for the actual advances. The Ann C. Pratt, 18 How. 63, 1 Curt. 340.

FOR WHAT PURPOSES A BOTTOMRY BOND MAY BE GIVEN. — A bottomry bond may be given for whatever is reasonably necessary for the prosecution of the voyage, repairs, supplies, wages due, and the like. The Edmond, Lush. 57, 211; The Cognac, 2 Hagg. Adm. 377; The Aurora, 1 Wheat. 96; The Robert L. Lane, 1 Low. 388; The Edward Albro, 10 Ben. 669 (a variety of items).

In the following cases the bottomry bond was invalid in whole or in part because given for things not reasonably necessary. The Lochiel, 2 W. Rob. 34 (in payment of old debts); The Osmanli, 3 W. Rob. 198, 213 (in payment of old debts); The Prince George, 4 Moo. P. C. 21 (in payment of old debts); The Toivo, 1 Spinks, 185 (to take up bottomry bond given on prior voyage); The Serafina, Br. & Lush. 277 (for insurance premium); The Texas, Crabbe, 236 (buying cargo); The Lykus, 36 Fed. R. 919 (buying cargo); The Edward Albro, 10 Ben. 669 (various items); Greely *v.* Waterhouse, 19 Me. 9 (for old debt); Bray *v.* Bates, 9 Met. 237, 250 (for old debt).

A premium for insuring lender's risk on the bottomry bond cannot be included in the bond. Boddington's, 2 Hagg. Adm. 423; The Jennie B. Gilkey, 19 Fed. R. 127 (*semble*); The Eureka, 2 Low. 417 (*semble*). But see The Robert L. Lane, 1 Low. 388.

BY WHOM BOTTOMRY BOND MAY BE GIVEN. — Bottomry obligations are usually given by the master, but sometimes by the owner. In case of the death, disability, or permanent absence of the master, the one who properly succeeds him in command of the ship may give a bottomry bond; *e. g.*: —

Mate. Parmenter *v.* Todhunter, 1 Camp. 541; The Ann C. Pratt, 18 How. 63, 1 Curt. 340; Ralli *v.* Troop, 157 U. S. 386, 401.

Successor of deserting master appointed by consignees of cargo. The Alexander, 1 Dod. 280; The Kennersley Castle, 3 Hagg. 1, 8.

British consul after a mutiny. The Cynthia, 16 Jur. 748.

Successor of master appointed by American consul. The Jacmel, 2 Ben. 107.

TO WHOM BOTTOMRY BOND MAY BE GIVEN. — Any one whose relations with the owner do not impose upon him the duty of making the necessary advances without the pledge of the ship, may loan upon bottomry; *e. g.*, a

Consignee not having funds of the owner. The Alexander, 1 Dod. 278; The Nelson, 1 Hagg. Adm. 169; The Rubicon, 3 Hagg. Adm. 9; The St. Catherine, 3 Hagg. Adm. 250; The Magoun, Olc. 55; The Leopard, Fed. Cas. No. 2828 (*semble*).

Agent not having funds of owner. The Hero, 2 Dod. 139; The Lord Cochrane, 2 W. Rob. 320, 331; The Royal Stuart, 2 Spinks, 258; The Oriental, 7 Moo. P. C. 398; The Staffordshire, L. R. 4 P. C. 194; Rucher *v.* Conyngham, Pet. Adm. 295, 307 (*semble*).

Cargo-owner. The Active, 2 Wash. C. C. 226.

On the other hand, one who has funds of the owner in his hands cannot enforce a bottomry bond for his advances to the master; *e. g.*, a

Consignee having funds. The Emperor, Bee, 339; The Lavinia, 1 Wash. C. C. 49; The Hurry, 1 Wash. C. C. 293.

Debtor of the owner. The Hebe, 2 W. Rob. 146.

Part-owner. The Randolph, Gilp. 457.

ASSIGNABILITY OF BOTTOMRY BONDS. — Bottomry bonds are usually made payable in terms to the obligee or his assigns. The James F. Maldon, *supra*, 208; Gale *v.* Browne (1536), 1 Sel. Pl. in Adm. (Seld. Soc'y), 55; Pieters's Case (1570), 2 Sel. Pl. in Adm. (Seld. Soc'y), 75 — "to L. de Bruyn or to the bringer hereof"; Melis's Case (1573), 2 Sel. Pl. in Adm. (Seld. Soc'y), 77; Fenner *v.* Meares, 2 W. Bl. 1269.

A bottomry bond is often spoken of as negotiable. The Rebecca, 1 C. Rob. 102, 104; The Mary Ann, 4 Not. of Cas. 376, 379.

But this is a loose use of language. A bottomry bond is not negotiable like a bill of exchange. It is assignable and the assignee may sue in his own name. The Rebecca, 5 C. Rob. 102; The M. P. Rich, 1 Cliff. 308, 313.

And it seems that the assignee should not be subject to a set-off of a bill due from the obligee. The Serapis, 37 Fed. R. 436, 438.

But a *bona fide* purchaser takes the bond subject to all defenses good against the obligee. The Catherine, 3 W. Rob. 12; The Onward, L. R. 4 Adm. 38, 53; The Lykus, 36 Fed. R. 919; The Serapis, 37 Fed. R. 436, 438.

BILL OF EXCHANGE AS COLLATERAL SECURITY FOR A BOTTOMRY BOND. — A bill of exchange may be given as security for payment of a bottomry bond, but liability thereon will not survive that upon the bond. The Jane, 1 Dod. 461; The Ariadne, 1 W. Rob. 411, 421; The Lord Cochrane, 2 W. Rob. 320, 335, 336; Stainbank *v.* Shepard, 13 C. B. 418, 444; The Staffordshire, L. R. 4 P. C. 194; The Onward, L. R. 4 Ad. 38; The Hunter, 1 Ware, 249; Greely *v.* Smith, 3 Woodb. & M. 236, 250; The Edward Albro, 10 Ben. 668, 672.

Conflict of Laws. — The validity and effect of a bottomry bond is determined by the law of the country to which the ship belongs. The Hamburg, Br. & Lush. 253; The Eliza Cornish, 1 Spinks, 36; Lloyd *v.* Guibert, L. R. 1 Q. B. 115; The Gaetano, 7 Prob. Div. 137; Pope *v.* Nickerson, 3 Story, 465; Force *v.* Providence Co., 35 Fed. R. 767, 778. See, also, The Brantford City, 29 Fed. R. 373, 384–390. — Ed.

CHAPTER IV.

SALVAGE.

THE ZEPHYRUS.

IN THE HIGH COURT OF ADMIRALTY, FEBRUARY 17, 1842.

[*Reported in* 1 *William Robinson*, 329.]

DR. LUSHINGTON.[1] The substance of the present case may be stated in a few words; it is as follows: the persons who claim as salvors, whilst the vessel was in very considerable danger, made most meritorious efforts to render assistance. As regards the preservation of the ship and cargo those efforts were unsuccessful, but the asserted salvors were ultimately enabled to bring off from the wreck the master and the crew, and to land them in safety upon the coast of Yarmouth. Under these circumstances, a suit has been instituted, and the act on petition of the parties suing concludes with the following prayer: That the court would decree them such amount of salvage as may be fitting, "for having been instrumental in saving and having saved the lives of the crew and the master." The first question that arises is this, whether, under the general principles which govern the practice of this court, I have any authority to make an award of salvage against the owners where the vessel has not been actually saved? Now I apprehend that, upon general principles, a mere attempt to save the vessel and cargo, however meritorious that attempt may be, or whatever degree of risk or danger may have been incurred, if unsuccessful, can never be considered in this court as furnishing any title to a salvage reward.[2] The reason is obvious, namely, that salvage reward is for benefits actually conferred, not for a service attempted to be rendered. Dismissing, therefore, from my consideration the endeavors which are stated to have been made by the salvors to save the property of the owners, I next proceed to consider the more material ground upon which the claim of the promoters of the suit is founded, namely, the successful rescue of the master and the crew who were on board the vessel at the time. Now, looking to

[1] Only a portion of the judgment of the court is given. — ED.

[2] The India, 1 W. Rob. 406; The Chieftain, 4 Not. of Cas. 459; The Undaunted, Lush. 90, 92 (*semble*); The E. A., 1 Spinks, 63, 65 (*semble*); The Atlas, Lush. 518, 527 (*semble*); The Fusileer, Br. & Lush. 341, 344, 351; The City of Chester, 9 Prob. D. 182, 202 (*semble*); The Sabine, 101 U. S. 389, 399; The Henry Ewbank, 1 Sumn. 400, 416 (*semble*) *Accord.* — ED.

general principles, and to the established practice of the court, I am clearly of opinion, that this court has no authority to direct a salvage award, upon the ground alone, that the lives of persons on board a vessel in distress have been preserved by the successful exertions of the parties suing.[1] The jurisdiction of the court in salvage causes is founded upon a proceeding against property which has been saved, and I am at a loss to conceive upon what principle the owners can be made answerable for the mere saving of life. The authority of decided cases is directly against any such proposition, and I have always understood it to have been settled by Lord Stowell as the law of the court, that it is impracticable for parties to prefer a salvage claim in the Court of Admiralty, merely on account of having saved the lives of individuals from impending danger or destruction.

I therefore reject the claim of the salvors, but I shall not condemn them in the costs.

THE ATLAS.

In the Privy Council, July 16, 1862.

[*Reported in Lushington*, 518.]

Sir John Coleridge delivered the judgment of their lordships.[2]

This was an appeal from the judgment of the High Court of Admiralty in a cause of salvage, which the owners, masters, and crews of the smacks Prosperous and Alert had instituted against the owners of the schooner Atlas and of her cargo, the claim for compensation having been rejected by the learned judge of that court. The facts appear to be these: The Prosperous and Alert are two fishing-smacks, and on the 4th of March last were employed in fishing in the North Sea about seventy miles from the English coast, when at a distance of some miles a vessel was discovered, which turned out to be the Atlas, apparently under no command. They proceeded towards her, and found her lying hove-to under her topsail only, rolling in the trough of the sea, which was running heavily and breaking over her fore and aft. The two masters and three men from each smack, with difficulty and at considerable risk, succeeded in boarding her. They found her derelict, her compasses, charts, and some other articles washing about her decks, and about three feet of water or more in her hold. She was laden with iron. With great exertion the pumps were set in motion, the fore-staysail set, and her head veered round. Hawsers were got ready in the smacks, and about 1 P. M. they began to tow her; this continued through that night, during which it was found necessary to keep the pumps constantly going, as she continued to make a considerable quantity of water. On the following day

[1] The Aid, 1 Hagg. Ad. 83; The Emblem, 2 Ware, 61 *Accord.* — Ed.

[2] Only a portion of the judgment of the court is given. — Ed.

a breeze sprang up, and the wind blew heavily; the sea made a complete breach over her, and it was difficult to stand at the pumps. The gale continued for some hours, but at 2 A. M. of the 6th they made the Newarp lightship; and about noon of that day reached up with the land a little below Winterton.

When the Atlas had been brought thus far, the steam-tug Emperor, of Yarmouth, came up and offered her services, which were accepted, and an agreement was made that she should tow the schooner and the two smacks up the Cockle into Yarmouth Roads, and thence into and up Yarmouth harbor, in safety, for the sum of 7*l*. Accordingly the schooner and the Alert were attached to her; the Prosperous, however, in breach of the agreement, the master of the tug refused to take, and she proceeded under canvas, and reached Yarmouth. The Emperor towed the Atlas and Alert in safety until between 6 and 7 P. M., when they were approaching the piers to enter Yarmouth harbor. The tide was at this time falling; the master of the Alert and the crew on board her doubted whether there were water sufficient to float the Atlas over the bar, and shouted to the master of the tug not to attempt to enter at that time; it does not appear whether he heard them, but, whether he did or not, he persevered in the attempt, and the schooner came to the ground; the tow-rope attached to the smack broke, and both she and the Atlas struck the ground, and drove upon the beach; on which the tug turned round and left them.

The sailors, six in number, who were on board the Atlas, took boat to consult with the master of the smack, who was on board of her, as to the measures to be adopted for getting the vessels off at the flood; a violent squall however drove them out to sea; the squall increased to a hurricane, and their lives were in great peril, but they were providentially picked up by a Ramsgate fishing-smack, and landed at Lowestoft on the following day.

Phillips, the master, when the weather had become calm, went ashore in his boat, and while he was trying to find out his owner's agent for the purpose of procuring assistance for completing the salvage, some strangers without authority boarded the Atlas, and brought her into the harbor at the flood early in the morning, the vessel of course requiring repairs, but the cargo being uninjured.

The course which their lordships will have to recommend to Her Majesty in this case will rest on two propositions. The first is this: That where a salvage is finally effected, those who meritoriously contribute to that result are entitled to a share in the reward, although the part they took, standing by itself, would not in fact have produced it.[1] There is a case, not cited in the argument, which is a strong

[1] The Jonge Bastiaam, 5 C. Rob. 322; The E. U., 1 Spinks, 63, 65; The Killeena, 6 Prob. D. 193, 198; The Camellia, 9 Prob. D. 27; The Cato, Bee, 241; The Henry Ewbank, 1 Sumn. 400; The Huntsville, Fed. Cas. No. 6916; The Tolomeo, 7 Fed. R. 497; A Raft of Timber, 15 Fed. R. 557 *Accord*.

But services not contributing to the ultimate safety of vessel will not support a claim for salvage. The Dodge Healy, 4 Wash. C. C. 651; The John Wurts, Olc. 462; The Brandon, 29 Fed. R. 878; The Angelina Anderson, 34 Fed. R. 925; The Avoca, 39 Fed. R. 567; The Golden Gate, 57 Fed. R. 661. — ED.

and clear illustration of this proposition, and an authority for it if any were needed. The Jonge Bastiaam.[1] This case, which, it may be observed, is mentioned with approbation by Mr. Justice Story in the case of The Henry Ewbank,[2] would have been on all fours with the present but for the alleged misconduct of the agent, assumed to be that of the plaintiffs themselves, which difference for the present purpose is immaterial.

This introduces the second proposition — that where success is finally obtained, no mere mistake or error of judgment in the matter of procuring it, no misconduct short of that which is wilful and may be considered criminal, and that proved beyond a reasonable doubt by the owners resisting the claim, will work an entire forfeiture of the salvage. Mistake or misconduct other than criminal, which diminishes the value of the property salved, or occasions expense to the owners, are properly considered in the amount of compensation to be awarded.[3] Wilful or criminal misconduct may work an entire forfeiture of it;[4] but that must be proved by those who impute it. The presumption, of course, is in favor of innocence, and this rule applies so strongly in favor of salvors that the learned judge of the admiralty, in the case of The Charles Adolphe,[5] has laid it down that the evidence must be "conclusive" before they are found guilty; by which he must be understood to mean that it must be such as leaves no reasonable doubt in the mind of the judge.

It is not disputed that this case falls within the first of these propositions. The salvage has been effected, and the plaintiffs have meritoriously contributed to producing it. What, then, are the circumstances which are to bring it within the latter part of the second, so as to justify the entire denial of compensation? Assuming for

[1] 5 C. R. 323.

[2] 1 Sumner's R. 421.

[3] The Cape Packet, 3 W. Rob. 122; The Dosseitei, 10 Jur. 865; The Rosalie, 1 Spinks, 188; The Perla, Swab. 230; The Magdalen, 31 L. J. Ad. 22; The Marie, 7 Prob. D. 203; The Yan-Yean, 8 Prob. D. 147; The Young America, 20 Fed. R. 926; The Katie Collins, 21 Fed. R. 409; The Strathnevis, 76 Fed. R. 855; The Magnolia, 2 Ir. Jur. N. S. 235 (*semble*) *Accord*.

[4] Misappropriation of a part of the property saved is the commonest case of forfeiture of salvage. Mason *v.* Blaireau, 2 Cranch, 240; The Bello Corrunes, 6 Wheat. 152; The Island City, 1 Black, 121; The Leander, Bee, 260; The Boston, 1 Sumn. 328; The Elizabeth, 1 Ware, 41, 43; The Rising Sun, 1 Ware, 378; The Missouri's Cargo, 1 Spr. 260, 270 (*semble*); The John Perkins, 3 Ware, 89; The L. T. Knights, 1 Low. 396; Harley *v.* Gawley, 2 Sawy. 7.

Other instances of forfeiture for misconduct are found in The Dosseitei, 10 Jur. 865, 866 (*semble*); The Duke of Manchester, 6 Moo. P. C. 90, 2 W. Rob. 470 S. C. (stranding of vessel); The Martha, Swab. 489 (riotous refusal to surrender the vessel); The Capella, 1892, Prob. 70 (exclusion of captain and mate from vessel); The Bello Corrunes, 6 Wheat. 152 (stranding the vessel); The Cherokee, 31 Fed. R. 167 (*semble*).

Salvage is forfeited also by abandonment of vessel after taking possession. The India, 1 W. Rob. 406; The Cosmopolitan, 6 Not. of Cas. Supp. XVII.; The Killeena, 6 Prob. D. 193; The John Wurts, Olc. 462; The Aberdeen, 27 Fed. R. 479; The Angelina Anderson, 34 Fed. R. 925; The Veendam, 46 Fed. R. 489, 491.

There is, of course, no salvage for one whose conduct created the necessity for salvage services. The Mayurka, 2 Curt. 72; nor for one who wilfully refrained from preventing the occasion for such services. American Co. *v.* Johnson, Bl. & H. 10. — ED.

[5] Swabey's R. 156.

the present that they are to be responsible for the acts of the master of the Emperor, what is the evidence of any wilful misconduct in him? There is no proof that he heard the voices of those who requested him to anchor for the night, or that he knew or believed there was too little water to float the Atlas over the bar, or that he might not, in the exercise of an honest judgment, have believed that there was. There can be no doubt that it would have been very beneficial to the owners if he could have placed the vessel in perfect safety that night, and he may have been misled by an honest desire to do so. It is not enough to say that there are circumstances which may favor an opposite presumption, the conclusion is still left in reasonable doubt; and on evidence of this character a verdict of guilty could not, according to the decision of the learned judge in the case last mentioned, be properly pronounced.

It is therefore unnecessary to consider that which their lordships have hitherto assumed, whether, namely, the learned judge correctly held the salvors to be entirely responsible in this case for the misconduct of their agent, nor do their lordships intend to pronounce any opinion upon that point. There can be no doubt that if by the imprudence or unskilfulness of the agent the value of the property be diminished, the principal, however innocent, or however meritorious as to his own acts, must suffer for it in the diminished amount of his compensation. But when the moral considerations and the considerations of policy, which enter largely into the law of salvage, are taken into account: when also it is remembered in how many instances the salvor cannot select his agent, but is bound to accept on the spur of the moment such offers of service as tend apparently to expedite or secure the completion of the salvage; and also in how many instances the agent's conduct is entirely beyond the control or direction of the principal, — it may perhaps be found that even the limited amount of responsibility just stated may almost exceed the extent warranted by sound policy or strict justice. Their lordships, however, throw this out merely to guard against the supposition of their having considerately assented to the doctrine of the learned judge in this case; and they entirely reserve any decision upon it until some case shall make it necessary to pronounce one.

Their lordships will therefore recommend to Her Majesty that the judgment be reversed, with the costs below and the costs of this appeal. They will also recommend that the salvage shall be allowed on the most liberal scale, agreeing as they do entirely with the learned judge below that the services of the plaintiffs were most meritorious, and they regret that the share of each individual will necessarily be small. The fund appears to have been of the value of 620*l.*; from the half of this (310*l.*) he has already given to the beachmen, who completed the saving, 120*l.* and their costs. Their lordships will recommend that 190*l.*, the residue of this moity, be divided equally between the two smacks.

THE UNDAUNTED.

In the High Court of Admiralty, June 21, 1860.

[*Reported in Lushington*, 90.]

Right Hon. Dr. Lushington.[1] I cannot have any doubt as to the duty of the court in this case. There is a broad distinction between salvors who volunteer to go out, and salvors who are employed by a ship in distress. Salvors who volunteer, go out at their own risk for the chance of earning reward, and if they labor unsuccessfully, they are entitled to nothing; the effectual performance of salvage service is that which gives them a title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labor and service may not prove beneficial to the vessel. Take the case of a vessel at anchor in a gale of wind, hailing a steamer to lie by, and be ready to take her in tow, if required; the steamer does so, the ship rides out the gale safely without the assistance of the steamer: I should undoubtedly hold in such a case that the steamer was entitled to salvage reward, and how much, to be determined by the risk encountered by both vessels, the value of the property at hazard, and the other circumstances of the case. The engagement to render assistance to a vessel in distress, and the performance of that engagement, so far as necessary or so far as possible, establish a title to salvage reward. In the present case there was an engagement: the steamer was engaged to go on shore and bring off an anchor and cable to this ship, which had parted from both anchors in a tremendous gale off the Foreland, and was, in my opinion, in very great danger. The engagement, as usual in such cases, was not more specific than was necessary. The true effect of it was, "You are to go and get me an anchor and cable, and do all that is necessary for this purpose." The steamer proceeds to the shore and employs two luggers to take in anchor and chain, as being by size and construction fitted to go alongside a large vessel in a seaway; in fact employs them as the best means of executing the promised service. Now, if it was necessary and proper to employ these luggers, their employment forms part of the original order, and their services must be paid for. I am of opinion that the luggers were most properly engaged by the master of the steamer; I am further of opinion that they did all in their power to reach the vessel in distress, they put out to sea immediately, and were for nearly three days knocking about the Forehead, and they were only disappointed of effecting their purpose by the act of God. The ship had driven as far as Lowestoft: she was finally fallen in with by the steamer, and towed by her and another steamer to Gravesend: on the luggers arriving with the cable and anchor, the master of the vessel then

[1] Only the judgment of the court is given. — Ed.

refused to accept them. Looking to all the circumstances of the case, the risk of the ship, the long labor of the salvors, and the expense and loss of profits incurred, I shall give the Resolute 400*l.*, and to each of the luggers, 100*l.*[1]

THE RENPOR.

In the Court of Appeal, April 20, 1883.

[*Reported in Law Reports, 8 Probate Division*, 115.]

Action for life salvage by the owners, master, and crew of the steamship Mary Louisa against the owners and master of the steamship Renpor.

Brett, M. R.,[2] referred to The Johannes.[3] *W. G. F. Phillimore* for the defendants was not called on.

Brett, M. R. In this case the judgment of the court below must be affirmed. The suit is brought under the following circumstances: the Renpor was in the greatest possible danger, she was in the ice, she could not move out of it, and she was one thousand miles from land, when the Mary Louisa came up with her. The Renpor very shortly sank, but before that happened the Mary Louisa saved the lives of her crew. The plaintiffs' vessel, whilst rendering this service, was in considerable danger, and there were, therefore, several of the elements present of a salvage service, namely, danger to the lives and property, both of salvors and salved, and a service rendered. It is then said that the action is maintainable irrespective of any agreement as a life salvage service. As I have already said, there were several of the elements present which entitle persons to salvage, but there is one element invariably required by admiralty law in order to found an action for salvage, there must be something saved more than life, which will form a fund from which salvage may be paid; in other words, for the saving of life alone without the saving of ship, freight, or cargo, salvage is not recoverable in the Admiralty Court.

[1] The Maude, 3 Asp. Mar. Cas. 338; The Melpomene, L. R. 4 Ad. 129; The Kate B. Jones, 1892, Prob. 366, 372, 373; The Sabine, 101 U. S. 384, 390 (*semble*); The Williams, Bro. Ad. 208; The Susan, 1 Spr. 499, 502 (*semble*) *Accord*.

If one claiming salvage has failed to perform his express contract, and is therefore precluded from recovering upon that, he is entitled, nevertheless, if his failure to perform is not due to his misconduct, to reasonable compensation in so far as his services have benefited the ship. The Samuel, 15 Jur. 407; The Nellie, 2 Asp. Mar. Cas. 142; The Aztecs, 3 Asp. Mar. Cas. 326; The Camellia, 9 Prob. D. 27; The Westbourne, 14 Prob. D. 132; The Hestia, 1895, Prob. 193; The Island City, 1 Black, 121, 1 Cliff. 210; The Brothers, Bee, 136; The Sherman, Chase, 468; The Strathnevis, 76 Fed. R. 855.

But no salvage will be given when the contract is unperformed, if the services rendered were of no real value to the ship. The Edward Hawkins, Lush. 515; The Cheerful, 11 Prob. D. 3; The Benlarig, 14 Prob. D. 3; The Lepanto, 1892, Prob. 122; The Edam, 13 Fed. R. 135; The Algitha, 17 Fed. R. 551. — Ed.

[2] Only a portion of the judgment of the court is given. — Ed.

[3] Lush. 182.

Life salvage it is true may, by statute, be payable under some such circumstances, but then it must be paid by the Board of Trade. It is said that under some circumstances if life is saved after the services of the salvors have been requested by the master of the ship which is in danger, the shipowner is bound to pay salvage, although there is no *res* saved, and The Undaunted has been cited in support of this proposition. The E. U.[1] has also been relied on as an authority in favor of it, more especially a dictum of Dr. Lushington, which is to be found in that case. But The Undaunted is really no authority in favor of the plaintiffs' contention, because in that case the ship was saved, and therefore there was a fund from which payment could be made. The question was there raised whether the plaintiffs could be paid out of that fund, and it was decided that they could, because they had exerted themselves to save the ship at the request of the master. It is unnecessary for us to say if we agree with that decision, but it in no way broke the fundamental law of the Admiralty Court, that something must be saved in order to give valid grounds for a salvage action. The E. U.[1] is a similar case, but there a supposed case is mentioned by Dr. Lushington, which is said to support the plaintiffs' contention in the present case. If Dr. Lushington did state this supposed case as containing his view of the law, it is contrary to what he had laid down before, and if it does, with all respect for his great authority, I am unable to agree with it. But I doubt if it is an exact statement of that learned judge's opinion, and the cases of The Fusileer,[2] the Zephyr,[3] and the Cargo ex Schiller,[4] are contrary to it, and support the rule that some property must be saved to give rise to a claim for salvage.

Then it has been argued that an action in the nature of a common law suit can in this case be supported on the agreement, which, it is said, is binding on the shipowner.[5] But there are two circumstances necessary in order to make an agreement binding on an owner; first, the contract must be made under a necessity; and secondly, it must be made for his benefit. I do not desire to say anything which may seem cruel, but I must express a doubt whether if an agreement is made only for the purpose of saving a master and a crew without regard to any saving of the property of the shipowner, though it be in a case of necessity, yet as the subject-matter is without benefit to the property of the shipowner, the master has authority to bind the owner to a money payment. But if this agreement was not merely one by which the lives of the master and crew were to be saved, what does it mean? The contract must be read having regard to the circumstances, and the parties to it; it is idle to suppose that those on the Renpor had made up their minds that the ship would sink at once, "we" and "I" clearly mean the "ship" and "us," the ship and the crew are treated as one thing. Thus it is a contract which the master

[1] 1 Spinks, 63. [2] Br. & L. 350. [3] 2 Hagg. 43. [4] 2 P. D. 145.

[5] The agreement was "to stay by me until I am in a safe position to get to port for the sum of 1200*l.*, my vessel being badly holed in starboard bow."—ED.

would have authority to make and by which the owner would be bound to pay the sum mentioned in it for staying until the ship was safe. Any question of a *quantum meruit* claim arising out of it is one which, though mentioned during the discussion of the case,[1] cannot be seriously argued.

I think, therefore, that the agreement is a proper salvage agreement; it fixes the amount of salvage to be paid both for services to life and property, but leaves untouched all the other conditions necessary to support a salvage award. As therefore both on principle and on the construction of the contract itself there must be something besides life saved to make it effectual, I am of opinion that neither owners nor master are liable in this action because no *res* has been saved.[2]

Cotton and Bowen, L. JJ., concurred.

Appeal dismissed.

THE VINE.

In the High Court of Admiralty, November 4, 1825.

[*Reported in* 2 *Haggard, Admiralty*, 1.]

This ship, in distress near the Needles, was assisted for three days and nights, and towed into Portsmouth. There were thirty sailors, the first eight that reached the ship were employed on the coast-guard service under the command of Lieutenant Porter, R. N.; but he did not accompany his men. A separate claim of salvage being given for this officer, it was alleged on his behalf, "that his men had proceeded under his directions in the revenue galley to the assistance of the vessel, that he gave them instructions, and also sent off a pilot boat to aid their exertions." A contrary statement, on the part of the owners, was supported by affidavit. The vessel and cargo were valued at 5500*l.*, and a tender of 250*l.* had been refused.

Judgment.

Lord Stowell, after having awarded 400*l.* as a salvage remuneration, thus proceeded: The claim of Lieutenant Porter is quite novel. It is, I apprehend, a general rule that a party, not actually occupied in effecting a salvage service, is not entitled to share in a salvage remu-

[1] "I will suppose a vessel in distress, and an order sent to put an anchor and cable on board, and that that is done; but that afterwards, from the violence of the weather, the vessel is carried away and lost; the service, however, is such as must be paid for whether the vessel is lost or not." *Per* Dr. Lushington in the E. U., 1 Spinks, 63, 64. — Ed.

[2] The Annie, 12 Prob. D. 50 (although owner of lost vessel had recovered her value from one who had caused the loss) *Accord.*

On the same principle if the vessel be lost, but some of the cargo saved, there is no claim for life salvage against the shipowner, but only against the cargo-owner. Cargo ex Schiller, 2 Prob. D. 145, 1 Prob. D. 473; Cargo ex Sarpedon, 3 Prob. D. 28. — Ed.

neration.[1] The exception to this rule, that not unfrequently occurs, is in favor of owners of vessels, which, in rendering assistance, have either been diverted from their proper employment, or have experienced a special mischief, occasioning to the owners some inconvenience and loss, for which an equitable compensation may reasonably be claimed.[2] But in this case what did Lieutenant Porter do? He permitted the men under his command to perform with the boats a salvage service; and on the ground of policy I think that officers of the preventive service should suffer their boats to assist vessels in distress; but such a permission may have its inconveniences, and it may sometimes be a matter at least for consideration how far the men, employed in protecting the revenue, ought to be allowed to quit the particular service for which they are engaged. The nature and duties of this arduous service are, however, a sufficient reason for Lieutenant Porter not going out in person to the assistance of this vessel: but to acknowledge him as a salvor would be to introduce a sort of prize principle very inapplicable to cases of this description. In cases of prize, a commander on shore, if the capture takes place within the limit of his station, is considered as the manager of the whole transaction, and, the property being condemned, is entitled to his proportion; but, in questions of salvage, the court must not act on the same liberality of principle that belongs to prize cases. Here all is to be paid out of the pockets of the British owner; — he alone has to discharge all demands. The application, I repeat, is novel; and, in dismissing it, I go as far as I can in allowing Lieutenant Porter his expenses.

[1] The Two Friends, 2 W. Rob. 349, 353; The Charlotte, 3 W. Rob. 68; The Blaireau, 2 Cranch, 240 (master not entitled to salvage for services of apprentice); The Ottawa, 1 Low. 274.

[2] The Haidee, 1 Not. of Cas. 594, 597; The Charlotte, 3 W. Rob. 68; The Norden, 1 Spinks, 185; The Blaireau, 2 Cranch, 240; The Camanche, 8 Wall. 476 (owner a corporation); The Blackwell, 10 Wall. 1 (owner a corporation); The Connemara, 108 U. S. 352; The Henry Ewbank, 1 Sumn. 400, 426; The Charles, Newb. 329; The Charles Henry, 1 Ben. 8; The Morning Star, 6 Blatchf. 154; The Birdie, 7 Blatchf. 238 (owner a corporation); The Arlington, 2 Ben. 511; The Jack Jewett, 2 Ben. 468. But the owner of property other than a ship, although it was used in salving, is not thereby entitled to salvage. The Ottawa, 1 Low. 274 (oxen used in salving).

Salvage is allowed to seamen who remain on salving vessel and take no other part in the rescue. The Baltimore, 2 Dods. 132; The Mountaineer, 2 W. Rob. 7; The Sarah Jane, 2 W. Rob. 110, 115; The Centurion, 1 Ware, 477.

The owner of the cargo on the salving vessel is not entitled to salvage. The Persian Monarch, 23 Fed. R. 820; The Brixham, 54 Fed. R. 539; The Dupuy de Lome, 55 Fed. R. 93; Compagnie Commerciale *v.* Charente Co., 60 Fed. R. 921; The Hekla, 62 Fed. R. 941. The consent of the cargo-owner, who was on board the salving vessel, and the consequent release of the latter from legal liability on the contract of carriage, was deemed sufficient in The Blaireau, 2 Cranch, 240, to entitle the cargo-owner to share in the salvage. But this case, as also the dicta in The Cora, 2 Wash. C. C. 80 and The Nathaniel Hooper, 3 Sumn. 542, are to be explained, as showing a contract between cargo-owner and shipowner that the latter should give the former a portion of the salvage to which the shipowner was entitled, and not as establishing any direct claim to salvage by the cargo-owner against the salved vessel. See cases cited in preceding paragraph.

In The Colon, 10 Ben. 60, although the cargo-owner was denied the right to salvage, he was allowed to recover damages against the salved vessel caused by the delay due to the salvage deviation. But this decision, although approved *obiter* in The Wells City, 57 Fed. R. 317, 320, the court declined to follow in The Persian Monarch, 23 Fed. R. 820. — Ed.

THE SAPPHO.

In the Privy Council, June 15, 1871.

[*Reported in Law Reports, 3 Privy Council*, 690.]

The Lord Justice Mellish.[1] This is a suit for salvage, and it raises a question of considerable importance, namely, whether, when salvage services are performed by one ship to another, and both ships belong to the same owners, the crew of the ship which has performed the salvage services is entitled to salvage remuneration.

The facts necessary to the decision of the case appear to be simple and plain. Whilst the Sappho, a screw steamer, was performing a voyage in the Mediterranean, its screw became disabled, and the ship itself appeared to be in a very disabled state, and in very bad weather. It was about 150 miles from Malta, and it appeared to be certainly in a state that made it extremely doubtful whether, if it was left to itself and got no assistance from any other steamer, it would ever arrive at Malta at all. In these circumstances she fell in with another screw steamer, the Nero, belonging to the same owners, and, it apparently not being known at that time that both vessels belonged to the same owners, it was agreed that the Nero should tow the Sappho to Malta, which she accordingly did, and that arrangement was entered into on the assumption that the services were to be salvage services. It turned out that the ships belonged to the same owners, and of course, therefore, there could be no salvage as respects the ships, since such a claim would be absurd;[2] but the question arises, whether the crew, and the master also, of the Nero, if he had claimed it, would not be entitled to salvage remuneration.

It certainly seems curious that this question has never been decided on principle at all. It was very much considered in the case of The

[1] Only the judgment of the court is given. — Ed.

[2] The Maria Jane, 14 Jur. 857; The Miranda, L. R. 3 Ad. 561; The Barney Eaton, 1 Biss. 242 (a mortgagee is not owner) *Accord.*

The rule is the same although one of the vessels be under charter, if the charter does not amount to a demise. The Waterloo, 2 Dods. 433; The Collier, L. R. 1 Ad. 83. For under such a charter salvage earned by the vessel would belong to the owner and not to the charterer. The Alpen, Swab. 181. But if the owner of a vessel has chartered it by way of demise, so that the lessee is owner *pro hac vice*, and would, therefore, be entitled to salvage as against vessels owned by a third person (The Scout, L. R. 3 Ad. 512), salvage is allowed as between this vessel and another belonging to the lessor. The Maria Jane, *supra*. In The New Orleans, 23 Fed. R. 909, the salvage was apportioned between owner = lessor and charterer = lessee.

The owner of the salving vessel does not forfeit his right to salvage as to the cargo, by reason of the fact that the vessel carrying it also belonged to him. The Miranda, L. R. 3 Ad. 561; Cargo ex Laertes, 12 Prob. D. 187; unless he is legally liable for the emergency that called for the salvage service, as in The Glenfruin, 10 Prob. D. 103.

Salvage is due although the service is rendered in the erroneous belief of the salvor that he is saving his own vessel. The Liffey, 6 Asp. Mar. Cas. 255. — Ed.

[3] 14 Jur. 857.

Maria Jane,[s] which is said to be an authority, that in no case where the ships belong to the same owners can any salvage remuneration be recovered. But when the facts of that case are looked at, their lordships do not think that Dr. Lushington intended to lay down any such general rule. There the ships belonging to the same owner were engaged in the African trade. It is stated in the judgment, that it was part of the general arrangement that the ships of the same owner and the crews of the same owner should render mutual assistance to each other, and the real question seems to have been whether the services there rendered did go beyond that mutual assistance which, under the circumstances of the African trade, and according to the well-known usages of that trade, one ship was bound to render another. Dr. Lushington, after all, puts the case upon what appears to be the true principle, namely, whether the services rendered were services which under their contract the seamen were bound to perform, and for which they are remunerated by their wages. It is quite clear that, as a general rule of law, seamen cannot recover salvage remuneration for services which by their contract they are bound to perform, and, therefore, they never recover salvage remuneration for services connected with the saving of their own ship, as long as the relation of master and servants between them and their owner, with reference to that ship, continues.[1] But it has never been laid down, and their lordships are not disposed to lay down, that if a seaman perform services for the benefit of his owner which are not within his contract, he cannot be entitled to salvage remuneration. Their lordships do not say services which he is not bound to perform, because it may be that as an ordinary incident of a voyage if a ship meets another ship in distress, and the master orders the seamen of his ship to give assistance, they are to a certain extent bound to give assistance; but then, for that assistance, if salvage services are rendered, they are entitled to receive salvage remuneration. Their lord-

[1] The Neptune, *supra*, 119, 120; The L. Jonet, L. R. 3 Ad. 556, 558; Hobart *v.* Dorgan, 10 Pet. 108, 122; The Clarita, 23 Wall. 1, 17; The Catherines, 2 Mas. 319, 335; The Pontiac, 5 McL. 359, 363; The Wave, 2 Paine, 131, 140; The Holder Borden, 1 Spr. 144; Miller *v.* Kelly, Abb. Adm. 564; The Acorn, Fed. Cas. No. 30; The John Perkins, Fed. Cas. No. 7360; The Antelope, 1 Low. 130; The Olive Branch, 1 Low. 286; The Ocean Prince, 38 Fed. R. 259 (stevedores); The C. P. Minch, 73 Fed. R. 859, 61 Fed. R. 511; The Nebraska, 75 Fed. R. 598.

For extraordinary services salvage was allowed to seamen of the salved vessel in The Mary Hale, Fed. Cas. No. 9213.

But seamen are entitled to salvage for services rendered either after a

Final abandonment of the ship. The Florence, 16 Jur. 572; The Warrior, Lush. 476 (*semble*); The L. Jonet, L. R. 3 Ad. 556; Mason *v.* The Blaireau, 2 Cranch, 240; The Cato, Pet. Adm. 48; The Triumph, 1 Spr. 428; The John Perkins, Fed. Cas. No. 7360 (*semble*); The Umattilla, 29 Fed. R. 252; The Aguan, 48 Fed. R. 320; Bridge *v.* Niagara Co., 1 Hall, 423; or after a

Discharge from the ship by the master. The Warrior, Lush. 476; or after a

Capture of the ship. The Two Friends, 1 C. Rob. 271; The Beaver, 3 C. Rob. 292; The Governor Raffles, 2 Dods. 14, 17; The Harmony, Pet. Adm. 70; Williams *v.* Suffolk Co., 3 Sumn. 270. See The Florence, 16 Jur. 572, 575; Phillips *v.* McCall, 4 Wash. C. C. 141.

But the recovery of the ship from mutineers is not a salvage service. The Governor Raffles, *supra*. — ED.

ships do not see why the case should be different if it turn out that the ship to which the service is rendered belongs to the same owner. The ordinary contract which a seaman enters into certainly says nothing about rendering services to another ship. He does something, therefore, which is not within his contract. It may be that he ought to do it because it is an ordinary incident that he should do it, but then if it is an ordinary incident that he should do it, and if he does it, not because it is within his contract, but for the reason Lord Stowell assigns in the case of The Waterloo, where he says:[1] "It is the duty of all ships to give succor to others in distress; none but a freebooter would withhold it," — if he performs that duty towards a ship, though it may be belonging to the same owner, because of that moral duty, and not because it is within his original contract of service with his owner, there does not appear to be any good reason why the ordinary consequence should not follow, namely, that for this extraordinary service he should receive the remuneration which the law gives him. That appears to be in accordance with the ordinary rules laid down by Lord Stowell, and all the great authorities respecting salvage, that it is a right very much favored in the law, and, therefore, that it ought not to be narrowed in a case which clearly comes within the principle. Indeed, the learned counsel for the appellants appeared to admit that if a man risked his life, that being a thing he was not bound by his contract to do, he would be entitled to receive salvage remuneration; but their lordships do not see on what principle a distinction can be drawn between a case where a seaman risks his life and a case where he performs other extraordinary services which would in their nature be salvage services. That would be raising a new distinction for which there appears no sufficient ground or authority. The true rule appears to their lordships to be, to consider, whether the services are in themselves of the nature of salvage services; and next, whether they are services which are within the contract which the seaman originally enters into, so that he receives remuneration for them by his ordinary wages. If they are not within his contract, and he does not receive remuneration for them by his ordinary wages, and they are in their nature salvage services, their lordships are of opinion that there is no good reason why the seaman should not receive the ordinary salvage remuneration which the law gives him.

Then, as to the question of amount, their lordships certainly think that the amount awarded by the court below is somewhat large, and they will not say that if they had to determine the question, they would give the same amount; but it is a fixed rule that their lordships do not interfere with the amount given for salvage, unless it is a case where the amount is very greatly in excess or deficient, in their estimation; and they do not think that, on the whole, there is sufficient reason to induce them to interfere with the amount in this case.

[1] 2 Dod. 437.

The result is, that their lordships will recommend to Her Majesty that this appeal be dismissed with costs.[1]

THE BRANSTON.

In the High Court of Admiralty, June 26, 1826.

[*Reported in* 2 *Haggard, Admiralty*, 3.]

The brig, homeward bound, got into distress; and a lieutenant of the royal navy, a passenger on board, contributed his assistance, and claimed to be remunerated for his services.

Per curiam [Lord Stowell]. Where there is a common danger, it is the duty of every one on board the vessel to give all the assistance he can; and more particularly this is the duty of one whose ordinary pursuits enable him to render most effectual service. No case has been cited where such a claim by a passenger has been established, though a passenger is not bound, like a mariner, to remain on board, but may take the first opportunity of escaping from the ship and of saving his own life. I reject the claim.[2]

CARGO EX CAPELLA.

In the High Court of Admiralty, May 7, 1867.

[*Reported in Law Reports*, 1 *Admiralty*, 356.]

On the night of the 31st of March, 1865, a collision occurred between the Southern Empire and the Capella. Shortly after the collision, the master and crew of the Southern Empire succeeded in saving the specie, and brought it to Liverpool, for which service they instituted a cause of salvage against the cargo.

The court found that both vessels were to blame for the collision, and the question was, therefore, whether in these circumstances the salvors were entitled to reward.[3]

[1] The Agamemnon, 5 Asp. Mar. Cas. 92; The Miranda, L. R. 3 Ad. 561 *Accord*. — Ed.

[2] The Vrede, Lush. 422; The Clarita, 23 Wall. 1, 18 (*semble*); The Mayurka, 2 Curt. 72, 78; The Wave, 2 Paine, 131, 140; The Brabo, 33 Fed. R. 884; The Ocean Prince, 38 Fed. R. 259, 261; The Nebraska, 75 Fed. R. 598, 601; The Stella Marie, Young, Adm. 16, 23.

For extraordinary services, salvage was allowed to a passenger in Newman *v.* Walters, 3 B. & P. 662; The Connemara, 108 U. S. 352; The Cora, 2 Wash. C. C. 80; The Great Eastern, Fed. Cas. No. 14,110, 2 Mar. L. Cas. 148, 11 L. T. R. 516 s. c.

In The Merrimac, 1 Ben. 201, salvage was allowed to troops transported by contract with government, who were distinguished from passengers. — Ed.

[3] The statement of facts is slightly abridged, and the arguments of counsel are omitted. — Ed.

DR. LUSHINGTON. The question for me to determine is whether when a collision has taken place between two vessels, and both vessels are held to blame, one of them can sue for salvage for having saved the cargo of the other from the perils consequent on the collision. I don't seek for authorities, but I look to the principle which ought to govern the case. In my mind, the principle is this, that no man can profit by his own wrong. This is a rule founded in justice and equity, and carried out in various ways by the tribunals of this country, and never, so far as I am aware, departed from by any English court.

The application of this rule to the present case is obvious. The asserted salvors were the original wrong-doers; it was by their fault that the property was placed in jeopardy. The rule would bar any claim by them for services rendered to the other ship which was a co-delinquent in the collision;[1] but the present claim, it is to be observed, is a demand for salvage against the cargo, the owners of which were perfectly innocent.

There has been no decision as to this particular question, at least to my knowledge, during my practice in this court, but I am not surprised at it, because I think that the claim is so opposed to common justice, it is very unlikely that any person would make the experiment. I pronounce against the claim with costs.[2]

AKERBLOM *v.* PRICE, POTTER, WALKER & CO.

IN THE COURT OF APPEAL, JUNE 20, 1881.

[*Reported in Law Reports, 7 Queen's Bench Division*, 129.]

THE judgment of the Court (Bramwell, Brett, and Cotton, L. JJ.,) was delivered by

BRETT, L. J.[3] In this action brought by the plaintiff, as shipowner, to recover from the defendants, as assignees of cargo, a general average contribution, the question in dispute was reduced to be whether a sum of 100*l.*, paid by the plaintiff to certain pilots, could be legally treated by the plaintiff as against the defendants as a payment for salvage services, or whether the plaintiff as against the

[1] *A fortiori* the delinquent ship cannot claim damages of the innocent ship. The Glengaber, L. R. 3 Ad. 534; The Altair, 1897, Prob. 105; The Clarita, 23 Wall. 1; The Iola, 4 Blatchf. 28. See *supra*, 264, *n.* 2.

But a vessel is none the less entitled to salvage, although belonging to the same owner as another vessel by whose fault the necessity for salvage services arose. The Glengaber, L. R. 3 Ad. 534. — ED.

[2] The Charles E. Soper, 19 Fed. R. 844; The Krona, 28 Fed. R. 318 *Accord*.

If two vessels are so situated without fault of either that both are in imminent danger of destruction, and one thereupon slips her cable and is driven ashore, whereby the other is saved, the salved vessel is not liable for salvage. The vessel that slipped her cable was legally bound to act in self-protection. The Mayurka, 2 Curt. 72. — ED.

[3] Only the judgment of the court is given. — ED.

defendants was entitled to say no more than that the payment was for services, which however meritorious, were only pilotage services. If the first case were made out, the plaintiff would be entitled to succeed; if the second, the whole payment must be borne by the plaintiff as the shipowner, and the defendants would be entitled to succeed.

The facts proved beyond controversy were that the vessel, bound for Barrow-in-Furness, was by the violence of the wind and sea driven to leeward of her port into Morecambe Bay; that by reason of the same violence of wind and sea, the vessel could not beat to windward so as to make her port or even remain where she was, but was being driven more and more to leeward towards dangerous sands; that her captain and crew were ignorant of the locality; that the vessel, unless guided to some part of the bay in which she might take the ground or lie in comparative safety, must almost inevitably have been lost; that the pilots, seeing her peril, put to sea from harbor in order to assist her; that by going to sea in such a storm they ran no inconsiderable danger of losing their own vessel and their lives; that being unable, by reason of the height of the sea, to board the vessel, they led her, by preceding her and signalling to her, to a safe anchorage in the bay; that (and it is a strong indication of the opinion of all present of the urgency of the position) no mention was made from the vessel or by the pilots of any port to which the vessel should be steered. The vessel had a pilot signal flying when the pilots put off and when they approached the vessel; and the vessel had not suffered any damage to her hull, spars, or sails.

Upon these practically undisputed facts, it was argued for the plaintiff that the jury ought in reason to have found for him, on the ground that the ship was in distress, and that from that fact alone when it exists, however great or small the distress, pilots are not bound to render any service to a ship except upon the terms of receiving salvage reward, and that the pilots in this case had not agreed to render services on any other terms. It was argued for the defendants that the jury were entitled and even bound to find for them, because the vessel was not herself damaged; and that unless a ship be herself damaged, pilots are bound to serve her on request as pilots; and, if they do serve her, are entitled to be paid only for pilotage service. Cases were cited from the Admiralty Reports on behalf of the plaintiff in order to support in its entirety the proposition enunciated for him. These cases were criticised on behalf of the defendants, in order to show that in all of them there was in fact some damage to the ship itself, besides its being otherwise in distress. It cannot be denied that the terms used by Dr. Lushington in The Frederick [1] and The Eliza,[2] and several other cases, if accepted literally, support the plaintiff's view. Equally it cannot be denied that the criticism on them made on behalf of the defendants is, in fact, correct. The difficulty of dealing with Admiralty Reports by way of authority is, that there is no necessity in that Court that the judge should, in the expo-

[1] 1 W. Rob. 17. [2] Lush. Adm. 536.

sition of the grounds of his judgment, discriminate strictly between the proposition of law which is to be satisfied by all the facts of the case, and the rule of interpretation of the direct facts of maritime vicissitudes given in evidence, by which he desires to bind himself and his successors as to the inference of fact he and they ought, as a general rule, to draw from those facts. The latter use of authority is inapplicable as such to a trial by jury, because a jury does not disclose the reason why its members have drawn any particular inference of fact. A jury may be well assisted by having the reasoning of great judges of the Admiralty Court explained to them. Upon careful consideration, we cannot adopt as a rule of law, or as a proper rule for drawing an inference of fact, the abrupt rule suggested for the defendants. And the rule enunciated by Dr. Lushington requires to be divided into its elements of law and fact, before it can be applied to a trial by jury. The fundamental rule of administration of maritime law in all courts of maritime jurisdiction is that, whenever the Court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to any agreement they may make with regard to them, the Court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties. If the parties have made no agreement, the Court will decide primarily what is fair and just. The rule cannot be laid down in less large terms because of the endless variety of circumstances which constitute maritime casualties. They do not, as it were, arrange themselves into classes, of which *a priori* rules can be predicted. If the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just.[1] This is the great fun-

[1] In the following cases the agreed reward for salvage being thought to be unjust was reduced by the Court: The Theodore, Swab. 351; Cargo ex Woosung, 1 Prob. D. 260; The Medina, 2 Prob. D. 5; The Silesia, 5 Prob. D. 177; The Prinz Heinrich, 13 Prob. D. 31 (*semble*); The Mark Lane, 15 Prob. D. 135; The Rialto, 1891, Prob. 175; The Strathgarry, 1895, Prob. 264 (*semble*); The North Carolina, 15 Pet. 40; Post *v.* Jones, 19 How. 150, 160; The Emulous, 1 Sumn. 207, 210; The Jenny Lind, Newb. 443; The A. D. Patchin, 1 Blatchf. 414; The Adirondack, 2 Fed. R. 387; The Sophia Hanson, 16 Fed. R. 144; The C. & C. Brooks, 17 Fed. R. 548; The Hesper, 18 Fed. R. 692; The Young America, 20 Fed. R. 926; The Engines of the Greenpoint, 38 Fed. R. 671; The Don Carlos, 47 Fed. R. 746; The Jessomene, 47 Fed. R. 903; The G. W. Jones, 48 Fed. R. 925; The America, 2 Stuart, Adm. 214.

In the following cases the contract price for the salvage service not being considered inequitable was upheld by the court: The Elfrida, 172 U. S. 186 (reversing s. c. 77 Fed. R. 754); The H. D. Bacon, Newb. 274; The J. G. Paint, 1 Ben. 545; The Ellen Holgate, Fed. Cas. No. 4375a; The Swiftsure, 29 Fed. R. 462; The Wellington, 48 Fed. R. 475; The Schiedam, 48 Fed. R. 923; The Agnes I. Grace, 49 Fed. R. 662; The Sir William Armstrong, 53 Fed. R. 145; The Sirius, 53 Fed. R. 611; The Alert, 56 Fed. R. 721.

In rare instances the agreed reward for salvage service being unjustly small has been increased by the Court, as in The Phantom, L. R. 1 Ad. 58; The Ernest M. Munn, 61 Fed. R. 694.

In the following cases the attempt to raise the agreed price for salvage service was unsuccessful: The True Blue, 2 W. Rob. 176, 180; The Whitaker, 1 Spr. 229, 283; The

damental rule. In order to apply it to particular instances, the Court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances. In the case, therefore, of pilots claiming salvage reward, the ultimate proposition with regard to the pilots to be determined by the tribunal which has to decide between the pilot and shipowner is, would a fair and reasonable owner and a fair and reasonable pilot, if they had had to agree, have agreed under the circumstances that the services to be performed should be performed for ordinary pilotage fees, or even extraordinary pilotage reward, or for salvage reward? would a fair owner have insisted on requiring the necessary services for ordinary pilotage fees, or even a higher rate of pilotage payment? would a fair pilot have refused to perform the necessary services unless upon the terms of a salvage reward? In such a dispute to be determined by a judge and jury, these besides the question of the position of the ship are the questions to be left to the jury. In this case, for instance, the questions for the jury were: was the ship in a position of imminent danger of being lost? was she saved from such danger by the acts of the pilots? were the acts of the pilots, by reason of the weather and the position of the ship, made so different in danger or responsibility from the ordinary acts of service of pilots, as that no fair and reasonable owner would have insisted on requiring such service for other than salvage reward? In a dispute to be determined by a judge, in a Court of Admiralty or otherwise, these are the propositions which are to be applied to the particular facts of the case. It follows that there can be no such rigid rule of law, or of interpretation of facts, as is suggested on behalf of the defendants. It follows that the meaning of the phrase "in distress," used by Dr. Lushington, is not to be interpreted in the rigid manner suggested on behalf of the plaintiff. Suppose a ship previously reduced by accident to such a stage of unseaworthiness as makes it expedient or necessary that she should enter a port of refuge, as by a leak or the loss of a mast, is approaching such port in moderate weather, and so that she can enter it, if steered a right course, with ease, notwithstanding the damage done to her: can it be pretended that it would be reasonable and just, within the tests above enunciated, that a pilot conducting her into port should be treated as a salvor? yet she would be an unseaworthy ship, a damaged ship, a disabled ship, and in a sense a ship "in distress." Suppose, on the other hand, the ship, as a ship, to be intact, no damage to hull, spars, or sails, but driven by the most violent weather, without power of resistance, within half a mile of an iron-bound leeward coast, with no possibility of escape from immediate total destruction, but by entry into a narrow, and to the crew, unknown haven of the coast; and suppose the weather and position to be such that with all the knowledge and skill of the best pilot, there would still be the greatest danger that he

Silver Spray's Boilers, Bro. Ad. 349; 467 Bars of Iron, 1 Sawy. 1; The R. D. Bibber, 33 Fed. R. 55. — ED.

and the ship might be lost: could any fair person say that a fair master would ask a pilot to come on board and assume such a responsibility and risk, or consider that, being on board, he should exercise such a responsible duty and run such a risk as has unexpectedly arisen, for any other than salvage reward? These hypothetical cases show that it is not the mere fact of injury to the hull, masts, or sails of the ship which is to govern, but that the tribunal must determine, whether under all the circumstances of the particular case the service, which the pilot has entered upon or has unexpectedly found imposed upon him, was rendered so different in responsibility or danger or kind from the ordinary service of a pilot, as to make it impossible that any fair owner should have insisted upon his being paid otherwise than by a salvage reward; or whether, although there was some increased responsibility or danger or unusual kind of service, any fair pilot would have refused to enter upon the service or to continue to perform the service, unless paid otherwise than by a fair compensation for pilotage services. That a pilotage service may be turned by supervening casualties into a service to be compensated by salvage reward, is thus laid down by Dr. Lushington: "The law I have laid down in more than one instance upon this point is, that if, in the performance of a contract of towage, an unforeseen and extraordinary peril arise to the vessel towed, the steamer is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance; and therefore is entitled to salvage reward.[1] I am of opinion that these rights and obligations incident to a contract of towage are implied by law, and that the law thereby secures equity to both parties and the true interests of the owners of ships. A similar law holds with respect to a pilot. On certain emergencies occurring, which require extraordinary service, he is bound to stay by the ship, but becomes entitled to salvage remuneration, and not a mere pilotage fee:" The Saratoga.[2] It must be remembered that in order to found a claim for salvage reward, it is absolutely essential that the ship should be in imminent danger of being lost, and should by the service be saved from such danger. It may be said therefore, and we think would be truly said, in fact in almost every, if not in every case, that whenever the ship is in such danger, the service of the pilot must necessarily be different in kind, responsibility, or danger from the ordinary service of a pilot. That, however, is a different proposition from either the one suggested for the plaintiff or that suggested for the defendants. It is consistent with the view that the true interpretation of the phrase used by Dr. Lushington is that the ship must be not merely in distress in a general sense, but in such distress as to alter the service of the pilot to the extent above suggested. It leaves the

[1] The William Brandt, Jr., 2 Not. of Cas. Supp. LXVII.; The Galatea, Swab. 349; The Albion, Lush. 282; The Minnehaha, Lush. 335, 15 Moo. P. C. 133 s. c.; The Saratoga, Lush. 318; The Annapolis, Lush. 355 (*semble*); The Pericles, Br. & Lush. 80; The White Star, L. R. 1 Ad. 68; The J. C. Potter, L. R. 3 Ad. 292; The Robert Dixon, 4 Prob. D. 121, 5 Prob. D. 54; The Connemara, 108 U. S. 352 *Accord.* — ED.

[2] Lush. Adm. 318, at p. 321.

rule of law to be that in order to entitle a pilot to salvage reward he must not only show that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward. It seems to us perfectly clear that the services of the pilots in this case were within the rule thus laid down, and that the payment to them ought to be considered as between the plaintiff and defendants as a payment of salvage reward.

We have thought it right to give our reasons at length, but we might decide this case by saying that the service rendered was one which the pilots were not bound to render; it was a danger they were not bound to encounter: next, that the service was not one of pilotage; it was not a piloting to any port or place, but a taking out, a salving, from danger.[1]

Judgment for the plaintiff.

[1] In the following cases a pilot was compensated as a salvor, having rendered services beyond those imposed upon him by law:—

Services to a damaged or disabled vessel. The Frederick, 1 W. Rob. 16; The Elizabeth, 8 Jur. 365; The King Oscar, 6 Not. of Cas. 284; The Felix, 1 Spinks, 23, *n.*; The Anders Knape, 4 Prob. D. 213; The Aglaia, 13 Prob. D. 160; The Santiago, 17 Times, L. R. 22; Hobart *v.* Dorgan, 10 Pet. 108; The Elvira, Gilp. 60; The Alexander, 2 Paine, 466; The Grace Brown, 2 Hughes, 112; The Susan, 1 Spr. 499; Flanders *v.* Tripp, 2 Low. 15; The Resolute, 38 Fed. R. 923.

Services out of pilotage ground. The Eugenie, 3 Not. of Cas. 430; The Rosehaugh, 1 Spinks, 267; The Hedwig, 1 Spinks, 19; The Aglaia, 13 Prob. D. 160.

Services other than piloting. The Hebe, 2 W. Rob. 246 (pumping and the like).

In the following cases the claim of a pilot for salvage was denied: The Joseph Harvey, 1 C. Rob. 306; The Michael, 2 Hag. Adm. 178, *n.* (cited); The General Palmer, 2 Hag. Adm. 176; The Enterprise, 2 Hag. Adm. 178, *n.*; The Columbus, 2 Hag. Adm. 178, *n.*; The Johannes, 6 Not. of Cas. 288, *n.*; The City of Edinburgh, 2 Hag. Adm. 333; The Jonge Andries, Swab. 303, 11 Moo. P. C. 313, s. c.; The Æolus, L. R. 4 Ad. 29; The Monarch, 12 Prob. D. 5; The Cherubim, Ir. R. 2 Eq. 172; The Perragio, Bee, 212; The Wave, 2 Paine, 131 (reversing s. c. Bl. & How. 235); The Hope, 2 Paine, 243; Love *v.* Hinckley, Abb. Adm. 436; The Cashemire, 38 Fed. R. 518; The C. D. Bryant, 61 Fed. R. 603.

Salvage was denied in the following cases also where the services rendered did not exceed the legal duty of the one rendering them. The Henry Ewbank, 1 Sumn. 400 (underwriter); The Boston, 1 Sumn. 328 (underwriter); Davey *v.* Frost, 2 Woods, 306 (land-fireman); The Aguam, 48 Fed. R. 320 (ship-master as to cargo).

MOTIVE OF SALVOR. — The fact that in saving a vessel the salvor was also saving his own life does not destroy his claim to salvage. The F. I. Merriman, 27 Fed. R. 313. — ED.

THE STEAMER SARAGOSSA.

In the United States District Court, Southern District of New York, November, 1867.

[*Reported in* 1 *Benedict*, 551.]

Blatchford, J. This is a libel for salvage, filed by Cornelius K. Garrison and others, owners of the steamer San Salvador, on behalf of themselves and all others claiming any interest, against the screw steamer Saragossa, her tackle, etc. The crew of the San Salvador have come in by petition and been made co-libellants. On the 30th of April, 1867, the Saragossa, being, with her cargo, of the value of $100,000, and on a voyage from New York to Charleston, broke the coupling to her shaft so that her screw became of no service. While in this condition she was found by the San Salvador, at a point about sixty to sixty-five miles from Charleston bar, and about fifty miles south of Frying Pan Shoals. The San Salvador was on a voyage from New York to Savannah, with a cargo and passengers, and was, with her cargo, of the value of $230,000. The Saragossa was in the usual track of vessels running down the Atlantic coast, and attracted the attention of the San Salvador by hoisting her ensign, union down. She had her sails set, the wind being light from the northward and eastward, but she was making very little headway. She asked the San Salvador to tow her to Charleston. The San Salvador towed her from sixty to sixty-five miles, using the hawser of the San Salvador, and left her in a safe place inside of Charleston bar. The service occupied about nine hours, at a speed of about seven knots an hour, the usual speed of the San Salvador in like weather being about eight knots an hour. What wind there was was fair to carry the Saragossa to Charleston by means of her sails, and she was in all respects in a good condition, except the accident to her machinery. The sea was very smooth, and it would probably have taken her three or four days to reach Charleston with her sails, it being nearly a dead calm. The usual route of the San Salvador would have carried her about nine miles outside of Charleston bar, and she deviated from her route at an angle of about fifteen degrees. The loss of time to the San Salvador was not over two or three hours, with the corresponding increased expense of coal, and the saving of time to the Saragossa was three or four days, with the saving of her expenses for that time.

This service was a salvage service. In order to make a salvage service it is not necessary that a vessel, whether sailing or steam, should be unnavigable, or that a steam vessel should be injured not merely in her machinery but in her hull or her sails also. Where a vessel has not received any injury or damage, and is in the same condition she would ordinarily be in without having encountered any

damage or accident, a service rendered to her is not a salvage service. The Reward.[1] A steam vessel which has lost the use of her steam machinery by an accident, is not in the same condition she would ordinarily be in, although she is sound in hull and masts and has the use of her sails, and a service rendered to her under such circum stances, by towing her, is not a mere towage service, but is a salvage service. It is not necessary that the distress should be actual or immediate, or that the danger should be imminent or absolute, but it is sufficient if, at the time the assistance is rendered, the vessel has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered. The Charlotte.[2]

I think, in this case that $900 is a proper compensation. Of this sum, I award $400 to the owners of the San Salvador and $50 to her master. The remaining $450 is to be divided among the officers and crew, including the master, in proportion to their respective monthly wages, the apportionment to be made by a commissioner, on a reference, unless the parties agree upon it. The claimant must, also, pay the costs of the suit.[3]

THE CARGO EX PORT VICTOR.

In the Admiralty Division, March 23, 1901.

[*Reported in* 17 *Times Law Reports*, 378.]

This action, which raised a question of very considerable importance, was brought by the owners, masters, and crews of the steamship Amelia and of the two steam tugs Columbia and Shamrock *in personam* against the Jamaica Fruit Importing and Trading Company of London (Limited) to recover salvage remuneration for services rendered to certain cargo lately laden on board the steamship Port Victor. The

[1] 1 W. Rob. 177.

[2] 3 W. Rob. 68, 71.

[3] Within the doctrine of the principal case the service was from the outset a salvage, and not a mere towage service, in the following cases. The Reward, 1 W. Rob. 174; The Charlotte, 3 W. Rob. 68; The Charles Adolphe, Swab. 153; The Harriet, 1 Spinks, 180; The Ellora, Lush. 550; The Ella Constance, 33 L. J. Ad. 191; The Phantom, L. R. 1 Ad. 58; The City of Berlin, 2 Prob. D. 187; The H. B. Foster, Abb. Ad. 222; The Versailles, 1 Curt. 353; The James T. Abbott, 2 Spr. 101; The M. B. Stetson, 1 Low. 119; Roff *v.* Wass, 2 Sawy. 389; The Bolivar *v.* The Chalmette, 2 Woods, 397; The Allegiance, 6 Sawy. 68; The Henry Frank, 4 Woods, 127; The Athenian, 3 Fed. R. 248; Atlas Co. *v.* The Colon, 4 Fed. R. 469; McConnochie *v.* Kerr, 9 Fed. R. 50; The Plymouth Rock, 9 Fed. R. 413; The Leipsic, 10 Fed. R. 585, 5 Fed. R. 108; The Young America, 20 Fed. R. 926; The Alaska, 23 Fed. R. 597; The Erin, 36 Fed. R. 712; The James Rumsey, 40 Fed. R. 909; The Lucy P. Miller, 41 Fed. R. 121; The Wallace, 41 Fed. R. 894; The Veendam, 46 Fed. R. 489; The William A. Taylor, 47 Fed. R. 70; The John Swan, 50 Fed. R. 47; McMullin *v.* Blackburn, 59 Fed. R. 177; The Alamo, 75 Fed. R. 602; The Strathnevis, 76 Fed. R. 855, 864.

In the following cases no salvage was allowed, there being no more than a towage service. The Isabella, 3 Hagg. Ad. 428; The Princess Alice, 3 W. Rob. 138; The Harbinger, 16 Jur. 729; The Emily B. Souder, 15 Blatchf. 185 (reversing s. c. 7 Ben. 550). — Ed.

portion of the cargo in question consisted of government stores, and was the property of the admiralty, but the plaintiffs contended that the defendants were liable to pay salvage in respect of it. The facts of the case, which were not in dispute, were shortly as follows: The Port Victor was chartered by her owners to the defendants for three years from October, 1896, and in June, 1897, she was bound on a voyage from London to Jamaica, via Plymouth, with four passengers and a general cargo, including the admiralty stores, the subject of the present action. These stores were shipped on the Port Victor by the admiralty under a freight engagement with the defendants, by the terms of which the defendants were liable to indemnify the admiralty in respect of any damage to or loss of the stores due to the negligence of those in charge of the Port Victor. About 9.15 P. M. on June 4, 1897, when the Port Victor was between Dungeness and the Royal Sovereign lightship, in the course of her voyage to Jamaica, she came into collision with the steamship Roecliff. By the collision the Roecliff was sunk, and the Port Victor sustained very serious injuries. Salvage services were subsequently rendered to the Port Victor by the plaintiffs in the present action, by whom she was taken back to Tilbury Docks and safely docked. In an action tried before the Admiralty Court on July 19, 1897, Mr. Justice Gorell Barnes, who was sitting with Trinity Masters, found the Port Victor alone to blame for the collision with the Roecliff. In another suit, brought by the plaintiffs in the present action against the owners of the Port Victor, her cargo and freight, to recover salvage, and which was also heard on July 19, 1897, Mr. Justice Gorell Barnes awarded to the plaintiffs the sum of 2200*l.*, but reserved for further consideration, if necessary, all questions as to the liability for the proportion of the award due in respect of the government stores, which were the property of the Crown. Both these cases are reported in The Times of July 20, 1897. It was agreed that the proportion of the award due in respect of the government stores was the sum of 297*l.* 15*s.* 8*d.* The plaintiffs made application to the transport department of the admiralty for the payment of the sum, but were refused payment on the ground that the stores were not being carried at the risk of the admiralty, but at that of the defendants. The plaintiffs thereupon instituted the present action for 297*l.* 15*s.* 8*d.*

Mr. Aspinall, K. C. (*Mr. Dawson Miller* with him) for the plaintiffs.

Mr. Carver, K. C. (*Mr. Scrutton*, K. C., with him) for the defendants.[1]

The PRESIDENT [JEUNE] delivered the following written judgment: The result, therefore, is, that as between the government and the defendants, the defendants were responsible for the safe delivery of the goods, and they are therefore directly interested in the preservation of the goods, and the salvage service was a direct benefit to them.

[1] The arguments of counsel and the statement of the case in the judgment are omitted. — ED.

It was argued before me that the above facts bring the case within that of the Five Steel Barges [1] decided by Lord Hannen. In that case the defendants were under a contract to build and deliver certain barges to the government. The barges were being towed by the plaintiffs for the defendants from Chepstow to Portland, and were salved by the plaintiffs, who brought an action *in personam* against the defendants in respect of two of the barges which were given up to the government. It was argued for the plaintiffs that the defendants had an interest in the barges being delivered safely to the government, and that, therefore, a service was rendered to them personally. It was said, in answer, that the plaintiffs had lost any rights they possessed against the barges by giving them up to the government, and that the defendants had no property in them. Lord Hannen held that it was perfectly clear on the authorities that an action *in personam* lies against the owners of a vessel which has been saved, even though the property has been transferred to others, and the lien lost.[2] "In this case," the learned judge proceeded, "the property does not appear to have been in the defendants, because, it would, I think, under the contract to which reference has been made, be in the government. But on this point I am of opinion that the right to sue *in personam* is not confined to the case of the defendant's being the actual legal owner of the property saved. I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a legal liability arising out of the fact that property has been saved, that the owner of the property who has had the benefit of it shall make remuneration to those who have conferred the benefit upon him, notwithstanding that he has not entered into any contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. In this case the defendants were under contract with the government to supply them with barges at a certain price. Payment was to be made by certain instalments, of which only one remained unpaid at the time of the services. I think that, if Mr. Barnes's argument is well founded — viz., that those instalments were all paid on condition that the barges should be delivered all within twelve months of the date of the contract — it would follow that, if the defendants had not been in a position to deliver the barges within the twelve months, then

[1] 15 P. D. 142.

[2] The right for salvor to proceed *in personam* rather than *in rem* to the extent of property salved has been frequently recognized. The Two Friends, 1 C. Rob. 271, 284; The Hope, 1 C. Rob. 115; The Trelawney, 1 C. Rob. 116, *n.*; Cargo ex Schiller, 2 Prob. D. 145, 149; The Dictator, 1892, Prob. 64, 304; The Sabine, 101 U. S. 384, 386; The Centurion, 1 Ware, 477; The Emblem, 2 Ware, 61 (unless the owner has abandoned the salved property); Seaman *v.* Erie Co., 2 Ben. 128; Duncan *v.* Dundee Co. (Court of Sess. March 8, 1878), 5 Rettie, 742. — ED.

either they would have been liable in damages for not performing the contract or liable to make restitution of the instalments which had been paid them on conditions not fulfilled by them. It appears to me, therefore, that they had substantially an interest to the full amount of the barges at the time of the services, and that the same moral obligation to which the law has given force in the case of an owner applies to those who have an interest in the property." There is a decision in the Scotch courts which appears to me to be in accordance with that in the Five Steel Barges. In Duncan *v.* Dundee, etc., Shipping Company,[1] it was held by the Court of Session that the shipowners in that case were acting as common carriers, and were, in the circumstances of the case, liable for the safe delivery of the goods, and that, therefore, they had no defence to a claim for salvage in respect of such goods. "The case," Lord Shand said, "comes to this — that, the carrier of these goods being absolutely bound to deliver them at the end of the voyage, the salvage has directly enured to his benefit, for it has enabled him to fulfil his contract and to earn the freight which he charged for these goods. On the ground that it is established in this case as matter of fact that the benefit of this salvage, in so far as regarded the cargo, enured directly to the carrier, I am of opinion that he is liable for the salvage which is here claimed." It was argued before me that the present case can be distinguished from that of the Five Steel Barges on the ground that in that case the defendants had a lien for the price of the barges, and so, for practical purposes, were the owners, although the property in law was no doubt in the government. It was contended that the claim for salvage is limited to a claim against the owners or at least against the persons who, like carriers, are in actual possession of the goods at the time of the salvage, but that in the present case the defendants were not the owners of the goods, nor were ever in possession of them. A legal foundation for this view was sought in the argument that the admiralty action *in personam* is based on the supposition that the goods were allowed by the salvors to be returned to their former possessor on the terms that he should be liable to pay the salvage reward. I think that this contention is based on too narrow a view of the right of a salvor, and, in my opinion, the nature and origin of the admiralty action for salvage do not impose any limits on that right narrower than those indicated by Lord Hannen and Lord Shand in the cases I have mentioned. It is quite true that in the case of The Elton,[2] I said, relying on the authorities I there cite, that, "although salvage suits in the form of actions *in personam* are comparatively rare, the Court of Admiralty always had jurisdiction, founded apparently on the fiction of an action *in rem* having been brought and the property salved having been allowed to be taken by the owners, to entertain such suits when at least there existed a corpus of property salved." But in the following year, when I had occasion in the case of The Dictator,[3] to examine the subject of the origin and nature of the ad-

[1] 5 Rettie, 742. [2] 1891, p. 265. [3] 1892, p. 304.

miralty jurisdiction more fully, I came to the conclusion, which the approval expressed by the Court of Appeal in the case of The Gemma [1] leads me to hope was well founded, that the action *in personam* did not arise out of jurisdiction *in rem*, and that the distinction between actions *in personam* and actions *in rem* depended only on whether the person or property of the defendant was arrested in the first instance. To rest the jurisdiction of the Admiralty Court upon an implied request from the owner of the property in danger to the salvors, or on an implied contract between the salvors and owner with the relinquishment of the *res* for consideration, is, I think, to confuse two different systems of law and to resort to a misleading analogy. The true view is, I think, that the law of admiralty imposes on the owner of property saved an obligation to pay the person who saves it simply because in the view of that system of law it is just he should; and this conception of justice naturally imposes a proportionate obligation on any person whose interest in the property is real, though falling short of that of ownership. I see no reason, therefore, why I should not follow the view of Lord Hannen, and of the Scotch Court of Session, that a man who has had a benefit arising out of the saving of the property is liable to a claim of salvage no less than the actual owner of it. It was urged before me that to take this view would expose mortgagees and insurers to salvage actions. I do not think it necessary in this case to define exhaustively the classes of persons against whom, under various circumstances, claims for salvage might be made. There is, no doubt, the authority of eminent judges in the courts of common law for saying that contribution cannot be required by an owner from the lenders upon bottomry or respondentia (*vide* Park on Marine Insurance, 8th ed., vol. 2, 898, and the judgments of Lord Mansfield and Lord Kenyon there cited). On the other hand, Dr. Lushington, in The Louisa,[2] held that mortgagees came within the term "owners" in the sections of the Merchant Shipping Act of 1854 relating to salvage. It is, however, easy to see that the contingent interest of persons who make advances by way of mortgage, or otherwise, on property, or of insurers, is of a different character from that of persons who have a direct interest in its safe delivery, and may negative, or, at least, impose different conditions on the right of a salvor against some of these persons. It may be, therefore, that it will become necessary hereafter to consider what is the exact definition of the interest in the property saved which gives rise to a claim for salvage. But in the present case I have no doubt that the defendant has such an interest, and my judgment must, therefore, be for the plaintiffs.[3]

[1] 1899, p. 285.

[2] Br. & L. 59.

[3] Five Steel Barges, 15 Prob. D. 142; Seaman *v.* Erie Co., 2 Ben. 128; Duncan *v.* Dundee Co. (Court of Sess. March 8, 1878), 5 Rettie, 742 *Accord*.

In Stebbins *v.* Five Mud Scows, 50 Fed. R. 227, the award to a salvor, who had rescued certain scows which had gone adrift through the carelessness of their owner, was increased by the District Judge because of the benefit to the owner in saving him from probable liability for damage to other vessels by collision with the scows. But the Circuit Court of Appeals, thinking the award not too large apart from this consideration, expressed no opinion upon the novel view of the lower court. — ED.

THE CITY OF CHESTER.

In the Court of Appeal, July 30, 1884.

[*Reported in Law Reports, 9 Probate Division*, 182.]

Lindley, L. J.[1] This is an appeal by the owners of the steamship Missouri against a decision of Butt, J., awarding a sum of 6500*l.* for salvage services rendered by the Missouri to the steamship City of Chester.

At the trial the plaintiffs tendered evidence in support of their claims for damages to their ship, the cost of repairs, and in respect of demurrage, but the learned judge refused to receive it; and he refused to direct a reference to the registrar and merchants to ascertain the amount of loss actually sustained by reason of the injuries done to the Missouri, and of her detention for repair. The view taken by the learned judge has already been given *in extenso* by Lord Justice Baggallay. The substantial question raised by the appeal is whether the learned judge ought to have received evidence of the above mentioned losses, and whether he ought, considering the nature of the salvage services and the great value of the property salved, to have awarded to the owners of the salving ship such a sum as would at least cover their losses out of pocket. I think he ought, and my reasons for so thinking are as follows: —

Salvage is the compensation made to those by whose assistance a ship or its cargo has been saved from impending peril or recovered from actual loss. The claim to compensation for salvage services is enforceable by action in the Court of Admiralty. The persons in whose favor the claim will be recognized and the circumstances under which compensation to them will be awarded, have been the subject of judicial decision, and the leading principles applicable to these matters may be taken as settled. If the claimants come within the recognized class of salvors, and the circumstances under which compensation is habitually awarded are proved, their claim is allowed. In such cases the claim is made and allowed, not as a matter of favor which can be granted or refused at the arbitrary discretion of the court, but as a matter of right.

The Mercantile Law Amendment Act, 1854,[2] clearly recognizes this right. It is true the Act is confined to salvage in the United Kingdom,[3] but by the law of this country the nature of the right does not depend upon whether the salvage services were rendered on the high seas or on British territorial waters. The lien which salvors have is only consistent with the existence of a right to be remunerated for their services, and this lien exists wherever the services may have been rendered.

[1] Only a part of the judgment of Lindley, L. J., is given. — Ed.
[2] 17 & 18 Vict. c. 104, s. 458. [3] s. 458.

But although the salvors have a right to compensation for salvage services, the amount to which they are entitled is not fixed more definitely than by saying it ought to be reasonable. What is reasonable in any case must depend upon all the circumstances of that case; and different minds will naturally sometimes differ in their views of what is reasonable. But here again some circumstances are always material for consideration, and these have been ascertained by experience, and the court has for its guidance a long course of judicial decision to assist it in coming to a proper conclusion in each particular case.

The first matter for consideration is the nature of the service rendered, the danger from which the one ship has been saved and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to their rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction.

The next matter for consideration is the value of the property saved. The primary object of saving a ship and her cargo from loss is to preserve them for their owners, and this object would be defeated if the remuneration awarded to the salvors were so large as to deprive the owners of the saved ship and cargo of all benefit from their preservation. This consideration at once limits the amount of the salvors' remuneration; for however meritorious their services, salvors are never awarded such a sum as to make those services useless to those who have to pay for them.[1] The value of the ship and cargo saved is therefore always one element, and a very important element, in considering the amount to be awarded to salvors. There is not, however, any definite rule either as to the proportion of value to be given to the salvors or as to the proportion to be left for the owners of the property saved. See The Salacia;[2] and it is obvious that whilst a small percentage on a very large value might be an ample remuneration in one case, a very large percentage on a small value might be a very inadequate remuneration in another case. The risk of getting little by reason of the comparatively small value of the property saved is one of those risks which salvors always run.

Another circumstance which has to be taken into consideration is the risk salvors always run of getting nothing at all by reason of the failure of their efforts to save. However strenuous those efforts, however heroic, still if unsuccessful they go unrewarded. They have not in the result benefited the owners of the ship or cargo, and there is nothing preserved out of which remuneration can be paid.

Another circumstance to be considered is the importance of so

[1] "In fixing the amount of salvage to be paid, I apprehend I am bound to bear in mind the 459th section of the 'Merchant Shipping Act, 1854,' which contemplates the possibility of the whole proceeds being exhausted by payment of salvage for life." *Per* Lushington, The Eastern Monarch, Lush. 81, 84. — ED.

[2] 2 Hagg. 262.

remunerating salvors as to make it worth their while to succor ships in distress. This consideration renders it necessary to be liberal not only to captains and crews who perform the salvage services, but also to the owners of vessels engaged in those services where such vessels have been injured or exposed to danger. The salving vessel is often herself exposed to imminent peril; the risk of loss or damage to her is often very great; and the damage actually done to her, and the loss actually sustained by her owner from delay in her voyage and otherwise may be, and often is, very considerable. Hence one element in determining the amount to be awarded for salvage services is the value of the salving ship and cargo which have been exposed to risk; and the nature and extent of the risk are other elements for consideration. Where the salving vessel is, as in the present case, a large and valuable steamer, exposed to great risk, the claims of her owner deserve very favorable attention: see *per* Dr. Lushington in The Spirit of the Age.[1] Unless, where the salving vessel is a valuable steamer, the remuneration awarded to her owner is sufficient to cover this risk, owners of such vessels will naturally discourage their employment in salvage services; a result which would be very disastrous, and which the Court should do what it can to prevent. In order to avoid such a consequence as this, it is necessary that the amount of compensation awarded to the owner of the salving ship shall, whenever practicable, be sufficiently large to cover the risk of damage and loss which he ran where fortunately none has been sustained; and where damage and loss have been in fact sustained, and its amount can be ascertained, it is necessary that the sum awarded shall, when possible, be large enough to cover such amount. This amount, however, ought not to be the measure of the remuneration, for the damage actually sustained may be very small, and there may have been serious risk of sustaining much greater damage; besides which there is always the risk of earning nothing by reason of the loss of the succored vessel. The amount of loss actually sustained by the owner of the salving ship can therefore seldom, if ever, be the maximum limit of the remuneration to be awarded to him. Neither can such loss be always the minimum limit; it never can be so where the value of the ship and cargo saved is too small to admit of payment in full of the loss in question. And even where the value is sufficient, the salvage service may be so trifling as to render it unreasonable to throw the loss sustained by the salvors on the owners of the property saved. But where the salvage services have been dangerous to the salvors, and have occasioned them serious pecuniary loss, and have been highly valuable to the owners of the property saved, and where the value of the ship and cargo saved is ample not only to defray the loss sustained by the salvors in addition to a proper sum for the services of the master and crew of the salving ship, but also to leave a substantial surplus for the owner of the property saved, in such a case the sum to be awarded to the owner of the salv-

[1] Swa. 286.

ing ship ought to be enough to cover her actual loss and whatever additional risk he ran. Of course care must be taken not to fall into the error of remunerating him twice over for the same risk; he must not be remunerated for the risk he ran of suffering the loss the amount of which is ascertained and taken into consideration as the loss sustained.

Another very important reason for ascertaining the amount of pecuniary loss sustained by the owner of the salving vessel is to enable the Court to make a proper apportionment of the total sum awarded for salvage services, for it is obvious that no part of that sum which is given to cover the risk run by the shipowner or damage to the ship ought to go to the master or crew.

Having thus examined the principles applicable to this subject, it is necessary to turn to the authorities and see how they stand.[1] . . .

The conclusion to be drawn from these authorities is that where the property saved is ample in the sense already explained, and where there is no circumstance which the Court can see at once would prevent it from giving an amount of salvage sufficient to cover the loss sustained by the salvors, evidence has been received and ought to be received to show the amount of loss actually sustained by the owner of the salving ship by reason of the salvage services, with a view to fix his remuneration at such a sum as will cover such loss, and remunerate him for such further risk as he ought to be compensated for.[2]

THE L. W. PERRY.

In the United States District Court, Eastern District of Wisconsin, February 3, 1896.

[*Reported in* 71 *Federal Reporter*, 745.]

Seaman, District Judge.[3] The main difficulty in this case arises from the inadequacy of the fund to furnish reasonable compensation for the service rendered, owing to the condition of the vessel and the cargo, and the expenses necessarily incurred to make them available for sale. It is undisputed that the schooner was derelict when taken up by the steamer; that it was a volunteer service, not referable to contract, and clearly a case of salvage; that, although not involving serious peril, the service was of special merit, because the schooner was adrift in the track of maritime commerce, and during a storm,

[1] The learned judges here discussed The Oscar, 2 Hagg. 257; The Salacia, 2 Hagg. 262; The Jane, 2 Hagg. 338; The Saratoga, Lush. 318; The Albert, 33 L. J. Ad. 191; The Mud-Hopper, 4 Asp. Mar. Cas. 103; The Sunniside, 8 P. D. 137; and The De Bay, 8 App. Cas. 559. — Ed.

[2] The Alaska, 23 Fed. R. 597; The Florence, 65 Fed. R. 248 *Accord*.

In The Cyclone, 16 Fed. R. 486, a special allowance was given to a salvor because of personal injuries received by him while rendering the salvage services. — Ed.

[3] Only the opinion of the court is given. — Ed.

imperilling other navigators through the absence of control, lights, or warning, and the steamer departed from her voyage at considerable expense, delay, and risk, and conferred benefit upon the public as well as upon the owners of the salved property.

Without regard to the element of reward which is intended by the salvage allowance, it is manifest that remuneration pro opere et labore would be placed in excess of the fund here, if such basis were allowable. Therefore, it is contended on behalf of the libellant that the entire sum remaining should be awarded for the salvage service; and, as supporting such claim, they cite The Zealand,[1] and The William Hamilton.[2] In those cases there was an award to salvors of the net proceeds, and in Llewellyn *v.* Two Anchors & Chains,[3] there is like disposition; but in each the fact is noted that no claimant of the salved property appeared, and in the opinion in The Zealand, Judge Lowell states, as ground for the allowance, the "distinct refusal by the owner to claim," and that if he had appeared he "should not feel at liberty to make the order." These decisions are of eminent authority in the admiralty, but so far as relates to the proceeds of the cargo, which is the principal subject of controversy here, are not applicable, because the claimants appear and contest the claim.[4]

While salvage is of the nature of a reward for meritorious service, and for determination of its amount the interests of the public and the encouragement of others to undertake like service are taken into consideration, as well as the risk incurred, and the value of the property saved, and where the proceeds for division are small, the proportion of allowance to the salvor may be enlarged to answer these purposes; nevertheless, the doctrine of salvage requires, as a prerequisite to any allowance, that the service "must be productive of some benefit to the owners of the property salved; for, however meritorious the exertions of alleged salvors may be, if they are not attended with benefit to the owners, they cannot be compensated as such." Abb. Shipp. (London Ed. 1892), 722. The claim of the libellant can only be supported as one for salvage. It does not constitute a personal demand, upon quantum meruit, against the owners, but gives an interest in the property saved, which entitles the salvor to a liberal share of the proceeds. Allowance of the whole cannot be made without repudiating the doctrine of salvage; and, as remarked by Judge Betts, in The Waterloo,[5] "would be a return to the barbarous practice of giving the finder all he finds." There must be a residuum secured to the owner. "His rights are not to be deemed derelict." In Smith *v.* The Joseph Stewart,[6] a similar claim was denied, and it is pertinently said in the opinion: "If the salvors are to take all, the loss would be as total to the owner as if his property had been swallowed up by the sea;" in effect, the owner would be required "to pay for saving when nothing is saved."

[1] 1 Low. 1. [2] 3 Hagg. Adm. 168. [3] 1 Ben. 81.

[4] In The Burlington, 73 Fed. R. 258, also, the salvors received, under peculiar circumstances, the entire proceeds of a salved barge. — ED.

[5] 1 Blatchf. & H. 114. [6] Crabbe, 218.

One of the grounds for liberality in salvage awards is the risk assumed by the salvor, — that he can have no recompense for service or expense unless he is successful in the rescue of property, and that his reward must be within the measure of his success. He obtains an interest in the property, and in its proceeds when sold, but accompanied by the same risk of any misfortune or depreciation which may occur to reduce its value. In other words, he can only have a portion in any event; and the fact that his exertions were meritorious, and that their actual value, or the expense actually incurred, exceeded the amount produced by the service, cannot operate to absorb the entire proceeds against the established rules of salvage.[1] The Carl Schurz.[2]

[1] The Waterloo, Bl. & H. 114; The Adolphe, Fed. Cas. No. 17,712; The Carl Schurz, 2 Flip. 331; The Spanish Bark, Fed. Cas. No. 6218 *a*; Cargo of Bark Edwards, 12 Fed. R. 508. (70% awarded); The Cairnsmore, 20 Fed. R. 519; The Lamington, 86 Fed. R. 675 *Accord.*

Amount of Salvage Award. It has not been thought expedient to devote much space in this volume to the question of the amount recoverable as salvage. A valuable "Note by the Court upon Salvage Awards in the Federal Courts," giving a very full collection of decisions, will be found in an appendix to The Lamington, 86 Fed. R. 685. The English authorities are discussed in Kennedy, Civil Salvage, 114–148.

Apportionment of Salvage Burden. All the property salved contributes to the salvage award according to its value regardless of its nature or the difficulty in rescuing it as compared with other objects salved. The Jonge Bastiaan, 5 Rob. 324 (specie); The Vesta, 2 Hagg. Ad. 189 (*semble*, jewels); The Longford, 6 Prob. D. 60, discrediting The Emma, 2 W. Rob. 315 (specie); The T. P. Leathers, Newb. 421; The St. Paul, 86 Fed. R. 340, 82 Fed. R. 110 (specie).

Several sets of salvors. Although there are two or more sets of salvors, salvage is not apportioned to the different sets in proportion to the value of the specific things saved by each. The rule is thus expressed by Lowell, J., in The Albion Lincoln, 1 Low. 71, 75: "I have been accustomed to look upon the vessel, freight, and cargo, or what was saved of them, as one fund, upon the whole of which all the salvors, though not associated by any contract among themselves, had a lien for such sum as, upon the whole, was found due to each. In the case of the vessel and freight this is necessarily so, and I am not aware that any different rule holds with respect to cargo, or to the materials of a ship that has been broken up."

Salvage Service against the Will of the Owner. No salvage is earned by services forced upon masters or owners against their will. The Dodge Healy, 4 Wash. C. C. 651, 656 (*semble*); The Susan, 1 Spr. 499, 502 (*semble*); The Choteau, 4 Woods, 71; The Cleone, 6 Fed. R. 517; The Cherokee, 31 Fed. R. 167, 169 (*semble*); The J. W. Husted, 36 Fed. R. 604.

Sovereign subject to Salvage Claim. A salvage lien attaches to cargo belonging to the sovereign. The Marquis of Huntly, 3 Hagg. Ad. 246; U. S. *v.* Wilder, 3 Sumn. 308, 314. But the latter cannot be sued, nor can the lien be enforced *in rem*, if the property is in the actual possession of an officer of the government. If not in such actual possession, the property may be seized by admiralty process, and the sovereign, coming into court as a claimant, must discharge the lien in order to get the property. The Davis, 10 Wall. 15.

Conflict of Laws. In The Edam, 13 Fed. R. 135, a Dutch vessel was saved by a British vessel. The court declined to apply either the Dutch or British law as such, but held that an American court should decide the case according to the maritime law as generally adopted by maritime nations.

Rescued Property exempt from Salvage.

Personal effects of master and seamen. The Rising Sun, 1 Ware, 385; Kennedy, Salv. 25.

Wearing apparel and other effects of passengers carried for daily use. The Willem, III., L. R. 3 Ad. 487. But passengers' baggage carried in the passenger compartment of the ship is not exempt from salvage. Heye *v.* North German Co., 36 Fed. R. 705, 33 Fed. R. 60; Harris *v.* Moody, 30 N. Y. 266 (*semble*).

Ship's provisions. See Brown *v.* Stapylton, 4 Bing. 119.

Bills of exchange. The Emblem, 2 Ware, 61.

But not bank notes. Harris *v.* Moody, 30 N. Y. 266. — Ed.

[2] 2 Flip. 330, Fed. Cas. No. 2444.

Therefore, the application to that extent must be denied; but, in consideration of the circumstances, and of the small amount remaining, the salvor should obtain the utmost which can be awarded. This is not limited to a moiety, as contended on behalf of the claimants, but may be placed at such portion as will make the best approach to the purpose of salvage allowance. Post *v.* Jones;[1] Smith *v.* The Joseph Stewart;[2] Two Hundred and Ten Barrels of Oil;[3] The William Smith.[4] In this view, three fourths of the net proceeds of both vessel and cargo, after deducting the expenses and costs apportioned against each, will be awarded to the libellant for salvage.

[1] 19 How. 150.
[2] Crabbe, 218.
[3] 1 Spr. 91.
[4] 59 Fed. 615.

WALPOLE *v.* EWER.

AT NISI PRIUS, BEFORE LORD KENYON, C. J., 1789.

[*Reported in* 2 *Park, Insurance* (*8th edition*), 898.]

IT was an action on a policy of insurance upon a *respondentia* bond on ship and goods, at and from B. to C. The ship was Danish, and an average loss was sustained upon the goods to the amount of 6*l.* 15*s.* per cent., and the plaintiff as holder of a *respondentia* bond had been called upon to contribute, and now brought his action against the English underwriters for the amount of that contribution.

LORD KENYON, C. J. By the law of England, a lender upon *respondentia* is not liable to average losses;[a] but is entitled to receive the whole sum advanced, provided ship and cargo arrive at the port of destination. The plaintiff contends that as, by the law of Denmark, such lenders upon *respondentia* are liable to average, and bound to contribute according to the amount of their interest, the insurer must answer to them. The Danish consul has proved that he received a judgment of the Court of Copenhagen, the decretal part of which proves the law of Denmark to be as the plaintiff has stated it. The opinions of several men of eminence in that country have been offered on each side: but I reject them, because the solemn decision of a court of competent jurisdiction is of much greater weight than the opinions of advocates, however eminent, or even than the extra-judicial opinions of the most able judges. It seems as if, in this case, the underwriters were bound by the law of the country to which the contract relates.[b]

Verdict for the plaintiff.

[a] "It was admitted, that on a bottomry bond there is no average or salvage." Lord Mansfield in Joyce *v.* Williamson, 3 Doug. 164, 165. — ED.

[b] But in Power *v.* Whitmore, 4 M. & Sel. 141, it was decided that the term "general average" in an English policy of insurance must be interpreted in accordance with English law. — ED.

CHAPTER V.

GENERAL AVERAGE.

DE LEGE RHODIA DE JACTU.

[*Digest of Justinian, Liber* 14, *Titulus* 2, *Articulus* 1.]

PAULUS *libro secundo sententiarum.* Lege Rhodia cavetur ut si levandae navis gratiâ jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.[1]

HICKS *v.* PALINGTON.

IN THE COURT OF REQUESTS, EASTER TERM, 1590.

[*Reported in Moore*, 297.]

I WAS of council for one John Hicks, plaintiff, against Palington and Others, defendants, merchants of Bristol; and the complaint was for average of a ship despoiled of certain goods shipped from Bristol to Galicia in Spain. And Doctor Dale, Master of the Requests said that by the civil law average is not due, unless the goods are lost in such manner that the rest of the goods in the ship are thereby saved; as, if goods of one of the merchants are cast into the sea, *navis levandi causa*, then the other merchants shall pay average, for the other goods are saved thereby.[2] So if a part of the goods be given to a pirate by way of composition to save the rest; but not if a pirate seized a part by force, in that case there shall be no average paid.[3] Still it was decreed for me, because the merchants had agreed to pay average after the ship was robbed.[4]

[1] "The Historical Position of the Rhodian Law," an interesting and instructive essay by Robert D. Benedict, of New York, is published in 18 Internat. Law Ass'n Rep. 237. — ED.

[2] Whitefield *v.* Garrarde (1540), 1 Sel. Pl. in Ad. (Seld. Soc'y) 95; Price *v.* Noble, 4 Taunt. 123; Johnson *v.* Chapman, 19 C. B., N. S. 563; Fletcher *v.* Alexander, L. R. 3 C. P. 375, 481; The St. Joseph, 6 McL. 573 *Accord.* — ED.

[3] Nesbitt *v.* Lushington, 4 T. R. 783 *Accord.* — ED.

[4] The Elizabeth, 2 Sel. Pl. in Ad. (Seld. Soc'y) 39 [November 29, 1575. After the arryvall of the saide shippe with the clothes and other goodes at Elsenor the Kinge of Denmarke's tolner sent for the saide purser and required to have xiiij packes of the clothes for the kinge which the purser denyed Then the tolner saide that the shippe shoulde tarye there untill the kinge had them and he shoulde be sent to Copeman havon But afterwarde agreed for two hundred of the saide clothes after the rate geven by the merchants to the

ROBINSON *v.* PRICE AND OTHERS.

IN THE QUEEN'S BENCH DIVISION, NOVEMBER 21, 1876.

[*Reported in Law Reports, 2 Queen's Bench Division*, 91.]

ACTION for general average. The ship John Baring, which sailed August 19th, 1873, from Quebec for London, sprang a leak September 11th. There being no prospect of stopping the leak, and no way of keeping the ship afloat without having the pumps worked by the donkey-engine, the master realizing the insufficiency of the coal on board for this unexpected demand, used some of the ship's spars and a portion of the cargo as fuel for the engine. In this way the ship was kept afloat until September 20th, when she fell in with a steamship and procured from her a supply of coals, and was safely docked in the Thames the following day.[1]

The questions for the opinion of the Court were (1) whether the loss incurred by the burning of the ship's spare spars was a general average loss; and (2) whether the loss incurred by the burning of portions of the cargo under the circumstances stated was a general average loss.

The Judgment of the Court (Mellor and Lush, JJ.) was delivered by

LUSH, J. The circumstances under which the ship's spars and the cargo were used as fuel for the donkey-engine satisfy all the conditions of a general average claim. The peril was imminent; the sacrifice voluntary, in the sense of being an act of will on the part of the master; it was, in the emergency, necessary in order to save the ship from sinking,[2] and was of course made with a view to the safety of the whole adventure — ship, freight, and cargo.

purser for payment of toll beinge xxij dolors for everye clothe Which two hundred clothes the saide kinge had and delyvered a bill for the paymente of so muche moneye for the same after the rate aforesaide There were in the shippe clothes of dyvers mens and the purser delyvered the packes as they laye savinge one of Mr. Fludd and one of Mr. Clerke so as some mens clothes were wholye taken by the kinge and some had parte taken and some others had non at all ffor as muche as the clothes were more werthe than the xxij dollors whereby some do susteyne losse and some other non at all The question is whether there is an averadge or contribucion to be made in this case by them who had non of theire clothes taken to the kinges use.

We David Lewes judge of thadmiraltye Thomas Yale judge of the courte of the Audyence of Canterburye Robert Fourthe and John Hamonde doctors of the lawe arbiters elected and chosen to deme and judge of the case above written havynge fully and advisedlye considered thereof Do order and judge that for as muche as the kinge of Denmarke's toller or officer did not require any of the merchants clothes by name nor did entre the shippe to take any But the purser being a common servant to all the merchants for that voyage made deliverye by agreement or composition made with him for IIc clothes being a lesser nomber than was required by the said toller or officer the merchants whose goods were not taken and have subscribed to the orriginall case remaininge in the regester of thadmiraltye of recorde ought by lawe and equitye to make contribucion or average towardes the losses or damages susteyned by them whose goods were delyvered to the kinges use everye man accordinge to the rate of his goods delyvered for satisfaction of the said kinges requeste]. —ED.

[1] The statement of facts is abridged and the arguments of counsel are omitted. — ED.

[2] See Harrison v. Bank of Australasia, L. R. 7 Ex. 39. — ED.

Prima facie, therefore, the case of the plaintiff is made out. But it was objected that, as the ship was furnished with a donkey-engine adapted and intended, in case of need, for pumping as well as for loading and discharging the cargo, the owner was bound to provide sufficient fuel for its use; that if this had been done the resort to the spars and cargo would not have been required; that it was not done, and therefore the use of the spars and cargo was not a necessity brought about by the perils of the sea, but a necessity occasioned by his own default.

Although we cannot accede to the proposition in its terms, we entirely accede to the principle which underlies it. We think that a shipper of cargo is entitled in time of peril to the benefit not only of the best services of the crew, in order to save his goods, but of the use of all the appliances for that purpose with which the ship is provided. It follows that where a ship is fitted up with auxiliary steam pumping power, it is the duty of the owner to make some provision for supplying the engine with fuel. Not that he is bound to have on board enough for every possible emergency, but he is bound to have a reasonable supply, having regard to the nature of the voyage, the season of the year, the quality of the cargo, the condition of the ship, and what experience has shown to be prudent to provide against under those conditions. If he fails to do so, he cannot call upon the owners of cargo to contribute towards that reasonable supply. That would be to make them pay for that which he ought to have provided at his own expense. If, under such circumstances, the opportunity occurs during a time of peril of buying coals from a passing steamer, we think it clear that he could not charge their cost as an extraordinary expenditure entitling him to general average.

That statement of the case not being so explicit as it might have been upon this point, we thought it right to send it back to the learned counsel who settled it between the parties, to find from the evidence he had taken one way or the other upon this question. He has returned it to us, with a statement as follows: "I find that the John Baring, when she left Quebec, had on board a reasonable supply of coal for the donkey-engine for pumping purposes." This finding concludes the defendants. The prima facie claim to general average contribution is not displaced by any default on the part of the owner, and our judgment must be for the plaintiff.

Judgment for the plaintiff.[1]

[1] Harrison v. Bank of Australasia, L. R. 7 Ex. 39; Shand v. Ash, Mitch. Mar. Reg. (1872) 242 *Accord*.

If a portion of the cargo, which has been landed that the ship may be repaired, is accidentally destroyed by fire, or otherwise injured, this loss creates a general average claim. The Mary, 1 Spr. 17 (*semble*); Hennen v. Monro, 4 Mart. N. S. 449; Lewis v. Williams, 1 Hall, 430. — ED.

THE ROANOKE.

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN, JUNE 4, 1891.

[*Reported in 46 Federal Reporter*, 297.]

JENKINS, J.[1] The record presents the question whether contribution in general average is sanctioned for damage by water poured upon cargo to extinguish fire on board ship. The principle which underlies the whole doctrine of general average is that a loss voluntarily incurred for the sake of all shall be made good by the contribution of all. Insurance Co. *v.* Ashby;[2] Hobson *v.* Lord.[3] The maxim of the Rhodian law, the foundation of general average, did not in terms extend further than to cases of jettison; but the principle applies to all other cases of voluntary sacrifice, properly made, for the benefit of all. Anderson *v.* Steamship Co.[4] The maxim itself, as suggested by one author, is probably an imperfect statement in writing of the principle known to the common law of the seas, illustrating the general principle by a perfect example. To justify general average contribution three things must concur: (1) A common imminent peril; (2) a voluntary sacrifice; (3) successful avoidance of the danger. Barnard *v.* Adams; The Star of Hope.[5] The first and third conditions are confessedly here present. The second condition is said to be wanting, because, as is claimed, the cargo destroyed was not "selected" for sacrifice; or, in other words, that the loss was incidental and unintentional, not primary and designed. There must be, it is true, a deliberate sacrifice to appease the exigency of the crisis, as distinguished from the chance result of the operation of the natural elements. I take it, however, that the term "sacrifice," as known to the maritime law, is used in the sense of giving up or suffering to be lost for the sake of something else, not in the sense of an immolation. Was there not here, within the principle of contribution, such designed injury, such deliberate sacrifice? Both ship and cargo were in the embrace of total destruction. Deliverance was only possible through extinguishment of the fire. There was certainty that pouring water into the hold to drown the fire would destroy cargo not on fire. That was a necessary result of the act. There was the will of man directing the act working destruction to cargo. There was intentional inundation of cargo. There was design to avert the greater loss of ship and cargo, by incurring the minor loss of part of the cargo. That, in my judgment, is equivalent to a voluntary sacrifice, satisfying the conditions of a general average act. It was a selection by the master for sacrifice of that which by the act must necessarily be destroyed. There was, to be sure, no manual selection, no separation of the "scape-goat"

[1] The statement of facts is omitted. — ED.
[2] 13 Pet. 331.
[3] 92 U. S. 397.
[4] L. R. 10 App. Cas. 107, 114.
[5] 9 Wall. 203.

from the remainder of the cargo, no particular design to destroy the particular subject. But that is not essential. It suffices if there exist the general design to sacrifice that which would naturally be lost in consequence of the act rendered imperative by the impending peril. The master must be presumed to have designed the consequences necessarily resulting from the act directed. The cargo so necessarily destroyed by the act is, in every equitable sense, selected for sacrifice. Many losses in the nature of jettison are thus borne in general average. As for example, goods exposed in barges to float a stranded ship, and lost in consequence; goods brought upon deck in order to get at others for the purpose of a *jactus*, and washed overboard, Benecke, Ins. 213; damage done to a ship by a tug coming alongside to render salvage service, Lowndes, § 33; the voluntary stranding of a ship to avoid capture, foundering, or shipwreck, Fowler *v.* Rathbones;[1] damage to cargo, resulting from such stranding, Lowndes, § 16. In all these cases there is, in a narrow sense of the term, no design to destroy, no selection for sacrifice. The purpose is to save, not destroy; a lesser peril is incurred to avoid certain loss from a greater one. The act, however, is hazardous, resulting in injury. The results are presumed to have been foreseen; that destroyed presumed to have been selected for sacrifice. The loss is compensated in general average as a necessary consequence of the measure taken for the common safety. I am of opinion that the loss here falls within the conditions of general average contribution. This conclusion is, as I think, supported by the decided weight of judicial authority in America, speaking to the precise question. Nimick *v.* Holmes;[2] Nelson *v.* Belmont;[3] Heye *v.* North German Lloyd;[4] Ralli *v.* Troop.[5] It is the settled law of England. Stewart *v.* Steamship Co.;[6] Achard *v.* Ring;[7] Schmidt *v.* Mail Steamship Co.;[8] Pirie *v.* Dock Co.;[9] Wire, etc., Co. *v.* Savill.[10] It is the law of France, Belgium, Germany, Italy, Holland, Sweden, Norway, Denmark, and Portugal. Lowndes on General Average, Comparative Table, xxxi. and appendices. It accords with the York-Antwerp rules of 1877, which, while without the sanction of law, are now generally adopted in marine underwriting, and in foreign bills of lading.

The case of The Buckeye,[11] decided by Mr. Justice Davis in 1863, is strongly urged as decisive here. The decision there is certainly counter to the conclusion I have reached. The argument of the opinion is that there must exist a particular intention to destroy, and a particular selection for destruction. Barnard *v.* Adams, cited in support, determines that contribution is not dependent upon any real or presumed intention to destroy, solely upon selection. The Star of Hope,[12] decided in 1869, — while Mr. Justice Davis was yet upon the supreme bench, and in the decision of which he participated, — determines that if the will of man in some degree contributed to the sac-

[1] 12 Wall. 102.
[2] 25 Pa. St. 366.
[3] 5 Duer, 310, affirmed on appeal, 21 N. Y. 36.
[4] 33 Fed. R. 60.
[5] 37 Fed. R. 888.
[6] L. R. 8 Q. B. 88.
[7] 31 Law T. (N. S.) 647.
[8] 45 Law J. Q. B. 646.
[9] 44 Law T. (N. S.) 426.
[10] 8 Q. B. Div. 653.
[11] 7 Biss. 23.
[12] 9 Wall. 203, 233.

rifice, that is sufficient to constitute the voluntary act or selection within the meaning of the commercial law. There the ship, in imminent danger of destruction from fire, sought safety in an unknown bay. In attempting to enter she grounded upon a reef or bank, the existence of which was unknown to the master. It was said there that the stranding was not only not intentional, but was involuntary and unexpected. But the court answered that, being aware that such a danger was the chief one to be expected in entering a bay, he deliberately elected to take the hazard rather than subject the common adventure to the imminent peril and to almost certain destruction if he remained outside; and that it was not possible to hold, under such circumstances, that the will of man did not in some degree contribute to the stranding of the ship. That case goes far beyond the one in hand, and seems to me wholly irreconcilable with the case of The Buckeye. There, was only possibility without expectation of loss; here, was certainty. The will of man in some degree contributed to the sacrifice that in the one case was possible, and in the other the certain, result of the act determined upon for the common safety. It is with diffidence that I venture to dissent from the decision of The Buckeye. I have halted in opinion whether it is not my duty to yield personal conviction to the judgment of the distinguished jurist then presiding in this circuit; but, considering that that decision stands opposed, as I believe, to the principle established by the Supreme Court, and to the law of nearly every maritime nation, I have felt at liberty to follow my own conviction in the interest of that uniformity of decision especially to be desired in maritime law. If therein I err, an appellate tribunal can set me right.[1]

The objection that the act was that of the municipal authorities, without direction or concurrence on the part of the master, is ill sustained in point of fact. The protest discloses that the alarm was given, and the fire department called into action, by the master of the vessel. The action of the firemen was therefore by his procurement. Subsequent flooding was the direct act of master and crew. It becomes unnecessary, therefore, to consider the cases of Wamsutta Mills *v.* Steamboat Co.,[2] and The Mary Frost,[3] to the effect that property sacrificed

[1] Affirmed in 59 Fed. R. 161. See, to the same effect, Stewart *v.* West India Co., L. R. 8 Q. B. 88, 362 (*semble*); Achard *v.* Ring, 31 L. T. Rep. 647; Pirie *v.* Middle Co., 4 Asp. Mar. Cas. 388, 44 L. T. Rep. 426 s. c. (*semble*); Wire Co. *v.* Savill, 8 Q. B. Div. 653; Ralli *v.* Troop, 157 U. S. 386, 411, 424, 37 Fed. R. 888; Heye *v.* North German Co., 33 Fed. R. 60, 36 Fed. R. 705; The Rapid Transit, 52 Fed. R. 320, 321; Crockett *v.* Dodge, 12 Me. 190; Merchants Co. *v.* Firemen's Co., 53 Md. 448; Wamsutta Mills *v.* Old Colony Co., 137 Mass. 471; Nimick *v.* Holmes, 25 Pa. 366 *Accord*.

The Buckeye,-7 Biss. 23 *Contra*.

General average may result from damage to the cargo by water in divers ways; *e. g.*,

From cutting away a mast. — The Mary, 1 Spr. 17 (*semble*); Maggrath *v.* Church, 1 Cai. 196.

From scuttling a stranded vessel to prevent pounding on the rocks. — Northern Co. *v.* Boston Co., 41 Fed. R. 793; Nelson *v.* Belmont, 21 N. Y. 36, 5 Duer, 310; Lee *v.* Grinnell, 5 Duer, 400.

From tipping the ship to repair propeller.— McCall *v.* Houlder, 66 L. J. Q. R. 408.

[2] 137 Mass. 471.

[3] 2 Woods, 306.

by direction of others than the master is not a general average loss.[1] The doctrine of these cases is challenged in Ralli *v.* Troop.[2]

It is lastly objected that neither ship nor owner is liable in general average for the loss in question. This claim is predicated upon Rev. St. § 4282, exempting the owner of a vessel from liability for loss or damage to cargo by reason or by means of any fire happening to or on board of the vessel without design or neglect of the owner. This provision is first found in 9 St. 635, and was enacted in 1851, and is said in Moore *v.* Transportation Co.[3] to have been in consequence of the decision in Navigation Co. *v.* Bank,[4] applying the common law liability of common carriers to carriers by water. Its provisions are largely borrowed from similar legislation in England. There shipowners were first exempted from liability in case of loss or damage by fire by the statute of 26 Geo. III., reënacted in 17 & 18 Vict. c. 104, § 503. The acts of both nations are essentially alike. The courts of England have ruled that the exemption of the statute corresponds with the ordinary exemption from the accidents of navigation, and does not touch liability to contribute towards a general average. Schmidt *v.* Mail Steamship Co.;[5] Crooks *v.* Allan.[6] Considering the previous state of the law, the object to be obtained, and the history of the legislation, there can exist no reasonable doubt of the correctness of these decisions. That in the law of insurance damage by water is attributed to the original peril by fire as a direct and proximate cause does not warrant a construction of the act in question which would seriously unsettle the law of general average, and was clearly without the intendment of Congress. Exceptions to libel overruled.[7]

[1] In Ralli *v.* Troop, 157 U. S. 386, reversing 37 Fed. R. 888, it was decided, Brown and Harlan, JJ., dissenting, that a sacrifice by a stranger, *e. g.*, the fire department of a city, does not make a case of general average. To the same effect are The J. P. Donaldson, 168 U. S. 599, 601 (*semble*); Wamsutta Mills *v.* Old Colony Co., 137 Mass. 471. But there is an excellent adverse criticism of this doctrine by the late Judge John Lowell in 9 Harv. L. Rev. 185-197; and the view of the learned critic is sustained by the decision of Mathew, J., in The Birkhall (1896), 12 Times L. R. 540. — Ed.

[2] 37 Fed. R. 888, 891. [3] 24 How. 1. [4] 6 How. 344.

[5] 45 Law J. Q. B. 646. [6] 5 Q. B. Div. 38.

[7] Affirmed, 59 Fed. R. 161. See, to the same effect, Schmidt *v.* Royal Co., 45 L. J. Q. B. 646.

Nor does a similar exemption from liability in a bill of lading cover the liability for a general average contribution. Schmidt *v.* Royal Co., 45 L. J. Q. B. 646; Crooks *v.* Allan, 5 Q. B. Div. 38, 4 Asp. Mar. Cas. 216 s. c.; The Roanoke, 59 Fed. R. 161, 53 Fed. R. 270; Nimick *v.* Holmes, 25 Pa. 366. — Ed.

THE MARY GIBBS.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, DECEMBER 4, 1884.

[*Reported in* 22 *Federal Reporter*, 463.]

IN Admiralty.

This was a libel in admiralty to recover a general average contribution by the owners of the brig Mary Gibbs against the respondent, as owner of the cargo. The libellant claimed that while said brig was on a voyage from Sagua la Grande to Boston, with a cargo of sugar for the respondent, she was, on March 28, 1883, struck by a gale which carried overboard her jib-boom, part of the mainmast, foretop-mast, with all the spars, blocks, rigging, and sails attached which, falling alongside the vessel, were held by the running and standing rigging, and began to beat heavily against the bottom and sides of the vessel, threatening to make a hole in the hull, and sink brig and cargo. The master thereupon, to save vessel and cargo, cut away these spars and rigging, and sails attached, and set them adrift, so that they were totally lost. The owners now claim to recover the value of these spars, sails, rigging, etc., so cut adrift, in general average. The respondent denied that cutting adrift such floating and wrecked spars and material was a general average sacrifice; and, if it was such a general average sacrifice, the respondent claimed they should be allowed for in general average only, at their value in their condition and position at the moment they were cut adrift.

NELSON, J. The Standard Sugar Refinery, as owners of the cargo of sugar on board the brig Mary Gibbs, is liable to contribute in general average for the material composing the wreck cut away for the purpose of saving the vessel and cargo;[1] the value of the material in adjusting the loss to be estimated as if it had been recovered from the sea and stowed in safety on board the vessel.

Interlocutory decree for libellant.

[1] The Margarethe Blanca, 14 Fed. R. 59, 12 Fed. R. 728 *Accord*.

The following are instances of general average acts entitling the shipowners to contribution: —

Cutting away masts, rigging, or tackle: Birkley *v.* Presgrave, 1 East, 220; Corry *v.* Coulthard, 2 C. P. D. 583 (cited); Shepherd *v.* Kottgen, 2 C. P. D. 578; Montgomery *v.* Indemnity Co., 17 Times L. R. 59; Potter *v.* Providence Co., 4 Mas. 298; Patten *v.* Darling, 1 Cliff. 254; Teetzman *v.* Clamageran, 2 La. 195; Maggrath *v.* Church, 1 Cai. 196; Pezant *v.* Nat. Co., 15 Wend. 453.

Scuttling ship to save burning cargo: Columbian Co. *v.* Ashby, 13 Pet. 331, 340; The Cargo of the Gallatin, 1 Woods, 642 (*semble*).

Sacrificing cable and anchors: Walker *v.* U. S. Co., 11 S. & R. 61. — ED.

COVINGTON v. ROBERTS.

In the Common Pleas, November 28, 1806.

[*Reported in 2 Bosanquet & Puller, New Reports*, 378.]

This was an action on a policy of insurance brought by the owners of the brig Nancy against one of the underwriters upon the ship, to recover a particular average loss. The defendant paid 4*l.* into court.

At the trial before Sir James Mansfield, Ch. J., at the Guildhall sittings after last Trinity term, it appeared that the Nancy was captured by a French privateer; but that on account of a heavy gale, and the sea running high, the privateer could not take possession of her; that the Nancy, in order to escape from the privateer, carried an unusual press of sail, in consequence of which she was much strained, opened most of her seams, and carried away the head of her mainmast, but finally succeeded in getting away. A verdict was taken for 100*l.*, subject to the award of an arbitrator, who was to "ascertain the amount of the average between the parties."

On a former day in this term a rule was obtained, calling on the plaintiff to show cause why the order of reference should not be amended by inserting the word "general" before the word "average," the defendant contending that he was only liable to a general average.

Shepherd, Serjt., in support of the rule, contended, that as the injury to the ship had been occasioned by an exertion to save the whole concern, the damage ought to be borne equally by the owners of the ship and cargo; and he referred to Birkley *v.* Presgrave,[1] where Lord Kenyon says: "All the articles which were made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, and the other expenses incurred, must be paid proportionably by the defendant as general average."

Sir James Mansfield, Ch. J. In the case referred to there was an article given up for the benefit of the whole concern. A cable was sacrificed. The language of Mr. Justice Lawrence is, that all loss which arises in consequence of extraordinary *sacrifices* or expenses incurred for the preservation of the ship and cargo, come within the description of general average. This is only a common sea risk. If the weather had been rather better, or the ship stronger, nothing might have happened. The word "particular" may be inserted in the order.[2]

Per curiam. *Rule discharged.*

[1] 1 East, 220.

[2] Power *v.* Whitmore, 4 M. & Sel. 141 *Accord.*

In The Bona, 1895, Prob. 125, 134, Lord Esher said: "This court would not be disposed to extend Covington *v.* Roberts."

The purchase of coal necessary for the use of an auxiliary screw, Wilson *v.* Bank of Victoria, L. R. 2 Q. B. 203, or of a donkey-engine, Harrison *v.* Bank of Australasia, L. R. 7 Ex. 39, is not an extraordinary expenditure giving rise to a general average claim. — Ed.

TAYLOR AND OTHERS v. CURTIS.

AT NISI PRIUS, BEFORE GIBBS, C. J., HILARY TERM, 1815.

[*Reported in 4 Campbell*, 337.]

THIS was an action of assumpsit for general average.

The plaintiffs are owners of the ship Hibernia, in which the defendants shipped goods to be carried from London to St. Thomas's in the West Indies. In the course of the voyage the ship was attacked by an American privateer. The Hibernia resisted, and a severe engagement ensued. The privateer was beat off, and the Hibernia delivered her cargo safely to the consignees. She sustained great damage during the engagement in her hull and rigging, which were repaired at a considerable expense to the owners. They also incurred a further expense in providing medical assistance for several of the crew who were wounded in the action. Large quantities of gunpowder and shot were likewise expended upon the occasion, which had formed part of the stores and outfit of the ship.

Lens, Serjt., for the plaintiffs. The damage sustained by the plaintiffs from the engagement is clearly a general average to which the defendants must contribute. It was voluntarily suffered for the benefit of all and proved the means of safety. No just distinction can be drawn between the firing of shot against an enemy, and cutting away a mast or throwing goods overboard in a storm. So the injury from the shot of the enemy is like that which is done by means of the jettison to other parts of the ship or goods saved. The healing of the wounded seamen is within the same principle, and is expressly laid down by foreign writers to be the subject of general average. So the practice at Lloyd's has corresponded with this doctrine.

GIBBS, C. J. I cannot feel that this is a loss entitling the plaintiffs to claim a contribution as for general average. The defence may be ungracious; but according to the rules which prevail in this country, I think the loss must fall entirely upon the ship. I cannot distinguish this from the case of a ship carrying a press of sail to escape from an enemy. That is done voluntarily for the preservation of all; but it has been held that a loss arising from a hazard so incurred is not the subject of general average. I likewise remember a case where a ship ran away from a privateer, and was shot through, and it was held that the owner could not claim a general average from the damage so sustained. The practice of underwriters sometimes to contribute to a loss such as this cannot weigh much, as it may be accounted for from the honor and liberality of those who contribute, and from the sense they must feel of their own interest. If there is no reward allowed for a gallant resistance, such resistances will not be made, and the whole value of the property must be paid, instead of a gratuity for saving it.

Verdict for the defendants; and the Court of C. P., approving of the direction of the C. J. at Nisi Prius, afterwards discharged a rule to show cause why there should not be a new trial.[1]

C. BARNARD AND OTHERS v. J. ADAMS AND OTHERS.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1850

[*Reported in* 10 *Howard*, 270.]

MR. JUSTICE GRIER delivered the opinion of the court.[2]

The plaintiffs below, Joseph Adams and others, brought this action against Charles Barnard and others, in the Circuit Court of New York, to recover contribution in general average for the loss of their vessel called the Brutus, on board of which certain goods were shipped, and consigned to the plaintiffs in error, and delivered to them on their promise to pay, provided contribution were justly due.

On the trial, the Circuit Court gave certain instructions to the jury, which were the subjects of exceptions, on the correctness of which this court is now called upon to decide.

As the facts of the case were not disputed, it will be proper to state them, in connection with the instructions given by the court, in order to avoid any mistake or misconception which might arise in construing the terms of mere abstract propositions without relation to the facts on which they were based.

On the 8th of October, 1843, the ship Brutus was lying at anchor, at the usual place of mooring vessels in the outer roads at Buenos Ayres, about seven miles from the shore. The width of the river at that place, between Buenos Ayres and Colonia on the opposite shore, is about fifteen miles. The Brutus had taken her cargo on board for New York, consisting of nutria skins, dry hides, horns, and jerked beef. The master was on shore, and she was in charge of the first mate, with a crew consisting of twelve persons in all. On the 7th, a gale had commenced, which on the 8th had become dangerous. About four o'clock next morning the ship began to drag her anchors, and the small bower anchor was let go. About nine o'clock in the evening, the gale increasing, the best bower anchor parted with a loud report. About ten o'clock, the small bower parted, and the ship commenced drifting broadside with the wind and waves. Endeavors were then made to get the ship before the wind, which failed, on account of the

[1] Gibbs, C. J., delivering the judgment of the Common Pleas, 6 Taunt. 608, said, p. 624: "The measure of resisting the privateer was for the general benefit, but it was a part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them, and there, it seems to me, they ought to rest." — ED.

[2] Only the opinion of the court is given. The dissenting opinion of Daniel, J., is omitted. — ED.

chains keeping her broadside to the sea, which was making a breach over her fore and aft. The chains were then slipped, and the vessel got before the wind, two men were put to the wheel, and one to the lead, and it was determined "to run the ship ashore for the preservation of the cargo and the lives of the crew." It was now about eleven o'clock at night when the ship was got before the wind and under command of the helm. The shore next to Buenos Ayres, towards which the ship had been drifting, had banks and shallows extending out some three or four miles. If the vessel had been driven on these by the tempest, she would have been wrecked and lost, together with the cargo and crew. On the Colonia side of the river were sunken rocks several miles from the shore. "For the purpose of saving the cargo and crew anyhow, and possibly the ship," she was steered up the river, inclining a little towards the Buenos Ayres side, with the intention of running her on shore at a convenient place. After they had proceeded up the river about ten miles, the mate discovered from the flashes of lightning that the vessel was approaching a point called St. Isidro, off which he perceived something black which he supposed to be rocks, and "being afraid," or "thinking it impossible to get by" this point without being wrecked and lost, he directed the course of the vessel to be changed towards the shore, where he had seen what he supposed to be a house, but which turned out to be a large tree. About midnight the vessel struck the beach and the rudder was knocked away. The foresail was then hauled up, but the stay-sail was let remain to keep her head straight, and she continued to work herself up until daylight. The place where she was stranded was a level beach about two hundred yards above ordinary low-water mark. The ship was not wrecked, or broken up, though somewhat damaged, and the cargo was not injured. The master chartered the bark Serene, and transferred the cargo to her. But it was found that, with the means to be obtained in that vicinity, it would have cost more than the ship was worth to get her off the beach. She was therefore sold. The Serene afterwards arrived safely at New York, under command of Captain Adams, former master of the Brutus. In transshipping the jerked beef from the Brutus to the Serene, a portion of it got wet, and when it arrived at the port of New York it was all found to be worthless.

On these facts, the court instructed the jury as follows: —

1. "The evidence on the subject of the stranding consists in the uncontradicted and unimpeached testimony of a single witness. He was the acting master of the vessel at the time of the loss in question. He states that when the vessel was without any means of resisting the storm, and her going ashore upon a rocky and more dangerous part of the shore was, in his opinion, inevitable, he did intentionally and for the better security of the property and persons engaged in the adventure, give her a direction to what he supposed to be, and what proved to be, a part of the shore where she could lie more safely. These facts, if credited by you, constitute in judgment

of law a voluntary sacrifice of the vessel, and for such sacrifice the plaintiffs are entitled to recover in general average."

This instruction forms the subject of the first exception, and raises the most important question in the case.

The apparent contradiction in the terms of this instruction has evidently arisen from a desire of the court to give the plaintiffs in error, on the argument here, the benefit of the negation of their own proposition, viz., that if the loss of the vessel by the storm was inevitable, the stranding could not be a voluntary "sacrifice entitling the plaintiffs to contribution." It is because the form in which this proposition is stated is equivocal and vague, when applied to the case before us, that the negation of it appears to be contradictory in its terms. The court should, therefore, not be understood as saying, that, if the jury believed the peril which was avoided was "inevitable" or that if the jury believed that the imminent peril was *not* avoided, they should find for the plaintiffs. But rather, that if they believed there was an imminent peril of being driven "on a rocky and dangerous part of the coast," when the vessel would have been inevitably wrecked, with loss of ship, cargo, and crew, and that this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured, then they should find for the plaintiffs. Looking at the admitted facts of this case in connection with the instruction given, it is plain that the jury could not have understood the court to mean anything else. And we may add, moreover, that, in the argument here, the learned counsel have not relied upon any verbal criticism of the instruction, but have encountered fairly the proposition which we now consider as maintained by the court below.

It cannot be denied by any one who will carefully compare this case with that of The Hope,[1] unanimously decided by this court, and the cases of Caze *v.* Reilly,[2] Sims *v.* Gurney,[3] and Gray *v.* Waln,[4] which have received the "unqualified assent" of this court, that, whatever distinctions may be taken as to the accidents and circumstances of these cases, they do not materially or substantially differ from the present, so far as the point now under consideration is concerned; and that we are now called upon to reconsider and overrule the doctrine established by those cases. But however they may appear to be contrary to certain abstract propositions stated by some text-writers on this subject in England, and a case or two in this country, the policy and propriety of overruling our own and the three other decisions which have received our "unanimous approval," even if we were now satisfied with their correctness, may well be doubted. There are few cases to be found in the books which have been more thoroughly, laboriously, and ably investigated by the most learned counsel and eminent judges. In questions involving so much doubt and difficulty, it is of more importance to the mercantile community that the law be settled, and litigation ended, than how it is settled.

[1] 13 Pet. 331. [2] 3 Wash. C. C. 298. [3] 4 Binn. 513. [4] 2 Serg. & Rawle, 229.

No decision of a question depending on such nice and subtle reasoning will meet the approbation of every mind; and if the cases we have mentioned have failed of this effect, it may well be doubted if any reasons which could be given for overruling them would prove more successful.

It is not necessary in the examination of this case again to repeat the history of this doctrine of general average, from the early date of the *Lex Rhodia de jactu*, through the civil or Roman law, and the various ordinances and maritime codes of European states and cities, down to the present day. The learned opinions delivered in the cases to which we have alluded leave nothing further to be said on that portion of the subject. We shall therefore content ourselves with stating the leading and established principles of law bearing on the point in question, in order that we may have some precise data with which to compare the facts of the present case, and test the value of the arguments with which the instructions of the Circuit Court have been assailed.

The law of general average has its foundation in equity. The principle that "what is given for the general benefit of all shall be made good by the contribution of all" is recommended, not only by its equity, but also by its policy, because it encourages the owner to throw away his property without hesitation in time of need.

In order to constitute a case for general average, three things must concur: —

First. A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently "inevitable," except by voluntarily incurring the loss of a portion of the whole to save the remainder.

Second. There must be a voluntary jettison, *jactus*, or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminentis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

Third. This attempt to avoid the imminent common peril must be successful.

It is evident, from these propositions, that the assertion so much relied on in the argument, namely, "that if the peril be inevitable there can be no contribution," is a mere truism, as the hypothesis of the case requires that the common peril, though imminent, shall be successfully avoided. Those who urge it must therefore mean something else. And it seems, when more carefully stated, to be this, "that if the common peril was of such a nature, that the *jactus* or thing cast away to save the rest would have perished anyhow, or perished 'inevitably,' even if it had not been selected to suffer in place of the whole, there can be no contribution." If this be the meaning of this proposition, and we can discover no other, it is a denial of the whole doctrine upon which the claim for general average has its foundation. For the master of the ship would not

be justified in casting a part of the cargo into the sea, or slipping his anchor, or cutting away his masts, or stranding his vessel, unless compelled to it by the necessity of the case, in order to save both ship and cargo, or one of them, from an imminent peril which threatened their common destruction. The necessity of the case must compel him to choose between the loss of the whole and part; but, however metaphysicians may stumble at the assertion, it is this forced choice which is necessary to justify the master in making a sacrifice (as it is called) of any part for the whole. Hence the answer of every master of a vessel, when examined, will be, "I considered the destruction of both ship and cargo 'inevitable,' unless I had thrown away what I did." "The goods thrown away would have gone to the bottom anyhow." If the case does not show that the jettison was "indispensable," in order to escape the common peril, the master would himself be liable for the loss consequent therefrom. It is for this reason that the ordinances of Marseilles require that the master should have a consultation with the supercargo and crew as to the absolute necessity of the measure, and as evidence that it was not done through the vain fears, cowardice, or imprudence of the master. But the right to contribution is not made to depend on any real or presumed intention to destroy the thing cast away, but on the fact that it has been selected to suffer the peril in place of the whole, that the remainder may be saved. The anchor lost by voluntarily slipping the cable may be recovered, the goods jettisoned may float to the shore and be saved, and yet, if the anchor or goods had not been cast away, they would have been "inevitably" lost, and there would have been a total loss of both ship and cargo. Take the case of Caze *v.* Reilly. A vessel is completely surrounded by the enemy's cruisers. It is impossible to save both ship and cargo from capture and a total loss. A part or the whole of the cargo is thrown overboard, and thus the vessel escapes. This is an admitted case for contribution, and it is no answer to the claim of the owners to say, "Your cargo was 'inevitably' lost; as it was situated it was worthless, and consequently you sacrificed nothing for the common benefit. Besides, a portion of it floated on shore and was saved from capture, or was fished from the bottom without sustaining much injury; the throwing it overboard was the best thing that could be done for it under the circumstances, as without that it would have been 'inevitably' lost." But suppose, as in the case referred to, the ship cannot be saved by casting the cargo into the sea, but the cargo, which is of far greater value, can be saved by casting the vessel on the land, or stranding her. Is it any answer to her claim for contribution to say, that "her loss was 'inevitable,' she was in a better situation on the beach than in the hands of the enemy, or at the bottom of the sea, or wrecked upon rocks, and therefore there was no such sacrifice as would entitle her to contribution?" We cannot comprehend why this argument should have no weight in the first case (which is an admitted case of contribution in all the books), and yet that it should be held as a conclusive obsta-

cle to the recovery in the latter. The replication to this objection in the first instance, and the conclusive one, is, "the vessel and cargo were in a common peril, where both or all could not be saved; the vessel alone, or the vessel and part of the cargo, have been saved, by casting the loss upon the cargo, and this constitutes the very hypothesis on which the doctrine of general average rests." Why, then, should there be a difference in principle, where the cargo is damaged or lost by being cast into the sea, and the ship saved, and the case where the ship is damaged or lost by a voluntary stranding, or by being cast on the land, and the cargo saved, is a question which has never yet been satisfactorily answered. In fact, we do not understand the counsel to contend for the doctrine of *salva navi*, or that the Brutus was not entitled to contribution because she could not be got afloat at a less cost than her value. The principle on which the counsel relied is that enunciated in the opinion of the court in Walker *v.* United States Ins. Co.[1] "It is not enough," says the learned judge, "that there be a deliberate intent to do an act which may or may not lead to a less; there must be a deliberate purpose to sacrifice the thing at all events, or at the very least to put it in a situation in which the danger of eventual destruction would be increased."

But, as we have already seen, the intention to destroy the *jactus*, or thing exposed to loss or damage for the benefit of the whole, makes no part of the hypothesis upon which the right of contribution is founded. Indeed, the speciousness of this assertion seems to have its force from the use of the word "sacrifice" in its popular and topical instead of its strict or technical meaning. The offering of sacrifices was founded on the idea of vicarious suffering. And when it is said of the *jactus*, that it is sacrificed for the benefit of the whole, it means no more than that it is selected to undergo the peril, in place of the whole, and for the benefit of the whole. It is made (if we may use another theological phrase) the "scapegoat" for the remainder of the joint property exposed to common destruction. The *jactus* is said to be sacrificed, not because its chance of escape was separate, but because of its selection to suffer, be it more or less, instead of the whole, whose chances of safety, as a whole, had become desperate. The imminent destruction of the whole has been evaded as a whole, and part saved, by transferring the whole peril to another part.

If a cargo of cotton, about to be captured or sunk, be thrown overboard in part or in whole, and the ship thus saved, the fact that the cotton floated to the shore and was saved, and therefore was in a better condition by being cast away than if it had remained to be captured or sunk, cannot affect its right to contribution, though it may diminish its amount. The loss or damage arising from its assuming the peril, that the ship may escape, may be truly said to be the real "sacrifice," in the popular use of the phrase. Its value is not measured by its hopes of safety, for by the hypothesis it had none; but its right to

[1] 11 Serg. & Rawle, 61.

contribution is founded on its voluntary assumption to run all the risk, or bear the brunt, that the remainder may be saved from the common peril. The fact that goods thrown overboard are in no worse, or even in a better, condition as to chances of safety, than if they had remained on board, or that the stranded vessel is in a better condition than if she had been wrecked or sunk, cannot affect the right to contribution of that part which was selected to suffer in place of the whole.

Having made these remarks, by way of vindicating the cases referred to, and noticing the arguments by which they have been assailed, let us briefly compare the facts of this case with the principles we have stated, and inquire, first, What was the common peril? and second, Was any portion of the joint adventure saved from it by the transfer of the risk or loss to another?

The common peril, which in this case was sought to be avoided, was shipwreck, or the destruction of vessel, cargo, and crew. The ship lay at anchor; she was assailed by a violent tempest, her cables broken, her anchors gone, and she was being driven by the force of the gale broadside upon the shallows extending three miles out from the shore at Buenos Ayres. In order to save the cargo and crew, it is determined to put on sail, and run up the river to find a safe place to strand the vessel. They proceed ten miles up the river, when they encounter another peril at Point St. Isidro. To avoid being wrecked on the rocks, the course of the vessel is immediately changed, and she is steered directly for the shore, and run upon a sandy beach, where she is left high and dry by the tide. The cargo is saved without injury, but the ship is on the land, where she is comparatively valueless, on account of the expense which must be incurred to replace her in her element. By the will and directions of the master, she has become the victim, and borne the loss, that the cargo might escape from the common peril. It is true she has not been wrecked or lost, as she inevitably would, had she been driven on the flats at Buenos Ayres by the tempest, or been foundered on the rocks off Point St. Isidro, but she has voluntarily gone on shore, which was death to her, while it brought safety to the cargo. And we are of opinion she has the same right to demand contribution that the owners of the cargo would have had against her, had it been cast into the sea to insure her safety.

There is therefore no error in the instruction given by the court below on this point.

2. The second and third instructions excepted to have reference to the place at which the goods are to be valued for the purpose of adjusting the general average.

The reasons given by the learned judge in these instructions are amply sufficient to show their propriety. The adventure was continued, notwithstanding the disaster, and terminated at New York. The goods were not returned to the shippers, and consequently no contribution could be collected at Buenos Ayres. The fact that the Brutus was left on the strand, and the adventure continued till the cargo reached its destination in another vessel, cannot affect the case.

The place where average shall be stated is always dependent, more or less, on accidental circumstances, affecting not the technical termination of the voyage, but the actual and practical closing of the adventure. We see nothing in the circumstances to take this case out of the general rule, that contribution should be assessed on the value at the home port.

3. The third exception relates to the allowance of the wages of the crew after the ship was stranded.

But as they were employed as mariners and quasi salvors of the cargo, laboring for the joint benefit of the adventure, we think the exception is not supported. Their services were essential to the entire saving of the cargo. Their duties did not cease with the stranding, and they were entitled to wages while their services were required for that purpose. If the same services had been rendered by strangers, the expense would have been properly charged as a result of the disaster, in stating the average. That the same services were rendered by the crew after the Brutus was stranded, and the voyage as to them technically broken up, cannot affect the case. Even if their obligation to the ship had ceased, still their services to vessel and cargo entitled them to their wages and support as a general charge.

4. The two and a half per cent. allowed for collecting the general average rests upon the usage and custom of merchants and average brokers. It is a duty arising out of the unforeseen disaster, and resulting directly from it. Usually there are contributions to be paid out, as well as received, by the shipowner. It is a troublesome duty, not embraced in their obligation as mere carriers. The usage is therefore not unreasonable. The objection, that it is paying the owners for merely collecting their own debt, is founded on the accidents or peculiar circumstances of this case, and does not affect the general principle on which this usage is based.

The judgment of the Circuit Court is therefore affirmed.[1]

[1] Columbian Co. v. Ashby, 13 Pet. 331; Star of Hope, 9 Wall. 203; Fowler v. Rathbone, 12 Wall. 102; Caze v. Reilly, 3 Wash. C. C. 298; The George, Olc. 89; Rea v. Cutler, 1 Spr. 135. (See, also, 1 Pars. Mar. Law, 292, n.); Sturgess v. Cary, 2 Curt. 59; Patten v. Darling, 1 Cliff. 254, 265; 800 Bales of Cotton, 8 Blatchf. 221, 3 Ben. 42; The Ocean Star, Holmes, 248; Brown's Case, 15 Ct. Cl. 392; Merithew v. Sampson, 4 Allen, 192; Sims v. Gurney, 4 Binn. 513 (criticised in Meech v. Robinson, 4 Whart. 360, 362); Gray v. Waln, 2 Serg. & R. 229 *Accord*.

Bradhurst v. Columbian Co., 9 Johns. 9 (ship lost); Meech v. Robinson, 4 Whart. 360 (ship lost); Eppes v. Tucker, 4 Call, 346 (ship lost) *Contra*. — ED.

MARSHALL AND OTHERS v. GARNER.

IN THE SUPREME COURT, NEW YORK, MAY 7, 1848.

[*Reported in* 6 *Barbour*, 394.]

EDWARDS, J.[1] It appears by the bill of exceptions in this case, that on the evening of the 14th of February, 1843, the ship North America, bound to New York, upon her homeward voyage from Liverpool, went ashore on a bar near Shrewsbury inlet. That after she struck she went over on her broadside, where she lay on her bilge. That at this time her masts were cut away, and she righted, so that her cargo was saved. It further appears that the ship was never got off, but became a total wreck. The captain testifies that if the masts had not been cut away, there would have been a loss not only of the ship and cargo, but of the lives of all on board. Upon this state of facts, the plaintiffs, who were owners of the ship, claim a contribution from the owners of the cargo, for the destruction of the masts and rigging, as general average.

If the ship had been restored from the disaster which caused her loss, by the alleged sacrifice which was made, it is not denied that the plaintiffs would be entitled to recover. The question here presented is, whether such right of recovery can be sustained under the particular circumstances of this case.

The council for the plaintiffs, on the argument, based their right to recover mainly upon the principle laid down in Columbia Insurance Company *v.* Ashby[2] (S. P. Caze *v.* Reilly;[3] Gray *v.* Waln;[4] Sims *v.* Gurney[5]). In that case it was decided that where, in a case of imminent peril, the captain voluntarily ran a ship on shore, and saved the cargo, the owners of the cargo were liable for general average, although the ship was totally lost.[6] In the case of Bradhurst *v.* Columbia Insurance Co.,[7] which had been previously decided in the Supreme Court of this State, a different rule had been laid down.

With the view which I have taken of this case, I do not consider it necessary to decide between these conflicting authorities. If, however, the rule which has been laid down in this State should be regarded as controlling upon us, the plaintiffs clearly could not sustain their claim. For, if the voluntary stranding of a ship, followed by a total loss, would not render the owners of the cargo saved, liable to contribution, *a fortiori* they would not be liable where the sacrifice

[1] Only the opinion of the court is given. — ED.

[2] 13 Pet. 331. [3] 3 Wash. C. C. R. 298. [4] 2 Serg. & Rawle, 229. [5] 4 Binn. 513.

[6] Barnard *v.* Adams, *supra*, 303; Caze *v.* Reilly, 3 Wash. C. C. 298; The George, Olc. 89; Rea *v.* Cutler, 1 Spr. 135; 800 Bales of Cotton, 8 Blatchf. 221, 3 Ben. 42; Merithew *v.* Sampson, 4 Allen, 192; Gray *v.* Waln, 2 Serg. & R. 229 *Accord.*

Bradhurst *v.* Columbian Co., 9 Johns. 9; Meech *v.* Robinson, 4 Whart. 360 (see, also, Walker *v.* U. S. Co., 11 Serg. & R. 61); Eppes *v.* Tucker, 4 Call, 346 *Contra.* — ED.

[7] 9 Johns. 9.

was of a part of a ship already involuntarily stranded, and, finally, totally lost.

The principle upon which general average rests is, that there has been a sacrifice of the property of one person for the safety of the property of another. Ordinarily the sacrifice is of a portion of the ship or cargo; but it may be of the whole, as in the cases above cited. But, in the case before us, there was no voluntary sacrifice of the ship, nor of any part of her. At the time her masts were cut away, she was already stranded upon a beach, where the water was but four feet deep, and she drew fifteen feet. And the captain states that, had the masts not been cut away, the ship would have been broken up and the lives of all on board lost. It was not the case of a ship rescued from one disaster and afterwards destroyed by another. The disaster was fatal, and there was nothing to be sacrificed. By cutting away the masts and rigging, their destruction from already existing causes was only anticipated. And the fact that one of the consequences of their immediate destruction was to protract the existence of the ship long enough to save the cargo, cannot entitle the owners to contribution.

With these views, I am of opinion that the judgment of the court below should be affirmed with costs.

JONES, P. J. concurred.

EDMONDS, J. dissented.

Judgment affirmed.

J. S. EMERY AND OTHERS v. EDWARD B. HUNTINGTON AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH, 1872.

[*Reported in* 109 *Massachusetts Reports*, 431.]

GRAY, J.[1] In order to support a claim for contribution in general average, there must be an extraordinary and voluntary sacrifice of part of the interests at risk for the benefit of all, by which part is rescued from the imminent peril impending over the whole. The danger encountered by the election of the master may be either of a different kind from the danger avoided, or of the same kind; but it must not be the very same danger, merely modified by acts done by the master, in the performance of his ordinary duty in the navigation or management of the vessel, so to meet the impending peril as to diminish its effects as far as possible. Nickerson *v.* Tyson;[2] Scudder *v.* Bradford; Bigelow, C. J., in Merithew *v.* Sampson;[3] Slater *v.* Hayward Rubber Co;[4] Phil. Ins. (3d ed.) §§ 1297, 1313.

[1] Only the opinion of the court is given. — ED.

[2] 8 Mass. 467. [3] 4 Allen, 192, 195. [4] 26 Conn. 128.

The case of a ship in immediate danger of capture affords a good illustration of the true distinction. If the master runs her ashore and thereby saves part of the cargo, or throws overboard part of the cargo and so enables the ship to escape, it is a case of general average. Caze *v.* Reilly;[1] Barnard *v.* Adams. So if the master of the ship, after being chased by an enemy who is rapidly gaining on him, at nightfall launches and sets adrift his long boat, fitted with a mast and sail and a lantern at the masthead, and thereby misleads the enemy and escapes. Emerigon des Assurances, *c.* 12, sect. 41, § 5. 3 Kent Com. (6th ed.) 238 note. 2 Arnould on Ins. (3d ed.) 775. But, in the absence of any statute or ordinance on the subject, damages incurred or ammunition expended by a private armed vessel, in fighting off an enemy, are not subjects of general average. Emerigon, *c.* 12, sect. 41, § 8. Taylor *v.* Curtis.

In all the decisions cited by the learned counsel for the plaintiffs, the peril elected by the master, and by which the injury was done for which contribution was sought, was a different peril from that which threatened the loss of ship and cargo. Most of them were cases of a vessel in imminent danger of foundering, or of being driven on shoals or rocks and thereby going to pieces before reaching the shore, and whose master, having no other means of saving vessel or cargo, ran her, beside or over the shoals or rocks, upon the beach. Sims *v.* Gurney;[2] Columbian Insurance Co. *v.* Ashby;[3] Barnard *v.* Adams; Sturgess *v.* Cary;[4] Rea *v.* Cutler;[5] Merithew *v.* Sampson.[6] In another case, the dangers avoided were those of fire on board and of being driven on a rocky and precipitous shore, the risk voluntarily undertaken by the master was that of running into an unknown bay without a pilot, knowing that stranding was one of the chief risks thereby assumed, and the injury actually suffered was by grounding on an unseen reef at the entrance of the bay. The Star of Hope.[7] In the remaining case the ship and cargo, being in danger of sinking in deep water, were run upon the flats and so stranded in shoal water, thereby increasing the peril to the ship, and diminishing the danger to the cargo and the expenses of saving both. Rathbone *v.* Fowler.[8]

But it has never, so far as we are informed, been held or suggested by any court or commentator, and could not be maintained, consistently with sound principles, that where a vessel is in inevitable danger of being thrown upon a particular rock or reef or shoal, and the master, in the exercise of his duty of so managing the vessel as to make the consequent damage to ship and cargo as little as possible, runs the ship upon the same shoal or rock or reef in such a manner as to bring a different part of the vessel in contact with it from that which the mere force of the winds and waves would, he makes a voluntary sacrifice which will found a claim for contribution in general

[1] 3 Wash. C. C. 298.
[2] 4 Binn. 124.
[3] 13 Pet. 331.
[4] 2 Curt. C. C. 59.
[5] 1 Spr. 135. 4 Allen, 192.
[6] 6 Blatch. C. C. 294, and 12 Wall. 102.
[7] 9 Wall. 203.

average. If it were so, there could hardly be a case of a shipwreck, in which the master did his duty, and which did not result in a total loss of ship and cargo, which would not require a general average contribution.

In the present case, taking the allegations in the bill to be true, as we must upon the demurrer, they show that the impending peril was a collision between the plaintiffs' barque and the steamer; that such collision was inevitable; that the act voluntarily done by the master of the barque was merely to starboard her helm, an ordinary manœuvre of seamanship; that its purpose was to diminish the effect of the impending blow; that by that act the collision was not avoided, but was met as well as might be, and only the position and manner in which the two vessels struck together modified; and that the damage to the barque, though less than it would have been if her course had not been changed, was all caused by the original peril of collision between the two vessels, and not by any new or different one. The plaintiffs cannot therefore claim a general average of the expenses of repairing the damages thus occasioned to their vessel.

It is no less clear that the sums paid by the plaintiffs under the decree of the Danish court (after putting into Copenhagen for repairs) for a portion of the damage done to the steamer, and the expenses incurred in defending against such proceedings, are not subjects of general average contribution. The Danish court had jurisdiction of the cause and possession of the barque; the proceedings therein were against the barque alone, and not against her cargo; and neither the incurring of the expenses of the proceedings, nor the payment of money under the final decree, can be considered as consequences of taking the barque within its jurisdiction, or as resulting from a voluntary sacrifice. The real and legal cause of the liability to pay such damages and expenses was the meeting of the two vessels in collision. Peters *v.* Warren Insurance Co;[1] Nelson *v.* Suffolk Insurance Co;[2] General Insurance Co. *v.* Sherwood.[3] The collision not having been a peril voluntarily incurred, the damages and expenses resulting therefrom were not matters of general average.[4]

Demurrer sustained, and bill dismissed.

THE BONA.

IN THE ADMIRALTY DIVISION, NOVEMBER 13, 1894.

[*Reported in Law Reports*, 1895, *Probate Division*, 125.]

ON January 11, 1893, about 1 P. M., the Bona, in the course of a voyage from Galveston for Liverpool, via Norfolk, Virginia, with a

[1] 3 Sumn., 389, 14 Pet. 99, and 1 Story, 463. [2] 8 Cush. 477. [3] 14 How. 351.
[4] Story, J., in 3 Sumn. 393, and 1 Story, 468. Phil. Ins. § 1272.

cargo of cotton and flour in bags, took the ground without negligence on the part of those in charge of her, while crossing Galveston Bar, and was in a position of considerable danger.

Efforts were made by working the engines to get her off, but she remained fast, thumping and straining heavily. The engines were worked a large part of the next three days, and at 1 P. M. of the 14th she came off the bank. After being surveyed in Bolmer Roads, Galveston, she proceeded to Norfolk, where necessary repairs were done to the boilers, and from thence she proceeded to Liverpool with her cargo, where repairs to the hull, rendered necessary by the stranding, were effected at a cost of 2878*l.* 8*s.* 3*d.* The like repairs to the engines and machinery cost 356*l.* 11*s.* 2*d.*, the latter sum being apportioned as follows: general average, 273*l.* 16*s.* 4*d.*; ship, 82*l.* 14*s.* 10*d.* The defendants paid their proportions of these several amounts in particular and general average; but, whilst admitting that the engines were properly employed, the defendants declined to contribute in general average in respect of the coals consumed, on the ground that the working of the engines was not a general average act, and the damage sustained by them not a general average loss, so that, on the same principle, the value of the coal was not a subject for general average contribution.[1]

THE PRESIDENT (SIR F. H. JEUNE). In this case the question which I have to decide is whether the coal consumed to work the engines which were used while the Bona was on Galveston Bar is the subject of general average contribution. The cost of repairs to the engines rendered necessary by their being strained in such use has been allowed in the average statement, and, having regard to the express provisions of the York-Antwerp rules of 1890 on this subject, and to the reference made to those rules in the policy and bill of lading, probably the cost of these repairs could not be excluded from general average in the present instance. But I understand that the parties do not desire that this inclusion of the expenditure on the engines should be held to conclude the question of the coal, and, in any case, it seems to me that the question whether the cost of the coal is to be treated as general average depends on the principle upon which the cost of repairs to the engines is held, if it be held, to be the subject of general average.

It is necessary, therefore, to consider the principle by which a claim to treat damage to engines, caused by their use in the attempt to relieve the position of a stranded vessel, as general average is to be tested. The question, as one of English law, appears to me to be governed by decided cases, and therefore it is not necessary to refer to the earlier authorities, to foreign law, or to the views of text-writers.

Two of the elements of general average — a common peril, and an act done for the common advantage of the adventure — are beyond question present in this case. The third element which is necessary

[1] The statement of facts is abridged. — ED.

is that of sacrifice — a term which implies that voluntary or intentional character in the act, which has been held to be essential. Where it is part of the cargo, which has been dealt with while a vessel is at sea for the general advantage, no question is likely to arise on the point of sacrifice. The destruction or abandonment, or employment for some purpose connected with the navigation of the ship, of any part of the cargo, at once impresses the act with the needful characteristic of a sacrifice; but where the subject is part of the ship's equipment it is more difficult to determine whether the act does or does not give rise to general average. There are cases, such as the cutting away of a mast, when it is clear that there is a destruction of part of the ship's equipment for the common advantage. The question in each case is whether the loss incurred was unavoidable, then or soon thereafter, or whether it was so far avoidable that it was accepted in order to save the ship and cargo, and so became a sacrifice: see Shepherd *v.* Kottgen. But there are cases where the advantage is gained, not by the destruction or abandonment, but by the employment of part of the ship's material. What is the test in that case? It is, I think, whether the employment is in its nature of an ordinary or extraordinary kind; and it must be observed that though there cannot well be a use of the ship's equipment extraordinary in its nature, under ordinary circumstances, there may be a use ordinary in its nature under extraordinary circumstances. The terms "abuse" or "misuse" of the ship's equipments have been employed to express such an abnormal or unnatural use as giving rise to an average act.

In the well-known instance quoted by Abbott from Emerigon of a boat sent adrift with a lantern on a mast in order to mislead a pursuing enemy, we have a simple case of misuse of part of the equipment of a ship which gave rise to general average contribution. In Birkley *v.* Presgrave,[1] we find the same principle applied in circumstances more nearly akin to the present. There, in order to secure a ship to a pier when it was all-important to do so instantly, not only were the ship's hawser and towing-line employed, but the cable on the bower-anchor was cut and used for the purpose. It was held that a claim for contribution did not arise in respect of the hawser and towing-line, because they were used only for the ordinary purpose of such articles, but did arise in respect of the anchor cable, because it was cut from its anchor and employed for a purpose for which it was not intended. "All those articles," Lord Kenyon said, "which were made use of by the master and crew upon the particular emergency and out of the ordinary course, for the benefit of the whole concern, must be paid proportionately as general average." It is clear that by the words "out of *the* ordinary course" Lord Kenyon meant "out of *their* ordinary course" — that is to say, in a manner unnatural for them; and, so read, the words of his Lordship appear to me to express the test necessary for the decision of the question which I am now considering. I think that Mansfield, C. J., in Covington *v.* Rob-

[1] 1 East, 220.

erts, summed up the view taken in Birkley *v.* Presgrave[1] by saying that in that case the cable was sacrificed.

The case of Harrison *v.* Bank of Australasia[2] and that of Robinson *v.* Price afford an illustration of the above principle. In the former of these cases ship's spars and wood, part of the ship's stores, were used as fuel for the donkey-engine engaged in pumping the ship. The court was equally divided upon the question at issue, because while it appeared to Kelly, C. B., and Bramwell, B., that the facts showed an imminent peril, requiring the sacrifice of the spars and wood, Martin, B., and Cleasby, B., were of a different opinion on this point. I think it must be admitted that the reasoning of Cleasby, B., negatives the right to general contribution even if a reasonable supply of coals for the donkey-engine had been provided; but the judgments, not only of Kelly, C. B., and Bramwell, B., but also, apart from the question of the imminency of the peril, that of Martin, B., admit the right to general average contribution. In Robinson *v.* Price, ship's spars and wood, part of the cargo, were used for the donkey-engine in circumstances of imminent peril, and when it was made clear that there had been a reasonable supply of coal for the donkey-engine on board, the court (constituted by Mellor and Lush, JJ.) held that the consumption, both of the ship's spars and the part of the cargo, was to be contributed to as general average. The diversion of the ship's spars from their proper object would appear to have constituted the sacrifice in both these cases.

On the other hand, the authorities are clear that where the equipment of the ship is employed for its ordinary purpose, though it may be under circumstances requiring unusual demands upon it, there is no sacrifice and no right to general contribution.

In Covington *v.* Roberts injury done to a ship and her mainmast in carrying press of sail to escape from a privateer was held not to be a subject of general average, on the ground that there was no sacrifice, but only a common sea risk. The circumstances were extraordinary, but the use of the ship and mast was not. In Power *v.* Whitmore,[3] on a similar principle, a claim of general average was refused in respect of damage to the ship and tackle caused by standing out to sea in tempestuous weather, when press of sail was necessary in order to avoid an impending peril of being driven on shore. Lord Ellenborough distinguished the case from that of Plummer *v.* Wildman,[4] where a master cut away his rigging to preserve the ship, on this ground, that "general average must lay its foundation in a sacrifice of part for the safety of the rest," and said that the damage incurred while standing out to sea was not an object of contribution. Taylor *v.* Curtis, where a claim for contribution in respect of ammunition expended and wounds of seamen incurred in a conflict was rejected, is another illustration of the same principle. The court held that "no particular part of the property was voluntarily sacrificed for the protection of the rest." The consumption of ammunition is the result of

[1] 1 East, 220. [2] Law Rep. 7 Ex. 39. [3] 4 M. & S. 141. [4] 3 M. & S. 482.

the natural use of guns, and wounds to combatants are the natural result of a combat.

In the present case I think that there was a sacrifice of the engines within the principle above indicated. In the language of the York-Antwerp rules of 1890, the damage to them was shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage. The engines were worked ahead and astern, no doubt, to prevent the vessel settling in the sand, and were used when the vessel was stranded in order to force her off. This was not an ordinary or natural use of the engines. I do not of course say that the using of the engines of a vessel when just touching the ground would lay the foundation of a claim for general average; that would not be an abnormal employment of the vessel's steam-power, nor would there be imminent peril. But that is not the present case.

In the above view, it seems to me to follow that the coals consumed in working the engines while the vessel was stranded should be the subject of contribution; such a use of the coal was abnormal, just as the working of the engines was abnormal. If the claim for damage to the engines was based on their being used with a pressure of steam or a number of revolutions unusual in character, it might be that such a claim could extend only to a portion of the coal expended; but here the use of the engines at all was, under the circumstances in which they were used, extraordinary, and constituted a general average act; and if that be so, it is, I think, clear — and, indeed, it was almost conceded in argument — that there must be a contribution for the coal consumed.

The case of Wilson *v.* Bank of Victoria[1] may be referred to as showing that the cost of coal consumed depends on the nature of the use to which the engines driven by its consumption are applied. In that case it was held that the freighters had a right, without contribution, to the services of the auxiliary screw, and therefore to disbursements required to provide the necessary fuel, on the ground that the expenditure in respect of which contribution is claimable must be not only extraordinary in amount, but incurred to procure some service extraordinary in its nature. Here the service which the coal was expended to provide was extraordinary in its nature.

I am of opinion, therefore, that there must be judgment for the plaintiffs with costs on the high court scale, for such an amount as, if not agreed upon between the parties, shall be ascertained by the registrar.[2]

[1] Law Rep. 2 Q. B. 203.

[2] Affirmed 1895, Prob. 132.

See to the same effect, Birkley *v.* Presgrave, 1 East, 220; Harrison *v.* Bank of Australasia, L. R. 7 Ex. 39; Robinson *v.* Price, *supra*, 294. — Ed.

VAN DEN TOORN *v.* LEEMING.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT, FEBRUARY 23, 1897.

[*Reported in* 79 *Federal Reporter*, 107.]

SHIPMAN, Circuit Judge.[1] The libellant, in behalf of the steamship Schiedam, filed a libel to recover from the respondents $1158.90, as the contribution from their part of the cargo for general average expenses incurred by the ship. The District Court decreed payment of $181.21, which was the amount admitted to be due after the rejection of the damages which were held not to be properly included in general average. From this decree the libellants appealed.

The facts of the case are succinctly stated by the judge of the District Court, as follows: —

"The above libel was filed to enforce the payment of general average contribution against one of the consignees of cargo on board the steamship Schiedam, which arrived in this port from Rotterdam on July 14, 1891. When 316 miles to the eastward of Sandy Hook, on the evening of July 10th, between half-past 7 and 8 o'clock, a crack 18 inches long was discovered on one side of the main shaft, mostly inside of the after bearing, and about 2 feet from the crank. This was temporarily repaired during the 24 hours following by drilling the shaft, which was 14½ inches in diameter, and inserting two iron bolts, 11 inches long and 1⅜ inches in diameter, across the line of the crack. The ship then proceeded on her voyage at about three fourths of full speed (making 37 or 38 revolutions per minute, instead of 50 to 52, full speed), without interruption, for 38½ hours, to within about 16 miles of Sandy Hook Lightship, when, after having thus made about 300 miles, the shaft suddenly broke wholly off at about 10 A. M. of July 13th, at the original place of fracture. The fractured parts, riding each other, carried away the bearings, damaged the bed plate and channel way, and did much other injury to the machinery. At about 2 P. M. of the same day the ship was taken in tow by a tug, and reached Quarantine, at Staten Island, at 9 P. M. For this latter service $1000 was allowed as salvage compensation. The Schiedam.[2] A general average account was afterwards adjusted, amounting in all to $17,508.65. In this charge was included, not only the expense of the towage last named, with other items concerning which there is but slight difference, but also charges to the amount of about $13,000 on account of the damage done to the vessel and machinery by the last violent breakdown of the shaft. No charge was made for the cracked shaft itself, nor for any injury supposed to have been done to the bearings before the repair to the shaft was made."

The only matter in controversy was the liability of the cargo to pay

[1] Only the opinion of the court is given. — ED.

[2] 48 Fed. 923.

its proportional part of the damage to the ship which resulted from the final break of the shaft. The claim for general average was founded upon the alleged fact that the risk of a great injury to the vessel was foreseen, and was deliberately undertaken in order to protect the cargo and ship from the large salvage expenses which would be incurred if towage was accepted as an alternative, and that thus the consequences of the final breakdown were a sacrifice voluntarily undertaken for the benefit of cargo and vessel.

The principles which are at the foundation of general average were elaborately discussed before the Supreme Court in the cases of Barnard *v.* Adams, Dupont de Nemours *v.* Vance, and in The Star of Hope.[1] In the first-named case, the court announced, with precision, the three things which must concur "in order to constitute a case for general average," which can be summarized as follows: (1) A common, imminent danger, to be overcome by voluntarily incurring the loss of a portion of the whole to save the remainder; (2) a voluntary casting away of some portion of the joint concern for the purpose of saving the residue; (3) the attempt must be successful. The controversy in this case is not in regard to the principles which are applicable to it, but it is whether the facts are those which ought to exist in order to create a case for general average. We say "ought to exist," for it is worthy of note that the tendency of modern adjustments is to enlarge the boundaries of expenses which are included in the adjustment. The question of fact is whether there was, at the time of the repair of the shaft and the decision to proceed to New York under the vessel's steam, a voluntary, expected sacrifice of anything; whether there was even a decision to enter upon a peril to the ship; or whether it was the usual case of repair, in the belief that the port of destination, 316 miles distant, could be reached in safety. Upon this point we fully concur in the conclusion of the district judge that:

"The evidence going to show any expected sacrifice on the part of the ship, or an expectation of such damage as actually happened, is not as strong or as convincing as is stated in the libellant's argument. The evidence hardly shows more than the recognition of a possibility of injury, but with a confident expectation that any breakdown would be avoided."

The testimony of the chief engineer, who was, presumably, the officer most conversant with machinery, is significant. In reply to the question by the counsel for the libellant, "Why was it that you decided to make these unusual repairs, and take these risks of proceeding under your own steam, instead of taking a tow?" he said: "In the first place, I knew that I could make the repairs, and that it could do the work, as was evident by its going 300 miles. And, in the second place, it was for the purpose of saving the expense of being towed." Both the captain and the engineer knew the possibility of a new breakdown, and the probabilities of further damage if the renewed break occurred; but that their decision amounted to a determination to sacrifice the

[1] 9 Wall. 203.

vessel, if need be, in order to save towage, does not seem to have occurred to them. The efficiency of the repairs was not as lasting as the engineer expected, for an injury to the ship subsequently happened; but this unsuccessful result does not entitle the ship to classify the use of the machinery and its injury, after a repair which was entered upon without foreboding, as a voluntary sacrifice for the purpose of rescue from a common danger. Our attention has been called to the provisions of the seventh York-Antwerp rule, as indicating the recognition of the principle that the damages to the machinery of the Schiedam should be allowed. The rule is as follows: —

"Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavoring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage."

The circumstances to which that rule is limited did not exist in this case. The decree of the District Court is affirmed, with costs.

C. W. DABNEY *v.* NEW ENGLAND MUTUAL MARINE INSURANCE CO.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY TERM, 1867.

[*Reported in* 14 *Allen*, 300.]

CONTRACT upon a policy of insurance on the bark Fredonia, issued to the plaintiff by the defendants, to recover a sum of money as general average for throwing over a part of a cargo of fruit belonging to the plaintiff.

On New Year's day, 1866, the bark Fredonia, bound from Fayal to Boston, responded to a signal of distress from the ship Gratitude, which was leaking badly. For two days the Fredonia kept near the Gratitude. January 3d, the mate of the Gratitude came to the Fredonia with some of the crew and passengers. They begged the master of the Fredonia to take them off; said they were beat out with pumping; and prayed the master to save their lives. The mate further stated that the forward pumps had given out, and the ship must go to the bottom. The master of the Fredonia then told the mate of the Gratitude that he would take them; they must fetch provisions and water; the mate of the Gratitude said they had plenty and would fetch it; and said mate and passengers then gave three cheers, and went back to their ship. The master of the Fredonia then gave orders to his mate to clear the oranges out from between decks, so as to make room for the passengers; some oranges were got out and thrown over before the first passengers came on board;

the women and children came first, at about nine o'clock in the morning; the master of the Fredonia had to keep them on deck, it raining heavily, until room could be made between decks, and after the second boat load came on board they were taken down. There were four boats going or coming, and the passengers came on board of the Fredonia faster than the fruit could be got out of her; it had to be passed out of the hatches, and the decks were full all the time. It was not possible to handle the ship with the passengers on deck. Three hundred and twenty persons came on board from the Gratitude, and there was room for about one hundred and fifty to stand on deck. All were aboard at half-past four, and the throwing over of the cargo stopped about half-past two. The houses on deck were full; there was not room for the people between decks to lie without lapping over, and there was no other place to put them, except the hold, which was full of cargo. The master of the Fredonia made full inquiries of the mate of the Gratitude and of the passengers who came alongside, and was satisfied that the ship was in a sinking condition, and that it was indispensably necessary to throw over that portion of the cargo, or to leave the passengers and crew of the Gratitude to go down with the ship.

Upon these facts, judgment was ordered for the plaintiff; and the defendants appealed to this court.[1]

H. C. Hutchins, for the defendants.

B. R. Curtis and *F. E. Parker*, for the plaintiff.

Bigelow, C. J. We can entertain no doubt that the conduct of the master of the vessel insured, so far from being censurable or unauthorized, was in accordance with the plain dictates of moral duty and humanity, and was fully justified by the circumstances. It follows that there was no breach of duty or violation of contract.

But the important question still remains, whether the throwing over of cargo can be deemed to have been made under circumstances which bring the case within the principles of a general average contribution. It is insisted by the learned counsel for the defendants, and it is the main ground on which he rests his defence to this action, that this throwing over was not occasioned by a peril of the sea, but that the just inference from the facts is that it was made in order to save the lives of the crew and passengers of the shipwrecked vessel. If he is right in this position, there can be no doubt that a claim for contribution cannot be supported. This is conceded by the plaintiff's counsel. A sacrifice of property made for the purpose of rescuing persons from shipwreck on board of another's vessel can in no sense be regarded as made for the common benefit, in order to escape a peril of the sea impending over the subject insured. The case therefore reduces itself to the single question, what in legal contemplation was the cause of the destruction of cargo?

We start with the admitted fact that the bark was in perfect safety,

[1] The statement of facts is abridged, and the arguments of counsel as well as portions of the opinions are omitted. — Ed.

exposed to no extraordinary peril from within or without, till she began to receive the crew and passengers from the shipwrecked vessel. When then did the peril arise, and what was the nature of it? The plaintiff insists that it was the innavigability of the bark; that this was caused by the lawful act of the master in receiving on board such a number of persons as passengers that it "was not possible to handle the bark" while they remained on deck, and that a jettison was made for the purpose of restoring the vessel to a navigable condition. But the difficulty with this statement is, that it not only disregards the exact order of events in their relation of cause and effect as they occurred, but that it also leaves out of view the motive which prompted the master of the bark in ordering a part of the cargo to be thrown overboard. We do not doubt that it would have been impracticable to navigate the bark, if the persons could have been received on board without removing a part of the cargo. But it does not follow that this removal was made for the purpose of restoring her navigability, or that unseaworthiness arising from innavigability was a peril to escape which the sacrifice of a part of the cargo was made. On the contrary, it seems to us that the legitimate inference from the facts is, that the cargo was taken out and thrown overboard for the purpose of saving the lives of the shipwrecked passengers and crew; that this was the primary and real motive of the master in directing its destruction, and the immediate and proximate cause of the loss. We do not mean to say that no claim for contribution could be supported where property on board had been sacrificed in view of a peril which was inevitable, merely because the loss was incurred in anticipation of the actual existence of a danger which could be averted only by a voluntary destruction of property. But we do say that the sacrifice must be made with the intention and for the purpose of avoiding the impending and anticipated peril; that this must be the motive and the cause of the sacrifice; and that it is not sufficient to sustain a claim for a general average loss; that it appears that, if the property had not been destroyed for a purpose other than the general safety, it would immediately have become necessary to destroy it for the common benefit.

Upon turning to the statement of facts, it is observable that it is not stated that the motive or object of throwing over a part of the cargo was to keep the vessel in a navigable condition. If such was the fact, it was within the knowledge of the master, and it was susceptible of clear and irrefragable proof. No sacrifice of property for the common benefit could be properly made, unless the master had, in the exercise of judgment upon the facts as they existed, determined that the sacrifice was necessary for the general safety. But it is not stated that any such judgment or opinion was formed. We are left to infer it from the statement that it was not possible to handle the ship with the passengers on deck, and that there was not room for them elsewhere without removing the cargo. This statement, however, is to be taken in connection with other facts which

tend to show that the preservation or restoration of the navigability of the vessel was not the immediate object of the sacrifice. It appears that as soon as the master determined to take the crew and passengers of the other vessel on board, he gave orders to his mate to clear out the oranges from between decks. It is also expressly agreed that this was done to "make room for the passengers," it being necessary to keep the women and children, who were the first passengers received on board, upon the deck in a heavy rain, until room could be made for them below. The throwing over of the cargo was in fact begun before any persons were received on board. Certainly the vessel was not then innavigable, nor can it be said that it was certain she would become so. The removal of the shipwrecked passengers and crew could not be accomplished in a very brief period of time. The master knew that it would necessarily occupy many hours. It was not in fact completed for upwards of seven hours. During this time, it was not impossible that some other vessel might have come to the aid of the bark in rescuing and receiving the passengers and crew, and rendered the sacrifice of a part of the cargo unnecessary. If no other facts appeared, we should entertain strong doubts whether on this statement the plaintiff has established the proposition on which his case depends, of a jettison made in view of an impending peril, and upon a judgment formed by the master that the sacrifice was necessary for the general safety.

But all doubts are set at rest by the further admitted fact, that the passengers and crew from the Gratitude could not have been taken on board the bark at all without a throwing over of the cargo. The whole number of persons received was three hundred and fifty, but only one hundred and fifty could stand on deck. There was no room therefore to receive them except by a destruction of the cargo which was between decks and in the hold. This was within the knowledge of the master when he determined to take them on board. How then can it be said that there was a jettison made to preserve or restore the seaworthiness of the bark? The unseaworthiness from innavigability did not exist, nor was it anticipated, except as a consequence or result of taking on board the passengers and crew from the wreck; but they could not be received until a part of the cargo was got rid of; as the passengers and cargo could not be on board at the same time, the alleged impending peril of innavigability from the overloading of the bark could not arise. The decision of the master which he communicated to the mate of the Gratitude, and which he immediately proceeded to carry into effect, was to take all on board, and this necessarily involved the destruction of a part of the cargo, because it was impossible to execute his declared purpose while the whole of the cargo remained on board.

Some confusion in the application of legal principles to the case before us may be occasioned by putting too much stress on the fact that the mode of destruction of part of the cargo was the same as in the ordinary case of a sacrifice for the common benefit, by throwing

it overboard. But suppose, when the shipwrecked vessel was overtaken by the bark, it had been found that the passengers had been previously dying from scurvy or from thirst, and it had become necessary, before removing them or while the removal was going on, to use the oranges for the purpose of relieving them from severe and possibly fatal suffering and disease. No one would contend that a destruction of the cargo for such a purpose would constitute any ground for a claim for a general average contribution. The necessary result of this view of the case is that judgment must be entered for the defendants. But there is really no distinction in principle between a case of a sacrifice of a cargo to relieve the passengers from personal suffering and death impending over them from want or disease, and one incurred to make room for them on board the bark in order to preserve them from this suffering and impending death occasioned by their longer continuance on the wrecked vessel. In both cases, the sacrifice is made for the relief and succor of the passengers, and not to obtain present safety from a peril impending over the bark.

Under such circumstances it cannot, in the opinion of a majority of the court, be said that the immediate cause of the destruction of cargo was the innavigability of the vessel, or that it was made by the master with a design to avert this peril. If the goods thrown overboard must have been sacrificed, as the facts show, for the purpose of receiving the shipwrecked persons on board, their destruction was inevitable irrespectively of the innavigability of the vessel. This peril, therefore, was not the cause of the loss in a legal sense, nor was this common safety the purpose for which the sacrifice of the cargo was made.

FOSTER, J., dissenting. The master was certainly under a paramount moral obligation to take on board the passengers and crew of the Gratitude, whose lives would otherwise have been lost. He had also the legal right to perform this act of humanity. This legal right necessarily involved the further incidental right to guard against the consequent innavigability of his own vessel, which was sure to be thereby occasioned. A jettison may always be made in view of an impending peril, without waiting for its actual occurrence, which often would be too late. And, when made under such circumstances, it is the subject of a general average contribution.

It is not denied that, if the passengers and crew of the Gratitude had been actually received by the Fredonia, and immediately afterwards its innavigability had been ascertained and the jettison thereupon ordered, there would have been a plain case of general average contribution, however brief the interval between the two events. Accordingly, as I understand the principles adopted by the majority of the court, their decision of the present case would be reversed, if the ship's company had landed one at a time upon the deck of the bark, and directly after each came on board, so many boxes of oranges had been thrown over as would make room for his accommodation.

But this refinement seems to me too subtle for the wise, practical administration of maritime law. To my mind there is no material distinction between a jettison resolved upon after the master of the Fredonia had rightfully decided and promised to fulfil the duty of rescuing the shipwrecked strangers, and one found to be essential to the common safety the moment after they came on board. When the moral necessity of taking them off the Gratitude had been demonstrated, the promise to do so had been given; and while the transfer was taking place, the ship's company of the Gratitude are in my opinion to be regarded as belonging to the Fredonia as much as after they had reached its deck. If a portion of its own crew and passengers had temporarily left that vessel, and it was found that they could not safely be taken back without a jettison, no one would suppose that it failed to be a subject of general average, merely because the throwing overboard of the cargo preceded their return. And I cannot distinguish in principle such a case from the present. The master had a right to consider what would be necessary for the general safety, when all were on board whom he had the moral and legal right, and had promised, to receive. Under such circumstances, the proximate cause of the jettison seems to me to have been the innavigability of the Fredonia, produced by the great number of new passengers whom its master had rightfully engaged to receive, and who were actually arriving on board. A peril of the sea was thus incurred in the fulfilment of the duty of saving life, and in consequence of that peril the jettison was made. No doubt the general safety must have been and was the object of the sacrifice. The precise question is, the general safety of whom? I differ from my brethren in thinking that, upon the facts of this case, the common safety included the human beings who were coming from the Gratitude, as well as the original ship's company of the Fredonia.

If this view be correct, the jettison was immediately produced by a peril of the sea, within the most stringent application of the maxim which pervades the whole law of marine insurance, that the proximate cause of a loss is alone to be regarded.

I am authorized to say that Mr. Justice Chapman fully concurs in this dissenting opinion.

Judgment for the defendants.

HORACE SCUDDER AND OTHERS *v.* JOHN BRADFORD.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1833.

[*Reported in* 14 *Pickering*, 13.]

ASSUMPSIT to recover a sum of money as general average.

At the trial before Shaw, C. J., it appeared that the plaintiffs were the owners of the schooner Champion, which sailed from New York for Boston about the 22d of January, 1831, with a cargo.

The master deposed, among other things, that on the 31st of January, at about 10 o'clock in the evening, he passed Cape Cod light; that at 11 o'clock commenced a severe snowstorm, with a gale of wind from east-north-east; that at about 8 o'clock the next morning, he was among Cohasset rocks, and was standing to the westward; that finding he could not get past them, as the wind was too light, he wore ship to the southward and let go both anchors; that the schooner kept drifting, and he cut away her masts to prevent her drifting, and she then brought up; that in about an hour afterwards she drifted again, and continued to drift until she struck on the rocks, and he then slipped both cables and let her go as high as she would, for the preservation of the lives of those on board, and of the cargo. He abandoned her in the afternoon, and the next day he found her dry on the rocks, with her bottom stove to pieces.

It was admitted that the defendant had goods on board the schooner, which were ultimately saved.

A nonsuit was entered. If upon the facts stated in the master's deposition and such as a jury ought to infer from it, the court should be of opinion that the plaintiff was entitled to recover, the nonsuit was to be taken off; but otherwise judgment was to be rendered thereon for the defendant.[1]

PUTNAM, J., delivered the opinion of the court. The general rule, that where the property of one is sacrificed for the preservation of that of others, in the prosecution of a voyage, is familiar, but of somewhat difficult application. It must be proved that the sacrifice was necessary and voluntary; it must be intended for the safety of all concerned, and it must appear that thereby the property which is to contribute, was rescued from the imminent peril then impending. The property saved from the danger which was immediately threatening, shall be held to contribute, notwithstanding it may be lost by subsequent perils in the course of the voyage.

No vessel could be in greater distress and danger than the Champion was in, when the masts were cut away. It was the voluntary act of the master. It was the only thing which could be done, to prevent shipwreck. It was done to save the cargo and ship, and the lives

[1] The arguments of council are omitted.— ED.

of those who were on board. There was a heavy swell of the sea, which was driving the ship with great violence towards the rocks. The wind was very light, and that also blowing towards the shore. In such circumstances it would have been hazardous if not impossible to bring her on the stays; so that tacking was out of the question. They tried in vain by wearing ship to keep her off. They threw over their anchors, but they were dragged by the force of the sea. The only hope was, that by the cutting away the masts the anchors might bring up the ship and prevent her drifting towards the shore. If that measure had succeeded, this would have been a case for a contribution; but it did not succeed. In about one hour after the masts were cut away the ship drifted and dragged her anchors until she reached and was wrecked upon the rocky shore. It cannot be affirmed that the property which was saved from the wreck was saved by the means of the cutting away of the masts. The forlorn hope failed. There was no more benefit derived from cutting away the masts before she reached the shore than from the slipping of the cables afterwards. It cannot be said that the property was safe or saved during the short space of time that she was brought up. The sea continued to set and roll with violence towards the shore, until the anchors were dragged as before. It was one continued peril, which was not avoided by the voluntary destruction of the masts. Phillips on Ins. 342. If the anchors had brought up the ship after the masts had been cut away, and had held her until the then impending peril had ceased, and the ship had proceeded upon her voyage and been lost afterwards, from other perils, the contribution would be due. For this general average is to be paid once or oftener, although the ship should be finally lost on the same voyage by subsequent and distinct perils. Weskett, 31, tit. Average, § 16. To apply this rule. Suppose the claim should have been made within the hour that the anchors held the ship after the masts were cut away. The answer would be obvious. Wait, and see if the ship will ride out this perilous swell of the sea; if she does, then call for your average. If she does not, this well-intended damage to the ship must go for nothing, as no benefit or safety will be derived from it. The answer is certainly as good now as it would have been then. The sacrifice was of no avail, and cannot be the legal foundation of a claim for contribution. What was saved was saved *tanquam ex incendio*. Phillips on Ins. 342.

It is the opinion of the whole Court that the judgment must be for the defendant.[1]

[1] Shoe *v.* Low Co., 49 Fed. R. 252, 46 Fed. R. 125; Lee *v.* Grinnell, 5 Duer, 400 *Accord*.
In case of a general average disbursement, contribution is due, although the expenditure did not benefit the contributors. Safford *v.* Dodge, 14 Mass. 66, 79. — Ed.

DORMER SHEPPARD AND OTHERS *v.* JOSEPH WRIGHT AND OTHERS.

IN THE HOUSE OF LORDS.

[*Reported in Shower, Parliamentary Cases*, 18.]

APPEAL from a Decree of Dismission of a Bill preferred in the Court of *Chancery*: The Case was thus,

The Appellants did in the Year 1693. load on Board the Ship *Union* at *Gallipoly* 210 Tuns of Oyls, of which Ship the Appellants were Owners; and the Respondents loaded on Board her at *Messina* 85 Bales of Silk, upon Freight by Contract both to be delivered at *London*. The Ship homeward bound was chased into *Malaga Mould* by one of the *Thoulon* Fleet, who were three or four days in sight, then stood in for that Port, as if designed to attack the Fort; and thereupon the Master discoursed the Owner's Factor, who sent him off a Lighter to save what they could of the Ships Cargo; and because the Silk was of the greatest value, the Silk was put on board the Lighter, and carried ashore; and to come at the Silk, (for it lay beyond the Oyls) they were forced to rummage the Ship: In saving of which, and some small part of the Oyls, many hours were spent, and by the Seamen only, and at Night the *French* left the Port, whereupon no more was landed. But about six days afterwards the *French* Fleet appeared again before *Malaga*, and then all Endeavours were used to save the Oyls, but were prevented by the Boats which the *French* Men of War sent into the Harbour, and the Enemy forced them to their Guns, and when they could defend the Ship no longer, they bored holes to sink her, but the Oyls kept her from sinking, and the *French* took her, and carried her away. The Bales of Silk were afterwards put on board another Ship, and delivered to the Respondents at *London*, for which they paid the Freight, &c.

The Appellants pretending that they ought to have a share of the Silk which was saved, in proportion to the value of the Ship and Oyls which were lost, they exhibited their Bill in *Chancery*, to enforce the Respondents to come to an Average with the Appellants for the loss of their Ship and Oyls. And after Examination of Witnesses, on the hearing of the Cause, the Bill was dismissed.

And it was argued on the behalf of the Appellants, That this Dismission was not justifiable by the Rules of Equity; for that it must be agreed, If Goods are thrown overboard in stress of Weather, or in danger or just fear of Enemy, in order to save the Ship and rest of the Cargo, that which is saved shall contribute to a Reparation of that which is lost, and the Owners shall be Contributors in proportion; and that there was the same Reason here; that by preferring the salvage of the Silk (being the best of the Cargo) before the Oyls, the Owners were deprived of the same opportunity for the salvage of the

Oyls; that as the Sea-law in Extremity directs the Master to preserve the best of his Cargo, and the Goods saved ought to contribute to the loss of the Goods Ejected; so where one is preferred before the other in case of Extremity, there being not time to land the whole, average is just and reasonable. And as to the six days time, there was then no apprehension of danger, and consequently the Master could not justifie the landing of any thing after the reason of their Fears were removed.

That the prudence of their Master in saving the Silk before the Oyls, ought not to be to the prejudice of the Owners interest, the Oyls lying next to be preserved; that the pretended neglect of the Master, in not landing them during the absence of the Enemy, is no Excuse, because then there was no danger; that the saying that the loss of the Ship and Oyls did not contribute to the salvage of the Silks, is no reason, seeing the salvage of the Silk (which had otherwise been lost) deprived the Owners of the same opportunity for the salvage of the other Goods; that in such Adventures, as the danger is common, so ought the loss or damage to be common and equal; that the Master is equally intrusted by and for all; and were it otherwise, it had been the Duty, and will be the Interest of all Owners of Ships to order their Servants in Extremity to preserve their own Goods; that the Silk, being of the greatest value, it was a National Service, to preserve that before the Oyls, and therefore equitable that all who embark in the same Bottom, should share alike in the Service done for Salvage, &c. And further, that if in Extremity, the safety of the best of the Ships Cargo is not preferrable before that of the meaner value, it will be of ill consequence; and therefore the Sea-law provides first for the Safety of the best of the Cargo, and the Master acted accordingly: and that 't is the Opinion of those who are learned in the Maritime Laws, That where Freighters Goods are equally in danger, and a like opportunity for the salvage thereof, if the safety of the one be preferred, and the other comes to be lost, such preference obliges the Goods preserved to contribute to those which are lost; it being a General Rule in Causes Maritime, That one Man's Interest ought not to suffer for the Safety of anothers.

On the other side, it was argued with the Decree, That this Pretence was new; that 't was a Notion unpresidented; that the Rule of Averidge went only to the cases, where the loss of one Man's Goods contributed to the safety of anothers, as by Lightning the Vessel, &c. and not to this Case; that here each Man was to undergo the Peril of his own Goods; that in case of Damage to Goods within the Vessel, other Goods were not contributory, but the Owner must endure his own loss, and had only his Remedy against the Master, if it were occasioned by his Defect or Miscarriage: that the reason of Averidge was a meritorious Consideration in the common Case, because there the loss of one did actually save the other; but here was no such thing: The loss of these Oyls did not save the Silk, nor did the saving of the Silk lose the Oyls; for if the Silk had not been saved, the Oyls had been lost, for they were so bulky that they could not easily be removed without

further time; and if part only be saved, 't is to the advantage of the Owner; and where all cannot be saved at a time, the Benefit is accidental to him, whose Goods the Master's discretion directs to be saved: And in this case here was no such Commodity, as could contribute to the loss of a Ship, if it had been kept on Board; for the Silk, if on Board, had not assisted to her sinking. But besides, here were six or eight days between the landing of the Silk and the seizing of the Ship by the *French*, in which time all the Oyls might have been landed, and thereby both them and the Ship saved; and the apprehension of the Danger could not so soon be removed by losing sight of the Enemy in the Morning, and therefore there was no reason for the Master immediately to forbear landing his Oyls. Therefore 't was prayed that the Appeal might be dismissed, and the same was accordingly done, and the Decree of Dismission below affirmed.

THE JOHN PERKINS.

In the United States Circuit Court, District of Massachusetts, May, 1857.

[*Reported in Federal Cases, No.* 7, 360.]

Curtis, J.[1] The libel filed by Nickerson, one of the crew of a fishing schooner called the Wyvern, for himself, and for Thomas Lewis, master of the Wyvern, in behalf of the owners, officers, and crew of the vessel, pleads that at about half-past eleven o'clock of the night of Sunday, Nickerson discovered the John Perkins drifting directly towards the Wyvern, which had one anchor down; that to prevent a collision and the destruction of both vessels, Nickerson cut the cable of the Wyvern, and thus prevented the destruction of both vessels. It is suggested that there may be a claim for a general average contribution for the loss of the cable and anchor. The question here is whether a voluntary sacrifice made by one vessel to avoid or escape an apprehended collision with another vessel, makes a case for contribution in general average.

It is certainly true that such a claim when viewed theoretically has an equity very similar to, if not identical with, that on which the Rhodian law was founded, and out of which the more modern doctrines of the law of general average have grown. "*Omnium contributione sarcitur quod pro omnibus datum est.*" Poth. Pan. 14, 2, 1. "*Equissimum enim est, commune detrimentum fieri eorum qui propter ammissas res aliorum, consecuti sunt ut merces suas salvas habuerunt.*" Poth. Pan. 14, 2, 6.

At the same time it is quite clear that the Roman Law never ap-

[1] Only so much of the opinion is given as relates to the question of general average. — Ed.

plied the principle between mere strangers. The Digest (9, 2, 29, 3,) says, "*Labeo scribit, si cum vi ventorum navis impulsa esset in funes anchorarum alterius, et nautæ funes præcidissent, si nullo alio modo, nisi præcisis funibus, explicare se potuit, nullam actionem dandam.*"

This is the precise case under consideration, except that the cable is cut by the mariners of the other vessel, which can hardly weaken the claim. Emerigon cites this as good law, and refers to the laws of Oleron and Wisbuy as containing a similar rule as to the removal of an anchor. 1 Em. on Ins. 416, ch. 12, § 14.

And at the common law there are cases of urgent necessity in which one whose property is destroyed has no action — as pulling down a house to prevent the spread of a fire, as was resolved in 12 Co. 13, 63. See also Viner Ab. Necessity pl. 8, 4 T. R. 797, 1 Dall. 363, 17 Wend. 290, 2 Denio, 461.

But whether an action would or would not lie, where the mariners of one vessel can escape only by cutting the cable of another vessel, and do so, the question here is whether the law of general average extends to a case where the cable of a vessel is cut by its crew to prevent an apprehended collision with another vessel.

I am not aware that the right of contribution has ever been extended beyond those who voluntarily embarked in a common adventure. Very eminent writers upon maritime law have considered that the right grows out of, and depends upon, a contract implied by the law from the relation created by the contract of affreightment. Such is the opinion of Pothier, Traité des Contrats des louages mar. Part. 2, Art. Prelim., of Pardessus, Droit Com. Part. 3, Tit. 4, ch. 4, § 2. Chief Justice Parsons declares in Whittredge *v.* Norris,[1] that the requisites to a case of general average are, a contract by which distinct properties of several persons become exposed to a common peril, and a relief from that peril at the expense of one or more of the concerned, who thereupon are entitled to a contribution from the rest. And in the case of Dupont *v.* Vance, as well as in Lawrence *v.* Minturn,[2] it will be found that the Supreme Court considered that the master, in the case of necessary voluntary sacrifice to escape peril, was acting as the authorized agent of all concerned in the common adventure, and so bound all by his act, a principle which could hardly apply between mere strangers. I have on a former occasion declared that I did not consider the right to recover a general average contribution arises from a contract, Sturgis *v.* Cary,[3] but from a principle of common justice, that they who have received a common benefit from a sacrifice voluntarily made by one engaged in a common adventure should unite to make good the loss which that sacrifice occasioned. But I never entertained a doubt, from the relation of the parties to a common adventure, the law would imply a contract for the purpose of a remedy; nor did I then suppose that it would be implied between strangers, who were not united in a common adventure by one or more contracts of affreightment.

[1] 6 Mass. 131. [2] 17 How. 109, 110. [3] 2 Curt. 384.

The ancient as well as the modern codes of sea laws proceed upon the assumption that the master, representing all the aggregate interests by holding that office, has the rightful power to judge upon the sacrifice of one of the interests which he thus represents, for the benefit of the others. But they afford no ground for the position that he may judge and act for mere strangers, whose property has not been confided to his care.

In my opinion the only subjects bound to make contribution are those which are united together in a common adventure and placed under the charge of the master of the vessel, with the authority to act in emergencies as the agent of all concerned, and which are relieved from a common peril by a voluntary sacrifice made by one of those subjects. Consequently, I must reject the claim for general average.

The decree of the District Court must be reversed; but the questions are so novel, and attended with so much difficulty, and the equitable considerations in favor of some of the claims are such, that I do not think it fit to charge the appellees with costs.[1]

THE ALCONA.

IN THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ILLINOIS, 1881.

[*Reported in* 9 *Federal Reporter*, 172.]

IN Admiralty.

This was a libel *in personam* by Charles Bewick *et al.*, owners of the propeller Alcona, against the Detroit Fire & Marine Insurance Company, to recover for a general average contribution. The policy insured the propeller against total loss and general average only in the sum of $10,000. The answer denied that the libel set up a proper claim for general average. By a stipulation of facts it appeared that the Alcona, with a cargo of 37,000 bushels of corn, left Toledo, Ohio, for Buffalo, and while proceeding down the Maumee River, when on the range stakes, brought up on the bottom, and was unable to get off without assistance; that she lay about 20 feet outside of the channel: that while she was thus stranded it was deemed advisable to lighten her of a portion of her cargo, and accordingly

[1] Whittridge *v.* Norris, 6 Mass. 125 *Accord.* In this case the master and crew, fearing to remain on board, started for the shore in the boats, taking with them several kegs and bags of dollars. The long boat being found to be overladen, some of the kegs were thrown overboard. The rest were brought safely to shore, and the next day the abandoned ship was regained and saved. Neither the ship and cargo left on board, nor the kegs brought to shore, were held liable to contribute.

The community of interest begins with the loading of the cargo: The Carron Park, 15 Prob. D. 203; and continues until the cargo is discharged: Whitecross Co. *v.* Savill, 8 Q. B. Div. 653; Dunham *v.* Commercial Co., 11 Johns. 315. — ED.

about 5000 bushels were removed from the propeller to a barge, and the propeller was then floated by the assistance of the propeller Alpena and certain tugs.

BROWN, D. J. So far as the facts of this case are concerned, I am satisfied that there is no evidence which would be proper to go to a jury that the Alcona was in any danger of total loss or serious damage to herself or cargo. There is no allegation to that effect in the libel. She lay upon an even keel, upon a bank of sand, clay, and mud, several miles from the mouth of the Maumee, protected from the heavy winds and sea of the open lake. A rise in the water would have floated her off without assistance, and it was very improbable that any such fall would occur as would put her in any serious peril. She was a little out of the channel, and there was plenty of room for other vessels to pass without fear of collision. The weather was good, and for all that appears she was as safe as if she were lying at her own dock. Nor should I be justified, from the testimony, in finding the existence of a usage of insurance companies to treat expenditures of this kind as general average. It is true that evidence was offered tending to show that in a number of similar cases, running through a series of years, expenses incurred under like circumstances had been allowed; but there is nothing to show a uniform and certain usage to that effect. A custom cannot thus be proved by isolated cases. Cope *v.* Dodd.[1]

We are, then, left to deal with the naked question whether expense incurred in getting off a vessel stranded in a place of safety can be the subject of a general average contribution. Cases in which steam-power is employed in hauling off stranded vessels are not strictly cases of general average, but are treated in the books as rather in the nature of general average. The law upon this subject originated in cases of jettison, and most of the earlier cases relate to actions brought to recover contributions for goods thrown overboard, or masts, cables, or rigging sacrificed to relieve vessels in distress. After the invention of steam-power the same principle was extended to expenses incurred for tugs hired to haul off stranded vessels from a dangerous shore; but I do not understand that the general principle upon which allowances of this kind are made has been at all enlarged in this new class of cases; and I apprehend the expense of tugs for this purpose would not be allowed in any case where, if other equally prudent and efficacious measures of relief had been adopted (such for example, as a jettison of a part of the cargo), the losses thereby voluntarily incurred would not be held the subject of a general average contribution. It would be unreasonable to say that a vessel in peril may select one method of relief and obtain an allowance by way of general average, while, if she selects another method of accomplishing the same thing, the loss would be hers alone. Hence it seems to me quite clear that we must look only to the circumstances in which this vessel was placed, and not to the particular

[1] 13 Pa. St. 33.

measures employed, to determine whether the case is a proper one for contribution.

Now, referring to the authorities upon the subject, I take it that nothing is better settled than that a voluntary sacrifice of a portion of the vessel and her cargo can only be justified to save the remainder from an imminent danger of loss.

In 2 Arnould, Insurance, 883, it is said: "It is an undoubted requisite of general average loss that it should have been incurred under pressure of a real and imminent danger." And at page 884 it is said: "The sacrifice must have been made under an urgent pressure of some real and immediately impending danger, and must have been resorted to as the sole means of escaping destruction."

In the case of the Columbian Ins. Co. *v.* Ashby,[1] in which it was held that the voluntary stranding of a ship in imminent peril constitutes a case of general average, Mr. Justice Story remarked that — "The Roman law fully recognized and enforced the leading limitations and conditions to justify a general contribution, which have ever since been steadily adhered to by all maritime nations: (1) That the ship and cargo should be placed in a common imminent peril; (2) that there should be a voluntary sacrifice of property to avert that peril; and (3) that by that sacrifice the safety of the other property should be presently and successfully attained. Hence, if there was no imminent danger, or necessity for the sacrifice, as if the jettison was merely to lighten a ship too heavily laden by the fault of the master in a tranquil sea, no contribution was due. The contention of libellants, that the expenses incurred in this case were for the joint benefit of the ship and cargo (because the voyage might otherwise have been indefinitely prolonged), is expressly declared in this case to be no ground for a general average contribution. It may be said that unless the ship is got off the voyage cannot be performed for the cargo, and the safety and prosecution of the voyage are essential to entitle the owner to a contribution. But this principle is nowhere laid down in the foreign authorities; and certainly it has no foundation in the Roman law. It is the deliverance from an immediate, impending peril, by a common sacrifice, which constitutes the essence of the claim. . . . But, in truth, it is the safety of the property, and not of the voyage, which constitutes the true foundation of general average."[2] . . .

The continental writers are equally explicit to the point that imminent peril of loss is an essential ingredient in a claim for general average. Says Goirand, in commenting upon article 400 of the French Commercial Code: —

"Four conditions are indispensable to general average, the absence

[1] 13 Pet. 331.

[2] The court cited Barnard *v.* Adams, *supra*, 302; The Harriet, 17 How. 100; The Ann Elizabeth, 19 How. 162; and The Star of Hope, 9 Wall. 203, as reaffirming the same principle. Birkley *v.* Presgrave, 1 East, 228; Thornton *v.* U. S. A., 12 Me. 150; Bedford Co. *v.* Parker, 2 Pick. 1; and McAndrews *v.* Thacher, 3 Wall. 347, were shown to be cases of peril. — Ed.

of any one of which suffices to render the average particular. In order that the average be general, it is necessary (1) that the damages or expenses arise from the voluntary act of man; (2) that such voluntary action has had for object to save the ship and cargo from immediate danger of loss; (3) that such danger has equally menaced both ship and cargo; (4) that the voluntary sacrifice has been attended with beneficial results, — that is to say, has led to the preservation of the ship and cargo."

The civil law courts are even stricter than ours in requiring a previous consultation with the crew, and parties interested in the cargo who may be on board. A report of the deliberation must be drawn up, specifying the motive of the jettison, and enumerating the articles thrown overboard or damaged. This is signed by the persons who took part therein, and transcribed into the log-book. At the first port touched at the captain must, within 24 hours after his arrival, attest the statement contained in the deliberation.

So, in the elaborate work of Hoechster & Sacré, vol. 2, p. 946, it is said: —

"The act [the basis of the claim for general average] should be a voluntary act agreed to after a consultation with the crew, and in the common interest. It should be justified by the fear of a peril certain and imminent, and have for its object to prevent a total or considerable loss by a less sacrifice." Page 960: "A jettison is justified only by extraordinary necessities, when it is a question of lightening the ship to prevent her foundering, by relieving her when she is stranded, or of quickening her speed to escape the pursuit of an enemy."

Section 702 of the Dutch Code provides for a case precisely like the one under consideration: "When a ship is prevented, from existing shoals or shallows or banks, from leaving the place of departure, or reaching her place of destination, with her full cargo, and a part thereof must be conveyed to the ship by or discharged into lighters, such lightering is not considered as an average." See, also, Caumont, title, "Avaries," §§ 31, 32, 33. These expenses are, however, allowed where the vessel is obliged to enter the harbor by a storm or the enemy's pursuit. Code of Portugal, art. 1816, §§ 14, 16, 18; Code of Spain, art. 936, § 5; Code of Italy, art. 509, §§ 10, 14; France, art. 400, §§ 7, 8. All of the continental codes, so far as I have examined them, appear to restrict claims for general average to cases where a voluntary sacrifice is made to save the vessel and cargo from a greater loss. If the allowance of general average can be made in the case under consideration, I see no reason why it is not equally allowable whenever a tug or lighter is employed to assist a vessel over a bar at the port of departure or of destination, or to relieve a vessel whenever and wherever, in the course of her voyage, she may happen to touch the bottom, be her situation never so safe if she happens to require assistance to get off. Such a ruling would be extending the doctrine of general average to cases never contemplated by

any writer upon maritime law, either in Europe or America, to which my attention has been called.[1]

NESBITT AND ANOTHER v. LUSHINGTON.

IN THE KING'S BENCH, JUNE 21, 1792.

[*Reported in* 4 *Term Reports*, 783.]

THIS was an action on a policy of insurance on wheat and coals on board the Industry, Captain Cassidy, from Youghall to Sligo, for 100*l*. The policy was in the usual form, and contained the common printed "memorandum; corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded."

It appeared in evidence that the ship was forced by stress of weather into Elly Harbor in Ireland. And there happening to be a great scarcity of corn there at that time, the people came on board the ship in a tumultuous manner, took the government of her from the captain and crew, and weighed her anchor, by which she drove on a reef of rocks, where she was stranded; and they would not leave her till they had compelled the captain to sell all the corn (except about 10 tons) at a certain rate, which was about three fourths of the invoice price. The 10 tons were lost in consequence of the stranding, by which it was damaged, and was obliged to be thrown overboard. The ship afterwards arrived at her place of destination with the remainder of her cargo, which was about 25*l*. worth of coals. The jury found a verdict as for a total loss; but it was understood that the real loss would be adjusted if the court should be of opinion that the plaintiffs were entitled to recover under the circumstances; a rule *nisi* having been granted for setting aside the verdict.

Erskine, *Law*, and *S. Heywood* now showed cause.

Bearcroft and *Baldwin*, *contra*, were stopped by the court.[2]

LORD KENYON, Ch. J. There is some novelty in this case. I think that this loss falls within a capture by pirates: and if a particular average could have been recovered upon this policy, the plaintiffs might have recovered upon the count, stating the loss to have happened by piracy. But, this being a policy upon corn, the memorandum states that the underwriter will not be liable for any average, unless general, or the ship be stranded. And I am of opinion that this is not a general average, because the whole adventure was never in jeopardy. There is no pretence to say that the persons who took the corn intended any injury to the ship, or to any other part of the cargo

[1] Harrison v. Bank of Australasia, L. R. 7 Ex. 39 (*semble*); Columbian Co. v. Ashby, 13 Pet. 331; Hobson v. Lord, 92 U. S. 397, 399; Bowring v. Thebaud, 42 Fed. R. 794; Earnmoor Co. v. New Zealand Co., 73 Fed. R. 867, 872 *Accord*. — ED.

[2] The statement of facts is abridged, the argument for the plaintiff is omitted, and only a part of the judgment of Lord Kenyon is given. — ED.

but the corn, which they wanted in order to prevent their suffering in a time of scarcity. Therefore the plaintiffs could never have called on the rest of the owners to contribute their proportion, as upon a general average.

Rule absolute.[1]

IREDALE *v.* CHINA TRADERS INSURANCE CO.

IN THE COURT OF APPEAL, JULY 3, 1900.

[*Reported in Law Reports*, 1900, 2 *Queen's Bench Division*, 515.]

APPEAL from the judgment of Bigham, J., upon the following agreed statement of facts.[2]

The plaintiffs own the iron ship Lodore, and by charter dated February 10, 1897, chartered her to load coals at Cardiff for Esquimault at 19*s.* 9*d.* per ton delivered. By a policy dated March 3, 1897, they insured the chartered freight thereunder, valued at 1650*l.*, with the defendants, against, *inter alia*, loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight.

The Lodore proceeded to Cardiff and there loaded a full cargo of coals, and sailed on March 29, 1897, on the insured voyage. On May 26, 1897, the coals began to heat, and the master decided, for the safety of the ship, freight, and cargo, to jettison cargo and to bear up for the river Plate. About forty tons were jettisoned, and the Lodore subsequently anchored in Buenos Ayres Roads on May 29, 1897. Between that date and June 25, 1897, cargo was from time to time discharged, and various surveys were held upon the coals, and it was found that the coals continued hot and would heat still further if the voyage was proceeded with. Accordingly, on June 25, 1897, the coals were condemned, and were ultimately sold. The vessel abandoned her voyage to Esquimault and returned to the United Kingdom with another cargo, and the chartered freight was totally lost.

It was necessary for the safety of the whole adventure for the vessel to put into Buenos Ayres as aforesaid, and it was reasonably certain that if she had continued on her direct voyage the temperature of the coal would have continued to rise until spontaneous combustion ensued, and that, had she so continued her voyage, the ship and cargo would have been destroyed by fire before reaching Esquimault. When and while she was at Buenos Ayres the ship and her cargo, both the portions landed and the portion remaining on board, were in safety, but after she reached Buenos Ayres no part of

[1] So if there is a peril of the ship, but not of the cargo, expenses incurred in order to rescue the ship give no claim to general average. Louisville Underwriters *v.* Panee, 93 Ky. 96 (ship stranded on bank of the Kentucky River). — ED.

[2] 1899, 2 Q. B. 356.

the cargo could have been reloaded and/or carried with safety to Esquimault in the same or another bottom, and it was all necessarily and properly sold at Buenos Ayres.

The policy and charter-party, the protest dated August 11, 1897, and the average statement dated March 15, 1898, with the survey reports as therein set out, may be referred to as parts of this special case.

This action, in the defence to which all underwriters interested similarly to the defendants concur, is defended to test the question whether, by way of set-off and deduction from the total loss on the policy, which is admitted, the defendants are entitled to have the said loss of freight made good in general average to any and what extent, and to deduct the contribution to the same falling on the plaintiffs as shipowners, from the amount due on the policy.[1]

The judgment of the court (A. L. Smith, Vaughan Williams, and Romer, L. JJ.,) was read by —

A. L. Smith, L. J. This is an action by shipowners upon a policy of marine insurance by which the defendants underwrote for the plaintiffs the chartered freight of coals, valued at 1650*l.*, upon a voyage from Cardiff to Esquimault in the plaintiffs' ship Lodore, and the perils insured against were "loss by fire and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid freight."

It is not disputed by the defendants that the chartered freight was lost by reason of the perils insured against within the meaning of the policy (The Knight of St. Michael[2]), and that for this loss the defendants are liable to the plaintiffs. But the defendants contend that upon the facts of this case there has been a general average loss which is the subject of a general average contribution payable by the plaintiffs, and that for the amount of this contribution the defendants are entitled to have credit given to them when they pay to the plaintiffs the amount recoverable under the policy.

The question argued before us was whether, as regards the coal, upon the delivery of which at Esquimault the freight would have become payable, there has been a general average sacrifice which would form the subject of a general average contribution, and, as this was the only point taken or argued, I pass on without observing upon the form in which the question is raised. My brother Bigham has held that the defendants' contention is ill founded, and they appeal.

It has long since been established that to constitute a general average loss so as to be the subject of a general average contribution, two things at least must co-exist: (*a*) there must be an intentional sacrifice of part of the ship or cargo, or a voluntary expenditure for the benefit of the ship and cargo; (*b*) such sacrifice or expenditure must be made at the time when a common danger to ship and cargo existed,

[1] The statement of facts is slightly abridged, and the arguments of counsel are omitted. — Ed.

[2] [1898] P. 30.

for when the common danger has ceased there can be no sacrifice or expenditure that can be the subject of a general average contribution. Bowen, L. J., in Svensden *v.* Wallace,[1] thus expresses himself as to what constitutes a general average sacrifice. He says: "It is essential at the outset to bear in mind two things, the nature of every general average sacrifice, and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo." The sacrifice must be "made for the common safety in a time of danger." What the learned Lord Justice here says about a general average sacrifice is only what will be found laid down in many cases and stated in the text-books of authority, though clothed in different language. We have nothing in this case to do with any expenditure, for it is not suggested that there has been any. What we have to consider is whether there has been a general average sacrifice of cargo, so as to be the subject of a general average contribution by the owner of ship and freight. It is said by the defendants that there was a general average sacrifice of the coal when the ship turned off her course and bore up to the river Plate, followed as it was, by an abandonment of the voyage after the ship arrived at Buenos Ayres. To appreciate this argument it seems to me important to consider — first, the position of matters and what took place when the captain of the ship determined to bear up for the river Plate; and, secondly, what took place after the ship's arrival there. The admitted facts are that upon May 26, 1897, when the ship was on her voyage from Cardiff to Esquimault, the coals began to heat and the master decided, "for the safety of the ship, freight, and cargo, to bear up for the river Plate." I leave out of consideration the forty tons of cargo which were jettisoned, for no question now arises thereon. I do not doubt that the bearing up under the circumstances above mentioned for the river Plate was a general average act, which would have given rise to a general average contribution if, in consequence of such act, any expenses or loss to the cargo were thereby occasioned. But no question of expenses arises, for none were incurred, and there was no loss to the cargo thereby occasioned. In these circumstances, how can it be said that the bearing up for the river Plate was a general average sacrifice as regards the cargo, so as to be the subject of a general average contribution? No part of the cargo was in fact sacrificed, and *a fortiori* there was no general average sacrifice so as to be the subject of a general average contribution. For the defendants it was argued that the voyage was abandoned when the captain decided to bear up for the river Plate, but in my judgment it clearly was not. The master bore up for the river Plate and went into Buenos Ayres for the purpose, if possible, of continuing the voyage after he had got the cargo in order. He did not bear up for the river Plate for the purpose of abandoning the voyage. That was wholly foreign to his purpose. The bearing up for the river

[1] 13 Q. B. D. 69, at p. 84.

Plate was no abandonment of the voyage at all, and it is wholly erroneous to say that it was. Now the ship with the coals on board — other than those jettisoned — arrived at Buenos Ayres on May 29, 1897, and remained there till June 25, 1897, on which day the coals were condemned and ultimately sold. The admission is that "when and while the ship was at Buenos Ayres the ship and her cargo were in safety." The sale of the cargo, which, in my opinion, constituted the abandonment of the voyage, was not a general average sacrifice which forms the subject of a general average contribution, for the common danger had ceased, and the ship and cargo had then been in safety for about a month. The suggestion that the sale of the coal at Buenos Ayres was made for the common safety of ship and cargo to enable the vessel to bring her voyage and the common adventure to a successful issue will not assist the defendants; for, as was pointed out by Bowen, L. J., in Svensden *v.* Wallace,[1] a sacrifice for the safety of the common adventure does not constitute a general average sacrifice according to the law of England; nor, indeed, was it argued that it did. What was argued for the defendants was that there had been a general average sacrifice of cargo when the ship bore up for Buenos Ayres, and at that time there was a common danger. I agree that then there was a common danger, but then there was no general average sacrifice of cargo. I am of opinion that there has been no general average sacrifice in this case, and consequently the right to a general average contribution never arose, and that this appeal must be dismissed with costs. I agree with Bigham, J.'s, inference of fact that at Buenos Ayres the coal was hopelessly lost.

Appeal dismissed.

TEETZMAN *v.* CLAMAGERAN.

In the Supreme Court, Louisiana, February, 1831.

[*Reported in* 2 *Louisiana Reports*, 195.]

Porter, J.,[2] delivered the opinion of the court.

This action is brought to compel the defendant to contribute his share of a loss sustained by a vessel, of which the plaintiff was owner.

The evidence shows that the brig, on her voyage from Bordeaux to New Orleans, encountered a violent gale of wind, which broke her masts. After they were broken they hung for some time overboard, and while in that situation the captain cut the rigging which attached them to the vessel, and freed her.

The inquiry in this case is, what was sacrificed? not sound masts certainly. For before they were cut away for the general safety, or even before a determination was taken to cut them away, they had

[1] 13 Q. B. D. 69, at p. 85.

[2] Only a portion of the opinion of the court is given. — Ed.

been broken by the tempest. In the situation they were at the time the rigging was cut, and they were got clear of, they would have been the subject of particular average. Any injury they sustained, previous to the time they were sacrificed for the general benefit, cannot be the subject of contribution, for that injury was not voluntarily incurred for the benefit of all. Compensation should be made to the amount of the loss sustained, and that amount was their value at the time they were separated from the vessel. One of the English writers (Stevens) assigns for reason why masts hanging over the sides of a vessel are not a subject for general average, that the situation in which they are placed renders them of *no* value. Phillips says they are, or may be of *some* value, and that to the extent of that value they are a matter for contribution. Bouley Paty, in recognizing the rule that they properly fall under the head of *avarie grosse*, states, but they only do so, for the value they had at the time they were cut away. This appears to us the good sense of the matter, for it is quite unjust to make the freighters contribute for the full value of masts, which were already rendered scarcely of any, by an accident, or force, for which they were not responsible.[1] Bouley Paty, tit. 12, sec. 2, vol. 4446. Stevens on Average, p. 1, ch. 1, 31, a 5, Emerigon, vol. 1, ch. 12, sec. 41, p. 622. Phillips, on Ins. 333.

SHEPHERD AND OTHERS *v.* KOTTGEN AND OTHERS.

IN THE COURT OF APPEAL, NOVEMBER 27, 1877.

[*Reported in Law Reports, 2 Common Pleas Division*, 585.]

THIS was an action by shipowners against owners of the cargo for a general average contribution.

The vessel was bound for Hong Kong, and somewhere between Scilly and Lisbon she encountered a storm; portions of the rigging gave way, and from this cause the mainmast was, in the captain's language, lurching violently. He says: "We wore the ship to try to save the mast. The mainmast was lurching violently. The mainmast would not break. We wanted it to break, for the simple reason that it was lurching so heavily that I was afraid it would open the ship out. I ordered the chief mate to cut away the port rigging so that it might fall to starboard clear of the ship. The mate obeyed my order."

The first of the four experts called for the defendants stated that in his judgment it was impossible to repair the rigging so as to secure the mast, and that by cutting away the mast the captain accelerated its

[1] Johnson *v.* Chapman, 19 C. B. N. S. 563, 582; The Cargo of the Gallatin, 1 Woods, 642; Nickerson *v.* Tyson, 8 Mass. 467 *Accord*.

In some cases it has been thought that there should be no contribution, although the certainty of the loss of the thing sacrificed was not due to a peril peculiar to it, but to a peril affecting both ship and cargo. Slater *v.* Hayward Co., 26 Conn. 128 (jettison of cargo on fire); Crockett *v.* Dodge, 12 Me. 190 (sinking vessel whose cargo of lime was on fire).

going overboard, "perhaps to the amount of a minute or two, not longer than that." The second stated that it was impossible to save the mast after the rigging was gone; the third stated that with the rigging gone the mast was "as good as a wreck;" that it was impossible to save it; that if the weather did not moderate it might be looked upon as likely to go over at any moment, and that there was no reasonable prospect of the weather moderating so as to enable the crew to repair the rigging; the fourth stated that there was no chance of saving the mast.

The learned judge concluded his summing-up as follows: "You must judge for yourselves, having regard to all the circumstances, the state of the weather, the state of the sea, the rigging gone, and all the circumstances as proved by the witnesses, and there is no evidence to contradict it. Are you of opinion that that mast was virtually a wreck and valueless and gone at the time it went over?"

The jury found that the mast was a wreck; and, in answer to a further question by the learned judge, "Do you find whether it was hopelessly lost?" "Yes."

The Common Pleas Division having made absolute the rule for a new trial on the ground of misdirection,[1] the defendants appealed.[2]

BRETT, L. J. In my opinion the judge at the trial left the right question to the jury, and there was evidence upon which the jury might find for the defendants, and upon that finding no claim for general average can be maintained. Strange to say, the question before us is novel in the English courts. The definition of general average has often been discussed, and the incidents necessary to found a claim for contribution have often been enumerated; and it has been established that general average cannot exist without an intentional sacrifice, but the meaning of the word "sacrifice," and what is comprehended by it, have never before been thoroughly considered. The question before us arose, to a certain extent, in Corry *v.* Coulthard,[3] but, owing to the finding of the jury in that case, it was not there necessary to define the meaning of the word "sacrifice" so nicely as it must be defined upon the present occasion.

Unless "possibility" means either a mathematical or scientific possibility, I entirely agree with Lord Justice Bramwell that the question left to the jury by Manisty, J., was really and substantially the question which the judges of the Common Pleas Division considered ought to have been asked of the jury; but in the ordinary occurrences of life "possibility" is never used in that sense, and is not so used in any part of maritime law. In the present case the act, relied upon by the plaintiffs as the act of sacrifice, is the cutting of the port rigging in order to insure the immediate falling of the mast; and we have to determine whether the contention for the plaintiffs is correct.

[1] 2 C. P. D. 578.

[2] The statement of the case is abridged and only the opinion of Brett, L. J., is given. — ED.

[3] 2 C. P. D. 583, 584.

I shall assume, for the purposes of my judgment, that the captain, when he ordered the port rigging to be cut away, did intend to sacrifice the mast for the benefit of both ship and cargo; and I shall not assume that he believed at that moment the mast to be absolutely lost, and that he cut it away only with the object of getting rid of it. Now, consistently with the decision of this court in Corry v. Coulthard,[1] and in accordance, as it seems to me, with what was intimated by the court in that case, the following proposition may be stated: If anything on board a ship, which is cut or cast away because it is endangering the whole adventure, is in such a state or condition that it must itself certainly be lost, although the rest of the adventure should be saved without the cutting or casting away, then the destruction of the thing gives no claim for general average. Or the proposition may be stated in the following terms: Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed, that is to say, there is no sacrifice. Another form of stating the result of this proposition is to say that there is nothing in respect of which a general average contribution could be claimed, because the thing in respect of which the contribution is claimed was, when the act relied upon was done, of no value whatever to the owner. Does this proposition apply here? It seems to me that the finding of the jury upon the question left to them must mean that at the time when the act relied upon was done, namely, when the port rigging was cut away in order to cause the mast to fall overboard, the mast could not be saved, not indeed by reason of any inherent defect, but owing to the violence of the gale, the giving way of the rigging, and the impossibility of the weather moderating so as to allow it to be repaired; the mast was necessarily lost, and must have been lost to its owners, whether the vessel should or should not be saved; or, in other words, that though the ship should outlive the storm, and though the mast should not be cut away, it would fall overboard and be lost in the space of a few minutes; there was no possibility, of which human foresight could take account, of the storm abating, so as to enable the mast to be secured, and the mast was lost whether it was or was not cut away. Under these circumstances it seems to me that there was no sacrifice of the mast, that the act relied upon caused no loss to the owners, and therefore that no claim for general average can be sustained.

I may add that what distinguishes this case from Corry v. Coulthard[1] is that there the jury found that it was possible to save the mast; it follows that in Corry v. Coulthard[1] the mast was of some value, and the facts of that case did not fall within the proposition which I have endeavored to lay down.

Judgment reversed.

[1] 2 C. P. D. 583, 584.

JOB AND ANOTHER v. LANGTON.

IN THE QUEEN'S BENCH, JUNE 11, 1856.

[*Reported in* 6 *Ellis & Blackburn*, 779.]

THIS was a case stated, without pleadings.

On the 16th March, 1855, the plaintiffs, who are shipowners in Liverpool, and owners of the barque Snowdon, effected with the defendant, who is an underwriter in that port, a policy of insurance upon the barque Snowdon, valued at 6500*l.*, at and from Liverpool to Saint John's, Newfoundland.

The vessel sailed from Liverpool, with a general cargo, on 20th March, 1855; and, in consequence, it is believed, of the compasses not having been properly adjusted, the same night ran ashore in Malahide Bay, on the coast of Ireland. The vessel, at low water, was high and dry; and it became necessary to discharge the whole of the cargo and the ballast before she could be got off. After the cargo was discharged, and placed in store at Dublin, the vessel was got off, at considerable cost, with the aid of a steam tug, and by cutting a channel for the vessel. The vessel was then towed to Liverpool, where she could be examined and repaired better than at Dublin. The steam tug did no work at the ship until after the cargo was landed, and the coals and ballast taken out of her. In order not to lose the market at Saint John's, the cargo was transshipped at Dublin on board another vessel, and forwarded to its destination. By mutual agreement the circumstance that the cargo was not kept for the Snowdon was not to affect the question in this case, which was to be disposed of as if the Snowdon, after being repaired, had carried on the cargo.

The question for the opinion of the court is, Whether the expenses incurred in getting off the ship and taking her to Liverpool for repair, after the entire cargo was discharged, were chargeable to general average, or to particular average on the ship alone. If they are chargeable to particular average, the plaintiffs are to be entitled to judgment for 4*l.* 9*s.*; if they are not so chargeable, judgment is to be entered for the defendant.[1]

LORD CAMPBELL, C. J., now delivered the judgment of the court.

Upon the question submitted to the court in this case, we are of opinion that the expenses incurred in getting off the ship and taking her to Liverpool for repair, after the entire cargo was discharged and in safety, are not chargeable to general average, but are chargeable to particular average on the ship alone.

There is no decision on the specific point; and there is no mercantile usage stated to guide us. We must, therefore, resort to the general principles on which this head of insurance law rests. We begin with the definition of general average by Lawrence, J., in Birkley *v.*

[1] The statement is abridged and the arguments are omitted. — ED.

Presgrave,[1] "All loss which arises in consequence of extraordinary sacrifices made or extraordinary expenses incurred for the preservation of the ship and cargo," meaning "for the joint benefit of ship and cargo." Here it cannot be said that there was any *sacrifice*, as in case of jettison of part of the cargo, or voluntarily cutting away masts or sails of the ship. The stranding was fortuitous, arising directly from perils of the sea. The expenses, to constitute general average, must therefore be brought within the second category, "extraordinary expenses incurred for the joint benefit of ship and cargo." They were extraordinary expenses not to be ascribed to wear and tear, and therefore to be borne by the underwriter: but are they to be considered as incurred for the joint benefit of ship and cargo, so that a portion of them ought to be borne by the owner of the cargo, or the underwriter of the cargo? Although the stranding was fortuitous, all expenses incurred from the misadventure till all the cargo had been discharged confessedly constituted general average. But how can it be said that the subsequent expenses in getting off the ship and taking her to Liverpool for repair were of the same character? The employment of the steam tug, and the cutting of the channel by which the ship was rescued, cannot, as was contended for, be part of the same operation as the unloading of the cargo; for the case expressly finds that "the steam tug did no work at the ship until after the cargo was landed, and the coals and ballast taken out of her."

We therefore do not see how these expenses are to be distinguished from the expenses of repairing the ship when she had been brought to Liverpool, which, it is admitted, must fall exclusively on the owner of the ship or the underwriter on the ship, as particular average. If the owner of the ship was to earn the stipulated freight by carrying the cargo to Newfoundland, it was his duty to repair her and to carry her to a place where she might be repaired. Mr. Blackburn's position, that, the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate this give rise to general average, would justify him in contending that these expenses do not constitute particular average: but, unfortunately for him, the expenses incurred in repairing the ship at Liverpool, according to this reasoning, would equally be general average; for the repairing of the ship was an extraordinary act which was necessary for the arrival of the ship with her cargo at Newfoundland, and was as much for the joint benefit of ship and cargo as bringing her to Liverpool from Malahide Bay.

Under the circumstances stated, after the cargo had been safely discharged and warehoused, it does not even appear that it was for the advantage of the owner of the cargo that The Snowdon should be got off the strand and repaired. Of course we do not, contrary to the intention of the parties, attach any importance to the fact that the cargo was forwarded in another vessel; and we shall give our decision as if The Snowdon, after being repaired, had carried the cargo to its ulti-

[1] 1 East, 228.

mate destination. But, in the absence of any statement to the contrary, we might infer (as the fact turned out to be) that there would be no difficulty in forwarding the cargo by another vessel. We do not say that there may not be a case where, after a fortuitous stranding of the ship and the cargo has been unloaded, expense voluntarily incurred by the owner of the ship to get her off, and to enable her to complete the voyage, whereby the cargo, which otherwise must have perished, is carried to its destination, may be general average; as the stranding of a ship with a perishable cargo on a desert island in a distant region of the globe. But, in the present case, the owner of the ship, after the cargo was discharged, appears to us to have done nothing except in the discharge of his ordinary duty as owner, and for the exclusive benefit of the ship. Notwithstanding some expressions of Lord Ellenborough in Plummer *v.* Wildman,[1] we consider it quite settled that, by the law of this country, the expenses of repairing the ship, or, after the cargo is safe, of bringing her to a place to be repaired, cannot, under such circumstances, be made the subject of general average.

We have examined all the authorities cited in the argument: but, not considering that there would be any use in now further commenting upon them, we give judgment against the defendant, as underwriter on the ship, in respect of the sum due for the expenses in question as particular average.[2]

Judgment accordingly.

THE ROYAL MAIL STEAM PACKET CO. *v.* THE ENGLISH BANK OF RIO DE JANEIRO.

IN THE QUEEN'S BENCH DIVISION, JULY 23, 1887.

[*Reported in Law Reports*, 19 *Queen's Bench Division*, 362.]

WILLS, J.[3] In this case the owners of the Tagus claim contribution by way of general average from the owners of specie carried by her on a voyage from Rio to Southampton under the following circumstances.

The Tagus grounded off the island of Itaparica, about fifteen miles from Bahia, at 2.30 A. M. on June 27, 1886. She grounded on a coral reef, on one part or another of which, with slight variations of position, she remained till the evening of July 2. The sea was running high, and very shortly after she struck seas broke over which continually swept the decks and washed away the cutter. She was exposed to the unbroken force of the Atlantic rollers, and I cannot doubt that

[1] 3 M. & S. 482, 486 (E. C. L. R. vol. 30).
[2] Matthew *v.* Mavrojain, L. R. 5 Ex. 116 *Accord.*
Compare Moran *v.* Jones, 7 E. & B. 523. — ED.
[3] Only the judgment of Wills, J., is given. Grantham, J., concurred. — ED.

she was from the first and remained to the last in a position which threatened the destruction alike of ship and cargo, and which made it necessary that extraordinary sacrifices should be made and extraordinary expenses incurred to save the ship and cargo. In the forenoon of the day on which she struck, June 27, the master began to land his passengers and their baggage, and completed this operation on the 28th. About 10 o'clock on the 28th he landed the specie, of which 25,000 sovereigns belonging to the defendants formed a part.

The vessel lay about 2½ miles from the shore, and very nearly opposite to a fishing village called Arituba, consisting of a few huts. The island is from 12 to 14 miles long, mostly uninhabited, but about 4 miles off is a small town called Catu, on the western coast of the island. A small steamer plies several times a week between Catu and Bahia, distant about 20 miles. The specie was landed at Arituba and placed there in a hut hired for the purpose, and remained there in charge of the purser and doctor, from June 28 to July 2, when the purser handed it over to a Brazilian custom-house officer, under the charge of whom, accompanied by the purser, it was on July 3 taken across the island to Catu and there put on board a small steamer sent from Bahia by the plaintiffs' agent. A file of soldiers had been sent from Bahia by the president of the province on July 1, and placed at the disposal of the captain, and they guarded the specie from their arrival till it left Catu, and escorted it on the steamer to Bahia, where it was handed over to the plaintiffs' agent, and by him forwarded to Southampton by the Elbe, under an agreement between the plaintiffs and defendants, by which they agreed to pay general average as if it had come by the Tagus.

The master of the Tagus finding her immovable sent away the second officer with the mail boat about 8 A. M. on June 27. Her position on the reef had been ascertained at 3.30 A. M., when she had 4 fathoms of water under her bow and 3½ under her stern, so that she must have been resting on the reef somewhere between bow and stern, and there can be no doubt that she was in a position of great peril. The plaintiffs' agent at once proceeded to engage lighters and tugs at Bahia to proceed to the assistance of the Tagus, and I have no doubt from this fact that the master had sent him word that it would be necessary to lighten the vessel in order to get her off. The mail boat with the officer in charge returned to the ship about 8 P. M. of the 27th. The first steamer sent by the agent arrived near the Tagus in the forenoon of the 28th, but the weather appears to have been too heavy to admit of her rendering any assistance, or even to allow communication between the agent's clerk who was on board her and the stranded vessel, and about mid-day she steamed back to Bahia. In the night, between the 28th and 29th very heavy rollers set in from the south, and about 5 A. M. the master came to the conclusion that the only means of saving the vessel was to jettison the cargo, and the crew worked at getting cargo overboard the whole of that day. A tug arrived in the evening of the 29th, and on June 30

and July 1 several other tugs followed. The work of jettisoning cargo and coals went on till the evening of July 2, the tugs hauling on to the ship and the ship's engines working at each high water. The hawsers parted repeatedly, and it was not till the evening of July 2 that the steamer floated. Lighters had been sent out to the ship to save if possible some of the cargo that had to be taken out, but the weather was too heavy to permit of their being used, except one, which carried some of the passengers' effects ashore. The steamer proceeded the next morning, July 3, under her own steam to Bahia, where she arrived a few hours before the small steamer with the specie. A portion only of the cargo had been jettisoned, and the Tagus was so far uninjured that she proceeded without repairs to Southampton with the remainder of her cargo on board, which she delivered in good order. She could have carried on the specie, but it was carried by the Elbe at the request of the defendants and under the agreement hereinbefore referred to.

The plaintiffs contend that the specie is liable to contribute by way of general average to the loss by jettison and the expense of getting the ship afloat, and the cost of landing, guarding, transporting, warehousing, and reloading the specie. No attempt has been made on either side to draw a distinction between the claim in respect of jettison and that in respect of the cost of tugs and the like, and for the purposes of this case I treat these two heads of claim as standing on the same footing.

The case is in one important respect peculiar. There is no question as to circumstances having arisen which gave rise to a general average loss. It is not suggested that cargo generally is exempt, nor is it denied that the goods remaining on board and the goods jettisoned, alike must bear their share of the common loss, but it is said that, so far as the specie is concerned, it was in a place of safety before any of the loss or expense was incurred, and that the expense of landing, guarding, transporting, warehousing, and reloading the specie, are particular average chargeable on the specie alone and are not general average at all. The question is not, therefore, whether the circumstances are or are not such as to make cargo, as distinct from ship and freight, liable to general average, nor whether, granting that cargo is liable to general average, the liability extends to this or that head of damage or expenditure, but whether one particular parcel of the cargo is exempt from the general burden. It is true the question is raised whether the specie is liable by way of general average contribution to bear its share of the expenses incurred for landing and guarding it and for transporting it to Bahia, but this seems to me to come pretty much to the question whether the specie is or is not liable to contribute to general average. If it be so liable, these expenses can hardly be particular average. If it be not, they certainly cannot be general average.

The cases, therefore, which deal with the liability of the cargo as a whole differ so materially in their circumstances from the present

case that they can hardly be said to govern it, and it is to the principles they lay down and illustrate rather than to actual precedent, of which there is a singular dearth, that we must look for the solution of the question.

I take it to be settled now that the circumstances which impose a liability in the nature of general average must be such as to imperil the *safety* of ship and cargo and not merely such as to impede the successful prosecution of the particular voyage. Svensden *v.* Wallace; Harrison *v.* Bank of Australasia.[1] I take it also to be settled that if the cargo as a whole be landed and in safety the expenses of getting the ship afloat incurred thereafter are not general average. Job *v.* Langton,[2] a case with which Moran *v.* Jones[3] has been supposed to conflict, but which does not seem to me, so far as principles are concerned, to be open to that observation. It is the decisions, if anything, which are at variance, not the principles upon which they are based. The Master of the Rolls has stated in Svensden *v.* Wallace that the *decision* in Moran *v.* Jones[3] cannot be supported, and I refer to the case therefore only to show that it has not been overlooked. Where the cargo as a whole is safely landed, the shipowner has his ship as she lies, either supposed to be worthless, in which case she will be left where she is, or supposed to be worth something to him, in which case he will be held to spend the money necessary to rescue her on his own account and for his own purposes only, in which case the expenditure cannot be the subject of general average.

These principles, though they deal with different epochs, so to speak, in the chain of events which give rise to general average, the first dealing with the state of things at the commencement of the liability, and the other with a state of things at which the liability has terminated, have this in common. Both point to the necessity, in order to establish a case of general average, for the existence of common danger of destruction at the moment when the liability is incurred. This necessity is laid down as the cardinal element necessary to establish a general average contribution in Arnould on Insurance, p. 917 (1st ed.), p. 934 (2d ed.), where the learned author says: "All which is ultimately saved out of the whole adventure, *i. e.*, ship, freight, and cargo, contributes to make good the general average loss, *provided it have been actually at risk at the time such loss was incurred, but not otherwise*, because if not at risk at the time of the loss, it was not saved thereby." This, however, is not a complete statement of what things are liable to general average, for goods jettisoned themselves contribute, and after they are thrown overboard they are no longer at risk: and yet no one ever contended that as each parcel or bale went over the side and was swallowed up by the waves, its liability to be carried into the account of future general average ceased, leaving the burden to be borne in a continually increasing ratio by the ship and its continually decreasing contents. It seems to follow that the loss spoken of must be regarded as a whole, and as that re-

[1] Law Rep. 7 Ex. 39. [2] 6 E. & B. 779. [3] 7 E. & B. 523.

sulting from a continuity of operations. Mr. Arnould's proposition, to make it complete, must be amplified. Property, I think it may be said, whether ultimately saved or jettisoned, actually at risk at any time during which the operation causing loss has been going on (comprehending under that phrase all such acts as may be properly considered as forming together one whole), is liable to contribution, provided that in consequence of that operation the whole adventure be preserved from destruction, because, if it was not at risk during any part of that time, no adventure of which it formed one of the constituents was saved by the operation. It is clear that Mr. Arnould's "loss" includes both jettison and expenditure to save ship and cargo from destruction.

It is obvious that if, in such a case, portions of cargo removed from the ship instead of being jettisoned are carried on shore in lighters and put in a place of safety, or are kept in the lighters and ultimately replaced in the ship, questions may arise whether such treatment is to be considered as the equivalent of jettison, or as the equivalent of remaining on board the ship, in either of which cases, as it seems to me, the liability to general average must ensue, or as a removal of a totally different character not subjecting the goods to contribution. If the object of the removal has been the lightening of the ship for the common safety, and the object of effecting the removal in such a fashion as to avoid jettison has been to do to that which must be got overboard something less wasteful than actual jettison, there seems to be no reason whatever for drawing a distinction between such a case and that of actual jettison, so far as liability to general average is concerned. But if the lightening of the ship formed no part, or no appreciable part, of the purpose for which the removal was effected, if the object of the removal was not to minimize the cost of jettison but to get out of harm's way the thing removed and to prevent it from being or remaining at risk at all, it seems to me that a different result may very well ensue, and that a portion of cargo landed under such circumstances may well be regarded as separated from the adventure, and no longer liable to contribution. There is authority for saying that the purpose for which an act causing loss is done may determine whether it constitutes general average or not. It is said in Abbott on Shipping, 7th ed., p. 479, to have been "considered" that where bullion was thrown overboard to escape capture by an enemy the loss was not general average, and the author gives as the reason that the jettison in case of pursuit by an enemy, in order to constitute a case of general average, must be for the purpose of saving ship and cargo by lightening her and increasing her speed. A reference is given to Butler *v.* Wildman.[1] The question in that case was whether such a loss was covered by a policy of insurance. It was said incidentally by Holroyd, J., that jettison under these circumstances would not be general average, and the observation is but an *obiter dictum*, but it is adopted by Lord Tenterden, and shows that the purpose for

[1] 3 B. & Ald. 398.

which an act causing loss is done must be regarded in determining whether it gives rise to general average contribution, and it illustrates the principle that if the act be not done to avert some danger common to ship and cargo, it does not constitute a case of general average. Mr. Lowndes has some pertinent observations in a passage dealing with the case where the ship and cargo are placed in a situation which may probably but not certainly result in total wreck. In the earlier stages he points out the difficulty of saying whether what is done is for the common safety or for the rescuing of the property piecemeal, and expresses the opinion that the purpose rather than the result shall govern the allowance, adding a warning against the natural tendency "to accept accomplished facts" and to settle the question of purpose by reference to the result (Lowndes on General Average, 3d ed., p. 147).

Cases, no doubt, may occur in which it may be difficult to say whether the purpose for which goods are removed is that of lightening the ship or of saving the goods, and there will no doubt from time to time be instances in which it is impossible to separate the one purpose from the other. "The mere fact that the cargo is unladen, although it is done in part for the purpose of saving the goods, yet if it is also done for the purpose of lightening the vessel and as a means of causing her to float, and of saving her from the common peril will not necessarily divest the transaction of its character as an act performed for the joint benefit of ship and cargo." McAndrews *v.* Thatcher,[1] in the Supreme Court of the United States. It is impossible with reference to such a matter to lay down any rigid or inflexible rule. The question will be one of circumstance and degree, and each case must depend upon its own facts. In the present instance, however, there seems to me to be no room for reasonable doubt that the predominant and probably the only object aimed at in sending the specie ashore was to put it beyond the reach of the peril to which the ship and the rest of the cargo remained exposed. From the fact that the master sent the mail boat to Bahia as early as possible and that the agent there immediately set to work to hire tugs and lighters, I have no doubt that it was present to the mind of the master very soon after the ship grounded that it would be necessary at all cost to lighten her, and that the jettison was delayed only because he hoped to be able to substitute for it the less disastrous expedient of getting the cargo ashore or into lighters. But I have equally little doubt that the specie was sent ashore not to lighten the vessel but to put such valuable property beyond the reach of possible danger by reason of the ship's breaking up or going to the bottom when she came off. What is the first step we always hear of when a vessel is wrecked? That the passengers and specie are put ashore. Specie is seldom aboard in quantities large enough for its removal to make any appreciable difference to the ship's chances of getting off when aground. The whole of the specie in this case weighed we are told

[1] 3 Wallace, 347, at p. 370.

about a ton and half. The Tagus is a vessel of some 3000 tons burthen. The ease to the vessel could be nothing at all. The combined value and smallness of total weight would be certain in any case to save the specie from jettison. Its value and the facility with which it could be got ashore would be certain, in any case where it was possible to land it, to save it from being left on board, and I cannot doubt that its removal was carried out not in any sense or degree as a means of securing the common safety of ship and cargo, but simply for the purpose of saving the specie itself. I think, therefore, that when the general average loss was incurred, in whatever sense, restricted or enlarged, that phrase can be properly used, it had ceased to be at risk, that upon no reasonable view of the facts can its removal be considered as a part of the means taken for saving any common adventure. I am consequently of opinion that it is not liable, using the words of the special case, "to contribute to the jettison or to any of the expenses of getting the ship off the ground incurred after it was landed."

It is objected that the master has no right to prefer one part of the cargo to another, and to favor it at the expense of the rest. I make two answers. First, it is not a question of what the master had a right to do, but of what was done. He may have acted wrongly, but it is none the less the fact that the specie *was* landed, and was landed with the object of putting it out of the way of danger and not of helping the general adventure. Secondly, I do not see any reason to suppose that it was favored at the expense or to the detriment of the chances of the rest of the adventure. The objection, moreover, is founded, I think, upon an erroneous view of the master's duty in such a case. It was laid down in the very learned and elaborate judgment of the Exchequer Chamber delivered by Willes, J., in Notara *v.* Henderson,[1] that a shipowner is a bailee of the goods entrusted to him for carriage in his ship, and that although exempt under the bill of lading from the absolute liability of a common carrier, he is yet bound to use reasonable care in respect of the goods he carries, and it follows that if the master, when it was easy to land the specie, neglected so to do and it was lost in consequence of his neglect, the shipowner would be liable. The master of a ship is under the same obligation as every one else having duties to perform to act as a reasonable man in performing them. Specie, owing to its small bulk, can be placed in safety with exceptional facility. Its great value makes it exceptionally desirable to save it if possible. Suppose that two boxes of equal bulk and equal weight lay side by side in the ship's hold, and that one was filled with gold and the other with iron, and that only one could be saved, would any one contend that a master who saved the iron in preference to the gold would be acting reasonably? It is pointed out in the judgment of the Exchequer Chamber in Notara *v.* Henderson[2] that many of the Continental codes

[1] Law Rep. 7 Q. B. 225, at p. 235.
[2] Law Rep. 7 Q. B. 225.

expressly recognize and enforce the duty of the master in such a case to place the more valuable article in safety before the other.

This observation answers another objection that was raised. To decide that the specie was not liable to general average contribution would, it was said, be to hold out an irresistible temptation to the master to leave the specie at all events on board so as to insure its contribution to general average. A jury or any other tribunal having to determine whether the specie had been lost through the negligence of the master would, I should think, make very short work of it, if it were shown that when it was easy to save the specie without adding to the difficulties of either ship or cargo in general, the master had forborne to do so in order to make certain that it should not escape contribution to general average. Moreover, there are two sides even to that question. The specie might in the end be lost though the ship and the cargo in general, or a substantial portion of it, were saved, and then the amount of general average to be made up in part by the ship and the cargo would be enormously increased. I cannot but think that the danger suggested is chimerical, but whether it be real or imaginary, it is no reason for departing from the clear and well-established principles which appear to me to govern this case. I am therefore of opinion that our judgment should be for the defendants.