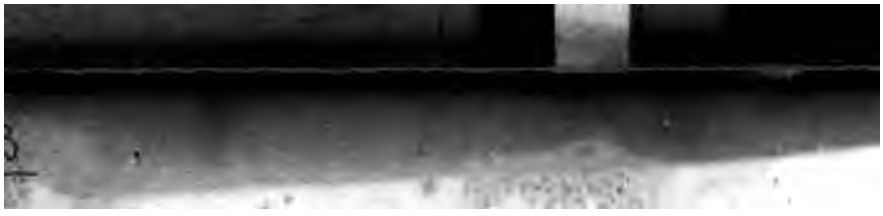

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Hon. John J. Gilchrist

with the respects of

E. H. Davis

REPORTS

OF

CASES DETERMINED

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF MAINE,

WITH SOME OPINIONS OF THE DISTRICT JUDGE

IN CASES DETERMINED IN

THE CIRCUIT COURT.

1839 — 1849.

BY EDWARD H. DAVEIS,

COUNSELLOR AT LAW.

PORTLAND:

PRINTED BY THURSTON & CO.,

1849.

This volume contains a selection of cases in the District Court, principally in Admiralty, decided by Judge Ware since the publication of Ware's Reports, and also some opinions pronounced by him in cases decided in the Circuit Court.

The Note upon the Admiralty Jurisdiction, on page 93, was written out at the request of the Reporter, while the printing was in progress.

The decisions in Bankruptcy, which formed the great mass of the business in the District Court, for some years after the act went into operation, have been omitted, excepting a few cases presenting points of more general application.

The rubrics have been prepared under direction of the Judge, and are generally given as made by him at the time the cases were decided.

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REPORTS OF CASES

DECIDED IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

DISTRICT OF MAINE.

UNITED STATES VERSUS BARTLETT.

The enrollment of a vessel by a Collector, without the oath of one of the owners having been previously taken and subscribed in conformity with an act of Congress of Feb. 18th, 1793, sect. 2, is void, and does not confer on her the rights and privileges of a vessel of the United States.

A vessel thus enrolled is not entitled to claim the fishing bounty under the act of July 29, 1813, sect. 5.

If the bounty has been improvidently paid to a vessel so enrolled by the Collector, it may be recovered back by the United States in an action for money had and received.

Money paid by an agent under a mistake of the legal obligation of his principal may, it seems, be recovered back by the principal in an action for money had and received.

December Term, 1839. This was an action of assumpsit, brought by the United States, to recover back the amount of a fishing bounty, paid to the defendants, as owners of the Schooner Gleaner, for the fishing season of 1834. The jury returned a special verdict. The verdict finds that the vessel was employed during four months, in the fishing season of that year, in the cod fisheries, and if, on the facts agreed

upon by the parties, and to be taken as part of the finding of the jury, the Court is of the opinion, that she was a vessel duly qualified according to law to carry on the fishing business, then the jury find that the defendants never promised; but if, in the opinion of the Court, she was not duly qualified as aforesaid, then the jury find that they did promise in manner and form as the plaintiffs have declared, and assess damages in the sum of $294.91.

The agreed facts, which are to be taken as part of the finding of the jury, are in substance as follows: The schooner was enrolled at Thomaston, in the District of Waldoborough, on the 17th of May, 1834, and was then owned, and continued to be owned during the whole of that year, by Elbridge G. Wellington, of Boston, in the District of Massachusetts, and George Bartlett and Knott Bartlett, both of St. George, in Maine District. The oath of ownership was not taken and subscribed by either of the owners during the year, but the oath touching the ownership was taken by John Bickman, the master, and the jury further found that enrollments in that office were occasionally made, as a matter of convenience, on the oath of the master only. The same day on which the enrollment was made, the Deputy Collector granted a license to the vessel to be employed in the cod fishery that season; and the license bond was given in the usual form by said Bickman. This license was surrendered by Bickman, August 29th of that year, and a new license taken out for the mackerel fishery, which was, October 24th, surrendered by Bickman, and another license taken out for the cod fishery. In each case the license bond was given by Bickman, the master. The last license was surrendered Nov. 24, 1834.

The jury further found, that no agreement was made in writing between the skipper and the fishermen, except a blank agreement in print, which was signed by the fishermen, but not filled up. But it was proved by parol, if competent to be so proved, that a verbal agreement was made

between the skipper and the crew, by which each man was to receive an equal share of the fish taken, in lieu of wages; and it was further proved, that in the fishing business it was frequently the case, that is, half the time or more, that the shipping paper was brought in not filled up, or was not filled up until the time was completed; and that no objection had been made on that account to the payment of the bounty. The bounty was paid to George Bartlett, January 1st, 1835.

The case was argued by *Howard*, District Attorney, for the plaintiffs, and *Fessenden & Deblois*, for the defendants.

Howard, for the plaintiffs, cited Laws of the United States, 1813, ch. 34, sect. 5 and 8; do. 1819, ch. 212; do. 1793, ch. 52, sect. 1 and 2; do. 1792, ch. 45, sect. 4; do. 1791, ch. 102; *United States* vs. *Rogers*, C. C. of the U. S. at Rhode Island, June Term, 1839; *Johnson et al.* vs. *United States*, 5 Mason, 442; *United States* vs. *Hoar*, 2 Mason, 314; *United States* vs. *Lyman*, 1 Mason, 504.

Fessenden & Deblois, for the defendants, cited The Elizabeth, 5 Robinson, 2; The Santissima Trinidad, 7 Wheat. 223; Laws of U. S. 1792, ch. 45, sect. 5; do. 1793, ch. 52; The Two Friends, 1 Gall. 112; *Ohl* vs. *The Eagle Ins. Co.*, 4 Mason, 172; *Heath* vs. *Hubbard*, 4 East. 110; *Ratchford* vs. *Meadows*, 3 Esp. 69; Abbot on Shipping, 67; *United States* vs. *Hathaway*, 3 Mason, 324; *United States* vs. *Tappan*, 2 Mason, 393; *Child* vs. *Schoonmaker*, 1 Wash. 419; *Washburn* vs. *Blount*, Gilpin, 452; *Ketland* vs. *Lebering*, 2 Wash. C. C. R. 201; The Harvey, 2 Haggard, 79.

WARE, *District Judge.*

This suit is brought by the United States to recover back the amount of a fishing bounty alleged to have been unduly paid to the defendants on the Schooner Gleaner, for the fishing season of 1834. The language of the act granting the bounty is, that from and after the last of December, 1814, there shall be paid, on the last of December, annually, to the owner of every vessel, that shall be duly qualified,

agreeably to law, for carrying on the bank and other cod fisheries, and that shall have been actually employed therein at sea for the term of four months at least of the fishing season next preceding, for each and every ton of such vessel's burthen, &c., a sum fixed by the law, provided that the allowance to no one vessel for a single season shall exceed 272 dollars, which is enlarged by the act of 1819, ch. 212, to 360 dollars. *Laws of the U. S.* 1813, ch. 34, sect. 5, *Story's Ed. vol.* 2, *p.* 1352.

The title of any vessel to claim the bounty, depends, therefore, upon two facts; First, on her being duly qualified according to law, for carrying on the fisheries; and Secondly, on her actual employment in the business for four months during the fishing season. The fact of her actual employment is found by the jury, but whether she was duly qualified or not the jury say that they are not advised, and they find the facts specially touching this point, and refer the question of law arising from them to the judgment of the Court. The facts being found, the decision of the question depends on the proper construction of the License and Registry acts.

The act of February 18, 1793, sect. 1, commonly called the license act, provides that vessels enrolled and licensed in pursuance of that act, "and *no others*, shall be deemed ships or vessels of the United States entitled to the privileges of ships and vessels employed in the coasting trade and fisheries." The second section provides, "that in order to the enrollment of any ship or vessel, she shall possess the same qualifications, and the same requisites, in all respects, shall be complied with, as are made necessary for registering ships or vessels by the act of December 31, 1792, and the same duties and authorities are given and imposed on the officers in relation to such enrollments, and the same proceedings shall be had in similar cases, touching such enrollments; and the ships or vessels so enrolled, with the master or owners, shall

be subject to the same requisites as are provided for vessels registered by virtue of that act." To determine then whether a vessel has been duly enrolled, so as to secure to her the privileges of an American vessel, it is necessary to examine the registry act. The provisions of that act, the non-compliance with which is supposed to vitiate the papers of this vessel, are found in the fourth section. That requires "that in order to the registry of any ship or vessel, an oath or affirmation shall be taken and subscribed by the owner, or one of the owners, before the officer authorized to make the registry, declaring, according to his best knowledge and belief, the name of the ship or vessel, her burthen, the time and place when and where she was built, &c., and enumerating all the particulars required by the second section of the act to entitle a vessel to be registered, and then provides that in case any of the matters of fact in the oath, which shall be within the knowledge of the person swearing, shall not be true, that there shall be a forfeiture of the ship, her tackle, &c., or of her value, to be recovered of the person by whom the oath is taken." And there is also a provision that if the master is within the district, he shall make oath to his own citizenship.

In this case no oath was taken by either of the owners, but the vessel was enrolled on that of the master alone, in swearing to the same facts, which should be verified by the oath of an owner. It is very certain that the words of the law give no authority to the officer to grant a certificate of enrollment, under such circumstances. The act expressly says, that in order to the registry of a ship, and the same is required for an enrollment, an oath shall be taken by the owner or one of the owners. The oath of the master is not required, except as to his own citizenship; and that may be dispensed with, provided he is not within the district, and that of the owner substituted in its stead. But no authority is given to the officer to substitute the oath of the master for that of the owner. It is clear, then, unless the construction

of the act can be maintained, which will presently be considered, that the enrollment of the vessel was an improvident and unauthorized act. But it is also clear that the enrollment was not procured by any fraud or deceit, for the certificate on its face shows who the owners were.

Does an enrollment thus made by the proper officer, without any imputation of fraud or deceit on the part of the owners, but without a compliance with the requisites prescribed by the statute, clothe the vessel with the rights and privileges of a vessel of the United States? It is contended that it does;—that the act of the officer, the duly authorized agent of the plaintiffs, in a case free from fraud or collusion, is binding on the United States;—and that papers thus obtained are conclusive evidence that the vessel is entitled to the privileges which the papers purport to grant.

The effect of this decision, it is plain, will be to render the provisions of the act, so far as the consideration of them is involved in the present controversy, merely directory. Such a construction appears to me to be wholly inadmissible. The first section of the act provides that vessels which shall be enrolled *in pursuance* of this act, and *no others*, shall be deemed ships or vessels of the United States, and entitled to the privileges of vessels employed in the coasting trade and fisheries. A vessel enrolled in pursuance of the act, is one enrolled in conformity with its directions and requirements. These are enumerated in the first eight sections of the registry act, and the ninth provides, that "the several matters hereintofore required having been complied with," the collector shall grant the certificate. It seems, at the first view, that the collector is not authorized to grant the certificate without a compliance with all the requirements of the act. Still, though the first section of the act declares that no other vessels than those enrolled in pursuance of the act, shall be entitled to the privileges of enrolled vessels, and the ninth section apparently exacts a compliance with all the re-

quirements, previously to the issuing of the certificate, it may perhaps appear, on a critical examination of the act, that an omission to comply with some of its directions, previous to the enrollment, will not absolutely vitiate and render void the ship's papers. This is, however, a question which it is not necessary to decide in the present case. And should it be conceded, that some of the clauses in the first eight sections are essentially directory to the officers, a strict compliance with which is not absolutely indispensable to the validity of the ship's papers, it appears to me that the provisions of the fourth section cannot be admitted to be of that character. That section requires, in order to the registry of a ship, that an oath shall be taken and subscribed by the owner or one of the owners, verifying the matters therein stated. The matters of fact included in the oath, besides several others, are all those enumerated in the second section, as being essential to entitle a vessel to be registered, and it is provided that if any of the matters of fact, within the knowledge of the person swearing, are not true, there shall be a forfeiture of the vessel, in respect to which the oath is taken, or of her value, to be recovered of the person by whom the oath or affirmation is made. Besides, some of the facts, required to be sworn to, are of a nature not to be known by any but the owners; as whether any foreigner has a secret interest in the vessel, by way of trust or confidence. If the master's oath may be substituted for that of the owners, he can only swear according to his knowledge and belief. A secret trust may exist in a foreigner, without his knowing it; and the only way, in which that can be effectually guarded against, is by requiring the oath of the owners. It would be an entirely unjustifiable construction of this section, to hold it to be merely directory to the officer, as to the manner in which he is to execute his duty; and that it may be neglected by the owner, without any peril to his interest, provided the officer chooses from any cause to grant a certificate without requiring the oath, or to accept that of the

master instead of the owners. But if any doubt could be raised as to the proper construction of this section of the act standing by itself, it would be removed by the 5th section. That requires, when papers are granted on the oath of one of the owners, that the other owners shall, within three months after, transmit to the collector, who granted the papers, a similar oath, or the papers shall be forfeit and void. If an oath of an owner can be dispensed with in the first instance, and valid papers granted without it, there would seem to be little reason in rendering them void, on a neglect by the other part owners to transmit a similar oath.

But it is said, that while the license act requires the same qualifications of the vessel, and makes the same requisites necessary for the enrollment, as for the registry, of a vessel, it no where denounces the same penalties and forfeitures. This is true; but if the construction, now given to the act, be correct, this does not reach the difficulty of the defence of this action. This is not a suit for a penalty, but to recover back of the owner a sum of money alleged to have been unduly paid. The question is not whether the vessel has forfeited the privileges of an enrolled vessel, but whether, under this enrollment, she can have acquired them.

Another ground of argument urged in the defence is, that the enrollment having been regularly made, by the proper officer, without any imputation of fraud on the part of the owners, the certificate is conclusive proof that the vessel is entitled to the privileges which it purports to grant, and that the act of the officer, being the authorized agent of the plaintiffs, is conclusive upon them.

It is true that in some cases a ship's papers are conclusive, and a party is not at liberty to contradict them. They are conclusive, in questions of prize, against the claimants, to show the national character of the ship. 5 *Rob.* 2; 7 *Wheaton*, 283. They are conclusive also against the insured, in a suit on the policy, to prove the ownership to be as the papers

represent it. 4 *Mason*, 172, 390. A party will not be permitted to deny the verity of documentary evidence, which he has himself procured, and the benefit and protection of which he has enjoyed. But in neither of these cases would the opposite party be concluded by the ship's papers. They would be allowed to disprove their truth by every species of legal evidence. If the grant of this certificate had been the personal act of the plaintiffs, certainly they would not easily be allowed to deny its validity, issued as it was with a full knowledge of the facts. But it is no otherwise their act than as it was done through the instrumentality of their agent. The law of agency is well settled. The act of the agent is not considered as the act of the principal, except when it is within the limits of his authority. If he transcends his authority or violates his instructions, the principal may repudiate the act as void, unless from the course of dealing, those who treat with the agent are justified in inferring that he is clothed with larger powers or entrusted with a wider discretion. But in this case the authority of the agent and his instructions are found in the public laws, which the defendants, like all other persons, are bound to know. There is therefore no pretence for saying, that the act of the agent is binding on the principal, unless it is fairly within the limits of his authority. So that we are brought back to the question, whether the officer was authorized to make the enrollment without the oath of one of the owners, or in other words, whether the provisions of the 4th section of the registry act are merely directory to the officer, to regulate his discretion in the execution of his trust, or whether a compliance with them is an indispensable prerequisite to the validity of the enrollment.

Another point of the defence, strongly insisted upon at the hearing, turns rather upon the form of the action. This is an action for money had and received, which, it is argued, is a strictly equitable action, and lies only when a party has received money, which, *ex æquo et bono*, he ought to re-

fund; that when a party is, by the general principles of equity and good conscience, entitled to retain the money, it cannot be recovered in this form of action, though the party might not have been able, upon the strict principles of law, to prevail in a direct suit for it. Now it is said that this money was paid upon a contract, or quasi contract, between the parties;—that the plaintiffs, by the law of 1813, promised to the owners of any duly qualified fishing vessel, that should be employed in the fisheries during four months of the fishing season, a certain sum of money; that the bounty constitutes one of the substantial inducements to the fishermen to engage in the business;—that the object of the law is, to encourage the fisheries, as a nursery of seamen, for the general interest of the country, and to promote the navigating interest, by furnishing employment for American shipping;—that this vessel, being American built and owned, and having been actually employed the time required, by American seamen, the public policy and objects of the law are satisfied. The terms of the contract having been substantially complied with on the part of the defendants, equity, it is said, will relieve them from an inadvertent omission to comply with conditions, that are merely formal and do not enter into the essence of the consideration.

The first difficulty, which this argument has to encounter, is that it assumes as a fact, that this vessel possessed all the intrinsic qualities which entitled her to be enrolled as an American vessel. This may be true, but it is a fact not found by the jury, and cannot be presumed by the Court. The question is, what judgment shall be rendered on this verdict; and upon this question the Court can look to no other facts, than what are apparent upon its face. If the fact then were as the argument assumes it to be, it ought to have been specially found by the jury.

But supposing this difficulty overcome, it would not, in my opinion, relieve the defendant's case. If the construction which has been given to the law is correct, that is, if the

oath of the owner is an indispensable prerequisite to the validity of the enrollment, then no bounty was due. A vessel with papers which are void, is like a vessel without papers. She is entitled to none of the privileges of an American ship, wherever she may have been built, or however owned and navigated. In the eye of the law she is considered as a foreign vessel, and can claim only the privileges of a foreign vessel. And such a vessel can, under no circumstances, entitle herself to the fishing bounty. The payment was therefore clearly made under a mistake, and the action for money had and received is the appropriate action to recover back money so paid.

It may, however, be objected, that if it was paid by mistake, it was a mistake of law and not of fact; and that money paid under a mistake of law merely, is not subject to repetition. The principle, when stated in general terms, and as a universal proposition, is not, perhaps, entirely free from difficulty. In the civil law, opinions of great authority are ranged on opposite sides of the question. The framers of the French code, with all the authorities of the civilians before them, dicided against the principle, and allow money paid under a mistake of law to be recovered, when the payment is supported by no moral or honorary obligation, and can be ascribed to no other cause but a mistake by the party of his legal obligation. *Code Civile*, 1377. *Toullier*, *Code Civile Francais*, *vol.* 6, *no.* 75; *Ib. vol.* 11, *no.* 63. In the common law, the authorities are not entirely agreed, though the preponderance of authority is against the recovery back of money in such a case. 1 *Story's Equity*, 121, *note* 2. But however it may be when the money is paid by the supposed debtor, no case, that I am aware of, has gone so far as to decide that an unauthorized payment by an agent, from an erroneous opinion of the legal obligation of his principal, shall be binding on the principal, and that he cannot recover back money thus unduly paid.*

* But see Story on Agency, § 435. Elliot v. Swartwout, 10 Peters, 153.

Upon the whole, my opinion is, that the enrollment of the vessel by the officer, without the oath of one of the owners previously taken and subscribed in conformity with the directions of the act of December 31, 1792, sect. 4, was void, and did not confer on the vessel the privileges of a vessel of the United States, and consequently she could not be entitled to the fishing bounty; and that the bounty, having been improvidently paid, may be recovered back by the plaintiffs, in an action for money had and received. Judgment must therefore be entered for the plaintiffs for the sum found by the jury.

This view of the case being decisive, renders it unnecessary to consider the other question arising on the verdict.

THE AMETHYST.

When property is left derelict on the high seas, those who first find and take possession of it, with the intention of saving it, acquire a right to the exclusive possession, which others, who afterwards discover it, have no right to disturb.

The right of property, in goods thus abandoned from necessity, is not lost to the owners, and those who find and undertake to save them are bound in good faith to consult the interest of the owners as well as their own. If they have not sufficient force to effect the salvage without great risk of the loss of the goods, they cannot, consistently with the good faith which they owe to the owners, refuse the assistance of others, who offer their aid, and who may thus become entitled as joint salvors to a share in the reward.

January 21, 1840.—This was a case of salvage. The Amethyst, a British vessel, sailed from Boston for St. John, in New Brunswick, May 1. On the 3d, at 5 o'clock, A. M. she was struck by a heavy squall, and upset. Of twelve persons on board, including passengers, ten saved themselves by hanging to the wreck until 11 o'clock, A. M., when they were taken off by the schooner Compeer, of Ellsworth. Two were drowned, and their bodies subsequently found on board the wreck. On the 7th of May, the schooners May Flower,

Ocean, and Wave sailed from Boothbay on a fishing voyage, and fell in with the wreck just before sun set. She was boarded from one of the schooners that evening, and the skippers of the three schooners agreed to lie by during the night, and tow her into port next day. She then lay about 15 or 20 miles South East of the island of Monhegan. The three schooners hoisted signal lights, and lay by in company through the night, and remained so near the wreck that she was seen at 10 and at 12 o'clock. One was so near as to be in danger of coming in collision with her. At day-light the wreck was seen at the distance of a mile or a mile and a half from the schooners, according to the testimony of the crews. Another vessel was at the same time seen bearing down on the wreck. They manned their boats for the purpose of resuming the possession, but when they arrived, they found that she had been boarded from the stranger vessel, which had then come up with her, and which proved to be the Only Son, from St. Andrews, New Brunswick, bound to Boston. When the parties met, a controversy arose between them, each party claiming the right of prior possession. That of the three schooners, said that they had discovered and boarded her the night before: the crew of the Only Son claimed the right as having the actual possession. Hard words and threats passed between them; the party from the schooners cut the lines, which were made fast to the wreck, from the Only Son, and being superior in numbers, maintained their possession. The crew of the latter vessel, during the dispute, took from her an anchor, and secu red it on board their own vessel, and then were compelled to abandon the prize to their adversaries. The schooners then made fast to her with their cables, one before the other, and proceeded with her in tow to Boothbay harbor. On the morning of the 8th, the weather was pleasant and the sea calm; but in the latter part of the day the wind arose and increased to a storm, so that before they got into the harbor, the schooners, one after another, parted their cables from the wreck, which was driven on a

dangerous reef of rocks, and the schooners with some difficulty saved themselves from the same danger. The next day hands were procured to assist in saving the property. The principal direction of the business, which was attended with serious difficulties of different kinds, was taken by Mr. M'Clintock, who appears to have conducted with spirit, prudence, and good faith. The vessel lay anchored to the sea, and the waves run high; the labor was severe, and the risk of life not inconsiderable in getting the cargo from the wreck; and, after it was landed, it was necessary to employ men to guard and protect the property, from persons who were prowling around for the purpose of plunder.

A claim was interposed by J. T. Sherwood, Her Britannic Majesty's consul, for the owner, and the case was argued by *Deblois*, for the claimants, and *Howard*, for the libellants.

WARE, *District Judge.*

This is a case of salvage of a vessel and cargo, found derelict and saved, under circumstances of considerable peril and severe labor; and it cannot be doubted that a liberal reward ought to be allowed, unless the claim of the salvors has been forfeited or impaired by misconduct on their part. It is contended that there has been such misconduct as ought justly to go either in diminution, or to a forfeiture, of their claims. The fact relied upon, as impairing their merits, is their refusal to accept the aid of the Only Son, in saving and securing the property, in consequence of which, it is argued that the vessel was finally lost upon the rocks, when the additional strength of another vessel might have saved her and brought her into port. It is contended that the master and crew of the Only Son being on the spot with their vessel, and ready to assist in the salvage, the libellants were bound to accept their assistance, and admit them as joint salvors; and they have in fact appeared and filed a claim for a share of the salvage.

As to the claim of the master and crew of the Only Son,

it is to be remarked, that in the controversy that arose between the parties, they did not claim nor ask to be admitted as joint salvors. They claimed the sole and exclusive possession of the wreck, as being first in discovering and taking possession of it. Their avowed purpose was to exclude the libellants entirely, and take her into port themselves.

It is clear upon the evidence, that when the Only Son discovered the wreck, it was in the legal possession of the libellants. The proof is that they discovered and boarded it on the evening of the seventh of May. They left no hands on board, it is true, to retain the actual and corporeal possession during the night, nor could men have remained on board during the night, without some risk of life. But they lay by in company, near the wreck, for the purpose of taking her in tow the next morning. The title which is acquired to property by finding, is a species of occupation; and it is laid down as a rule of law, by the civilians, that the mere discovery or sight of the thing is not sufficient to vest in the finder a right of property in the thing found. *Pothier, Traité de la Proprieté, No.* 63. His title is acquired by possession, and this must be an actual possession. He cannot take and keep possession by an act of the will, *oculis et affectu*, as he may when property is transferred by contract, and the possession given by a symbolical delivery. To consummate his title, there must be a corporal prehension of the thing. Though it is said that it is established by custom, (*moribus receptum est*) and that such was the ancient law of the Romans, when two are near together, or in company where the thing is found, that the title is acquired in common. *Pothier, Pandects*, 41, 1, 8. *Heinccius, Recitationes in Instit.*, § 350. *Voet ad Pandect*, 41, 1, 9. Upon these principles, the discovery of the wreck left derelict, by the three schooners, and the boarding her from one of them, was sufficient to give them the right of possession. The three which were in company when she was discovered were entitled to share equally in the good fortune, though she was boarded and the ac-

tual possession taken by only one, for those who boarded took possession for the benefit of all.*

The right of possession, having become perfect, was not lost by temporarily leaving the wreck, without the intention of ultimately abandoning it, but with the purpose of returning and resuming the actual possession, and carrying her to a place of safety the next morning. Things being once in our possession remain so, while they are subject to our custody, and are so situated that we can resume the actual possession at pleasure; and this principle is equally applicable whether the right of dominion is acquired by finding or by an onerous title. *Pothier, Traité de la Possession, No.* 79. *Vinnius, In Institut. Justin. Lib.* 2, 1, 18. When therefore the wreck was discovered by the Only Son, on the morning of the 8th, the fishermen, though not in the actual possession, *pedis positione*, had that kind of possession that preserved all the possessory rights, which they acquired the night before. Having discovered and taken the property into their hands, they had a right to retain it for the purpose of carrying it to a place of safety, and entitling themselves to the reward allowed in such cases, and to exclude all others from interfering with their possession. They had not only acquired rights, but had come under obligations with respect to the property. The finder of property left derelict at sea, does not acquire the dominion or the absolute property in what is found. He acquires the right of possession only,

* It is, says Pothier, an ancient pretension, that of claiming a part of a thing found, on the pretext of having seen it at the same time; we find it in Plautus, *In Rudente*, Act 4, Scene 3. Trachalion claimed a share in a valise which Gripus had fished up from the sea. On this demand Gripus asks, "Quemne ego excepi e mari?" Trachalion coolly replies, "Et ego inspectavi e littore."

Phædrus commemorates the same pretension in a dispute between two bald men for a comb —

"Invenit calvus forte in trivio pectinem;
Accessit alter æque defectus pilis;
Eia, inquit, in commune quodcunque est lucri;"

— this is a windfall for both of us.

with a title to a reasonable reward for his services, when the property is brought to a place of safety. The finders were therefore bound, unless they chose to abandon it, to exert themselves with all due care, fidelity, and vigilance, to preserve and protect the residuary interest remaining in the true owners. The master and crew of the Only Son, although they doubtless supposed that they were the first discoverers of the wreck, had no right to disturb the possession of the libellants; and as they were not in sight when the schooners first discovered and took possession of it, they have no just grounds for claiming to be admitted as joint salvors.

But although the libellants may have had the right of exclusive possession, they were bound to use every reasonable precaution to insure the safety of the property, for the benefit of the owners, and it is argued, therefore, that it was their duty to accept the aid of the Only Son, though they might thereby diminish their share of the salvage. It is true that salvors are bound to act with good faith towards the owners, and this obliges them to use all reasonable and available means to ensure the safety of the property. They are influenced primarily, in engaging in the service, by the expectation of a reward. But when once they have engaged in the business, their own interest is not alone involved. When the goods are rescued from danger and brought to a place of safety, they are saved for the owner, after deducting a just and proper compensation for the salvors. A person undertaking to save derelict goods stands, in relation to the owner, somewhat in the character of a *negotiorum gestor* of the Roman law, that of a voluntary agent who interferes in the affairs of another without a mandate or authority, and he is bound to act for the interest of the owner as well as his own. Generally the interest of both will be the same, that of conveying the goods to a place of safety without loss and expense; but if it is otherwise, it would be a violation of good faith for a salvor to look solely to the enhancing of his reward at the expense of the owner. The golden rule, of deal-

ing with others as we would have others deal with us, is a principle of social duty, deeply laid in morals and in the constitution of human nature; and in these cases of providential calamity, it is a rule of law as well as of morals. If the finder cannot, with his own force, convey the property to a place of safety, without imminent risk of a total or material loss, he cannot, consistently with his obligations to the owner, refuse the assistance of other persons proffering their aid, or exclude them from rendering it, under the pretext that he was the first finder and had thus gained a right to the exclusive possession. The principles of good faith are of universal obligation, and binding in all cases in which the interests of others are involved.

Upon this part of the argument the question is, whether the three schooners with their own crews, constituted a force apparently sufficient for the service, under the circumstances of the case. For if the force was manifestly inadequate, so that the attempt to save the wreck, without other assistance, would be exposing the property to great hazard, then it was their duty not merely to accept, but to solicit aid, and not expose the property of the owner to a total loss, in their eagerness to enhance their own reward. The Amethyst was a vessel of 98 tons; the schooners were smaller, one being of 60, one of 55, and one of 45 tons; but each was manned with a full crew of fishermen, amounting in the whole to eighteen men. The weather was calm, and the wreck lay about fifteen miles from the island of Monhegan, in which there is no harbor, and about double that distance from the safe harbor of Boothbay. To one not versed in nautical affairs, this would appear to be a sufficient force to tow the wreck into port, with ordinarily favorable weather, and the prospect of the morning was that of good weather. The prudence and propriety of men's actions are not to be judged by the event, but by the circumstances under which they act. If they conduct with reasonable prudence and good judgment, they are not to be made responsible because the

event, from causes which could not be foreseen nor reasonably anticipated, has disappointed their expectations. The schooners took the wreck in tow, and had without difficulty carried her nearly to a place of safety, when, the weather having become boisterous, the cables broke, one after another, from the violence of the tempest, from their holdings, and at last from the wreck, and she was carried by the waves on a dangerous reef of rocks, so that the vessel was nearly a total loss. Now it is not apparent how another vessel, of about the same tonnage as the fishermen, would prevent this calamity. If the weather had continued favorable, the three were sufficient; and in the storm which arose, it is not probable that the presence of the Only Son would have insured, or could have contributed much towards, her safety. On the facts proved, it does not appear that the libellants would have been chargeable with any fault which would impair their claims for salvage, by declining to admit their participation in the service, if it had been offered. But in point of fact it was not offered.

The whole mass of property saved in this case is small; the value, after deducting expenses, amounting only to $841 12, the largest part of one moiety of which is exhausted by the necessary expenses of getting the property ashore and securing it, after the wreck went on the rocks. So that leaving but a pittance for the owners, the compensation of the salvors will scarcely amount to a *quantum meruit*, for the laborious and dangerous service of rescuing the goods from the waves, and I may add, saving them from pillage from the piratical shoresmen, after they were landed. I shall allow 400 dollars salvage, leaving the cost and expenses a charge on the residue.

Decree.

This case came on to be heard upon the libel, answer, depositions, and exhibits in the cause, and was argued by counsel; upon consideration whereof it is ordered, adjudged, and

decreed, that there be allowed, out of the proceeds of the sale of the savings of the wreck of the vessel and the cargo now in the Registry, the sum of *four hundred dollars* as salvage.

And it is further ordered, adjudged, and decreed, that o said sum of four hundred dollars there be allowed and pai to

The owners of the Schooner Ocean,	$40	
The owners of the Schooner Wave,	$40	
The owners of the Schooner May Flower,	$40	
		$120

and that the residue of the said sum of four hundred dollars to wit: the sum of *two hundred and eighty dollars*, be divid ed into *twenty* shares, and that there be allowed and paid tc

Samuel M'Clintock, who superintended the landing of the goods, &c.,		1	Share,	$14
Moses Lewis, Skipper of Sch. Ocean,		2	do.	28
George Brewer, Skipper of Sch. Wave,		2	do.	28
John Hotten, Skipper of Sch. May Flower,		2	do.	28
Benjamin Orchard,	Crew of the Ocean.	1	do.	14
James Lowry,		1	do.	14
John Knowles,		1	do.	14
Morrill Thompson,		1	do.	14
—— ——, cook,		1	do.	14
Benjamin Gray, boy,		½	do.	7
Freeman Reed,	Crew of the Wave.	1	do.	14
James C. Auld,		1	do.	14
Samuel Brewer,		1	do.	14
Caleb S. Reed,		1	do.	14
Ira Quimby,		1	do.	14
James Goold,		1	do.	14
William Huff,	boy,	½	do.	7
Samuel Montgomery,	do.	½	do.	7
William Hotten,	do.	½	do.	7
		20		280
				120
				$400

And it is further ordered, that all costs and expenses be charged on the residue of the proceeds of the sale remaining in the Registry, amounting to $ 441 12, and after deducting

the same, that the remaining sum be paid to Joseph T. Sherwood, Esq., her Britannic Majesty's Consul, and the authorized attorney of the claimants, for their use.

And it is further ordered, that the sum of *thirty dollars*, found on the person of ——— ———, a passenger found on board the vessel, drowned, now in the hands of Thomas Cunningham, Coroner, after deducting *ten dollars* to be paid Samuel M'Clintock for the expenses of his interment, be paid to the said Joseph T. Sherwood, for the use of the legal heirs of the deceased.

THE CALISTO.

By the general maritime law, material men, who perform labor or furnish materials for building or repairing a vessel, have, in addition to the liability of the owner, a lien on the vessel for their security. But this principle of the maritime law has never been adopted by the common law.

By the maritime law of the United States, material men have a lien on the vessel for supplies furnished a foreign vessel, but not for supplies for a domestic vessel. And, for the purposes of a lien, every vessel is considered foreign, when in a port of a State to which she does not belong.

The statute of Maine, of Feb. 19, 1834, ch. 626, giving, to "all ship-carpenters, caulkers, blacksmiths and joiners, and other persons who perform labor, or furnish materials for, or on account of any vessel building or standing on the stocks, by virtue of a written or parol agreement," a lien on the vessel, does not include the case of a laborer hired generally and employed in various work, so as to give him a lien on the vessel, for his wages, for such part of the time as he may have been employed in work for the vessel.

March 30, 1840.—This was a libel against the hull of a new brig, built during the last season by David Spear. It was alleged in the libel, that Spear commenced building the vessel in April last, and that the hull was finished and launched on the 6th of February; that the libellant was employed by Spear in building her, and that there remains due to him,

for his services, the balance stated in the schedule annexed to the libel, amounting to $116 64, which he has demanded and which remains now unpaid, for which he claimed a lien on the vessel for his security, and praying that the vessel may be decreed subject to the lien and sold for the payment of what is due.

Spear was duly served with process, but did not appear; but Mr. Purinton, intervening for his own interest, entered an appearance and filed a claim as owner, and put in an answer, in the nature of a plea to the jurisdiction, alleging, that at the time when the labor is said to have been performed, the vessel was, and ever since has been, wholly owned by citizens of this State, viz. by said Purinton, the respondent, that she is a domestic vessel; and concluding with a prayer that the libel may be dismissed. Afterwards, upon a suggestion from the Court that the objection to the jurisdiction could not be sustained, he put in an answer to the merits, alleging that the vessel was built by Spear for him, denying all knowledge of the libellant's having been employed, or having rendered any service, in building the vessel, and putting him to the proof of his claim.

Evidence of the declaration of Spear was offered by the libellant, tending to prove that, by the terms of the contract, he was specially engaged for work upon this vessel; but the evidence was ruled to be inadmissible.

The case was argued by *Fox*, for the libellant, and by *C. S. Daveis*, for the respondent.

WARE, *District Judge.*

The plea to the jurisdiction has been very properly abandoned at the argument. The objection was presented in precisely the same form in the case of *Peyroux vs. Howard*, 7 *Peters*, 324; that is, that all the parties were citizens of the same State, and overruled in both the District and Supreme Court. The same question was also raised and decided in the same way in the case of *Davis vs. New Brig*, *Gilpin*, 474.

In cases of admiralty and maritime jurisdiction, the competency of the court does not depend on the citizenship of the parties. The jurisdiction is founded on the subject matter, and attaches, whoever may be the parties, and wherever they may reside. And, that contracts of material men, for materials found and labor performed in building and repairing vessels, are matters of admiralty and maritime jurisdiction, has been too often decided to admit of controversy at this day. Over these contracts the admiralty exercises a general jurisdiction. It will in all cases give a remedy *in personam;* and whenever the law gives a lien or privilege against the vessel, it will enforce it by process *in rem*. *The General Smith*, 4 *Wheaton*, 438. *The Aurora*, 1 *Wheat.* 105. *The Jerusalem*, 2 *Gall.* 345. *The Robert Fulton*, 1 *Paine*, 620. *The St. Jago de Cuba*, 9 *Wheat.* 409. *The New Jersey*, 1 *Peters Adm. Rep.* 223. *The Eagle*, *Bee.* 78. In every proceeding *in rem*, therefore, founded on such contracts, the question is not, whether the Court can take cognizance of the subject matter, but simply whether, in the particular case, the creditor has a right to look to the vessel itself for his security, or is confined to his personal remedy against the debtor.

By the general maritime law, material men, under which term, in the language of the admiralty, are included all persons who supply materials or labor in building or repairing vessels, or furnish supplies which are necessary for their employment, as provisions for the crew, have, in addition to the personal liability of the debtor, a lien on the vessel for their security. *Ordinance de la Marine*, *Liv.* 1. *Tit.* 14. *Art.* 16. 1 *Valin* 363. *Consulat. de la Mer. Ch.* 32, 33, 34; *Boucher's Translation. Cleirac. Jurisdiction de la Marine p.* 351. *Art.* 18. *No.* 4, 5. It is commonly said that this principle was borrowed by the maritime, from the civil, law. *Abbot on Shipping*, *p.* 108, 9. But it seems more probable that it originated in the maritime usages of the middle ages,

where we find the origin of all the general principles of the law of the sea. The Roman law did, it is true, allow to those who loaned money for the building, repairing or the supplying of vessels, a privilege against the vessel. *Dig.* 20, 4, 5 and 6. *Dig.* 42, 5, 26 and 54. But in that law a privilege did not amount to an hypothecation. *Peckius Ad rem Naut.; Note of Vinnius* b, *page* 233. *Voet. Ad Pand.* 20, 2, 29 and 20, 4, 19. *Vinnius, Select. Juris Quaest. Lib.* 2, *C.* 4. *Heinn. Ad. Pand. Pars.* 6, § 263. The first only gave a *jus praelationis*, a right of prior payment out of the thing, before it could be taken by unprivileged creditors. It was like the priority laws of the United States, and did not attach as a lien on the thing. And the privilege of material men, for supplies furnished for a vessel, was also postponed that of the fisc. But hypothecation gives a *jus in re*, a species of proprietary interest in the thing itself. And in the maritime law every privilege imports a tacit hypothecation. *Emerigon, Contrats a la Grosse, Ch.* 12, *Sect.* 1 and 2. If therefore it was adopted from the Roman law, it was adopted with an important modification, giving to the privileged the rights of an hypothecary creditor, and raising the privilege to an hypothecation.

But this principle of the maritime law is not acknowledged by the common law, and has never been received by the commercial jurisprudence of England. *Abbot on Shipping*, 109. It has however been partially adopted in the maritime law of the United States. Our law allows the lien when the supplies are furnished to a foreign vessel; and, for the purposes of the lien, a vessel is considered as a foreign vessel, when she is in a port out of the State to which she belongs or where her owners reside. But when supplies are furnished to a vessel, in the State where she belongs and is owned, no lien is created by the maritime law of the United States. If, however, it is allowed by the local laws of the State, it may be enforced by process *in rem* in the admiralty.

In the present case, the labor was performed on a new vessel, owned in the place where she was built, and, being a domestic vessel, whether the creditor has a lien upon her for the value of his services, depends entirely on the law of the State. The lien is claimed under an act of the Legislature of Maine, of Feb. 19, 1834, Ch. 626, Sect. 1. This act provides, "That from and after the passing of this act, all ship-carpenters, caulkers, blacksmiths, and joiners, or other persons, who shall perform labor or furnish materials for and on account of any vessel building or standing on the stocks, *by virtue of any written or parol agreement,* shall have a lien on such vessel for his or their wages until four days after said vessel is launched, and may secure the same by an attachment on said vessel; which attachment shall have precedence of all other attachments where no such lien exists." That labor was actually performed by Read in the building of the vessel, has been sufficiently proved, and is not now denied. The question which has been discussed at the bar is, whether it was performed under such circumstances as entitle him to the benefit of the law. For it is not sufficient that materials be furnished, or labor and service rendered, in the construction of a vessel. This must be done by virtue of an agreement; and what sort of an agreement will bring a party within the privilege of the act, is the precise question which is involved, and has been learnedly argued, in this case.

There was no written contract between the parties, and there is no direct proof of the terms of agreement by which Read was engaged. They are left, by the testimony, to be inferred from the circumstances under which the engagement was made, and the manner in which the contract, whatever it might be, was executed. It appears that, about the 16th or 17th of April, Read came to the house of Capt. Spear, the builder, a stranger, and by birth a foreigner, in a state of great destitution, and wished for employ-

ment. Spear took him into his house, furnished him with some clothing, and employed him a few days for his board. He then left and went to Portland to seek business, but not being successful in obtaining it, he returned, and was again employed by Spear, and continued in his service until November, when he was finally discharged. For the first month he was employed exclusively in gardening, planting, laying stone wall, and other labor on the farm. About the beginning of June he went into the smithery, and was engaged part of the time at his trade as a blacksmith, in doing the iron work for the vessel. Butman, one of the witnesses, who was also employed as a blacksmith for two months and eight days from the 19th of May, says that during that time he constantly worked with Read, and that about half the time they worked in the shop, and about half the time on the farm, on the highways, in the woods getting timber, and various work. After that period, and until Read was finally discharged, his employment was not wholly, but more exclusively, upon the vessel, either in the shop preparing the iron work, or in the yard boring on the ship. While in the smithery, however, he was not wholly occupied in work for the vessel, but occasionally did other jobs which were brought by the neighbors to the shop, but all on Spear's account. The proportion of the time employed upon the vessel is not clearly proved, but is estimated by some of the witnesses as about three-fourths of the whole period from the commencement to the close of his employment.

It has been already observed, that the statute does not create a lien for labor and materials, upon the simple and naked fact that they have been actually employed in the building of the vessel; the lien arises only when the materials and labor are furnished by virtue of a previous agreement. The argument of the libellant's counsel is, that the performance of the labor, or the supply of the materials, having been proved, and the actual appropriation of them to the finishing of

the vessel, it is unnecessary to proceed further and show the agreement in pursuance of which it was done; but the fact, that it was done in the execution of a previous contract, results as a presumption of law. To a certain extent this is undoubtedly true. If labor has been performed for another, with his knowledge and under his direction, or goods have been furnished, received, and consumed by him, the law will certainly imply from these facts, an agreement. But what agreement will be presumed? Why, on the part of the person who receives the benefit, that he agreed to pay what they were reasonably worth, and, ordinarily, nothing more. Suppose a man, who is by trade and occupation a ship-builder hires a laborer to work for him a year, but the particular terms of the agreement, except its duration, are not susceptible of proof. The law will imply nothing more than that he should perform such services as are usually required of hired laborers, and, after the contract is executed, that the hirer shall pay him a reasonable compensation for such services. Again, suppose such a ship-builder to purchase a quantity of lumber suitable for ship building; if the particular terms and conditions of the contract do not appear, the law will imply nothing more on the part of the purchaser ordinarily, than a promise to pay what it is worth. A contract or agreement requires, as essential to its existence, the assent of two or more minds; *duorum vel plurium in idem placitum consensus. Dig.* 2, 14, 1, 51. If particular pacts or conditions are annexed to the contract, qualifying its general nature, or varying and modifying its general obligations, there must be the same assent of the parties to these conditions to give them validity, as to the substance of the contract. It must be a consent *in idem placitum.* If the parties have not taken care to express these accessory conditions in the terms of the contract, or what juridically amounts to the same thing, if they cannot be proved, the law will not presume the assent of the parties to them, un-

less, from the circumstances of the case, or the ordinary course of dealing, these are plainly to be inferred.

Let us now apply these general and familiar principles of law to the evidence in this case. The fact that the libellant labored for Spear, and under his direction, from April to November, and that he was part of the time employed upon the vessel, is admitted. That the labor was performed by virtue of an agreement, will be inferred as a presumption of law. But the law will infer, from the general fact, nothing more than a general contract for labor; and what is there in the present case that will authorize the presumption of anything beyond this? Nothing, except what results from the manner in which he was actually employed, and the fact that he was a blacksmith by trade. As to the kind of labor in which he was employed, it appears that for the first month he was exclusively occupied in various work on the farm; for the two following months, about one half of the time on the farm, and one half in the blacksmith's shop; and during the residue of the term of his service, principally in the shop at his trade, in doing the iron work for the vessel, or in the yard working on the ship; but part of it, also, on the farm. Taking then the whole course of his employment, the result will be against this presumption of a special contract with him as a mechanic, for labor on the vessel. Whatever presumption might arise from the fact that he was by trade a blacksmith, is overcome by the various kind of labor in which he was actually employed without any objection on his part. The inference certainly is, that he was hired rather as a Jack-at-all-trades, than as a master of one. And this receives confirmation, partially at least, by all the evidence which has been offered touching the rate of wages for which he was engaged. It appears from his own declaration, that Spear would consent to give him but fourteen dollars a month, though he said he ought to have sixteen. But all the proof is, that the rate of wages for a blacksmith at this time, was not less than a dollar a day, about double the rate at which

he was to be paid. It appears to me, that the fair conclusion to be drawn from all the facts is, that this was a general agreement for service as a hired laborer, and not a special contract for any specific kind of labor.

Does a person, hired as a laborer generally, and employed under that general contract part of the time in work upon the vessel, come within the fair intent and meaning of the legislature, so as to be entitled to a lien on the vessel for his wages, during that part of the time that he is so employed? The language of the law is, that any persons of the description named in the act, who shall perform labor and furnish materials *for or on account of any vessel, by virtue of a written or parol agreement*, &c. The labor must be performed, or the materials furnished, in pursuance of an agreement, and it must be an agreement to do this for, or on account of, the vessel to which the lien attaches. The intention of the law is, to give to that class of persons called, in the language of the admiralty, material men, a privilege against the vessel for their security, not universally and in all cases where their labor or the materials furnished by them have been applied to the building of a vessel, but where this has been done under a contract for, or on account of, the vessel to the use of which they have been appropriated. The contract must therefore have itself a reference, tacit or express, to the vessel against which the privilege is claimed. It is not intended to be said that, in all cases, a mechanic who is employed in building a vessel, or a material man who sells lumber which is used in the construction of it, must, in order to maintain their lien, prove that the vessel was expressly named in the contract. In ordinary cases, or certainly in very many cases, this will be presumed. And these contracts being made while the vessel is in the process of building, and the labor or materials appropriated to her construction, it would require some countervailing circumstances to overcome the natural presumption that the contracts were made with a view to the particular vessel. I

fully agree with the libellant's counsel, that the lien being one beneficial to the general interests of commerce, and having its foundation in natural equity, the law ought to receive a liberal construction, to carry into full effect the beneficent intentions of the legislature. It belongs to that class of liens which the law habitually favors. And the act, being in fact but a mere recognition or adoption of a principle of the general maritime law, as old as the law itself, a court of admiralty would be the last tribunal to feel any reluctance in giving to it its fullest and most beneficial operation. But to extend the privilege to a case like the present, would be carrying the lien beyond what seems to me to be the obvious and clear intention of the legislature, and also further than it would be supported by the principles of the general maritime law.

Libel dismissed.

UNITED STATES VERSUS WEBSTER.*

The duty of a quartermaster is to provide supplies and necessaries for the army. Under the general laws relating to the service and the army regulations, his authority is restricted to furnishing supplies of a particular description, and if he furnishes other articles than such as are allowed by law and usage, he cannot charge the United States with them.

The laws and usages of the service restrict him as to the nature of the claims against the United States, arising out of the service, which he may settle and allow, and if he settles and pays such as he is not authorized to pay, such payment will not be a legal set-off in an action by the United States against him.

It is the duty of the quartermaster to provide quarters, hospitals, provisions, &c., for the army, and when obtained by contract he may pay for

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* This case was carried to the Circuit Court by writ of error, but did not come to a hearing until after the decision in the case, United States v. Eliason, (16 Peters, 291) made in 1842. It was then affirmed without argument upon the authority of that decision.

them. But when taken by impressment, whether he is authorized to settle and pay for them, by law and the common usage of the army—Quære.

But such claims against the United States, arising during the Florida war, he had authority to adjust and settle by the act of May 28th, 1836, ch. 32.

The preamble of a statute cannot control the enacting part of the law when the meaning is clear; but when the language is ambiguous and may admit a larger or more restricted interpretation, the preamble may be referred to, to determine which sense was intended by the legislature.

The reason of this rule of interpretation is, that it states the reasons and objects of the law.

If the reasons and objects of the law are made known by any other document equally authentic and certain, these may for the same reason be referred to, to aid in the interpretation of doubtful or ambiguous language in the law.

The intention of the act of May 28, 1836, was, to authorize the quartermaster to adjust and pay such claims, against the United States, as he was not authorized to settle and pay under the general laws and usages of the service.

Under this act, the quartermaster was authorized to settle and pay for articles taken for the use of the United States, with the consent of the owners, without contract, or impressed; whether such as are consumable, as provisions; or not, as horses, carriages, arms, &c., and are lost by the accidents of the war. The common principle of the law of letting and hiring, by which, in a loan for use, the lender runs the risk of loss by extraordinary accidents, does not apply to such a case.

But the law did not authorize him to pay for special damage to a house and grounds, occupied for quarters for the officers and for an encampment.

Under the order of the War Department of May 18, 1833, repeated in that of 1835, and making the 56th art. in the Digest of December, 1836, the defendant is not entitled to charge commissions on his disbursements.

June Term, 1840. This was a suit brought by the United States against Captain Webster, a disbursing officer in the quartermaster's department of the army, to recover a

balance of money alleged to be remaining in his hands, and for which he had not accounted. The jury to whom the case was submitted returned a special verdict, stating the general balance claimed, viz, $8,481 47, and enumerating the particular credits claimed by the defendant, and referring to the decision of the Court as matter of law, whether he was entitled to the credits which he claimed, or any part of them.

The facts found by the verdict are, that the defendant was duly appointed an acting assistant quartermaster of the left wing of the army, in active service in the war against the Seminole Indians, on the 15th of February, 1836, and continued to act as such till March 1, 1837, during which period the disbursements were made;—that in that time he received the sum of $143,595 04; that during the whole time he held the commission of a first Lieutenant in the line of the army, and received the pay and emoluments attached to that office, and no other; that he claimed a commission of 2 1-2 per cent. for disbursing part of said sum, amounting to $2,652 46, which was disallowed by the accounting officer of the Treasury Department, and that this per centage, if by law any may be allowed, is a reasonable compensation for said service, and ought to be deducted from the balance claimed to be due.

The jury also found, that the disbursements were made for expenses incurred and supplies furnished, on account of the militia received into the service of the United States in Florida, prior to the 28th of May, 1836.

And they further found, that of the moneys then received and disbursed by the defendant, he paid—

First, for property impressed into the service of the United States, and lost in their service, $325.

Secondly, for property not purchased, but received into the service of the United States for their use, with the consent of the owners, viz: horses and vehicles for transportation, and

horses and military equipments, used by the militia in said service, and lost and destroyed, the sum of $5,144 15.

Thirdly, for special damages done to a house occupied as quarters, and to ground occupied as an encampment, in said service, $130.

Fourthly, for articles purchased and used in the service, $300 40.

All these credits had been presented, to the accounting department of the government, and disallowed; and are to be allowed to the defendant in offset, all, if, in the opinion of the Court, they were paid and disbursed agreeably to law. And if, in the opinion of the Court, the defendant is, by law, entitled to all the credits he has claimed, including the per centage, then the jury find that the defendant never promised; and if, in the opinion of the Court, the defendant is not entitled to the whole, but is entitled to any part of said credits, then such part as he is by law entitled to, is to be deducted from the said sum of $8,481 47, and the jury find that he did promise for the residue.

The case was elaborately argued by *Hobbs*, for the defendant, and *Howard*, Dist. Attorney, for the United States.

WARE, *District Judge.*

The question, which the jury, by their verdict, have referred to the opinion of the Court, is, whether the defendant is by law entitled to all or any part of the credits which he claims. If he is, they find that to that extent they are to be allowed and deducted, as offsets from the general balance demanded by the plaintiffs. So far as these consist of charges for disbursements, it was not denied at the hearing that they were actually made by him, under color of his authority as an acting quartermaster, and that the articles paid for were actually received and consumed by the troops, or lost. The ground on which the allowance of them is contested, is, that the disbursements were made in satisfaction of claims against the United States, which, however just

and valid they may be, he, in his quality of acting quartermaster, was not authorized to settle and pay.

1. The jury have distributed these credits into four classes, distinguished from each other by the different circumstances, under which the several claims against the United States originated. The first class is constituted of articles impressed and lost in the public service. It is not denied, as it cannot be, that the owners are justly entitled to a compensation for their property thus taken without their consent, and appropriated to the public use; but it is said that it does not fall within the ordinary duty of the quartermaster's department, to adjust and settle claims of this description; these claims having, as it is contended, always been settled by a different tribunal.

It is the peculiar and appropriate duty of the quartermaster's department, to provide for the troops such supplies and necessaries, and to procure such services to be performed, as the exigences of the public service require for the subsistence, the comfort, and the efficient action of the army, whether in movement or position. But the general laws, the army regulations, and the ordinary usages of the service, restrict the quartermaster, in furnishing these supplies, to articles of particular descriptions. He has not an unlimited authority to furnish the troops, at his discretion, with any articles, which, in his judgment, may be necessary or convenient for them, or conducive to their health or comfort. If, therefore, he purchases for their use, articles which are not authorized by the regulations and usages of the service, he cannot charge them to the United States. Being an agent acting under a limited authority, he cannot charge his principal, when he exceeds his authority. The same regulations and usages may undoubtedly restrict the quartermaster, as to the nature of the claims which he is allowed to adjust and settle, although they may be immediately connected with the subsistence and operations of the army, and indispensable to the service; and if he undertakes to pay such claims, he cannot,

by the accounting officer, be credited for such payments, and it may at least be questionable whether they can be allowed by the Court, as a legal or equitable set-off, in an action against him for a balance unaccounted for. Such a payment may constitute a just claim against the United States, and he may be equitably subrogated to the rights of the creditor whose demand he has satisfied, but he will be turned over to the same remedies, for obtaining his remuneration, which would be open to the original creditor.

If these accounts of Captain Webster were to be settled and adjusted under the general laws, providing for this branch of the public service, and the regulations and established usages, which constitute the complement of the law, it would be desirable to have some more satisfactory evidence of what those usages are. No part of the army rules and regulations, which has been quoted at the bar, speaks at all of the forcible impressment of articles for the public service, nor, of course, of the mode of settling and paying for them. They neither affirm nor deny the authority of the quartermaster in this particular. I am not aware that, from the silence of the regulations, any argument can be drawn either in favor or against his authority. It is made the duty of the quartermaster, to provide quarters, hospitals, provisions, fuel, forage, means of transportation, and other necessaries of the service. Ordinarily, they will be obtained by contract; but if they cannot be so obtained, the necessity of the case, and the usages of war, authorize the taking them by force. But as private property cannot be taken for the public use, without a just compensation, (*Constitution of U. S. Amendments, art. 5,*) the authority of an officer to take, would seem to involve that of paying the fair value when taken. But it is said, that though the officer has the right, in a case of necessity, to take by impressment, his authority to pay the price of what he has taken, is negatived by the established and uniform usage of the service. A number of acts of Congress were referred to, providing specially for the payment of impressed property, and they have been insisted

upon as proving, that it has been the invariable practice of the government, to provide for the settlement of such claims by special laws. Now these laws prove affirmatively, that such claims have in many cases been provided for, by special laws; but they do not prove negatively, that no claims of this description may be, or ever have been settled, and adjusted, under the general laws and usages applicable to this branch of the public service. The acts referred to were not laws providing for the current expenses of the army, but for the settlement of old claims, which may have been omitted to be adjusted and paid at the times, from other causes than the incompetency of the quartermaster to settle them.

But in point of fact, the decision, of this part of the case, does not turn principally on the general laws, providing for the military service, nor upon the common and ordinary usages of the army. All the payments of Captain Webster, which are now in controversy, were made under the authority of an act, specially providing for the expenses of the Florida war. This act provides, "That the Secretary of War be, and he hereby is, directed to cause to be paid the expenses that have been incurred, and the supplies which have been furnished, in the states of South Carolina, Georgia, Alabama, Louisiana, and the territory of Florida, on account of the militia and volunteers received into the service of the United States, in defence of Florida; Provided, that the accounts, for these claims, shall be examined and audited at the Treasury, as in other cases." *Act of May* 28, 1836, *ch.* 82, *sect.* 1. The question therefore is, whether Capt. Webster was authorized, as an acting quartermaster, to settle and pay the claims, which form the subject matter of this controversy, under this law. The law provides for the payment of *expenses incurred and supplies furnished.* These are terms of very general import, and there is nothing in the language of the act limiting them to expenses and supplies of any particular description; nor is there any thing, which authorizes us to give them a more extensive operation, than they have in the general laws, relating to the same general

subject, that is, to the military service. Looking at the words of the act alone, therefore, it is difficult to derive from them an authority for the payment of any other claims, than such as the quartermaster is authorized to settle, by the general laws and military usage. But there is a paper, among the public documents of that session of Congress, which may, like the preamble of a statute, serve to fix and give a more precise and definite meaning to these general terms, by showing the cause and purposes for which the act was passed. *Executive Documents*, 1 *Session* 24 *Congress*, *Doc.* 231. It is a paper which was prepared by the War Department, submitted to the House of Representatives, and by their order printed, before the passage of the law. It contains an abstract of the various claims, which were, or would be, preferred against the United States, growing out of the Florida war, for the payment of which, there was no authority under the existing laws, and which must therefore be ultimately rejected, unless provision were made for their settlement by a special act.

It is a rule in the construction of a statute, that recourse may be had to the preamble, though it is in strictness no part of the law, as one element for opening and expounding the meaning and intention of the legislature, although it cannot control the enacting part of the law, when the words are clear and explicit, and are manifestly more comprehensive than the preamble. (1 *Black. R.* 569, *Perkins* v. *Sewall.* *Cowp.* 543, *Pattison* v. *Banks.*) But when the words of the enacting part are ambiguous, or may fairly admit a larger or more restricted signification, then reference may be made to the preamble, to determine which sense is intended by the legislature. The reason is, that the preamble states the grounds and objects of the law. And when the reasons and grounds of the law are made known, in any other manner equally certain and authentic, they are entitled to have the same influence, in the construction of a statute, as the preamble, if the meaning of the words is doubtful, because

every law ought to be carried into effect according to the intention of the law maker, when the intention can be certainly known. (*Com. Dig. Parliament, R.* 11.)

It appears to me that a document, prepared and published as this was, and preserved among the public archives of the country, stating the nature of the claims to be provided for, and the necessity of a special act for that purpose, and which was before the legislature, at the time when the law was passed, may be fairly invoked in aid of the exposition of the statute; not to control the meaning of the legislature clearly and explicitly expressed, but to give a precise and determinate meaning to words which are ambiguous, or expressions which may be taken with a greater or less latitude of signification. If it does not bring before the Court the objects and intentions of the law-maker, in so solemn and authentic a form as when these intentions are set forth in a preamble, at least it affords a medium of exegesis, against which the Court cannot shut its eyes, without excluding, from its consideration, what would have an influence upon every mind studious of ascertaining the real intent of the law-maker.

It appears from this paper, on the sudden breaking out of the war in Florida, the promiscuous massacre of the people, and the wasting of the country by a savage foe, that the militia and volunteers, of the territory and of the neighboring states, turned out with great promptness and alacrity, for the defence of the distressed inhabitants. In this hasty and tumultuary assembling of the military force, there were, as might be expected, great irregularities committed, and a variety of expenses incurred, some from necessity and some through ignorance, which are not authorized in the regular and ordinary course of the military service. The troops were collected, or rather assembled, with strong hands and willing hearts, overflowing with zeal and patriotism, but with little knowledge or familiarity with the details of military duty, and without military arms and accouterments, provisions, or necessary camp equipage; and these appear to have been

taken with great promptitude, and little ceremony, wherever they could be found. *Furor arma ministrat.* In the State of South Carolina, it is stated in a letter from the Governor to the Secretary of War, that horses were impressed and appraised, by warrants from the colonels of regiments, under a belief that they would be paid for, at that valuation. The remark of the War Department is, that there is no law which authorizes the payment for horses under such circumstances. A letter of Col. Gadson, quartermaster-general of Florida, states that volunteers are rushing in from all quarters, and making or converting every private storehouse into a public depository, from which is taken any thing that may be wanted, upon the simple receipts of even unauthorized agents. Volunteers, he says, were considered as entitled to any thing they wanted, and, from private storehouses, the drafts have been large for blankets and a variety of articles not issued under the regulations. Property was seized and appropriated to the public use, with a degree of irregularity and illegality rarely witnessed. It is hard, he adds, that those who yielded to the press should not be indemnified, and he proposes that all these claims should be settled on principles of equity. The War Department, upon this, remarks that there is no law, which authorizes the payment of claims on equitable principles merely; or which, if paid, would release the disbursing or paying officers, from the operation of the laws and rules of the Treasury, on the settlement of their accounts. *There appears to be no remedy but legislation.* All this irregularity is not a matter, which should occasion surprise. It is what might, under the peculiar and distressing circumstances of the case, naturally be expected. The unprotected inhabitants, after a long period of peace and tranquility, were aroused from their dreams of security, by the sudden onslaught of a barbarous and merciless foe. *Dimicandum est pro aris et focis.* They were girding themselves for battle, in defence of their altars and houses, of their wives and children.

It was upon statements like these, that the law of 1836 was made, providing specially for the payment of the expenses incurred and the supplies furnished. If the expenses had been such as the disbursing officers were authorized to pay, under the existing laws and ordinary usages of the army, no special act would have been required. It was because they were not of this character, that a special act was necessary to provide for them, and the natural presumption is, that it was intended to meet all the cases described in the abstract, provided they come within the words of the law in their natural and ordinary signification.

It appears to me, that it is not straining the meaning of language to hold, that the payment for articles thus irregularly taken and appropriated to the public use, is included in the term, expenses incurred. It is certain that somebody must be liable for them, and against whom can they equitably be charged, unless against the party for whose benefit they were taken, and to whose use they were applied? Now among the expenses particularly described, and which the disbursing officers were not authorized to pay, were articles irregularly impressed and appropriated to the use of the army. It appears to me that the natural and just conclusion is, that one of the objects of the law was, to supply that authority. My opinion therefore is, that the defendant is entitled to the credits claimed under this part of the finding of the jury.

2. The second class of credits claimed, as they are arranged by the verdict, consists of payments, for articles received into the service of the United States, with the consent of the owners, and lost, or destroyed, while in their service. It appears from the vouchers, that some of the articles included in this class, were such as are consumed by use, as provisions for the troops and forage for horses. If we may recur to the abstract which has been mentioned, to aid us in interpreting the law, there does not appear to me to be any substantial reason for doubting, whether such expenses were

or were not intended to be provided for, by the act, and of course whether Capt. Webster had authority to settle and pay them, provided, the articles were in fact consumed by the army, although they may have been irregularly taken. If goods, which are consumed by use, are loaned in this way, the contract by which they are transferred is what is technically called *mutuum*, or a loan for consumption. It is of the essence of this contract, that the right of property, in the thing loaned, shall pass from the lender to the borrower, and he, by receiving it, becomes bound to return, not the same individual thing, but one of the same species, equal in amount and quality, or if he fails to do so, to pay its value. (*Pothier, Pret de Consomption, No.* 4, 13, 39.) The proprietary interest in the thing being transferred to the borrower, if it is lost, or destroyed, the loss falls on him. *Res perit domino.* With respect to other articles, as horses and wagons for transportation, and horses and military equipments for the use of the soldiers, there is, at the first view, upon the general principles of the law, more room for doubt. If they were received into the service without being purchased, and with the consent of the owners, it must have been either by a gratuitous loan, or by a contract of hiring. In either case, the limitation of the responsibility of the borrower, or hirer, is well settled, by the general principles of law. He is not liable for a loss occasioned by inevitable accident, or in the language of the common law, by the act of God or the public enemy, unless the loss has been preceded by some fault on his part, without which it would not or might not have happened. *Story's Bailments*, sect. 240, 408; *Pothier, Pret a Usage, No.* 55, 56. The jury have not found, by what accidents these losses were occasioned, but by recurring to the vouchers, to which by the agreement reference may be made, it appears that many of them were occasioned *majore casu*, or by that class of accidents for which the hirer, or borrower, is not ordinarily responsible; and as they were avowedly hired for the use of the army, while actively engaged in

war, it cannot be imputed to the plaintiffs as a fault, that they were exposed to destruction by the public enemy. In these cases, the general principles of law place the loss on the owners, and of course the United States would not be liable. If the decision of the present case turned entirely on general principles, the difficulty, which I should feel in this part of it, would be in applying this rule of the common law to a loan, made to the public under such circumstances, unless it appeared by the terms of the contract, that the lender expressly took the risks of war upon himself. But waiving this question, by recurring to the abstract, we shall find, that the settlement, for property received into the public service, in this way, and lost, fairly comes within the purview of the act of 1836. In Georgia, for instance, cannon, rifles, muskets, and other articles, were taken from the State arsenal and furnished to the troops, for which somebody must account to the State. The payment, for articles thus taken and lost by the casualties of war, was then one of the claims which were before Congress when the law was passed. They were supplies furnished to the militia and volunteers, and, if lost, the indemnity due to the owners was an expense incurred, which could not be allowed by the accounting officers of the Treasury Department, under the existing laws; but which, under the pressing exigencies of this case, no one will deny, ought to be paid by the United States. It was to meet cases of this kind that the law was made. My opinion therefore is, that these payments are authorized by the law, and that the defendant is entitled to the credits classed under this head.

3. In the third class, are placed special damages done to a house occupied for quarters, and to grounds occupied by the troops for an encampment. No claims of this kind were brought to the view of the legislature, by the document to which reference has so often been made. They are claims which are entirely of a different character from all those enumerated in the abstract, and therefore this document furnish-

es no reason for supposing that they were within the contemplation of the legislature, when the act was passed. It appears to me, therefore, that the allowance of this credit must be determined by the general laws and usages of the service. It is made the duty of the quartermaster to provide quarters for the army. He must therefore have the authority to agree for the rent and other expenses, necessarily arising out of the execution of his power, and as a disbursing officer, to pay them. This authority seems to be naturally, if not necessarily, incidental to the power of providing quarters, for without it the power cannot be executed. The ordinary deterioration of the property will be taken into consideration, and provided for by the rent. But extraordinary damage, as the destruction of the tenement by fire, or other unusual and unanticipated damages, will not be. The settlement, for damages of this kind, does not appear to me to be necessarily incidental to the general power of providing quarters. A further observation may be made under this head, that the officers in the purchasing department of the army are presumed to be selected with a view to their qualifications for this duty. They may be very competent judges of the value of articles which they are required to purchase, and wholly incompetent to estimate the necessary cost of repairing special damages done to the house, or the injury done to a plantation by cutting down trees, destroying fences, and interrupting the labors of husbandry. My opinion therefore is, that the defendant, in order to entitle himself to these credits, must show, that the settlement of such claims is within the ordinary range of the authority of a quartermaster, under the existing laws, the army regulations, and the established usages of the service; and as no such authority is shown, these credits cannot be allowed.

4. In the fourth class, the jury have placed articles purchased for the army, and consumed or lost in the service. There does not appear to be any objection to the allowance of these credits.

5. The only question arising out of the verdict, which remains to be disposed of, is that of the right of the defendant to charge commissions on his disbursements. The facts found are, that, during the time when he made these disbursements, he was an officer in the line, and that he received only the pay and emoluments attached to his rank as an officer in the line. Whether he performed the duties of quarter-master in addition, or as a substitute, to his other duties, the jury do not find, there having been no evidence upon this point offered on either side.

It is contended that he is not entitled to any such commission, first, because, as an officer under the rules and regulations of the army, by the conditions of his engagement, he was liable to be put upon other duties and services, besides the ordinary duties attached to the office which he held, whenever required by his superiors; and as the occasional performance of extra duties was originally contemplated, under the appointment, no extra compensation for them can, upon general principles, be claimed for such services. There appears to me to be more of logical exactness, than of substantial justice, in this reasoning. It is true that such being the condition attached to the tenure of his office, if extra duties are required, he is bound to perform them, however onerous, or whatever responsibility they may involve. But that in point of equity and good conscience, he can claim no extra compensation for such services, is to my mind by no means so clear. Nor does the law, in other cases, follow out the logical consequences of a contract, with so much rigor, at the expense of general equity and substantial justice. The mate of a vessel, by the very conditions of his engagement, is liable to have devolved upon him the duties and responsibilities of a master. This liability is contemplated in his contract. In case of the master's death, during the voyage, or his being otherwise incapacitated from performing the duties of his office, the mate succeeds, as *hæres necessarius*, to his employment, with all the duties and responsibilities belong-

ing to it. Yet it has never been doubted, although the possibility of all this is contemplated in his original engagement, that he is entitled to an extra compensation, for these extra services and responsibilities. Now what is just and equitable in the transaction of business between man and man, cannot, one would suppose, be considered inequitable or unreasonable, ordinarily, between an individual and the public. The responsibility of disbursing so large a sum of money, in adjusting and paying a great number of miscellaneous accounts, amidst all the confusion created by a perilous and destructive war, is certainly worth something. But I need not dwell upon this. The present suit shows, that by mere error of judgment, while acting with the most perfect integrity and best intentions, he might become involved in pecuniary difficulties, extremely embarrassing and even ruinous to his fortunes. My opinion, therefore, would be upon general principles, even unsupported by authorities, that the defendant was entitled to an extra compensation, for the responsibility attendant on this extra duty. And it appears to me that the reasoning of the Court in the cases of the *U. S. vs. McDaniel*, *U. S. vs. Fillebrown*, and *U. S. vs. Ripley*, 7 *Peters Rep.* 1, 18, 28, fully authorize this conclusion.

But whatever equitable claim the defendant may have, for an extra compensation, on general principles, it is said that every allowance of this kind, whether in the form of extra pay, or commissions for disbursements, is prohibited by the act of March 3, 1835. The title of the act is, "Act making additional appropriations for the Delaware Breakwater, for certain harbors, and removing obstructions in and at the mouth of certain rivers, for the year 1835," ch. 26. At the end of the act there is this proviso: "That no officer of the army shall receive any per cent., or additional pay, extra allowance, or compensation, in any form whatever, on account of his disbursing any public money, appropriated during the present session, for fortifications, executions of sur-

veys, works of internal improvement, building of arsenals, purchase of public supplies of any description, or for any other service or duty whatever, unless authorized by law."

It is contended, that this proviso is general in its operation and applies to all future appropriations for the military service, as well as to those specially enumerated. Now the first objection, that occurs to this interpretation of the law is, that this is not the obvious, or natural, nor the grammatical, meaning of the words. The proviso is, in its terms, restricted in its operation, to the disbursing of moneys, appropriated during the then present session of Congress. Nor do I see how a more extended sense can be given to the law, consistently with the rules of grammar, without either doing violence to the meaning of the language, or interpolating, into the act, words not used by the legislature. And this the Court has no authority to do, when the language has a plain and sensible meaning as it stands. In the second place, there is nothing, in the character of the act, which would lead one to suppose, that the legislature had any thing in view beyond the current year. The law is in its nature temporary, making provision for the public service for the current year, and of course spending itself within the year. It is not in such a law, that we should naturally be led to look, for provisions of a permanent character.

Another objection is made to the allowance of commissions, upon which I have found much more difficulty in arriving to a conclusion satisfactory to my own mind. The general regulations for the army, prescribed by the War Department, under the sanction of the President, have been appealed to by both parties, as having the force of law. It will not be pretended, that these regulations can control or annul an act of the legislature, and when it is said that they have the force of law, nothing more is meant than that they have that virtue, when they are consistent with the laws established by the legislature. It is observed by Mr. Justice McLean,

in delivering the opinion of the Court, in the case of the *U. S. vs. McDaniel*, that "a practical knowledge of the action of any one of the great departments of the government, must convince any person, that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his, powers by the law, but it does not follow that he must show a statutory provision for every thing he does. No government could be administered on such principles. To attempt to regulate by law, the minute movements, of every part of the complicated machinery of government, would evince a most unpardonable ignorance on the subject. While the great outline of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established, in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits, and no change of those usages can have a retrospective effect, but must be limited to the future." 7 *Peters's Rep.* 14.

These remarks apply, with as much force at least, to the Department of War, as to any other branch of the administion. A moment's reflection will satisfy any one, that it is quite impossible, that any statute should go into all the detail of regulation required to maintain the police and discipline of the army, and still more so, that it should anticipate, and provide for, all the exigencies demanded for the prompt and effective action of the military force, amidst the vicissitudes and casualties occurring to an army, engaged in the active duties of a campaign. A great deal must unavoidably be left to the judgment and discretion of the officers in command, and much also to the head of the department who has

the general superintendence of that service. The great outlines, of their powers and duties, may be fixed by law, but, within these landmarks, there is a wide field of detail and contingencies, which no human sagacity can foresee, and which of course cannot be provided for by general laws. These are necessarily left to the judgment and discretion of those, who have the immediate superintendence of the service, and although no such order can be valid, when it is repugnant to an act of Congress, a great many orders, in matters of detail, may be, and are, issued, which are not inconsistent with the general law, although not expressly authorized by it. Such orders, emanating from a superior, and especially from the War Department, the subordinate officers are bound to obey. In this way, customs and usages become established, which constitute a sort of common law of the service. The same authority, which establishes the usage, may change it; for customary law is abrogated, by the establishment of a contrary custom. But while it remains unchanged, it is binding. And such customs and usages, in the military service, may be proved by the same kind of evidence as is competent to prove a custom in other cases. But the highest evidence will be the regulations of the army, printed and promulgated by the War Department; for these regulations, if I have a correct view of the subject, are nothing more than an authoritative digest of these customs.

These usages and customs, the gradual product of time and circumstances, constitute a sort of complement of the statute law upon the subject; and they may affect the rights and obligations of those who are subject to them, in various ways. They may regulate and define their privileges and immunities, the nature of the services which may be required of them, and the kind or amount of extra compensation, to which they may be entitled, for the performance of services superadded to the ordinary duties attached to their office. But all this must be consistent with the will of the legislature, expressed

in the public laws, and not in opposition to it. Now as to the right of the defendant to an additional compensation, for the performance of extra services beyond those ordinarily attached to his office, the statute law is silent. No other act of Congress has been relied upon, except the proviso in the act of 1835, before mentioned; and this case cannot, in my opinion, be brought within the provisions of that act, without the interpolation of words which the legislature have not seen fit to use; and this the Court has no authority to do, when the words, as they stand, have a plain and sensible meaning. This would be to make, and not to interpret, the law.

The title of the defendant to a commission on disbursements, then, being neither prohibited nor allowed by any act of the legislature, depends on general principles, and the custom and usages of this particular service. By the general principles of the common law, he would be entitled to an extra compensation for this extra service and responsibility. It would be no valid objection to the claim, that by the condition of his engagement he was liable to have extra duties and responsibilities devolved upon him; because it would be presumed, that the compensation agreed upon was fixed in reference solely to such services as were in the direct contemplation of the parties, when the engagement was made, and not with a reference to services which rested only upon remote and uncertain contingencies. But the officers of the army are all liable to be put upon extra services, not falling directly in the line of their ordinary routine of duty, some more and some less onerous, some of greater and some of less responsibility; and these requisitions are so common, that they may reasonably be presumed to come within the contemplation of the parties when the engagement is made, not merely as a possible but a probable contingency. A great variety of cases may therefore be expected to arise, in some of which it may be reasonable to allow an extra compensa-

tion, and in others not. The executive department of the government, which has the immediate direction and superintendence of this branch of the public service, has the best means of judging when such an allowance ought, and when it ought not, to be made. Should the department reject a claim which is authorized by an act of Congress, there is no doubt that it ought to be allowed by the Court; because no order or requisition, of an executive officer, can annul an act of the legislature, or defeat a right which has become vested under a positive law. Or if the department should disallow a claim which is sanctioned by established usage, such usage having the power of law, an order of the department cannot have a retroäctive effect to defeat a right already vested. This appears to me to be the clear doctrine of the cases before referred to. But when a claim is presented, not sanctioned by any act of the legislature, nor confirmed by any well known or established custom, but standing merely upon the general principles of equity, the decision of an executive department, confirmed by the President, if not absolutely conclusive, deserves to be very gravely considered, before it is overruled by the Court. Such is the case with this claim for commissions. It is admitted that it is not directly authorized by any act of Congress, and no evidence has been produced of a usage to allow commission in such cases. The claim therefore stands upon its own naked and general equity.

Now there is, in the general regulations of the army published in 1835, an article precisely applicable to this case. It is the 56th article, on the 23d page of the printed volume, having for its rubrick, *Restrictions as to Extra Allowances*, and is in these words: "In all cases where an officer of the army is required, by the direction of the War Department, to perform duties or to make disbursements, for which compensation is not specially provided by law, and where the instructions directing such duties to be done, or disbursements to be made, make no provision for additional compen-

sation, no allowance therefor will be made to such officer. It will then be considered, that in the opinion of the War Department, the services so required are within the proper sphere of his duty, as an officer of the army." The date of the approval of this digest is December 31, 1836, subsequent to the time when this claim, or at least the principal part of it, arose, and could not have the effect of defeating rights already vested. But this article is a mere transcript of a general order, bearing the date of May 18th, 1833, and was therefore in force during the whole period when this service was performed. This order is confirmed by another of March 14, 1835, which enumerates in detail the cases in which extra compensation had been formerly allowed, and which would be disallowed for the future. Among them are — "Monthly allowance, or per centage, to officers of the line temporarily performing staff duties — and per centage to officers for disbursing funds not properly appertaining to their department." This order is professedly founded upon a construction of the proviso in the act of 1835, before mentioned, and therefore it may be said, that if the Court overrules the construction put upon the law by the department, the order founded upon that act, and professedly intending to carry it into effect, ought to be overruled also. But the order of 1833, was anterior to the act, and therefore could have no reference to it, and that is equally decisive against the claim set up in this case; nor do I see how it can be overcome but by a direct denial of the authority of the department to establish any such rule, with respect to extra allowances, by general regulations and orders.

It appears to me, that it is fairly within the authority of the War Department, under the sanction of the President, to establish general rules upon this subject, which, when duly promulgated, will be binding on the rights of the officers. It is not contended that an order of the executive can control an act of the legislature, or deprive a party of a right ac-

quired under the law. But, as has been remarked, the legislation of Congress can never go into all the minute detail of regulation, involved in the complicated service of the army. Much must unavoidably be left to the discretion of the high officers, who superintend that branch of the public service; and as these matters of detail are left to the regulation of the Department, it seems to me reasonable, when officers are required to perform services which do not fall within the range of their ordinary duties, that it is properly within the discretion of the department to determine what, and whether any, extra compensation should be allowed for such extra service, taking care that the rule be uniform, and applying in the same way to all similar cases. An authority of this kind seems to me to be clearly implied, in the reasoning of the Court in the cases which have been before mentioned. "The amount of compensation," says Mr. Justice McLean, "in the military service, may depend in some degree upon the regulations of the War Department; but such regulations must be uniform, and applicable to all officers under the same circumstances." *U. S. vs. Ripley*, 7 *Peters*, 25. And in still broader terms he says, in the opinion before quoted, "Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within respective limits; and no change of those usages can have a retrospective effect, but must be limited to the future." 7 *Peters*, 15. If usage is to govern, in what manner does usage become established? Obviously in no other way than by the practice of the department. Apply the remark to the case now in judgment. A usage of allowing extra pay, for extra services of any particular kind, is established, by its being charged in various instances and allowed and ordered to be paid, by the department. It is obvious, therefore, that no usage can be established but by the concurrence of the department; for no number of charges, however numerous, on the part of the officers, can ever con-

stitute a usage, under which any right can be claimed, unless they have been allowed. It is the allowance which constitutes the usage. The existence of the usage necessarily implies the right of the department to make the allowance; and if it have the right to allow, it must have the right to disallow. The regulation of 1833 was in force when these disbursements were made; and it expressly denies any allowance, for disbursements made by an officer, where none is provided by law, and when the order, directing them to be made, makes no provision for an additional compensation. This case falls precisely within the words of the regulation, and on this ground, my opinion is, that the claim for compensation cannot be allowed.

The verdict must be made to conform to this opinion. From the gross sum of $4,981 47, are to be deducted the sum of $325, paid for articles impressed and lost in the service of the United States, $5,144 15, paid for articles received into their service by the consent of the owners, and lost, and $300 40, for articles purchased, amounting in the whole to $5,769 55, leaving a balance of $2,711 92.

THE EMBLEM.

In cases of salvage, the Court has no authority to allow a reward for saving life. This is a common duty of humanity. But when the saving of life is connected with the saving of property, the Court may consider it, in fixing the amount of salvage.

The rights acquired by the salvors are only *in rem*, to be paid by the property. They have no claim *in personam* against the owners, if they choose to abandon the goods.

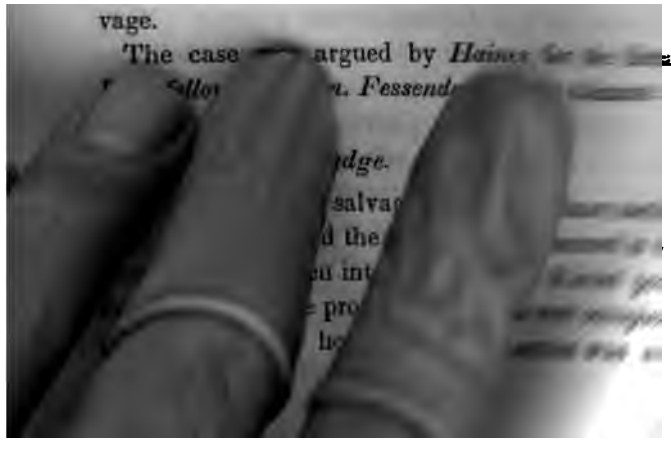
But if the property is delivered by the salvors to the owners, before a compensation for saving them is made, the salvors may maintain a libel *in personam* for the salvage.

The Court can allow no salvage for saving, from a wreck, bills of exchange or other papers, the evidence of a debt, or of title to property.

The Emblem.

July 27th, 1840. This was a libel for Salvage. It appeared from the evidence, that the Schooner Emblem, of New Bedford, sailed from Apalachicola, on the 18th of March, for Havana, with a crew of six hands, and with five passengers. On her passage she met with unfavorable weather, but no serious accident befell her until the morning of the 25th, when she was struck by a squall, about 6 o'clock, and upset. She lay upon her beams for about eight hours, when her masts gave way and she righted. For some time before the disaster, there had been a strong wind. The waves ran high and continually broke over her, and the crew and passengers could save themselves, from being washed over, only by lashing themselves to the wreck. In this situation she lay from six o'clock in the morning of the 25th, to the same hour in the morning of the 29th. During the whole time, the weather was boisterous, and the waves constantly broke over the wreck and the heads of the persons on board, so that they were constantly kept wet, lashed to the wreck to save themselves from being carried away by the waves, and without food or drink. They were within sight of land, not from the wreck, but from the mast head of a ship, and in a place where vessels were continually passing and re-passing. The only one of the persons saved, who was examined, Mrs. Judah, stated that she saw five vessels pass them on the first day, and seven on the second; and was informed, by one of the crew, that twenty-three, in all, were in sight, at different times, from the wreck, while they lay in this helpless and distressing situation. Some of them came so near, that the persons on board could be ly and distinctly seen from the wreck. But their relief. In the mean time, one after company, as their strength became ers of nature failed, were loose washed into the deep. The the evening after the di

were relieved. Mrs. Judah saw her husband and [illegible] children successively swept from the deck by the [illegible] the waves, and buried in the ocean. At last [illegible] thus tossed upon the sea, for four full days [illegible] clock of the morning of the 29th. they saw a vessel [illegible] down for them. It proved to be the Charles Miller of this port, George M. Hatch, master, which had left Hartford the day before, on her return to Portland. He immediately brought his vessel near to the wreck, and the waves still continuing to run high, he sent his boat to their relief, and took from the wreck those whom the waves had spared. But who were now so much enfeebled, by their long suffering, as to be entirely helpless. They were lifted into the boat and lifted out again, by the crew of the salvor ship, and one was so much reduced that he died of exhaustion in the course of the day. Having taken off the survivors, he proceeded on his way; but, about two hours after, the wind [illegible] and having learnt that there was some property on board the wreck, he returned for the purpose of [illegible] to save it. After about four or five hours labor the crew of the Charles Miller succeeded in fishing out of the [illegible] two trunks, one containing theatrical dresses, of [illegible] the other, two bags containing about 500 dollars [illegible] and bills of exchange and drafts amounting [illegible] dollars. On his arrival at Portland he libelled [illegible] vage.



The case [illegible] argued by *Haines* [illegible] *Fessend[illegible]*

with any peculiar hazard. But there are other circumstances in the case, which will incline the Court to look upon it with a more favorable eye. It was connected with the saving of several lives, which, but for the timely aid of these salvors, must inevitably have been sacrificed. Now a Court of Admiralty has no authority to allow a reward merely for the saving of life. "That," as is observed by Lord Stowell, "must be left to the bounty of individuals; but when it is connected with the preservation of property, then the Court can take notice of it, and it is always willing to join that to the *animus* displayed in the first instance."* The rate of salvage rests entirely on the discretion of the Court, but it is a judicial discretion, governed by fixed and certain principles. The first principle is, that it shall be liberal, and not confined to a mere *quantum meruit* for the service actually performed, but such as will operate as an inducement, to men of daring and adventurous courage, to engage in these perilous enterprises. It would be surprising, when Courts are thus liberal in remunerating hardy enterprise, displayed in the saving of property, if they were entirely deaf to its merits, where the same dangers are braved in saving life. But this is a charge which cannot justly be imputed to Courts of Admiralty. It has been stated by high authority, that stopping, for the purpose of saving the lives of shipwrecked persons, is a meritorious duty, and is not such a deviation as will discharge underwriters.† Now, though the Court is not authorized to grant a reward directly, for the discharge of this common duty of humanity, yet when it has incidentally led to the saving of property, it will not exclude it wholly from its consideration, in determining the amount of salvage upon the property.

The motive, for the deviation in this case, seems to have been the saving of life. When the survivors upon the wreck

* *The Aid*, 1 *Haggard*, 83. See also *The Two Catherines*, 2 *Mason*, 319.
† *The Boston*, 1 *Sumner*, 328.

were safely lodged in the salvors' vessel, she continued on her course, and it was not until after the wind lulled, and the danger of entering upon the wreck was diminished, that Capt. Hatch returned to ascertain what property could be saved; so that the acquiring any reward for themselves appears to have been, in the minds of the salvors, an after or secondary consideration. I am clearly of the opinion, that in this case, looking at the risk, time, and labor of the service only, the remuneration ought to be liberal, and that the humanity of the salvors, although it cannot be the object of a direct reward, in the way of salvage, is not to be forgotten in determining the rate of salvage upon the property. Not that the Court has the authority to take one man's property and appropriate it, as a reward for saving another man's life; but that the general principles of humanity and of enlarged policy, applicable to these cases, where all, who are interested in adventures upon the high seas, are liable to become in turn the salvors and the saved, require that the circumstance of the preservation of life ought not to be wholly kept out of sight, in measuring the reward. Sure I am, that no one, who has once been exposed to the horrors which these persons suffered, will ever object to the principle.

But, in the present case, there are some circumstances which, I am free to say, have struck my mind with considerable surprise. They are, that this vessel should have lain, for four days, in one of the most frequented parts of the American seas, with vessels continually passing her, some of them almost within hailing distance, and when they were in full view of this unhappy company, who were lying thus lashed and dying upon the wreck, and no one came to their relief, until more than half of their number were released from their sufferings, by death, and consigned to a watery grave. It is a fact, which would seem to be incredible, if it did not rest upon indubitable and unsuspected proof. If this fact is to be taken as a just measure of the humanity of the persons who frequent those seas, I know not but itmay

be the part, not only of humanity, but of worldly wisdom, to let them understand that sometimes even in godliness there is gain, and to tempt them by the allurements of pecuniary profit, if they can be led by no other, to acts of humanity and mercy.

The counsel for the claimants have fairly allowed full credit to the humanity of Capt. Hatch and his crew, standing as it does in such striking contrast with that of others in the neighborhood of those seas. They have not contended against a reasonable allowance of salvage, upon the particular circumstances of the case. The principal question, which has been discussed, is, whether any salvage can, upon the principles of law, be allowed upon the bills of exchange and drafts, which were saved in the same trunk which contained the specie. The argument for the claimants is, that a bill of exchange is not property, in any proper sense of the word, but merely the evidence of a debt, and that if lost, the debt is not cancelled, but the creditor can recover it, upon the original consideration for which the bill was given; and therefore, if saved from a shipwrecked vessel, it is no more subject to salvage than a deed of real estate, or any other muniment of title, which may be useful to the owners, but is of no value in the hands of any other person. On the other side it is argued, that although a bill of exchange is not strictly property, it is a security, and although the loss of the security does not cancel the debt, it renders the recovery of it difficult, and may, from the inability of the creditor to procure sufficient proof, render a recovery impossible, and thus by the saving of the security, the salvors have rendered an essential benefit to the owner, capable of being valued in money. For this benefit, it is contended, they are entitled to a remuneration. The fact which gives force to this argument, is, that the whole set of each of the bills was saved, all being found together in the trunk of Mr. Leland, the supercargo.

That the owners of these bills have derived some benefit, from the rescue of them from destruction, cannot be denied. It has furnished them with the proof, that no bill, of any of the sets, is now outstanding in circulation, in the hands of a bona fide holder, and has thus removed one of the difficulties they would have to encounter, in a suit for the debt, upon the original consideration, and if the finding and saving of property in this way furnished the ground of a personal action against the owner, *quasi ex contractu*, I see no insuperable obstacle to a decree against the owners of a suitable remuneration to the salvors. But, by the common law, the finder, of property which has been casually lost, has no legal claim, against the owner, to any thing in the nature of a reward or compensation for finding. All that he can pretend to is the repayment of the actual expenses he has incurred in preserving it, and upon the payment of this, the owner is entitled to receive his property free from all other charge.* The finder of a check, or promissory note, or other chose in action acquires no property in the note, and has no right to demand the payment of it; and if a promiser pays it, after notice that it came into the possession of the holder by finding, he would not be protected against a demand by the owner.† And in this rule, the common agrees with the civil law. The finder, of what belongs to another, acquires no property in the thing found, unless the owner had renounced his property in it, and left it derelict as *bona vacantia*, but he was bound to restore it to the owner.‡

This is the law, if the thing is lost on the land. But the maritime law, from considerations of public policy, has established a different rule for goods which are lost at sea. A person who preserves goods which are lost, or in danger of being lost, by the fortunes of the sea, is entitled to a reward

* Kent's Commentaries, 356.

† McLaughlin vs. Waite, 5 Wendell, 404.

‡ Digest, 6, 1, 67. Pothier, Traité de la Proprieté, No. 66.

for that service. But what is the nature of this right? Is it a personal claim, or right of action, to recover the reward, against the owner of the thing saved, or is it merely a right to proceed against the thing itself, to obtain his satisfaction? This is a material question which arises in the consideration of this case. That the salvor has a perfect right to proceed against the goods saved, admits of no doubt. By saving them, he acquires a sort of proprietary interest in the goods, a *jus in re*, and a complete possessory right, against all persons claiming an interest in them, to retain them until his compensation is paid, or until he can proceed to enforce his right against them, by due course of law. And it is the familiar practice of Courts of Admiralty, in all the maritime Courts of Europe, to give him a remedy by process *in rem*. The goods, upon filing a libel by the salvor, are taken into the custody of the Court, and ordered to be sold for the payment of the salvage. The right of dominion, or the absolute property, in the meantime, remains in the original owner. But he is under no obligation to assert his right, by intervening with a claim. He may abandon his property if he pleases, and if he does so, and declines to make himself a party to the suit, no decree can be made against him. In certain cases, it is true, the Admiralty has jurisdiction, in cases of salvage, to proceed *in personam*. If the owner wishes to receive his goods, before proceedings at law are instituted, and the salvor delivers them to him, a personal libel may be maintained for the salvage. Such were the cases of the Trelawny and the Hope.* But this is solely on the ground of his possession of the property. All the authorities speak of the right of the salvor as attaching to the thing, and not as the foundation of any personal claim against the owner, independent of the goods saved. The customs of the sea, as we have them collected in all the old maritime codes, treat the salvor's claim in the same way, as a right against the property saved, and the

* 3 Robinson, 215, 216. 4 Robinson, 223.

usual mode, of compensating the service, is by the allowance of a certain portion of the goods saved, or of their value. The service is no where spoken of, as constituting the ground of a personal claim against the owners.

Upon these principles, admitting that the salvors have performed a meritorious and valuable service to the owners of these bills, by rescuing them from destruction, it is difficult to see in what mode the Court can give them a remedy. It can only act on the thing, and pronounce the bills subject to salvage; and it can execute its decree only by an order of sale. If they are sold, what right would be transferred to the purchaser? Could he recover from the persons, whose names are on the bills, the sums for which they were drawn? The difficulties, it appears to me, would be insuperable. Suppose the title deeds of an estate were saved from a wrecked vessel, it would not be pretended that the possession of the deeds carried with it any title to the land, or any interest in it. Or, suppose the paper saved were a will, and it were pronounced subject to salvage; would a sale, under a decree of a Court of Admiralty, transfer to the purchaser any interest in the legacies? Or, if the papers saved were settlements, receipts or acquittances; these papers might be of great value to the owner, but would be of no use to any one else. If any salvage is due on such articles, it can only be recovered in a personal suit against the owners. But the saving of property, from the perils of the sea, creates no personal obligation against the owner, independent of his interest in the property saved.

But it is contended for the libellant, that the papers having been saved and brought into Court, the Court may prescribe the terms upon which they may be redelivered to the owner, and may hold them impounded until the condition be performed. When goods are brought into the custody of the law by process *in rem*, a claimant cannot, it is true, recover the possession of them, but by an order of the Court. But when he is entitled to the possession the Court, is bound to

pass the order. The authority of the Court to retain the possession, is founded on that of the libellant, and the foundation of his right is a supposed lien upon them, for the payment of salvage. But if they are not subject to salvage, then his right fails. The case falls under the rule of the common law, and the owner is entitled to receive them, upon the payment of the actual expenses which the finder has incurred in preserving them, and it will be the duty of the Court to order them to be restored to the owner, upon proper proof of his title.

My opinion is, that nothing can be allowed upon the bills of exchange and drafts; but I think that there are peculiar reasons for allowing a liberal salvage on the property saved. And I allow it the more willingly, as, from the evidence now before the Court, it appears that the specie belongs to the same persons, who are entitled to the bills. As the salvors have performed a meritorious service, in rescuing from destruction the evidence of property, for which, upon the principles of the maritime law, no remuneration can be allowed, this fact may be justly remembered, in the allowance of salvage on those articles which are legally subject to that burthen. The whole amount of the property saved will not probably exceed six hundred dollars. I shall allow three hundred and eighty dollars for salvage, and charge the expenses upon the residue. This will be divided in the proportion of two-fifths to the owners of the salvor ship, and three-fifths to the master and crew; to be divided into thirteen shares:

Four shares to Capt. Hatch, the master;
Two shares to Lewis West, the mate;
One share to James Cole, mariner;
One share to Charles Dennison, "
One share to George Morris, "
One share to Daniel Nash, "
One share to Stephen Chase, "
One share to Wm. Robinson, "
One share to Isaac Johnson, steward.

SAMUEL DAVIS vs. GREENWOOD C. CHILD, ET AL.

By the general maritime law of Europe, material men have a privileged lien on a vessel, for repairs and supplies furnished for the vessel. But by the maritime laws of this country, they have no lien when the repairs are made, and the supplies are furnished, for a vessel in a port of the State to which she belongs, unless it is allowed by the local law.

Where the repairs are made, or the supplies furnished, for a vessel in a port of a State to which she does not belong, she is considered a foreign vessel, and the rule of the general maritime law prevails.

A person who *lends money* to be employed in the repairs of a vessel, or to furnish her with supplies, has the same privilege against the vessel that material men have. He is considered as giving credit both to the ship and to the owners. The ship is hypothecated to him for his security, and he may maintain in the admiralty, either a libel *in rem* against the vessel, or a libel *in personam* against the owners.

Whether this principle be supposed to have been borrowed from the Roman law, or to have had an independent origin in the commercia usages of the middle ages, it appears to be equally unquestionable in one case as in the other.

The admiralty has a general jurisdiction to enforce all maritime liens.

The admiralty has no direct jurisdiction over trusts, although they may relate to maritime affairs; if the libellant states a trust, as the foundation of his suit, he states himself out of court.

Nor has the admiralty any jurisdiction over matters of account, merely as accounts, although they may arise exclusively out of maritime transactions. It can take cognizance of accounts, only as incidental to other matters over which it has jurisdiction.

Nor has the admiralty jurisdiction to enforce the specific performance of an agreement relating to maritime affairs.

August 4th, 1840. The substance of this case as stated in the libel, is as follows:—On the 29th of March, 1837, Child & Dole, being the owners of the schooner Sultan, let her on shares to one Prince B. Lewis, to be employed in the coasting trade. He proceeded in the vessel to the southern States, and employed her until the 13th of October, 1838, when the owners, having become dissatisfied, employed Ja-

cob B. Stanwood to proceed to New Orleans, to take possession of the vessel for them. He went accordingly, and took the schooner into his possession, and appointed James P. Coffin, master. On the return of the Sultan from a voyage to Texas, in February, 1830, she was found to require repairs; and it was then also ascertained that there were large sums due for debts alleged to have been contracted on account of the vessel, by Lewis, the former master.

Lewis had absconded and was not to be found. For the purpose of settling these accounts, and for raising money to pay the expenses of these repairs, Stanwood applied to the libellant for a loan, who advanced the money for that purpose. Afterwards, on the 22nd of March, the libellant, at the request of Stanwood, caused process to be sued out against the vessel for the money he had advanced; and it was agreed between them, that, at the sale, she should be purchased by the libellant, provided that she sold for less than her value, for the benefit and in trust for the owners, Child & Dole. The object of the sale was, to free her from the claims of other creditors. She was sold under an order of Court, and bought by the libellant, May 24th, 1830, he, by the agreement with Stanwood, taking the conveyance in his own name, and to hold the legal title of the vessel, as a security for his advance, but in trust for the owners; and by the direction of Stanwood, acting as the agent of the owners, he caused the repairs to be completed, and the vessel to be fitted for sea. Stanwood left New Orleans before the repairs were finished, having given directions to the libellant to procure for her a freight, when repaired, as soon as practicable, to take the entire management and control of the vessel, and act for the interest of the owners.

The libellant expended upon the vessel, at New Orleans, $2,339 32. He then appointed Thomas F. Hinds, master; procured freight, and she sailed for Mobile, June 26th, 1839. After going to sea she was found to leak, and on her arrival at Mobile, it was found, from the defective condition of her

bottom, that further repairs were necessary to render her seaworthy, and she was further repaired by the direction of the libellant, acting under the authority derived from Stanwood, at the cost of $3,272 89. She then sailed with a freight for Boston. When she had been out about four days, she was run into by another vessel, and was obliged to put into New Orleans for repairs, where she was again repaired under the direction of the libellant, at the expense of $1,418 75. She then sailed for Boston, where she arrived on the 27th of April, her freight amounting to $1,338 56, after deducting her expenses of $502 27, leaving a credit to the owners of $836 29. A bill of particulars, annexed to the libel, contains a statement of all the moneys expended by the libellant, on account of the vessel, and all he has received for insurance, average, and freight, leaving a balance now due him of $4,828 37. The libel concludes with a prayer that the Court will pronounce for the repayment of the balance of the sums expended, and that Child & Dole may be required to accept a reconveyance of the vessel, which the libellant now tenders.

To this libel, the respondents put in a plea to the jurisdiction. The question of jurisdiction was ably argued.

Fox, for the libellant, *C. S. Daveis*, for the respondent.

WARE, *District Judge*.

Two questions arise upon the pleadings in this case, and which have been elaborately argued by the counsel. *The first* is, whether a person who *lends or advances money* to be expended in repairing a vessel, or in furnishing her with supplies necessary for her employment, as provisions for the crew, can maintain a libel *in personam* against the owners for such advances, or a libel *in rem* against the vessel herself. *The second* is, admitting the first question to be decided in the affirmative, whether the jurisdiction of the Court can be maintained on the particular facts alleged in this libel.

The first question does not appear to me to involve any serious difficulty. It is true that no judicial decision was cited, at the argument, directly in point, and I am not aware of any reported case, in which the precise question has been presented for decision. But the jurisdiction of the Court seems to me to stand on principles too well established to be brought into doubt.

By the general maritime law of Europe, any person who furnishes materials or labor for the repair or equipment of a ship, or supplies her with things necessary for her employment, as provisions for the crew, acquires by this alone, without any express stipulation for that purpose, a tacit hypothecation of the ship itself for his security. In this country, no such implied hypothecation is recognized by the common or customary law, when the repairs are made, or the supplies furnished, in a port of the State to which the vessel belongs. In some of the States, the local law gives a lien, and where it does, it may be enforced by the admiralty. *Peroux* v. *Howard*, 7 Peters, 12, 324. *Harper* v. *a New Brig*, Gilpin, 537. But by the common maritime law of this country, if the supplies are furnished in the port of a State to which the vessel does not belong, the privilege is admitted, and the lien attaches. *The Jerusalem*, 2 *Gall.* 345. *The St. Jago de Cuba*, 9 Wheat. 409. *The Gen. Smith*, 4 Wheat. 438. *The Aurora*, 1 Wheat. 105. The creditor, in such a case, is considered as giving credit both to the ship and the owners, and he may proceed in the admiralty against either. But it was contended, at the argument, that this privilege is confined to the persons who actually furnish the supplies or make the repairs, called, in the language of the admiralty, material men, and is not extended to a party who loans money, which is expended in repairs or in furnishing materials for the vessel. The ground assumed in the argument is, that such advances are to be considered as a common loan, not distinguishable from any other credit arising in the common course of mercantile business, and that the purposes for which the money

was advanced and to which it was applied, cannot be inquired into, to show that the consideration was maritime, and thus within the cognizance of the Court as a cause of admiralty and maritime jurisdiction.

The first inquiry that is naturally suggested, as a test of the jurisdiction, is, whether such a loan is held by the maritime law to be a privileged debt, giving the creditor a lien on the vessel for his security. If it does, then I hold it to be clear, that it may be enforced by this Court, for the admiralty has a general jurisdiction to enforce all maritime liens. The lien which material men have against the ship, for repairs or supplies, has been supposed to be derived from the Roman law. *Abbott on Shipping, ch.* 4, § 10, *p.* 102. Now if this privilege of the creditor be admitted to be a principle borrowed by the maritime law from that of Rome, there would seem to be an end of the controversy as to the rights of the lender, for it is quite clear that in the Roman law he had this privilege. It was a general principle of the law of Rome, that any creditor who loaned money to be employed in preserving, repairing or improving a thing, had a privilege against it for the reimbursement of the loan. *Domat. Lois Civiles, Liv.* 3, *Tit.* 1, § 5, *n.* 6, 7. The very case, of repairing a vessel, is put as an illustration of the general doctrine. *Qui in navem extruendum vel instruendum credit vel etiam emendum privilegium habet. Dig.* 42, 5, 26 *and* 34. *Dig.* 20, 4, 5 *and* 6. And the privilege, in the Roman law, extended to a creditor who loaned money for the purchase of a ship. Indeed, by the *text* of the law, the privilege seems to be confined to the lender, and it is only by analogy that it is extended to comprehend the immediate furnisher of the materials or labor by which the vessel is repaired. *Domat. Liv.* 3, *Tit.* 1, § 5, *n.* 9. And the principle was carried further in favor of lenders. If the master loaned money of a third person, with which he paid the creditor who loaned directly for the repairs of a ship, this

new creditor was subrogated to the right of the first lender, and considered as giving credit to the owner. *Dig.* 14, 1, 1, § 11. *Domat. Liv.* 3, *Tit.* 1, § 6, *n.* 6. But by the Roman law, this was a mere personal privilege, and did not involve a tacit hypothecation of the thing. It gave to the creditor a right of preference, *jus prælationis*, a right of prior payment out of the thing, over the general creditors of the owner; but his right was postponed to all hypothecary creditors. *Emerigon, Contrate a la Grosse, ch.* 12, § 1. *Vinnius, Select. Jur. Quæst.* 42, *ch.* 4. And the privilege of the creditor was postponed to that of the fisc. *Dig.* 42, 2, 34. But these personal privileges of creditors, independent of hypothecation, are unknown to the maritime law. In that law, every privilege implies a tacit or privileged hypothecation. *Emerigon, Contrate a la Grosse, c.* 12, *sec.* 2, § 1. *Cleirac, Jurisdiction de la Marine, Art.* 13, *No.* 6.

Whether the rules of the maritime law on this subject were derived from the Roman law, or what is more probable, had their origin in the customs and usages of maritime commerce in the middle ages, there is no doubt, that a person who lends money for the purpose of repairing a vessel, or of furnishing her with supplies, and which is actually employed for that purpose, is entitled to the same privilege against the ship, as one who actually furnishes the supplies, or performs the labor. The reasons of justice, equity, and public policy are the same in the one case as in the other, and the law makes no distinction between them. It makes no difference, says Emerigon, whether one has furnished the materials, or loaned the money with which they have been purchased. *Contrate a la Grosse, ch.* 12, § 4. A merchant whose goods are sold in the course of the voyage, to supply the necessities of the ship, is entitled to the same privilege, this being, in fact, a loan to the vessel. We find this privilege of the lender for the repairs or the necessities of the vessel, established in the earliest monuments that remain

of the maritime law of the middle ages. In the Ordonnance of Peter 4th of Aragon, of 1340, for regulating the proceedings of the consular or maritime Courts, which makes the first forty-two chapters of the common editions of the Consulate of the Sea, it is said, that in the sale of a new vessel, before she had made a voyage, the laborers and furnishers of materials shall have the first rank of privilege, and be preferred to creditors who have loaned money for the building of a ship, but still recognizing the privilege of the lender as subordinate to that of the workmen. After she has made a voyage, the mariners shall hold the first rank of privilege, and after them come those who have loaned money for the use of the vessel. *Ch.* 32 *and* 34, *Pardessus Lois Maratimes, vol.* 5, *pp.* 389, 325. Cleirac marshals the privileges in the same order — that of the mariners first, and after them, creditors who have lent money to repair or to purchase rigging and provisions for the ship; and he quotes this Ordonnance from the Consulate as authority. *Jurisdiction par la Marine, Art.* 5, §15, and *Art.* 18, § 4 *and* 5. The rule established by the French Ordonnance of 1621, is, that upon the seizure and sale of a vessel, the wages of the mariners for the last voyage shall be first paid, in preference to all other creditors, and after them, those who have loaned money for the necessities of the ship during the voyage, and thirdly, those who have loaned money for repairs, for provisions, or the equipment of the ship, before the commencement of the voyage. *Liv.* 1, *Tit.* 14, *Art.* 16. That is, according to Valin, those who have loaned on bottomry or otherwise, for the repairs, victualling or equipment of the vessel, and these comprehend carpenters, caulkers, and other workmen who have been employed in the repairs, as well as those who have furnished the materials used in the repairs, and also the keepers of boarding houses, who have, by order of the master, boarded the crew while repairs were being made, (1 *Valin, p.* 363,) putting the lender in the same class with the furnishers of materials and

the workmen. Boulay Paty, in his commentary on the *Code de Commerce*, says, that the privilege exists, as well in favor of the simple lender, as of him who takes the security of a bottomry bond. *Cours de Droit Maratime, Tit.* 1, § 2, *Vol.* 1, *p.* 119.

Indeed, it appears to me, that upon the principles ofthe maritime law, it is very clear, that a person who lends money to be expended in repairing a vessel, or in furnishing her with provisions, or fitting her for sea, has the same privilege against the vessel, which is allowed to material men who are the actual furnishers, or the mechanics who perform the labor. The authorities are entirely conclusive. The lender is considered as trusting to the ship, as well as the owners: and by the loan itself, he acquires a privileged hypothecation, which is as sacred in every respect as that which is created by an instrument of bottomry, except that he is not entitled to maritime interest. *Peckius, Ad Rem Nauticam, p.* 99, and *Vinnius's note. Kurike, Quæst. Illust., Quæst.* 13. *Voet. ad Pand.* 20 and 19. *Stypman Jus Maritimum, Pars* 4, *cap.* 5, § 146. By the law of this country, the privilege exists only where the credit is given to a vessel, in a port out of the State to which she belongs, unless it is allowed by the local law.

Now, if the law allows to a creditor a lien on the vessel for his security, the jurisdiction of the admiralty follows of course. This is the appropriate Court to enforce maritime liens, and the only Court in which it can be done effectually. If the admiralty has jurisdiction over the matter in a proceeding *in rem*, I do not see on what principle the jusrisdiction *in personam* can be denied. It is only on the ground that the contract is maritime, that the Court can issue process against the thing. It is the subject matter that determines whether it is of admiralty and maritime jurisdiction or not; and if it is so, the Court has jurisdiction as well *in personam* as *in rem.* In this case, the consideration of the contract is purely maritime.

If this were the only ground on which the plea could be supported, I should feel no difficulty in overruling it, and requiring the respondents to answer to the merits. Upon the principles stated, the jurisdiction would attach for the money advanced for repairs in the first instance, before the vessel was sold, and when legal title was in Child & Dole. But for these advances the vessel was arrested and sold. The libellant was the purchaser, and took the legal title in his own name. If the jurisdiction of the Court rested on a lien alone, it is clear that the libel could not be maintained on this claim, for by the sale the lien was discharged. But as the admiralty has jurisdiction in favor of material men *in personam* as well as *in rem*, if the proceeds of the sale were not sufficient fully to discharge the debt, the libellant's claim may be good against the owners for the balance, for a decree against the vessel, without satisfaction, might not discharge the owners from their liability. It does not, however, appear from any allegation of the libel, but that the libellant was fully paid for all his advances, made before the sale of the vessel, by the proceeds of the sale; and from the bill of particulars annexed to the libel, it appears, that, in point of fact, he was. As the libellant, by the form of his pleading, has made this a part of his libel, my opinion is, that this part of his claim must be taken as satisfied.

The only question that remains is, whether the libel can be maintained on the transactions that took place after the sale. It is alleged in the libel, that the seizure was made and the vessel sold under a decree of Court, on proceedings instituted by the direction of the agent of the owners; and that by an agreement between the libellant and the agent, he became the purchaser for the owners, and took the legal title in his own name, as a security for advances to be made, but for their use, and to be held for their benefit; and that all the subsequent expenditures upon and on account of

the vessel, were made in pursuance of his orders, and for the benefit of the original owners. The libellant therefore states himself to be the trustee of the respondents. All the expenditures were for the vessel while he was the legal owner.

If the plea is overruled and the respondents are required to answer to the merits, the first question presented for decision, if the fact is denied by the answer, will be, whether the libellant is trustee or not; whether he took the legal title for the benefit of the respondents, or purchased on his own account. Now, let it be admitted, that the subject matter of the contract set up in the libel—that is, the repairs made and the supplies furnished — are within the undoubted jurisdiction of the admiralty, can the Court take cognizance of the case, where, in order to arrive at the merits, it must first decide a question covering the whole case, which is of the peculiar, and generally the exclusive, jurisdiction of another tribunal, and is not within the jurisdiction of this Court? In other words, can the Court take jurisdiction of a trust *ex directo*, as constituting the very foundation of the suit? It seems to me that it cannot, and when the libel sets forth a trust, upon which the Court must pronounce a judgment before it can look at the merits on which relief is sought, that the libellant states himself out of Court. Matters of trust, whether in relation to real or personal property, belong to the peculiar and appropriate jurisdiction of Courts of equity, and the modes of proceeding in equity are particularly adapted to the discovery and enforcing of trusts; and though it is true that Courts of common law do take cognizance of some matters of trust, as in in the case of bailments, (1 *Story's Equity*, § 60,) yet the general rule is, that mere matters of trust are within the exclusive jurisdiction of equity. 2 *Story's Equity*, § 960. It is admitted that the admiralty is competent to pronounce upon the question of title to vessels, but when this is said, I apprehend that generally the legal title is intended. It is

not however intended to be denied, but that this Court may take notice of an equitable title when it comes up incidentally, especially when it is alleged in the way of defence, in a case over which the admiralty has a clear and unquestionable jurisdiction. In a suit for possession, it might well decline to interfere in favor of the legal title against one who had an equitable title, at least until the rights of the parties had been settled by a competent tribunal. It is admitted also, that when the admiralty has jurisdiction of the principal matter, it has authority to pronounce on the incidental questions which may arise in the cause. *The Tilton*, 5 Mason, 570. But my difficulty is, that in this case the equitable title does not arise incidentally, but is alleged in the libel as the very foundation of the libellant's title to relief. Such a case, it appears to me, cannot be properly a subject of admiralty jurisdiction. Indeed the libel seems to me to be a Bill in Equity in disguise.

But the case presents other objections to the jurisdiction, which, if not insuperable, are not easily overcome. The libellant alleges, that in pursuance of an agreement with the agent of the owners, he purchased the vessel for them, and took the title in his own name, to be held for their benefit; that he expended on the vessel, at different times, large sums of money, in repairs and in the purchase of supplies, having the control and management of the vessel, and receiving for their use her earnings: and the libel concludes with a prayer that the respondent may be required to receive from him the legal title, and pay him the balance of his account. The suit, therefore, in one aspect, partakes of the nature of a bill in equity for a specific performance of an agreement. It was never contended, that a Court of admiralty has the authority to decree a specific performance of an agreement. If the Court, in this case, should pronounce for the payment of the balance of the account, it might, perhaps, annex a condition, that the libellant should reconvey the vessel to the respondent. But a direct suit for

the specific performance of an agreement is a thing unheard of in the admiralty. But allowing this objection may be avoided, there is more difficulty in overcoming the other. The libel unavoidably involves the taking of an account, for it is indispensably necessary, in order to ascertain the balance. There might be here, in equity, matter for a cross bill, if the defendants chose to resort to it, in order to extract the facts directly from the party, though the admiralty might perhaps obtain the same object by an examination of the party on interrogatories. But the suit itself seems to be primarily for an account. Now the admiralty has no direct jurisdiction over matters of account, although they may relate purely to maritime affairs. *The steamboat New Orleans* v. *Phebus*, 11 Peters, 175. The simplicity and directness of its course of proceeding are not supposed to be adapted to such controversies, and a libel for an account directly will not lie in the admiralty. The Court takes cognizance of accounts only when they arise incidentally in a cause, as in a suit on a bottomry bond, or for average.

Libel dismissed.

THE HUNTRESS.

The owners of a Steamboat, employed in carrying passengers and merchandise between port and port, are responsible to shippers of goods, as common carriers.

Common carriers must, at their peril, deliver goods which they carry, to the right persons, and if they make a wrong delivery, they will be responsible for any loss which may be thereby occasioned.

It is the duty of the owner of goods to have them properly marked, and to present them to the carrier or his servants, to have them entered in their books; and if he neglects to do it, and there is a misdelivery and loss in consequence, without any fault of the carrier, he must bear the loss.

But the carrier is not discharged from all responsibility as to the delivery, by such neglect, but if there is a wrong delivery or a loss through any want of reasonable caution on the part of the carrier or his servants, he will be responsible.

A contract for the transportation of goods on the high seas, when it becomes a subject of litigation, is a case of maritime jurisdiction, within the meaning of that clause of the third article of the Constitution, which extends the judicial powers to "all cases of admiralty and maritime jurisdiction."

In that clause, the terms, *admiralty* and *maritime*, are not synonymous. Each has its appropriate use.

In the grant of this jurisdiction, it is to be presumed that the words are used in the sense which they had in this country at the time when the Constitution was adopted.

Where, in the Constitution, technical terms of law or jurisprudence are used, which are common to our own law and to the law of England, if there is a difference of signification in the two countries, the meaning which they have in our own country is to be preferred.

The jurisdiction of the Admiralty Courts in this country, at the time of the revolution, and for a century before, was more extensive than that of the High Court of Admiralty in England.

It is a rule in the interpretation of all contracts and other instruments, that if there is anything ambiguous in the terms in which they are expressed, they shall be explained by the common use of those terms in the country where they were made.

The terms *admiralty* and *maritime* belong to the Law of Nations, as well as to our own domestic law, especially *admiralty*. A Court of Amiralty is a Court of the Law of Nations, and derives, in part, its jurisdiction from that law. The Constitution may therefore refer to the Law of Nations for the meaning of these terms, as constituting part of our own law.

One of the rules acted upon by the convention, in the grant of powers to the National Government, was, to make the judicial coëxtensive with the legislative power. The regulation and government of maritime commerce is given to the Legislature, and by taking the word maritime, in this clause of the Constitution, in its usual and natural sense, the judicial power is made coëxtensive with that of the Legislature.

The contemporaneous construction of this clause in the Constitution—by the Federalist—by Congress—by a series of decisions of the Supreme Court—and by the uniform practice of all the Courts of the Union, continued for sixty years, negatives the hypothesis, that the Admiralty and Maritime jurisdiction, under the Constitution, is identical with that of the High Court of Admiralty in England; and consequently negatives the assumption, that we are to look for the definition of these words of our Constitution, to the statute laws of England, as they are enforced by her Courts.

November 5, 1840. This was a libel *in personam* against the owners of the steamboat Huntress, for the loss of a box of goods shipped by the libellant at Boston, to be delivered to him at Portland. The Huntress was regularly employed in running between Boston and Portland, for the transportation of passengers and goods. The libellant shipped on board of her at Boston, on the 30th of June, three boxes to be carried to Portland, and at the same time he took passage in the boat himself. The boxes all arrived safe, were landed, and put into the store-house on the wharf. Bonney, the libellant, paid the freight, had them put in a hand-cart, and ordered them to be carried to the Elm Tavern. He then went to the tavern, leaving the porter to follow him with the boxes. After he had left the wharf, one of the boxes was claimed by a female passenger as part of her baggage. The mate, with one Adams, a passenger who appeared to be travelling in company with the woman who claimed the box, came on shore, and Adams pointed out the box, and they took it from the porter and carried it back on board the boat. On the box being shown to the woman, she pronounced it to be hers, and said that it contained wearing apparel. It was delivered to her, without any examination of the contents, and she being bound to Hallowell, it was carried on board the Thorn, another boat, which took the passengers of the Huntress which were bound to the Kennebec, and with her carried to Hallowell. This box, it is alleged, contained thirty bonnets, one hat, and ten pieces of Florence platt. The mate then thinking that there either was some

mistake or fraud, took the other two boxes and carried them back to the boat. Bonney, having been informed by the porter that there was some mistake about his goods, returned to the boat to inquire into the difficulty. After some conversation with the clerk, the two boxes which remained were restored to him, and the clerk wrote to the agent at Hallowell, to look after the other box, and Bonney went there in pursuit of it. When he arrived at Hallowell, the agent sent for the woman who had taken the box, and she said it was taken by mistake. She went away, and, on being sent for again, was not to be found, but had left the place, and carried one of the bonnets with her. On inquiry, it was ascertained that she had sold the ten pieces of Florence platt, the hat, and three bonnets. The price for which one of the bonnets was sold, $6,25, was brought to the agent. Twenty-five bonnets remained in the box, most of them in a damaged state. The agent offered to return them to Bonney, but he refused to receive them, unless he was paid for the damage and for the articles missing.

The clerk of the boat, who was examined as a witness, stated that it was his custom to stand on the wharf to receive the freight which was offered, and that he entered it all in a book kept for that purpose, except small packages, which were carried into the office; that he had no account of the boxes of Bonney in his book, and had no knowledge of their being in the boat until after she arrived at Portland. A notice was posted up in the boat, that no freight would be received within an hour of the time that the boat is advertised to leave the wharf, and requiring all freight to be intelligibly marked, or it would not be received; but the actual knowledge of this notice was not brought home to the libellant. An advertisement was also published in the Portland papers, but it contained no direction as to receiving, or marking, goods for freight. The clerk stated, that the two boxes detained had no marks upon them by which they could be known, but that Bonney pointed out to him his name writ-

ten with a pencil upon them, but that the lines were so faint and indistinct as to be nearly illegible, and that if he had seen them in the storehouse in Boston, he should have left them as unmarked goods. The mate, who delivered the other box to the female passenger, stated that it had no mark upon it, and stated the circumstances of the delivery of it to the woman somewhat differently from the libellant's witness. These differences are noticed in the opinion of the Court.

The case was argued by *Fox*, for the libellant, and *W. P. Fessenden*, for the respondents.

WARE, *District Judge.*

Upon the facts proved in this case, the libellant claims to recover of the owners of the boat, the value of the merchandize he has lost, as he alleges, through the carelessness and miscondnct of their agents. There can be no doubt that the owners of the boat are snbject to all the liabilities of common carriers. It is proved that she was regularly employed in running between Portland and Boston, for the conveyance of passengers and merchandize. A common carrier is one who makes it a business to transport goods, either by land or water, for hire, and holds himself ready to carry them for all persons who apply and pay the hire. 2, *Kent Comm.* 598. 1 *Pick. R.* 50, *Dwight* vs. *Brewster.* Undertaking, as he does, to carry goods for all persons, he is considered as engaged in a public employment, and as engaging beforehand to carry goods for a reasonable remuneration for any person who may apply to him and pay the hire, and he will be liable to an action for refusing, unless he has a reasonable cause for his refusal. *Story, Bailments*, § 502. The law, for strong reasons of public policy, holds him to a very rigorous responsibility. He is answerable not only for his own acts, but for those of his agents and servants. Among the obligations which common carriers take upon themselves, as resulting from the nature of their employment, is that of delivering the goods, when they are transported to the place of destination, to the proper person.

If they are delivered to a wrong person, and any loss or damage ensues in consequence, they are responsible to the owner. *Golden* vs. *Manning*, 3 *Wilson*, 429. *Garnett* vs. *Willan*, 5 *Barnwell and Alder*, 52. And when the goods are lost or damaged, the *onus probandi* is upon the carrier, to prove that the loss was occasioned by some cause for which the law will excuse him. *Story*, *Bailments*, 529. It is in evidence, that the box in question belonged to the libellant, that a part of its contents has been lost, and that the greater part of what remained has been materially damaged, and the burthen of showing that the loss and damage occurred under such circumstances as will exempt the owners from their responsibility, is thrown upon them.

The counsel for the respondent contends, in the first place, that the box had been delivered to Bonney, and that they were therefore discharged from all their liabilities. The facts, as they are stated by the libellant's witnesses, Watts, the keeper of the store-house, and Potter, the porter, are, that the three boxes were landed and put into the respondents' store-house; that Bonney employed a porter to carry them to the tavern, and had them put in his cart; that, after he had left the wharf, a claim being made, by another passenger, of one of the boxes, the mate came on shore with Adams, and they took the box, carried it again on board the boat, and delivered it to the woman who claimed it. Now, if it should be admitted that here was such a delivery as would discharge the owners from all further responsibility, had nothing more been done, although the box had not been actually removed from their store-house, it is quite as clear from this evidence that the delivery was revoked, not merely as to the box in question, but as to all of them. It is quite impossible to put any other construction upon the act of a mate, in taking all the boxes and replacing them on board the boat, after Bonney had left the wharf, than that it was a revocation of the delivery. The goods were again in

the possession of the respondents, by the act of their servants, and all their responsibilities as common carriers re-attached. It was contended at the argument, that the goods having been once delivered, the retaking of them was the private and unauthorized act of the mate, for which the owners are not accountable; and if there is any responsibility, it is only the private and personal responsibility of the mate, or of the mate and Adams. But the mate did not interfere in the business as a stranger; he interposed in his quality, and with the authority of mate, and as a servant of the owners, having a right to retain the goods. It is the appropriate duty of the mate to superintend the loading and unloading of the goods taken on freight. It is true, that if a dispute arises between different persons claiming the same goods, the proper person to decide this dispute is the clerk, because he takes the account of the goods. But if the mate volunteers to decide the dispute, and delivers them to a wrong person, the most that can be said is, that he is acting beyond the line of his proper duty, and may be answerable to his employers; but they are responsible to the owner, for they are as much responsible for the acts of their servants as for their own.

The mate, in his deposition, gives a different account of the affair. He says that Adams informed him that a man had taken a wrong box on shore, and he then went ashore, and took and carried it on board the Thorn. Afterwards, he adds, that upon reflection he is satisfied, that Adams went ashore and took the box on board the Thorn, before speaking to him; that he then went on board the Thorn, examined the box and found no mark upon it; that he asked the woman if it was hers, to which she replied that it was, and had wearing apparel in it. Without opening the box to verify her statement, he allowed her, upon her word alone, to retain the box, and she carried it with her to Hallowell. Now, in the first place, the testimony of the mate is objected to, as that of an interested witness. He, with Adams, hav-

ing taken the box from the porter and delivered it to a wrong person, without consulting and taking the direction of the clerk, it is argued, is answerable over to his employers for any damage which may be recovered against them, and has therefore a direct interest to prevent a recovery. And if it be conceded that he exculpates himself by his own statement, that is overcome by the plain, direct, and positive testimony of two disinterested witnesses, by whom he is flatly contradicted. My opinion, upon the facts which have been proved, is, that if there had been a delivery, it was revoked by the same authority by which it was made, and that the respondents are not for that cause exonerated from their responsibilities as common carriers.

In the second place, it was contended at the argument, that the owners of the boat are not responsible, because no contract of affreightment for the carriage of the goods intervened between the parties, but that they were surreptitiously put on board by the libellant, or by his procurement, without the knowledge of the clerk of the boat, and without being properly marked so that it could be known to whom they belonged.

No evidence was offered to show by whom or by what means the goods were brought on board. They were not brought to the notice of the clerk, and were not entered on the freight list. The contract of affreightment, or that for the transportation of goods by a common carrier, like all other contracts, requires for its completion the consent of parties, either express or implied. If goods, says Pothier, are put on board a vessel without the knowledge of the master, there is no contract, and consequently no obligation on one part or the other; and therefore the master, who finds the merchandise in his vessel, may put it ashore, and charge the expense of unlading to the owner. The French legislation has provided for this case by a special article. The master may discharge the goods found on board his vessel, without being made known to him, or he may carry them, and charge

the highest freight paid for merchandise of the same quality. *Ordonnance de la Marine, Liv.* 3, *Tit.* 3, *Art.* 7. Valin and Pothier teach us that, if he does not discover them until after he sails, provided the vessel is overloaded, he may discharge them, at an intermediate port, before the end of the voyage, leaving them in the hands of some solvent merchant, and giving the owner notice; but if the vessel is not overcharged, he ought to carry them to the port of destination. 1 *Valin*, 647. *Pothier, Traité de Contrat de Charter Partie, No.* 10, 12. This obligation does not arise from the contract of the parties, because no contract has intervened, but results from the principles of natural law, the great law of social charity, which commands us on all occasions to promote the well being of others, when it can be done without a sacrifice for ourselves, and not to do an act, though permitted by the positive law, which will be materially injurious to another, without any corresponding benefit to ourselves. The Code de Commerce adopts the morality of Pothier, and confines the right of the master to discharge the goods at the port where they are laden. *No.* 292, *Boulay Paty. Droit Maratime, Vol.* 2, *p.* 373, *Tit.* 2, *Sect.* 5.

If these principles ought to govern in the case of a common freighting vessel, and they are recommended as well by public convenience as by their pure and honorable morality, they apply with much greater force to cases like the present. The boat was, in the strictest sense of the word, a common carrier, making her trips daily between Portland and Boston. Her goods on freight were owned by a great variety of persons, were brought in small quantities, loaded in a hurry, ordinarily without the formality of a bill of lading, and often, as in this case, accompanied by their owners. The owners of the boat, by the nature of their employment, engaged, and were bound to take the goods of all persons who offered them, without any special contract for that purpose. Holding themselves out generally, as ready to carry freight or passengers, the public have a right to take them at their

offer, and they are not at liberty to refuse, without good cause; and those who wish for a passage, or have goods to be transported, need not take the trouble to make a contract beforehand. They understand that the master is bound to allow them a passage, and to carry their merchandise, unless he has some valid excuse, and they go down to the boat prepared to go on board and take their goods with them. Now it appears to me, that if the goods are put on board in the ordinary manner, a contract results from the fact itself. In the present case, the owners of the boat held themselves out as ready to carry freight for all persons generally, and if the libellant had his goods carried to the wharf, and they were taken on board in the usual course of the business, as other goods were, he accepted their offer, and it appears to me that the contract was complete; but if it was not, it was ratified and made perfect by the payment and acceptance of the freight. This was the decision of the Roman law. Whether the goods, says Ulpian, are shipped by a *bill of lading* or not, (for this seems to be the meaning of *ei assignatæ*, translated into modern nautical phraseology,) the contract is complete by the simple fact that they are laden on board; the carrier becomes responsible for their safety.*

It is true, that if goods are furtively put on board by the owner, and there is an apparent desire to conceal them, a presumption would naturally arise, that the owner intended to defraud the carrier of his compensation for his services. Such conduct might rebut the presumption of an implied contract, and a question might be made whether the acceptance of the freight was a waiver of the wrong, so as to subject the carrier to all the responsibilities which would result from a contract. But that question does not arise in this case, because there is no evidence tending to create any suspicion of that kind, against the libellant. Regularly, with-

* Recipit autem salvum fore, utrum si in navem res missæ ei assignatæ sunt, an etsi non sint assignatæ, hoc tamen ipso quod in navem missæ sunt receptæ videntur. *Dig.* 4, 9, 1, § 8.

out doubt, the clerk of the boat ought to be notified, and, for his own security, the shipper ought to see that his goods are entered on the freight list. But in the hurry and confusion in which the business is often done, it would be a harsh presumption to assume that fraud was intended from this neglect alone. It is certain, also, that the goods ought to be plainly and legibly marked, so that the owner or consignee may be easily known; and if, in consequence of omitting to do it, without any fault on the part of the carrier, the owner sustains a loss, or any inconvenience, he must impute this to his own fault. It is certain, that the box had not such plain, intelligible marks upon it, as would readily point out the owner. He probably thought, as he was in company with his goods, that this was of less importance. But it was a fault on his part, and the natural and necessary consequence of that fault he must bear. But his fault will not excuse the fault of the carriers or their servants. They are not liberated from all care and responsibility, because the shipper has not placed proper marks on his goods. Bonney took, and paid the freight of, the three boxes. They were landed, and he had them delivered to a porter, and ordered them to be carried to his lodgings. Here was abundant proof that he claimed them. But now, after Bonney had left the wharf, in the confidence that his goods would follow him, comes forward another claimant. She gave no better proof of title than Bonney. If the box was not marked for him, neither was it for her. Yet without any examination, without even taking the trouble to open the box, and see whether it contained, as the woman alleged, her wearing apparel, and in the absence of Bonney, who had paid the freight to the mate himself, it was delivered over to her. No one can hesitate to say, upon the simple statement of the facts, that there was, in this, undue precipitancy and a want of due caution on the part of the mate. Nor will any man of ordinary prudence and caution, pretend, that this is the way in which opposing claims to

property ought to be settled. The woman passenger had declared what the box contained, if it belonged to her. If Bonney had been sent for, and the question had been asked him, the adverse claims would have been satisfactorily settled on the spot. The delivery to one of the claimants, in the absence of the other, without any further inquiry, was a gross fault on the part of the mate, and as the owners of the boat are responsible for the acts of their servants, it is imputable to them. My opinion, therefore, is, that the owners are liable. And as the respondents refused to make him any compensation for the loss and damage of his goods, he was justified in leaving them upon their hands, and looking to them for their value.

Decree for Libellant.

Note.—In this case the question of jurisdiction was not raised by the counsel, nor adverted to by the Court. The competency of the Court to pass upon such questions, had been, in this District, maintained in several cases in which the same general question was involved. Here it had been supposed, that a contract for the transportation of goods on the sea was clearly within the jurisdiction of the Court, as a maritime contract. If in the clause in the Constitution, repeated in the judiciary act, "all causes of admiralty and maritime jurisdiction," the word *maritime* has any meaning, and was not used merely for the purpose of rounding the phrase, it must include such a contract; and we are not gratuitously to suppose that words, in the Constitution, were used without meaning. Besides, the service of the seamen is not denied by any to be a maritime service, and as such a proper subject of maritime jurisdiction. This service consists in the transportation of the goods. The ship-owner, as a carrier, performs it by his servants, the master and ship's company. To admit the jurisdiction in one case, and deny it in the other, is to affirm of the same service, that it *is* and that it *is not* mari-

time, or else to affirm that the term maritime, as used in the Constitution, is an unmeaning expletive, a supposition so preposterous, not to say indecent to the memory of the illustrious statesmen who framed that instrument, that it is not to be for a moment entertained.*

But in the recent case of *The New Jersey Steam Navigation Company* v. *The Merchants' Bank*, 6 *Howard*, 344, agreeing precisely in its principal features with this case, the question whether the Court had jurisdiction over the cause, as one arising on contract or growing out of a maritime service, was raised by counsel, and argued at great length. The libel was sustained, and the jurisdiction of the Court vindicated in a very able opinion of Mr. Justice Nelson, on the ground that the contract and the service were maritime, and his opinion had the concurrence of three of the other judges, including the Chief Justice. Two of the judges concurred in the judgment on the ground of tort, and one denied the jurisdiction altogether. The authority of the Court to take jurisdiction in these cases being brought into such grave doubt, it seems not inappropriate to add, as a sequel to the opinion on the merits of this case, a few observations on this subject. If they have no other value, they will serve to show that the jurisdiction, over such cases, has not been taken by the Court without some consideration and reflection on the subject.

* If the word maritime is merely exegetical of admiralty, one word includes the other, and they may be used interchangeably. Admiralty is maritime jurisdiction, and maritime is admiralty jurisdiction, without limitation or exception. But it is well known that the admiralty jurisdiction is twofold, a *prize* jurisdiction exercised *jure belli*, extending to all captures in war, as prize, whether on sea or on land; and a civil jurisdiction over causes civil and maritime, springing from a consideration purely maritime. They are so distinct that it has been doubted, in England, whether the judge of the Admiralty Court can exercise both jurisdictions under one commission. *Brown, Civil and Admiralty Law, vol.* 2, *ch.* 1, *p.* 29. *Chapt.* 6, *p.* 208, *&c. Lindo* v. *Rodney, Doug.* 613. The addition of the word maritime, in the Constitution, closes the door against all doubt or cavil whether both branches of the jurisdiction are granted. See 2 *Brown*, 210.

In these, and in analogous cases, the only question that can be considered as an open one is, whether they come within that clause of the Constitution which says, the judicial power of the United States shall extend to "all causes of admiralty and maritime jurisdiction." If they do, then the original cognizance of them is, by the ninth section of the judiciary act, given to the District Court. The question then carries us back to the Constitution; and if we are to apply, to the interpretation of that, the same rules and principles which Courts apply to the interpretation of all other instruments, it is difficult to conceive where the most subtle ingenuity will find a loop to hang a doubt on. No Court ever pretended to an authority to strike from a solemn instrument any word that had a plain and sensible meaning in the place where it was found, unless it was repugnant to the tenor of the whole instrument, or plainly and irreconcilably contradictory to some other part of it. Such a decision can stand on no other grounds than the *Hoc volo, sic jubeo.* It must then be conceded, unless this can be made apparent, that the word *maritime* stands part of the Constitution, either as a significant word, or an unmeaning pleonasm.

I do not now recollect, that it ever has been seriously contended, that such causes can be excluded from the jurisdiction of the Courts of the United States, by any interpretation of the words of the Constitution, taken by themselves. The argument, that this clause is controlled by the seventh amendment, which secures the right of trial by jury in all suits at common law, where the value in controversy exceeds twenty dollars, has no application to the Constitutional grant; because these are not suits at common law; and further, because Congress may provide for the intervention of a jury, on the trial of a cause on libel and answer, as well as in a suit according to the forms of the common law. And if the objection has any weight, it applies, with precisely the same force, against the jurisdiction in all cases in Equity. Ac-

cordingly we find that those who deny the jurisdiction, drop all the ordinary rules of interpretation of written instruments, and resort to matter *dehors* the Constitution, to determine the meaning of this clause. It is contended, that we are not to take the plain and obvious meaning of the words, nor to interpret them by reference to other parts of the same instrument, but that their meaning is to be ascertained by a reference to the usages, jurisprudence and laws of England, usages that never prevailed, and laws that were never in force here.*

* For more than a century before the formation of the Constitution, that is, from the early part of the reign of Charles II., revenue causes had been heard and tried in the Colonies by Courts of Vice Admiralty. How extensively the jurisdiction was, in practice, exercised by the Courts, as instance Courts, cannot probably now be ascertained with certainty. The commissions of the judges prove, that the restraining statutes of Richard II., according to the construction given to them by the common law judges in England, were not in force in the Colonies. The following is a copy of one of these commissions to an admiralty judge of the Colony of New Hampshire, as quoted by Judge Story, 2 *Gallison Rep.*, 470. It authorizes him "to take cognizance of, and proceed in, all causes civil and maritime, and in complaints, contracts, offences or suspected offences, crimes, pleas, debts, exchanges, accounts, charter parties, agreements, suits, trespasses, enquiries, extortions, and demands, and business civil and maritime whatsoever, commenced or to be commenced between merchants, or between owners and proprietors of ships and other vessels, and merchants or others whomsoever with such owners and proprietors of ships and all other vessels whatsoever employed or used within the maritime jurisdiction of our vice admiralty of our said province, &c., or between any other persons whomsoever had, made, begun or contracted, for any matter, thing, cause or business whatsoever done, or to be done, within our maritime jurisdiction aforesaid, &c.,&c.; and moreover in all and singular complaints, contracts, agreements, causes and businesses, civil and maritime, to be performed beyond the sea or contracted there, however arising or happening," with many other general powers. And it declares the jurisdiction to extend "throughout all and every the sea shores, public streams, ports, fresh waters, rivers, creeks, and arms, as well of the sea, as of the rivers and coasts whatsoever of our said province," &c.

In Stokes's History of the Colonies, Judge Story observes, there is a commission similar in its main clauses, which Mr. Stokes says was the usual form of the commissions of the Colonial Admiralty Judges. *Story on the Const.*, § 1659, *Note* 1.

In a word, that the framers of the Constitution meant, by the words "all causes of admiralty and maritime jurisdiction," precisely that jurisdiction that was exercised by the High Court of Admiralty in England.

In our jurisprudence, these terms, certainly the former, admiralty, had always borne a different and a larger signification than that which they had in the jurisprudence of England. The jurisdiction was here more extensive. Not to rely on any debateable point, it is certain that it included revenue seizures on navigable waters, which were never within that of the High Court of Admiralty, but belonged exclusively to the Court of Exchequer. Now the assumption is, and it is made without a tittle of proof, unless general argument is to be taken as proof, that the framers of the Constitution, silently, and without the slightest notice, referred, for the sense of these words, not to the meaning which they had in our jurisprudence, but to that which they bore in the jurisprudence and laws of England. If the fact be so, we will venture to affirm that it is a fact unique in the history of the world. It may safely be said, that no man, and no other body of men, engaged in framing an organic law for the government of a great nation, ever, silently and without notice of any such intention, referred, for the sense and meaning of any of their words, to the signification which they had in laws and jurisprudence of a foreign nation, especially if these words had a well known meaning in their own country.

The jurisdiction exercised in fact, probably varied in different Colonies, and in the same Colony under different judges. That conferred by the commission extends to all that was ever claimed by the admiralty; and the best evidence of the rightful jurisdiction of the Court undoubtedly is, the commission of the judge.

Stokes was Chief Justice of the Royal Province of Georgia. His work "On the Constitution of the British Colonies," is referred to and quoted more at large by Mr. Justice Wayne, in his very learned and able opinion in the case of *Waring* v. *Clarke*, 5 *How.* 454. Stokes says that all the commissions were alike, and Judge Wayne adds, that "the King's authority to grant these commissions never has been, and cannot be denied."

We may here be met by an argument, that the Constitution does, in fact, refer to the common law for the definition of words, by the use of technical terms of that law, as *habeas corpus*, *trial by jury*, &c., without proceeding to define them. But these words were just as familiar in our law, as in that of England. And if, by supposition, there had been any difference in the sense in which they were used in the English statutes and common law, and that in which they were generally used and understood in this country, can there be a doubt which sense is adopted by the Constitution? The common law, and of course the sense in which the technical words of that law are used, was never in force in this country, any further than as it was adopted by common consent, or by the Colonial legislatures. Beyond this, it was as much a foreign law as that of France or Holland; and for the definition of any technical terms of general law or jurisprudence we may, with just as much propriety, refer to the laws of any other foreign country as to those of England, except so far as the law of England has been adopted and incorporated into our own laws and jurisprudence. And where the same words have a different import in the two countries, that which prevails in our own is most certainly to be preferred.

It is again said, that the extension of the jurisdiction of the Vice Admiralty Courts, in the Colonies, to revenue causes, was one of the grievances of which they complained, and which, with others, led to the revolution. From this fact it is argued, that it is to be presumed, that in defining this jurisdiction, the framers of the Constitution would adopt that limited jurisdiction which was sought and claimed from the mother country. The answer is, that if the convention had intended to do it, they would have taken care so to express themselves as to leave the subject free from doubt. So far from doing this, they have in the grant of this jurisdiction employed terms that in their ordinary and natural import clearly negative the supposition that the restricted jurisdiction of the

High Court of Admiralty was intended. The fact, of the alleged grievance and of the complaint, is admitted, but the argument draws the wrong inference. On every principle of sound reasoning, the precisely opposite inference is the just one. The whole matter of the controversy and complaint were fresh in the minds of the convention. They perfectly well knew the enlarged and restricted jurisdiction of the admiralty, and they seem studiously, by adding the word maritime, to have chosen words that gave the larger instead of such as would give the narrow jurisdiction. Notwithstanding the admitted fact, that the admiralty jurisdiction had been viewed with jealousy and distrust while we were Colonies, it does not follow that either the convention or the people would have any hostility to it under the new government. It was probably supposed, that the revenue laws would be more steadily and systematically enforced by the Courts than by juries, and this is precisely what would be desired by both the people and the government, by all except the brotherhood of smugglers.*

While the Colonial state remained, the people would naturally feel an objection to leave the decision of revenue causes to the Court instead of the jury. The judges were strangers, and sent from abroad. They brought with them all the prejudices and partialities of Englishmen, in favor of their own country and people, and to this was added the bias, which the officers of the Crown are always supposed to have, in favor of its prerogatives. Such officers were naturally viewed with jealousy and distrust. But under the Constitution, a new order of things arose. The judges were our neighbors and kinsmen, and responsible to our own government. And the people might be willing to trust a larger measure of power

* This is the reason given by Judge Chase, why revenue seizures were, by the act of Congress, put on the admiralty side of the Court. 4 *Cranch*, 446.

to these than they would willingly see exercised by strangers and foreigners. There was no longer any foundation for the jealousy, and it no longer existed.

We have said, that to ascertain the sense in which words are used in the Constitution, we are to look to the meaning which they had in our own country, and for the meaning of the technical language of jurisprudence, we are to look to the laws and jurisprudence of our own country, if the words there had acquired a plain and positive meaning.* This, perhaps, may require some explanation. The terms, admiralty and maritime, belong to the law of nations, as well as to our own domestic and municipal law. This is peculiarly true, of the former, admiralty. A Court of Admiralty is a Court of the law of nations, and in one branch of its jurisdiction, that of prize, both the law and jurisdiction are derived solely from the law of nations, and on the instance side of the Court, in many cases, as when the controversy is between parties of different nations, its rule of decision, whether relating to the law of the case or the jurisdiction of the Court, is not always to be taken from the municipal law of either of the parties, but from that general maritime law which governs all on the common highway of nations. It has therefore been supposed by some jurists of great eminence, that, for defining the jurisdiction of the Court, that is, for determining the meaning of this clause of the Constitution, we are not to look to the jurisprudence of any one people in particular, but to that common and universal law that is acknowledged by all Chris-

* It is a universal rule dictated by common sense, for the interpretation of contracts, and equally applicable to all instruments, that if there is anything ambiguous in the terms in which they are expressed, they shall be explained by the common use of those terms in the country where they are made. *Pothier, Obligations, No.* 94. *Domat. Les Lois Civiles, Liv.* 1, *sect.* 2, *No.* 11. *Semper in stipulationibus et cæteris contractibus id sequimur quod actum est, aut si non pareat quid actum est, erit consequens, ut id sequimur quod in regione in qua actum est frequentatur. Dig.* 50, 17, 34.

tian and maritime nations.* But, perhaps, in the rule which is stated above, I differ rather in the formula in which it is expressed than in the substance of the rule itself. The law of nations is not the exclusive law of any particular people. It is the common property and common law of all, and as such, is part and parcel of our own law. If, then, we recur to this general law for the definition of these terms, in one sense we are not going beyond our own law. Now, in this common law of the sea, we find these words, as understood by every people in the commonwealth of commercial and maritime nations, with the exception of England, to have a more comprehensive sense than that which confines them to the jurisdiction exercised by the High Court of Admiralty.

* This was the opinion of Judge Story. *De Lovio* v. *Boit*, 2 Gall. Rep.

In the case of *Davis et al.* v. *The Brig Seneca*, *American Jurist*, *vol.* 12, *p.* 489, decided in 1829, Judge Washington says, "As preliminary to the investigation of this question, I not only admit but insist,

"First, that the judicial power of the United States under the Constitution, and the jurisdiction of the District Courts under the 9th section of the judiciary act of 1789, embrace all cases of a maritime nature, whether they be particularly of admiralty cognizance or not.

"Second, that this jurisdiction, and the law regulating its exercise, are to be sought for in the *general maritime law of nations*, and are not confined to that of England, or of any other particular maritime nation."

It is supposed that the late Chief Justice Marshall fully concurred with Judges Washington and Story on this subject.

The jurisdiction of the admiralty in England, before the statutes of Richard II. and Henry IV., and the construction put upon them by the common law Courts, it is admitted, was as large as that of Courts of Admiralty in other maritime nations of Europe. It is certain that these laws did not originally extend to the Colonies, because the Colonies were not then in existence. If they were ever in force here they must have been subsequently adopted. But the commissions, from the Crown to the Vice Admiralty judges, show most conclusively that they never were adopted. These confer all that general jurisdiction over maritime causes, that was anciently exercised by the Admiralty Court of England, and has always been by the Admiralty and Maritime Courts of every other country of Europe. If these laws, with their construction, were in force in this country, then all these commissions were illegal, because a commission from the Crown could not abrogate an

If no valid reason for limiting the admiralty and maritime jurisdiction of the Courts of the United States, by applying to the interpretation of these words the laws of England, is found in the language of the Constitution granting it, as little will be found, when we turn our attention either to the general tenor of that instrument, or to other special powers granted by it. In the Federalist, universally admitted to be the best commentary on the Constitution that has yet appeared, written principally by two of the members of the convention, who had more agency in giving to it its substance and form than any others, it is said, "If there are any such things as political axioms, the propriety of the judicial power of a government being coëxtensive with its legislative, may be ranked among the number." *No.* 80. It appears to me, that nothing can be more certain than that this axiom was steadily kept in view by the convention. Now, the power of regulating, that is, the general control over, commerce with foreign nations, and between the States, is granted, by another article of the Constitution, to the legislative department. This covers the whole maritime commerce of the country. The grant to the judicial department, of the cognizance of all causes of maritime jurisdiction, makes the judicial coëxtensive with the legislative power. This is the only way in which we could be assured of

act of Parliament. But it was never pretended that these commissions were illegal. It follows therefore, whether we refer for the meaning of these terms to the general maritime law of nations, or to the well known and well established laws of our own country, that we are brought to the same conclusion. For the jurisdiction of the admiralty in this country, prior to the adoption of the Constitution, I would refer to the opinion of Judge Wayne, in the case of *Waring* v. *Clarke*, 5 *Howard Rep.* 454, 458. In that very learned and able opinion it is conclusively shown, that the admiralty jurisdiction of England was not that exercised and acknowledged in this country. It was here larger, and, by the commission of the judges, as ample as it anciently was in England. From the want of reports, it is impossible to say how extensively the jurisdiction was ordinarily exercised, but it was certainly, in practice, more extensive than in England.

having, what is so important to a commercial nation, a uniform maritime law, in all the States of the Union. It is unnecessary to expand the argument. Every mind disciplined by habits of juridical reasoning and experience, which has reflected at all on the mechanism and operations of civil government, will feel the conclusion to be irresistible, if we suppose that the convention felt the value and force of this axiom, as they were felt by the Federalist. That the writers of the Federalist only shared and expressed the common feeling and opinion of the convention, is, I think, proved by their work. The judicial is, by the Constitution, made coextensive with the legislative power. It is not essential that this jurisdiction, in maritime causes, be exercised in all cases by the Court alone, as is most usual in the admiralty. Congress may provide for the appointment of assessors, as is not unfrequently done by the Court itself, from its own inherent authority, or for the intervention of a common jury.

Thus far the subject has been considered as an original question, precisely as it presented itself, sixty years ago, to the first judicial tribunal that had to pass upon it. To us, however, it does not present itself as a naked question of original speculation. It comes prejudged by a contemporaneous construction, and by the uniform and unvarying practice of more than half a century.

In looking for the contemporaneous construction of the Constitution, our attention is naturally first turned to the Federalist. The eightieth number treats of the extent of the judicial power. In that, Gen. Hamilton says, "It seems hardly to admit of controversy, that the judiciary authority ought to extend to these several descriptions of cases." He enumerates five classes, the fifth of which is, "*all those which originate on the high seas*, and are of admiralty *or* maritime jurisdiction." After commenting more at large on the previous classes, he adds: "The fifth point will demand little animadversion. The most bigotted idolizers of state au-

thority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes."

The commentators on the *Code Napoleon* habitually refer to the discussions at the tribunate, and in the council of state, on the several articles of the code, as of high authority in the interpretation of any doubtful or ambiguous language. We have not, for our aid in explaining and opening the sense of any obscure article in our Constitution, the benefit of the debates upon it in the convention; but we have what all will admit to be of equal, if not of much higher authority. We have a commentary, deliberately prepared by three of the most accomplished statesmen which this country has yet produced, published immediately after the Constitution was made, while all the discussions were fresh in their minds, and before it was adopted by the people. The number quoted was written by Gen. Hamilton, but it is fair to presume that all concurred in the general opinions that were entertained by each. Can any one suppose, when it is said that the judicial power under the Constitution extends to *all* cases, that arise on the high seas; when afterwards recurring to the subject, seemingly *ex industria*, the word admiralty is dropped, and the word maritime used alone, as descriptive of the Constitutional jurisdiction, thus presenting it as the leading and important feature in the clause; I ask, can any man imagine that the Federalist supposed that the cognizance of maritime causes, intended to be given to the Courts of the United States, was confined to the narrow and jejune jurisdiction, allowed by Lord Coke and his followers to the Admiralty Court of England? Were Gen. Hamilton, Chief Justice Jay, and Mr. Madison so ignorant of the common-places of the law of England, as not to know that the admiralty in England, instead of having jurisdiction over *all* cases that arise on the high seas, was allowed to take cognizance of but a very small number of them?

We have in the judiciary act, (Sept. 24, 1789, ch. 20,) a contemporaneous construction of this clause of the Constitution, of the highest authority. In apportioning to the several Courts the judicial power, the ninth section assigns to the District Court "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."*

*This act bears internal marks of having been prepared with great care, by men who well understood the state of the law. This clause is a proof of it. In the case of the *Vengeance*, 3 *Dall.*, 294, the Court decided that a revenue seizure, made on the water, was a civil cause of admiralty and maritime jurisdiction. Independent of the local law and the usages of this country, it is not properly a cause of admiralty jurisdiction. In the celebrated case of the *Columbus*, in 1789, Sir James Marriot says, that "the Court of Admiralty derives no jurisdiction in causes of revenue from the patent of its judge, or from the ancient, customary, and inherent jurisdiction of the prerogative of the Crown in the person of the Lord High Admiral." *Collectanea Juridica*, *vol.* 1, *page* 97. As an instance Court, it takes cognizance of maritime contracts and torts between party and party, by virtue of its general and inherent power. Its jurisdiction in revenue causes is superinduced by special acts of the legislature, but does not belong to it merely as a maritime Court. In this country, revenue causes had so long been the subject of admiralty cognizance, that Congress considered them as civil causes of admiralty and maritime jurisdiction, and to preclude any doubt that might arise, carefully added the clause, "including," &c. This is a clear proof that Congress considered these words to be used in the sense which they bore in this country, and not in that which they had in England.

The act gives *exclusive* admiralty and maritime jurisdiction to the District Court. As a Court of the law of nations, as a Court of prize, its jurisdiction is, and was intended to be, in every sense, exclusive of that of the State Courts. As a maritime, or instance Court, its jurisdiction is also exclusive where the remedy can be given only by a Court of Admiralty. But in cases where the Courts of common law have always exercised a concurrent jurisdiction, the jurisdiction is not, and was never intended by the Constitution

If this act is not unconstitutional, it is perfectly decisive of the whole subject. It negatives, beyond the possibility of doubt or controversy, the hypothesis that limits the admiralty and maritime jurisdiction of the Courts of the United States, under the Constitution, to that allowed by the common law Courts of England to the High Court of Admiralty. Revenue causes were never within the admiralty jurisdiction in England, but always belonged exclusively to the Exchequer. But in this country, for more than a century, these causes had been heard and decided by Courts of Vice Admiralty. Congress, therefore, must have considered that the words of the Constitution were used, not in the sense which they had in the laws of England, as expounded by Lord Coke, and by the common law Courts on writs of prohibition, but in the sense which they bore in the jurisprudence of our own country.

This law was made by the first Congress that met under the Constitution. How many of its members had borne an active part in the Convention in framing the Constitution, I have not at hand the means of determining. But in one

to be, exclusive, though the subject matter be maritime. To take the familiar case of mariners' wages; if they mean to look to the vessel, and proceed on the maritime hypothecation, they must go to the admiralty; the jurisdiction is exclusive, because the hypothecation cannot be enforced in a suit according to the forms of the common law. But if they proceed *in personam* against the master or owners, no man ever doubted that the Courts of common law have jurisdiction. But here, to preclude the possibility of doubt, Congress added the clause saving to suitors a common law remedy where that law could give it. Saving to *suitors;* undoubtedly to the creditor party, the actor. He has his choice of jurisdiction, and the debtor party must abide that jurisdiction, as in common sense and common right it ought to be; as it in fact is in all other cases of concurrent jurisdiction, between that of common law and equity, as well as between common law and admiralty.

The case of the *Columbus* is quoted by Brown as the *Columbia*, decided in 1782. The whole case will be found in the first volume of the *Collectanea Juridica*, a curious, and, in this country, rare collection of Law Tracts, published in London, in 1791.

branch, the Senate, then consisting of twenty-two Senators, six, that is, more than one-fourth of the whole number, had been members of the Convention.* Was there no one of these, Robert Morris, for instance, who could inform the Senate in what sense the words of this clause were understood by the Convention? In that Senate, also, were Oliver Ellsworth, Rufus King, and Richard Henry Lee. They had not, indeed, been in the Convention; but surely such men were not ignorant of the sense in which these words were understood at that time; nor did Chief Justice Ellsworth require long homilies to be read from the horn books of the law, to inform him that revenue seizures were not, by laws of England, civil causes of admiralty jurisdiction.

The law passed, and I am not aware that any opposition was made to this part of it. It went into operation and was brought, of necessity, to the attention of the Courts at every session. But for seven years we hear no word of complaint from any District in the Union, of this part of the act. If it was so gross and palpable a violation of the Constitution, as it certainly was if the words of this clause are to be measured by the sense which they had in England and not by that which they had in this country, we may well ask, with some feelings of surprise, where, during these seven years, were slumbering the watchmen of our American Israel?

The first case in which the question was raised, was that of *The U. S.* vs. *The Vengeance*, 3 *Dall.* 297, in 1796. The vessel was seized for a violation of an act of Congress, of May 22, 1793, prohibiting, for a limited period, the exportation of arms and ammunition. The vessel was condemned in the District Court, and on appeal the decree was reversed by the Circuit Court, and a decree of restoration pronounc-

*William Samuel Johnson, of Connecticut, Robert Morris, of Pennsylvania, George Reed and Richard Bassett, of Delaware, John Blair, of Virginia, Pierce Butler, of South Carolina, and Wm. Few, of Georgia.

ed. From the Circuit Court the case was carried by *writ of error* to the Supreme Court. On the opening of the case, the Court, supposing the Attorney General did not intend to enter into any further discussion, expressed their opinion; but being informed by Lee, the attorney, that on account of the importance of the subject he wished to be heard further, they gave him time. In his argument, he took the ground that this was not a cause of admiralty and maritime jurisdiction, because it was not so in England at the time of the Revolution. After he had closed his argument, the Chief Justice (Ellsworth) informed the opposite counsel, that the Court saw no reason to change the opinion which they had expressed on opening the cause, and that they would dispense with further argument; and the next day 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 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 must certainly have been on 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 that no jury was necessary, as it was a civil cause; and the *appeal* to the Circuit Court was regular, as it was a cause of admiralty and maritime jurisdiction."

The question was again raised, in the case of *U. S.* vs. *The Sally*, 2 *Cranch*, 406, in 1805. The same objection was taken, and was again unanimously overruled. In the year 1808, it was again brought up, in the case of *U. S.* vs. *The Schooner Betsey and Charlotte*, 4 *Cranch*, 443, a seizure made in the port of Alexandria, under a law for suspend-

ing commercial intercourse with certain ports in the island of St. Domingo. The question was again most thoroughly argued against the jurisdiction, by Lee, twelve years after he argued the case of the *Vengeance*. In this argument, as is truly said by Judge Nelson, "will be found the ground and substance of all the arguments that have been urged in favor of the limited construction of the admiralty powers under the Constitution." 6 *Howard Rep.* 322. It was contended, with perfect justice, by Mr. Lee, that if this was not a case of admiralty and maritime jurisdiction under the Constitution, it could not be made so by Congress, and in that case, the law which put such causes on the admiralty side of the Court, was unconstitutional. The Court again, without hearing a reply, unanimously overruled the objection and sustained the jurisdiction. The first and last of these cases were fully and earnestly argued, and with such learning and ability, that, in the opinion of Judge Nelson, those who have followed on the same side have done nothing more than expand the argument and accumulate citations. They abundantly prove, what nobody ever doubted, that in England the jurisdiction of the admiralty has been, since the controversy in which Lord Coke figured, so little to his reputation either as a lawyer or a man, restricted within very narrow limits;* but they leave untouched the only question

*The state of mind, in which Lord Coke went into the controversy on the subject of the admiralty jurisdiction, does not deserve the respectable name of prejudice. It was mere willfulness and passion. Brown says that he hated the civil law and every thing connected with it. He was undoubtedly a man of an acute and vigorous mind, but it ran in a narrow groove. No man knew better the old law of England in all its ramifications of feudal technicalities and quibbling subtleties; but this was all, except the temporary politics of the day, that he did know. He talks about the gladsome light of jurisprudence, but no one at this day will look for this light in his ponderous volumes of insufferable tediousness, in which all things are jumbled together in a perfect chaos. As a jurist, in the liberal and philosophical sense of the word, Lord Mansfield was as much his superior as light is better than darkness.

in which we are interested; what is the meaning of these words in the Constitution? what was intended by the framers of that instrument? and in what sense they were generally understood by those who adopted it? Mr. Lee contended that they meant precisely that jurisdiction which was exercised by the High Court of Admiralty in England. This has been repeated by all those who have followed him on that side of the question. Indeed, when the argument for the narrow jurisdiction is reduced to its last analysis, this assumption is the only element on which it rests; an assumption which we may be permitted to call at least extraordinary, for it amounts to this, that we, half a century after the adoption of the Constitution, know better what was intended by those who framed and adopted it, than they knew themselves.

The Supreme Court considered the question so clear of doubt or difficulty, that, without hearing a reply, they unanimously overruled Mr. Lee's objections. And here let it be remembered, that three of the judges who concurred in these decisions were members of the Convention who framed the Constitution,* and all had taken a part, more or less active, in the discussions that preceded its adoption. It is difficult to conceive how any contemporaneous construction of a law can have a higher authority.

It is now sixty years since this law was passed. During the whole of this time it has been practiced upon, and enforced habitually in every maritime District in the Union. Thousands of cases have been adjudicated, involving millions of property. Great numbers of these cases have been carried by appeal to the Supreme Court, and have been affirmed with the concurrence of every judge that has had a seat on that bench. If the opinion of those who contend for

* These three were Wm. Patterson, James Wilson and John Blair. Their names appear among those who signed the Constitution, and are supposed to be the same persons who were afterwards appointed judges of the Supreme Court.

the English limitation of our admiralty jurisdiction is correct, that is, that our Constitution is to be interpreted by the laws of England, every one of these decisions was *coram non judice*, an absolute nullity and incurably void.

The only real question is on the meaning of this clause of the Constitution, all causes of admiralty and maritime juristion;—the sense in which these words were understood by those who made, and those who adopted it, for it may well be assumed that both understood the words alike. We have the contemporaneous declarations of every branch of the government, of the legislature which passed the law of Sept. 24th, 1789, and of the Executive who approved it, a series of deliberate and well considered decisions of the judiciary, and the quiet assent of the people to an unbroken and unvarying practice continued for more than half a century, all concurring in one point, that the admiralty and maritime jurisdiction, under the Constitution, is of larger extent than that of the English Court of Admiralty, and all repudiating the assumption that we are to look to the laws of England for the definition of these terms in the Constitution. If this cannot now be considered as a settled question of American jurisprudence under the great organic law of the government, we may, it seems to me, well say not only that no such question is settled, but that none ever will be or ever can be settled. And if every officer of the United States, who is entrusted with a portion of the constitutional powers of the government, is at liberty to carry those powers into practice as *he understands the Constitution*, without any reference to the opinions of others, or to any settled and long continued construction, this sacred instrument becomes a piece of wax, to be moulded into every variety of arbitrary and fantastic form that will harmonize with the varying idiosyncrasies of these various officers.

The only object of these observations is, to vindicate the Court in taking cognizance of causes of this description, and not to enumerate all the causes that are embraced by the

terms of the Constitution; and if a contract for the transportation of goods on the high seas is not a case of maritime jurisdiction, then it seems to me that there is no such case.

THE BETSY AND RHODA.

By the common law, a simple contract debt is not extinguished by the creditor's taking a new security for it, unless the security be of a higher nature, as an instrument under seal, or unless it be agreed to be received in satisfaction of the debt.

But by the law of Maine, if a negotiable security be given for a pre-existing simple contract debt, the legal presumption is, that it is received in payment, and that it is an extinguishment of the original cause of action; but this presumption is liable to be controlled by proof to the contrary.

The presumption of the local law will not be enforced by the admiralty, against a seaman who receives of the owners their negotiable note for his wages.

Such a note will not be held to be an extinguishment of the claim for wages, nor of the lien of the seaman against the ship, unless it is distinctly stated to him at the time that such will be the effect, and the note is accompanied by some additional security or advantage to the seaman, as a compensation for his renouncing his lien on the vessel.

Nov. 9th, 1840. This was a libel *in rem*, for wages. The libellant shipped Oct. 9th, 1839, for a coasting voyage, along the coast of the United States, as mate, for twelve dollars a month. In the prosecution of the voyage, the vessel went to Savannah, and was there employed as a lighter on the river for a considerable time, when she returned to Portland. The libellant claimed a balance of $46 10 due. After his discharge he called on the owners for his pay, but they not being ready to pay, offered him their promissory note for the amount, payable in twenty days. This offer was made in the office of the counsel of the owners. He objected to re-

ceiving it, and stated as a reason, his apprehension that it might put at hazard his right to proceed against the vessel. It was not stated to him that it would or would not be a waiver of his lien on the ship. But he was persuaded to take the note upon the representation that he would get his pay sooner on the note than he would by a libel against the ship. When he called for his pay at the maturity of the note, the owners gave him in exchange for it an order on their counsel. That not being accepted, he returned it, and took back the note, and filed a libel against the ship. The note was brought into Court, and offered to be surrendered. The defence was, that by consenting to take the note the lien was discharged.

Haines, for the libellant; *Bradford*, for the respondents.

WARE, *District Judge.*

It is not denied that the services, for which wages are claimed, have been performed, and that the balance demanded by the libellant remains due and unpaid. The only question is, whether by consenting to take the promissory note of the owners for the sum due, he has or has not lost his right of proceeding against the vessel; notwithstanding the note is brought into Court and offered to be surrendered to the makers.

By the maritime law, the ship is hypothecated to the seamen for their wages, and so long as the debt remains due in the quality of wages, the lien against the vessel continues in force. If the lien is lost, it must be because the acceptance of the note operated as payment, or as a legal extinguishment of the claim for wages for which it was given. By the common law, a debt due on simple contract is not discharged by the creditor's accepting another obligation of the same nature for the same consideration. *Johnson* vs. *Johnson*, 11 *Mass. Rep.* 359. The new title is not considered as an ex-

tinguishment of the old debt, but is treated as a merely collateral and additional security.

The same principle prevailed in the civil law. A creditor by taking a new obligation for a debt, did not extinguish the old title. The original obligation remained in force, and the second was held to be merely an accessary, which of course became extinct when the principal was satisfied. The new title was never held to supersede the original cause of action, unless such was clearly proved to have been the intention of the parties. When this was the case, there was constituted what was technically called a novation. The old debt was transferred to the new obligation, and the original cause of action was extinguished, and all the accessary and collateral securities attached to it were abandoned. *Warkœnig, Jus Romanum Privatum, vol.* 2, § 525. By the constitution of Justinian, a novation could never be inferred from presumptive evidence; it could stand only on the express agreement of the parties. *Code* 3: 42, 8. *Instit.* 3: 29, 3. The rigor of this constitution has not been followed generally by those nations which have adopted the Roman law as the basis of their jurisprudence. A novation may be inferred from circumstances, but they must be clear, urgent and conclusive, such as leave no doubt of the intention of the parties. *Gaill, Practicarum Observationum, Lib.* 2, *Ob.* 30, § 3. *Voet. Ad. Pand.* 46, 2. 3 *Vinnius, Comm. in Instit. Lib.* 3, 30, 3, § 7. *Toullier, Droit Civil, vol.* 7, *No.* 276.

This rule of jurisprudence, which equally prevails in the common law and civil law, is founded on this plain and reasonable principle, that no one ought, on slight circumstances, to be presumed to renounce any of his rights. When a new security is taken for an old debt, the natural and legal presumption is, that it is taken as collateral, unless it is expressly agreed, or is clearly to be inferred from the circumstances, to have been the intention of the parties to cancel and annul the original cause of action, and substitute the new title in its place.

If the present case is to be decided upon these principles, it is clear that the defence cannot prevail. It is manifest from the evidence, that the libellant did not actually consent to renounce his right of proceeding against the vessel, because he objected to taking the note upon the very ground that it might endanger this right.

It is true that, by the local law of this State, the acceptance of a negotiable security for a pre-existing debt, by simple contract, is generally held to be payment, and an extinguishment of the original cause of action. *Thacher* vs. *Dinsmore*, 5 *Mass. Rep.* 299. *Chapman* vs. *Durant*, 10 *do.* 47. *Whitcomb* vs. *Williams*, 4 *Pick.* 228. *Wood* vs. *Bodwell*, 12 *do.* 268, 70. *Vance* vs. *Nobleborough*, 2 *Greenleaf*, 121. *Descadillas* vs. *Harris*, 8 *Greenleaf*, 298. The reason assigned for this departure from the principles of the common law is, that the debtor might otherwise be put to inconvenience, and possibly be compelled to pay the debt twice, as he could not successfully defend himself against an action on the note in the hands of an innocent endorsee, by showing that the debt, for which it was given, had been otherwise satisfied. The law, therefore, raises a presumption against the creditor, who has taken such security, that he has renounced his right of action on the original contract. This, however, is only a presumption, which may be overcome by proof to the contrary; but the burthen of proving this is thrown on the creditor. *Maneely* vs. *M'Gee*, 6 *Mass. Rep.* 143. *Johnson* vs. *Johnson*, 11 *do.* 359. This is not only an innovation on the common law; it is also a departure from the general law merchant. That puts upon the debtor the burthen of proving that the note was intended by the parties as a satisfaction of the debt. 1 *Burr*, 9, *Rhoades* vs. *Barnes*. 6 *Cranch R.* 253, *Sheehy* vs. *Mandeville*. 1 *Cranch*, 181, *Clark* vs. *Young*. 3 *East R.* 251, *Drake* vs. *Mitchell*. 10 *Peters R.* 567, 8, *Peter* vs. *Beverly*. 4 *Mason*, 343, *Wallace* vs. *Agry*. Like the common and civil law, it adheres to the natural presumption, that when two securities are giv-

en for the same debt, both titles are intended to be valid and binding until the contrary is proved, though but one satisfaction can be demanded.

Admitting then, that this case is to be governed by the local law, it is still, on the most rigorous interpretation of the rule, an open question upon the evidence, whether the note was received in satisfaction of the wages, or not. The testimony on this point is not of a very conclusive character. The libellant consented to take the note, on the assurance that he would obtain his money on the note sooner than he could get it by a libel against the vessel. And he took it with an uncertainty in his own mind, whether he would thereby lose his remedy against the vessel. That uncertainty was not removed by the owners, although it is manifest that they acted under the impression that such would be the effect, and the business was transacted in the presence and under the advice of their counsel. It may be conceded, that if this had been a transaction between merchant and merchant, the presumption of the local law ought, upon this evidence, to prevail. They would be dealing on equal terms, and neither party would be under any obligation to communicate what both are presumed to know; for, ordinarily, every man is presumed to know the legal consequences of his own acts. But this was between the merchant owners and a seaman. In the admiralty, seamen are always treated as a favored class of suitors, and entitled to a large and liberal protection, as being, in a qualified sense, the wards of the Court. From their open and unsuspicious character, their inexperience in business, as well as their usual state of destitution and notorious improvidence, they are extremely liable to be overreached, by the superior knowledge and foresight of those with whom they deal, and drawn into unequal bargains. And especially does their poverty, with their habitual recklessness of the future, place them in a state of dependence, which subjects them very much to the power and influence of their employers. They

in all respects stand on unequal ground, with unequal advantages, in treating with the merchant owners, a class of men, who, by their education, habits, and course of life, are as remarkable for their shrewdness and quick perception of their interest, and the systematic steadiness with which it is pursued, as seamen are for the reverse. A Court of Admiralty will, therefore, interpose to protect them from the consequences of their own heedlessness and ignorance, upon the same principles that Courts of Equity protect, against their improvident bargains, young heirs dealing with their expectancies, or wards and *cestui que* trusts dealing with their guardians and trustees. It habitually looks with jealousy upon the contracts and dealings of owners with them, when there is any departure from the ordinary terms of the contract, or the usual course of dealing; and if it appears that from their improvidence or necessities, they have been induced to waive any of their rights, without an adequate compensation, the Court will set aside the most express stipulations as inequitable. *The Juliana*, 2 *Dodson*, 504. *Harden* vs. *Gorden*, 2 *Mason*, 555. *The Minerva*, 1 *Haggard*, 355. *Brown* vs. *Lull*, 2 *Sumner*, 449. 3 *Kent's Com.* 193.

Upon these principles, how stands the defence of this cause? The libellant was persuaded to accept for his wages a promissory note, on the representation that he would thereby obtain the money without the expense and trouble of a suit, and sooner than he could get it by a libel against the vessel; and for these considerations the owners now contend that he renounced his lien on the ship, to which a seaman always looks as his best security.

Now, in the first place, it is to be observed that the first part of this representation turns out, as the present suit shows, to be a failure by a breach of contract, on the part of the owners themselves. The second part, to wit, that he would obtain his wages sooner through the note than he could get them by a libel against the vessel, was untrue in point of fact, even on the supposition that the note had been

paid at maturity. The note could not be demanded until after the expiration of twenty days. But a libel for wages, when the parties are all present and there is no defence, is never permitted to remain in this Court for half that time. To a seaman, the delay is, in many cases, equivalent to the denial of justice. His daily bread is earned by his daily labor, and that is of course upon the water. He is unfitted by his tastes and his habits for the common occupation of a laborer on land. It would be difficult for him to find employment if he sought it, and not easy for him to perform the service, if the employment was found. He usually has not the means to pay his expenses ashore for any length of time, and if he had, it would be better for him to abandon a moderate claim, than to await the distant result of a suit, in its slow progress through the forms of the ordinary Courts of justice. In all maritime countries, therefore, seamen are privileged to go into their own peculiar Courts, whose course and forms of proceedings, are adapted to the direct and guileless character of the suitors, and the simplicity of their causes; where the proceedings are prompt, and justice is administered without delay. *Velo levato—sine strepitu forensi. Kurik. Quæst. Illust. Quæst. 37. Loccenius De Jure Maritimo Lib.* 3. *Cap.* 10. In the admiralty, causes for subtraction of wages are always summary, without the prolix formalities and delays of plenary causes. The considerations, therefore, for which the libellant was induced to waive his lien on the vessel, if such be the legal effect of the act, have either failed in point of fact, or were founded in error and mistake.

But further; he never did, in point of fact, consent to waive his remedy against the vessel. A doubt, it is true, arose in his mind, whether such might not be the legal consequence of his accepting the note, but unless this was the necessary result in law, he did not make it so by his consent. If then it is to be adjudged that the lien is lost, it must be simply by force of the presumption of the local law, against the

rule of the common law, and the general law merchant; and equally in opposition to the principles of the civil law and the natural presumptions arising out of the contract itself. For when a creditor takes a new security, the natural presumption is, that it is taken as subsidiary to the original obligation, unless it be a security of a higher nature. But in the present case, it was of an inferior nature, or rather, it was a renunciation of the better part of his actual security, without any compensatory advantage. For the owners were equally liable on the contract for wages, as upon the note, and for these also he had a remedy against the master and the vessel, in addition to the personal liability of the owners.

It is not necessary for me to consider how far a Court of common law would feel itself bound to enforce against the seaman in this case the rule of the local law. A Court of admiralty, it is certain, will, in some cases, give a remedy where a Court of common law would not. By its constitution, it is required to decide *ex æquo et bono*, and its practice shows that it is not, in the administration of justice, tied down to the dry, and sometimes harsh rules of the common law. Within the limits of its jurisdiction, it acts upon the liberal and enlarged principles of a Court of Equity; and especially it does so in dealing with the contracts between seamen and ship-owners. *Browne vs. Lull*, 2 *Sumner R.* 443. *The Minerva*, 1 *Haggard*, 347. *The Fortitudo*, 2 *Dodson*, 58, 7. *Ship Bellona*, *Bee's Rep.* 106. It goes as far in extending its protection to the weaker party in these cases, as a Court of Equity does in any case, unless it be where a party is strictly a ward of the Court, and it acts in the character of guardian. It applies the same protective principles that a Court of general Equity jurisdiction does where the parties stand to each other in fiduciary relations, as that of attorney and client, beneficiary and trustee, or principal and agent, and will not allow an owner to derive any benefit from a surprise he has practiced upon the inex-

perience or ignorance of a seaman, or an advantage he has taken of his necessities.

In this view of the habits and the course of a Court of admiralty, I do not feel myself authorized to say that the libellant, in taking the note, waived his privilege against the ship. He acted under a species of constraint. He was indigent, and needed prompt payment. He was entitled to it without delay, and he consented to receive the note upon the assurance that it was his most expeditious mode of obtaining it. The most that can be said is, that it may have suspended his rights of suing out process until the note arrived at maturity, or until he surrendered it to the makers. To have given to the act the effect of a waiver of his privilege, and an extinction of the lien, it should in the first place have been distinctly stated to him that such would be the result; and as at present advised, my own opinion is, that the note should also have been accompanied with some other security, in addition to the personal liability of the owners, as an equivalent and a compensation for the discharge of the lien.

This, it appears to me, is the judgment which the Court is required to pronounce on this transaction; and my mind is fortified in this conclusion, by the judgment pronounced by the Circuit Court, in the case of *Browne* vs. *Lull*, before referred to. The Court there stated, with great clearness and force, the reasons for watching with jealousy any innovation upon the usual form of the mariners' contract, and the conclusion from the whole is, that "whenever any stipulation is found in the shipping articles, which derogates from the rights and privileges of seamen, Courts of admiralty hold it void, as founded on imposition or an undue advantage taken of their necessities and ignorance and improvidence, unless two things concur;—first, that the nature and operation of the clause is fully explained to them; and secondly, that an additional compensation is allowed, entirely adequate to the new restriction and rules imposed upon them thereby."

The same reasons of natural justice and public policy, upon which these principles are founded, apply, with equal force, to any adjustment or settlement of the wages after they are earned, by which they are not actually paid. The wages, while they remain due in that quality, are a privileged debt; and a seaman ought not to be presumed to waive any privilege attached to his demand, unless the legal effect of the settlement is fully explained to him at the time, and some advantage or security is allowed in compensation for that which he renounces. My opinion therefore is, that the lien is not lost.

THE DAWN.

The libellant shipped for a voyage from Boston to Turk's Island. The ship, soon after leaving port, was so much damaged by the fortune of the seas, that the master, for the safety of the lives of the crew, put into Bermuda, where a survey was called, and she was condemned and sold as a wreck, and her crew discharged. Wages were paid to the libellant until he arrived at Bermuda. By his libel, he claimed either the two months wages allowed to seamen on the sale of a vessel in a foreign port and the discharge of the crew, by the Act of Congress of Feb. 28, 1803, § 3; or a sum in addition to his wages to pay his expenses home.

The Act of Congress applies only to the case of a voluntary sale of a vessel, and not to a sale rendered necessary by misfortune; held that the libellant was not entitled to the statute allowance, but was entitled to a sum in addition to his wages to defray the expenses of his return, home, to be paid from the proceeds of the sale of the vessel.

Generally, when the performance of a contract has become impossible by a fortuitous event, the parties are discharged from its obligations.

On the happening of any disaster to a vessel, by which the prosecution of the voyage is rendered impossible, the seamen are discharged from the principal obligation of performing the voyage; but they are not released from the incidental obligation of rendering their best services for saving as much as practicable of the ship and cargo.

The opinions of Valin and Pothier on this subject examined and questioned.

On the principles of the common law, applicable to the contract of hiring of labor and service, a party cannot ordinarily claim an extra compensation, on the ground that, by some unexpected event, the service which he has agreed to perform, becomes more laborious and dangerous than was anticipated at the time of the contract.

The maritime law, on principles of public policy, makes an exception to this general rule, in cases of shipwreck.

In cases of shipwreck, the seamen are entitled to their full wages up to the time of the disaster, provided, by their exertions, enough is saved of the freight and wreck to pay them.

The old rule in England, that freight is the only fund against which wages can be claimed, was never the rule of the maritime law, and was never adopted in this country.

The ship, together with the freight, is, to the last fragment, hypothecated to the seamen for their entire wages, *tota in toto et tota in qualibet parte.*

In cases of shipwreck, the seamen are entitled to claim, according to the merit of their services, an extra reward, beyond their wages, against the property saved. This ought not generally to be less than the expenses of their return home.

This, being of the nature of a salvage reward, may be allowed, as well against the savings of the cargo, as against the fragments of the ship.

The decisions of the American Courts quoted and commented upon.

The doctrines of the maritime ordinances of the middle ages, on this subject, examined.

Under these ordinances, and the usages of the age when they were framed and established, the contract of seamen took a peculiar character. Their wages were made to depend on the successful termination of the enterprise. If that totally failed, contrary to the common principles of the contract of hire of labor or service, there was a total loss of wages. There is no trace of such a usage in the Roman law, nor in that ancient collection that goes under the name of the Rhodian laws, nor in the legislation of the Lower Empire. On the western coast of Europe, it appears to have been nearly coëval with the revival of commerce, after the fall of the Western Empire.

On this restriction contrary to common right, as a compensation and having its origin in the same policy of connecting the interest of the crew with the safety of the ship, was engrafted another principle, that,

in cases of shipwreck, the seamen should be paid, out of the effects which they saved, a compensation beyond their stipulated wages, in the nature of salvage.

February Term, 1841. This case was before the Court several terms ago, and is reported in *Ware's Reports*, 485. After the opinion was then delivered, the counsel for the respondent moved the Court to suspend the decree, to enable the party to offer further evidence to show the actual condition of the vessel, when she arrived at Bermuda. Under the circumstances of the case, the Court allowed the motion. The case was now presented on the new evidence. The material facts upon the whole case were as follows. The libellant shipped on board the Brig Dawn at Boston, Nov. 26, 1836, as mate for a voyage to Turk's Island, for wages at 25 dollars a month. Soon after the brig left port, she encountered violent gales, by which she was so much damaged in her hull and rigging, as to be incapable of continuing the voyage, and the master, for the safety of the lives of the crew, bore away for Bermuda, where she arrived on the 28th of December. The master then made his protest, and applied for a survey. Commissioners were appointed for that purpose by the Governor, who, after an examination, reported, that from the great damage which the brig had received in her spars and rigging, and especially from the disabled state of her hull, connected with her great age, she was unfit for sea, and unworthy of repair; and she was subsequently sold as a wreck. The additional evidence, now introduced, went to confirm the report of the surveyors, and to prove the ruinous condition of the vessel, and to show further the great expenses of the repairs, which would have been required to fit her for sea.

The crew were discharged, and paid their wages up to the time of the discharge. The libellant claimed, in addition, two months' wages allowed by the act of Congress of Feb., 1803, sect. 3, upon the sale of a ship and the discharge

of her crew in a foreign port, or upon the discharge of a seaman in a foreign country with his own consent; and if, under the circumstances of this case, he was not entitled to claim under the statute, an alternative claim was set forth in the libel for a reasonable compensation, in addition to his wages, in the nature of salvage for his extra labor and services in saving the vessel, and to pay his expenses home.

The case was argued by *C. S. Daveis*, for the libellant, and *T. A. Deblois*, for the respondent.

WARE, *District Judge.*

I do not think it necessary, on this occasion, to say much upon the claim for the statute allowance of two months' additional wages, which are directed to be paid to the Consul for the seamen's use on the sale of a vessel in a foreign port, or when a seaman is discharged in a foreign country with his own consent. When this case was before the Court at a former term, that question was fully considered, and the conclusion to which my judgment was brought, by that examination, was that the statute applied only to the case of a voluntary sale of the vessel, and to a strictly voluntary discharge of a mariner, and not to a sale or discharge rendered unavoidable by an imperious and overruling necessity. But when a vessel is sold in a foreign port, the case is within the words of the statute, and if the owners would exempt themselves from its operation, it belongs to them to show that the sale was involuntary on their part. As the evidence then stood, it did not appear to me that the necessity of the sale was sufficiently established by the proof; but, under the peculiar circumstances of the case, it seemed to be reasonable to suspend the decree, and allow the owner to offer further evidence to that point. The evidence now produced does, in my opinion, satisfactorily show that the sale was, in the reasonable meaning of the word, a sale of necessity. Not that it was physically impossible to repair the vessel and proceed

voyage; for it is always possible to repair or rebuild
l, while any part of the hull remains. But the dam-
ere so extensive, and the expense of the repairs would
been so considerable, that it was, beyond question,
for the interest of those on whom the loss must ulti-
fall, to abandon the voyage and sell the materials
ed for the most they would bring. A sale is, within
rcantile and reasonable sense of the word, necessary,
he vessel cannot be repaired but at a great sacrifice
interests of the owners. And when a voyage is brok-
or such cause, the seamen are not properly discharg-
the whole enterprise is brought to a premature con-
by a fortuitous event, for which neither party is re-
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other question raised by the pleadings in this case is
r, upon a shipwreck and loss of the vessel in a for-
ountry, the seamen, who have remained by the ship
thfully performed their duty to the last, can, upon the
les of the maritime law, claim a compensation, out
property which they save, beyond their stipulated
up to the time when their connection with the ship is
dissolved, sufficient to pay their expenses home.
uestion has been very ably and elaborately argued on
des; and the authorities bearing upon it have been
examined. But, with all the researches of counsel,
dged case has been found, in which the question has
rectly and formally decided.

contended by the counsel for the libellant, that this
founded on an ancient principle of the maritime law
ope, incorporated into the earliest digests of the law,
ommended as well by the dictates of justice and hu-
as by an enlarged and enlightened public policy;—
it is not directly sanctioned by any judicial prece-
neither are there any by which it is directly nega-
ut, that there are cases in which a compensation in

the nature of salvage may be allowed, beyond the amount of wages due, is fairly inferable from the doctrines of many of the adjudged cases, and is in fact but a just application of the general principle of the marine law, which studiously connects the interest of the crew with the safety of the vessel and cargo. On the other side it is argued, that the claim cannot be supported as one flowing from the contract, all rights under that being satisfied by the payment of wages up to the time when the contract was dissolved by an accident of major force;—that it cannot be maintained as a salvage reward, because the ship's company can, it is said, in no case claim as salvors, being bound by their contract to use, on these melancholy occasions, their utmost exertions for the preservation of the ship and cargo for their stipulated hire;—and the silence of our jurisprudence, on a question which must have frequently been presented to the Court, has been strongly urged as a proof that no such principle, as that contended for in behalf of the libellant, is acknowledged by the maritime law of this country. And it is further contended, admitting the rule of the maritime law to be, that upon a shipwreck in foreign parts, the crew are entitled to claim against the savings from the wreck a sum sufficient to pay their expenses home, that this rule is superseded, in this country, by the acts of Congress for the relief of destitute mariners in foreign countries, requiring the Consuls of the United States to provide for their return at the public expense. Such I understand to be the general tenor of the arguments at the bar.

I agree with the counsel for the respondent, that by the maritime law, as it is received in this country, the seamen are bound to remain by the wreck and contribute their utmost exertions to rescue as much as possible from the violence of the elements, so long as there is a reasonable probability of saving any thing, without too much hazard of life. It is true, that a different view is taken of the obligations of the crew by the most distinguished maritime jurists of

France. Valin says, that in case of shipwreck the seamen are at liberty to abandon the ship, although he admits that his opinion is in opposition to the decision of the Judgments of Oleron and the ordinance of the Hanse Towns. The reason, he says, is, that in this case the owner is under no *personal* obligation to pay their wages or the expenses of their return home, and consequently, if they refuse to aid in saving the property, he has no cause of complaint. *Comm. sur Ordinance de la Marine, Liv.* 3, *Tit.* 4, *Art.* 9, *vol.* 1, 704. Pothier maintains the same doctrine. By the accident of major force, he says, which prevents the continuation of the voyage, the parties are freed from their engagements, and the seamen are no longer under any obligation to continue their services. *Contrats Maritimes, No.* 127. Boulay Paty, without being very explicit, seems silently to acquiesce in the same conclusion. *Cours de Droit Maritime, vol.* 2, 230–1.

But, notwithstanding the imposing authority of these great names, it appears to me that this doctrine is exposed to very grave objections. It is true indeed as a general principle, when the performance of a contract is rendered impossible by a fortuitous event, that the parties are freed from its obligations. And in this case, the prosecution of the voyage having, by an accident of major force, become impossible, the seamen are undoubtedly discharged from the principal obligation of the contract, that of performing the voyage. But as incidental to that, they are bound at all times to exert themselves for the preservation of the property entrusted to their care. It would be singular if they were released from this collateral obligation on the happening of an event, which rendered it peculiarly necessary. It appears to be a duty, resulting directly and necessarily from the nature of their engagement, to render their utmost exertions, on these occasions, to save all that is possible for their employers. This duty is expressly enjoined upon them in nearly all the

old maritime ordinances. The law is so stated by Abbot, in his treatise on shipping, *Part* 5, *Ch.* 2, *Sect.* 2. And so it has, I believe, been uniformly held in this country. 2 *Peters Ad. R.* 395. 2 *Mason R.* 337. So long as these services are continued, their right to wages, under the contract, remains in full force, and their lien against the fragments of the wreck which they preserve. But, by abandoning the wreck, they forfeit their wages, nor will their right be restored should the wreck be saved by other hands. 3 *Kent Comm.* 196. 2 *Mason R.* 337, *The Two Catherines.* 3 *Sumner R.* 67, *Pitman* vs. *Hooper.*

But the question presented in this case is, whether the seamen can claim any thing beyond the full amount of wages up to the time of the actual termination of their services. It is quite clear that this claim cannot be maintained upon the common principles applicable to the contract of hiring. Having agreed to perform the service for a stipulated price, they cannot maintain a claim for extra compensation, although, by some fortuitous event, that service may have been rendered more laborious, or have involved more danger than was anticipated. However just and reasonable such an allowance may, in some cases, be, as a pure question of casuistry, it cannot be sustained upon any established and known principle of law. Do then the principles and policy of the maritime law furnish any ground for making an exception, in favor of maritime services, to the general rule of the common law? After an attentive consideration of the subject, and an examination of all the sources of information within my reach, I am brought to the conclusion, that to some qualified extent they do; and I will now proceed to explain somewhat at large the grounds upon which this opinion is founded.

No case was cited at the bar, in which this question has been decided, at least in the form in which it is presented in this case. There are, however, several, in which the general subject of the claims of seamen in case of shipwreck,

against the fragments which they save, is considered. Chancellor Kent, in his Commentaries, in speaking of shipwreck in connection with wages, says that "some of the decisions in this country seem to consider the savings of the wreck as being bound for the arrears of the seamen's wages, and *for their expenses home.*" 3 *Comm.* 195. Here the expenses home are spoken of as a charge on the wreck, in addition to the arrears of wages. And I refer to this paragraph, not so much as an authority in support of the doctrine, as to show that the idea, that the crew may be entitled to something beyond their wages, is not such a novelty in our jurisprudence, as was supposed at the argument. In the case of the *Two Catherines*, 2 *Mason*, 319, the vessel had performed her outward voyage and earned freight, and was wrecked, and the cargo totally lost on her return, in Narraganset Bay, near her home port. The libel was framed with a double aspect, claiming, in the alternative, wages or salvage. The question, what was due to the crew, appears to have been elaborately argued at the bar, and was profoundly examined by the Court. The conclusion of the Court was, that no wages were due, but that the crew were entitled to salvage against the materials, which they had saved, of the vessel. The Court held, that there was no principle of law which authorized the position, that the character of seamen creates an incapacity to assume the character of salvors,—and that the salvage should never be less than the amount of wages, which would have been due had no disaster happened, but may, according to the circumstances of the case, be more. (p. 332—340.) I am aware of the language used by the same learned judge, in delivering the opinion of the Court in the case of *Hobart* vs. *Drogan*, 10 *Peters*, 122. But it does not appear to me to be inconsistent with the decision of this case, nor to take from its authority.

In the case of the *Cato*, 1 *Peters Ad. R.* 48, the ship was lost at sea, and the crew taken from the wreck by another vessel. Part of the crew of the Cato assisted that of the

salvor vessel in saving a portion of the cargo, and they were allowed to claim, as subordinate and auxiliary salvors, one half the share that was allowed to the crew of the salvor ship. Judge Peters observed, in delivering his opinion in that case, that "the third article of the laws of Oléron has been produced, together with the commentaries upon it, to show that seamen saving from a wreck are entitled to a reward, when sufficient property is saved, beyond the amount of their wages. *I have*," he says, "*never disputed the doctrine in cases to which it seemed applicable.*" In another part of his opinion he adverts to a previous decision he had made in the case of the Belle Creole, upon a state of facts similar to those of the Cato, and says, "I do not exactly recollect by what rule I estimated the quantum of wages I ordered to be paid out of the surplus, to the officers and crew of the Belle Creole, but I think it was *beyond the amount of wages.*" I shall have occasion, presently, to remark particularly on the third article of the laws of Oleron, and it will be seen how it applies to the present case. The case of the *Catherine Maria*, 2 *Peters Ad. Rep.* 424, was that of a vessel foundered at sea. A part of the cargo was saved by the aid of another vessel, in which the crew were brought home. Salvage was allowed to the crew of the salvor vessel, and the crew of the lost vessel were allowed their wages from the property saved, *which was part of the cargo*, not only to the time of the abandonment of the ship, but to the time when the goods were brought into port, and were taken into the custody of the Marshal, under the process of the Court. In the case of the *Brig Sophia*, *Gilpin R.* 77, the vessel was wrecked on her return voyage to Philadelphia, on the capes of the Delaware. The cargo was entirely lost, but some of the spars and rigging of the vessel were saved. The seamen filed a libel against the relics of the vessel for their wages, and the mate a separate libel claiming salvage. The Court held that the claim for wages could not be sustained, on the ground that freight is the mother of wages

and that, when the freight is entirely lost, no wages *eo nomine* are due. But it was further decided, that although nothing could be recovered as wages, the seamen were entitled to claim as salvors, and that the amount, which would have been due as wages had the disaster not happened, might be be recovered as salvage. The libel of the seamen was therefore dismissed, and the mate recovered the amount of his wages under the title of salvage.

All these cases clearly sustain the principle, that the seamen, in the event of shipwreck, are entitled to claim against the property which they have saved, in the quality of salvors. It is true that in the case from Gilpin, this seems to be treated as a substitute for the claim of wages, and to be measured by the amount which would be due if the disaster had not occurred. In the other cases, it is clear that the Court thought it might exceed that amount, and in that of the *Catherine Maria*, more was in fact awarded. And if the claim is valid for salvage, it would seem, as in all other cases of salvage, it must be discretionary as to the amount, to be determined by the particular circumstances of the case. But all these cases are open to one general remark, which may be thought to detract something from their authority in support of the principle contended for in the case at bar; it is this, that it seems to have been tacitly assumed that the wages were lost by the calamity which prevented the earning of freight, and therefore, if the seamen could not be rewarded for their services in the way of salvage, they could claim nothing. Undoubtedly it was formerly the doctrine of the English Courts, that freight was the only fund out of which wages could be claimed, and of course when freight was not earned no wages were due. *Holt, Law of Shipping*, 275. But that is now overruled in England, (1 *Hagg. R.* 227, *The Neptune*,) and it was never received in this country but with material qualifications. Freight is indeed the natural fund for the payment of wages, and the seamen have a privileged claim against it. It is a right which does not

stand merely on a dry rule of positive law, but is derived from the nature of things, for it is in part the product of their own labor. But, by the maritime law, the ship is as much pledged for wages as the freight. When the interests of third parties are involved, as between underwriters when the ship and freight are insured by separate policies, it would seem, upon principles of natural law, that the freight ought first to be exhausted, and the vessel resorted to only as a subsidiary fund when the freight proved insufficient. This was the opinion of Emerigon, (*Traité des Assurances, Art.* 17, § 11, 53,) and, in a proper case, the Court may perhaps have the power of marshaling the funds to meet the claims of natural justice. But, at all events, the seamen are to be paid their wages, when enough for that purpose is saved of the ship or freight. 3 *Sumner R.* 60, *Pitman* vs. *Hooper.* It is not pretended that these authorities establish the principle as a settled rule of jurisprudence in this country, that upon shipwreck, when part of the property has been saved to the owners by the exertions of the crew, they are entitled to an allowance, in the nature of salvage, beyond the amount of their wages. But to me they seem to prove, at least, that the opposite rule is not established, and that the question is fairly open to be decided upon principle and the authority of the general maritime law.

We will now inquire what grounds it has for its support in the general doctrines of that law. The policy of connecting the interest of the crew with the safety of the ship and cargo, is deeply imbedded in the principles of the maritime law. The ship and freight are the only pledge they have for their wages. Their lien upon these and every part of them attaches as a privileged hypothecation, *tota in toto et tota in qualibet parte*, or, as it has been emphatically expressed, to the last plank of the ship and to the last fragment of the freight. *Jugemens D'Oleron, Art.* 3. *Consulat de la Mer. Ch.* 132 (*edition of Pardessus,* 92). *Emerigon des Assur-*

ances, *Ch.* 16, *Sect.* 11, § 2. *Pitman* vs. *Hooper*, 3 *Sumner R.* 50. But this is the whole of their security. If the ship and freight are wholly lost, there is a total loss of wages; and though the ship may be lost on the most distant and inhospitable shore of the ocean, they are not only left penny-less to find their way home as they can, but when, through many hardships, they have arrived there, however long and perilous their service may have been, they have no personal claim against the owner, unless freight in the course of the voyage has been saved and put on shore. Upon the common principles of the contract of hiring service or labor, the title of the laborer to his reward depends upon the faithful performance of the service for which he is engaged, and is not liable to be defeated by the accidents of fortune. 2 *Kent's Comm.* 590, 1. *Pothier*, *Contrat de Louage*, *No.* 423. The principle which attaces the right to wages to the fortune of the vessel, or in other words, makes the right dependent on the successful issue of the enterprise for which the men are hired, is a peculiar feature of the modern maritime law. No trace of such a principle is to be found in the Roman law, nor in the maritime legislation of the Eastern Empire, nor in that ancient compilation which goes under the name of the Rhodian laws. *Pardessus*, *Lois Maritimes*, *vol.* 1, *p.* 325, *note* 3. It owes its origin to the necessities and peculiar hazards which maritime commerce had to encounter in the middle ages, when to the dangers of the winds and waves were added the more formidable perils of piracy and robbery. The principle having been then established, and found by experience to be favorable to the general interest and security of commerce, it has been preserved in the maritime jurisprudence of Europe, when the special necessities in which it had its birth have ceased to exist.

It is then to the maritime customs and usages of the middle ages, in which this restriction upon the right of wages had its origin, that we are to look for its nature and quality, as well as for any countervailing advantages to the seamen,

by which this abridgement of the rights naturally resulting from their contract was compensated, and the scales of justice, which had been made to incline in favor of the employer, were equitably reädjusted. If we retain the harsher principles of the old law, it is but just that we should also preserve the temperaments, by which its severity and apparent injustice were mitigated.

The earliest monument of the maritime jurisprudence of the middle ages which remains, unless we except the Consulate of the Sea, is the Judgments of Oleron.* The rule is there stated in these terms: "When a vessel is lost, in whatever place it may be, the seamen are bound to save all they can of the wreck and cargo. In this case the master shall pay them their reasonable wages *and the expenses of their return home*, so far as the value saved is sufficient; and if he has not money enough, he may pledge the objects saved to bring them back to their country. If the seamen refuse to labor for the salvage, there is nothing due to them, and on the contrary when the ship is lost, they lose also their wages." *Art.* 3. The rule cannot well be be more explicitly declared than in this article. If the ship is totally lost, the seamen lose their wages; but, against the effects which their exertions have rescued from destruction, they have a claim not only for the full amount of their wages, for that I understand to be meant by their reasonable wages, but also for a further sum to defray their expenses home. Thus we see that in the very origin of the custom which restricted the right of seamen for their wages to the effects which they saved, it was connected with another of allowing them against these effects an additional reward for their labor in saving them.

The Judgments, or Roles, or, as they are more frequently called in this country, the Laws of Oleron, do not appear, at first especially, to have been sanctioned by any direct act of legislation. They are apparently a collection of maritime

* See note at the end of this case.

usages, to which custom had given the force of law; but they have at all times been referred to as of high authority by all the most commercial nations of Europe. They were the earliest digest of maritime law in the western part of Europe, and from the general wisdom and equity of their decisions, as well asf rom other causes, they seem, in one form or another, to have been early incorporated into the maritime jurisprudence of all the western nations of that continent. Being a work of French origin, they were received as common law in Aquitaine, Brittany, Normandy, and the whole extent of the Atlantic coast of France. In England they early acquired nearly the same authority from an opinion there entertained, that they were originally compiled and published by Richard I., in his character of Duke of Aquitaine, on his return from the Holy Land. In the latter part of the twelfth century they were adopted by Alphonso the Wise, King of Castile and Leon, and thus became the law of the northern coast of Spain. *Pardessus, Collection des Lois Maritimes, vol.* 1, *pages* 301 *and* 306. *Vol.* 2, *page* 29. 1 *Black. Comm.* 418; 2 *do.* 423. They were at an early period translated and adopted as the maritime law of Flanders, under the names of the Judgments of Damme and the Laws of West Capelle. *Pardessus, Lois Maritimes, vol.* 1, *chap.* 9. The third article above quoted is in its substance incorporated into the ordinance of Phillip II., of 1563, *Part* 4, *Art.* 12. 4 *Pardessus*, 24. In the more northern countries, this code does not appear to have been received as common law; but the general principles and usages, which it established, were incorporated into their own ordinances. The whole of the first twenty-five, which were the primitive articles, are transferred to the ordinance of Wisbuy, from the 15th the 39th article. The seventeenth article of the laws of Wisbuy is almost a literal translation of the third of Oleron. The Hanseatic ordinance, without copying so closely the article of Oleron, arrives at nearly the same conclusion. In case of shipwreck, the crew are re-

quired to assist the master in saving the wreck and cargo, for an equitable compensation in salvage, to be taken from the wreck and the merchandize, according to the judgment of arbiters. If the master has not money, he shall carry the seamen back to their country, if they choose to follow him. But if the seamen do not assist, the master is not bound to pay them anything, and those who have not done their duty are liable to corporal punishment. When the ship perishes, the whole that is saved is pledged to pay the totality of the wages. *Ordinance of* 1614, *Tit.* 4, *Art.* 29, and *Tit.* 9, *Art.* 5. *Ordinance of* 1591, *Art.* 45. The law of Denmark requires the master and crew to save the ship and her rigging as well as the cargo, and a compensation shall be paid them according to the opinion of good men. On the other hand, the freight due from the shippers on the merchandize saved, as well as the wages of the crew, shall be paid in proportion to the part of the voyage performed. The mariner who will not aid in saving the ship and cargo shall lose his wages, even what has been advanced, and be regarded as infamous. *Code of Frederic II.*, 1561, *Art.* 24. *Pardessus*, *Lois Maritimes*, *vol.* 3, *p.* 250. The same rules are established by the laws of Hamburgh. The crew are bound to exert themselves to save the vessel and cargo for an equitable recompense, and if they refuse their assistance, the master shall pay them neither their wages nor any thing else. *Statute of* 1603, *Tit.* 17, *Art.* 1. 3 *Pardessus*, 325. The law of Lubec substantially agrees with that of Hamburgh. It requires the master and crew to exert themselves to save the vessel and cargo, and allows them an equitable compensation, to be determined by arbiters. He who does not assist shall be paid nothing, and shall besides be deprived of his wages. *Official Code*, 1586, *Tit.* 3, *Art.* 3. 3 *Pard.* 444. The Prussian law also enjoins the same duties upon the crew, and requires the merchant to pay them a liberal reward, *honestum premium viri boni arbitrio. Code of the Duchy of Prussia*, 1620, *Lib.* 4,

Tit. 12, *Art.* 3, § 3. The maritime code of Charles XI. of Sweden, as well as several of the ordinances of the northern nations, prescribes particularly the course to be pursued by the master on these occasions. He shall first save the crew, then the rigging of the ship, and lastly the cargo, for the saving of which he shall employ the boat and the services of his crew, for an equitable compensation. When the ship and cargo are entirely lost, the master and crew can demand nothing that is due to them. But if they save of the wreck the amount of their wages, they shall be paid without deduction. No one shall have a reward for a salvage who has not aided; and he who has saved effects may detain them until he is paid. *Code of Charles XI.*, 1667, *Part* 5, *chap.* 2. 3 *Pardessus*, 170. And finally, the maritime legislation of Russia inculcates the same principles, imposing on the crew the obligation of saving what they can from the wreck, and giving them an equitable compensation for the salvage. *Statute of Riga*, 1672, *Tit.* 5, *Art.* 1. 3 *Pardessus*, 520.

The French Ordinance of Marine, of 1681, was framed upon a review of all the antecedent maritime legislation of Europe, improved and corrected, it is said, by information sought from practical men in every part of the continent. And so admirably was the task executed by the great man who digested it, that from its first publication it was generally acknowledged as constituting in some sort the text of the commercial law of all nations. In this celebrated code we find the same principles established and confirmed. When the ship and merchandize are entirely lost, it is followed by an entire loss of wages. But if any part of the vessel is saved, the seamen engaged for the voyage or by the month shall be paid their wages. If merchandize only is saved, they shall be paid their wages in proportion to the freight received. But at all events they shall be paid for their days employed in saving the wreck and the effects shipwrecked. *Liv.* 3,

Tit. 4, *Art.* 8, 9. The same principles are preserved in the *Code de Commerce*, *Art.* 261.

It is certainly a little remarkable, in passing to the southern coast of Europe, that we find but very slight traces of a custom that seems from the earliest times to have prevailed on the Atlantic coast, that of allowing to the crew something in the nature of salvage from the property they save from the wreck. There is one chapter in the Consulate of the Sea, from which perhaps a custom may be inferred of allowing to seamen the expenses of their return home, when the vessel is lost on a foreign coast. It provides that when a ship sails to the countries of the Saracens, and falls into the hands of enemies, or is lost by the fortune of the seas, if the master receive no freight, he shall not be bound to pay the seamen anything. "The master," says the Consulate, "who by one of the causes mentioned loses his vessel, is not obliged to furnish the means of passage nor provisions for the seamen till their return to a Christian country, because he has lost all he had, and peradventure more." *Chap.* 228, *edition of Pardessus*, 194. The reason given for exempting the master from the charge, in this case, leaves room for the conjecture, that if part of the wreck had been saved by the crew, they might, by custom, be entitled to some allowance from it. The law of Genoa provides, when any disaster happens to a Genoese vessel, that the crew shall be bound to remain with the master and assist in the salvage, and that the master shall provide for their board and pay them double wages while they are employed in this service. *Statutum*, 1441, *chap.* 94. *Pard. vol.* 4, 519. This is all I have been able to find in the legislation of those countries which border on the Mediterranean, indicating the existence of such a custom; while the Ordinance of Peter IV. of Arragon and Valentia, by its silence, seems to negative it. It allows the seamen their wages in these cases to the time of the expiration of their service, provided they exert themselves to save the wreck and cargo, but nothing more, and visits upon their refusal to

aid, the penalty of the forfeiture of all wages, even of that which has been paid in advance. *Ordinance of* 1440, *Art.* 17. 5 *Pardessus*, 357.

From this review of the maritime legislation and jurisprudence of Europe, and more particularly of the western nations of Europe, commencing with the Judgments of Oleron, in the twelfth, to nearly the close of the seventeenth century, we find, either by positive ordinances, or by immemorial usages having the force of law, one prevailing rule applying to the case of shipwreck upon the whole extent of the Atlantic coast. It required the ship's company, in case of disaster, to exert themselves to the utmost of their ability to save as much as possible of the ship and cargo, generally under the penalty, for the refusal or neglect to perform this duty, of a forfeiture of wages, and in some cases of additional punishment; but restricting their claim for wages to the effects which they save, and allowing them, against those effects, some reward beyond the amount of their wages stipulated by the contract. These principles seem to have been incorporated into the early law of every maritime state on the Atlantic coast, from the extreme west of the Spanish peninsula to Sweden, including the ports of the Baltic. Such a general concurrence, of itself, raises a strong presumption that they are, taken together, founded in justice and wisdom. But independent of the authority of general usage, these principles appear to me to have their foundation in just and enlightened views of public policy, their object being to connect the fortune of the crew with that of the vessel, and thus fortify the obligations of social duty by the ties of pecuniary interest. They are strongly maintained by Mr. Justice Story, in the case of the *Two Catherines*, before referred to. "In my judgment," says he, "there is not any principle of law, which authorizes the position, that the character of seamen creates an incapacity to assume that of salvors; and I cannot but view the establishment of such a doctrine

as mischievous to the interests of commerce, inconsistent with natural equity, and hostile to the growth of sound morals and probity. It is tempting the unfortunate mariner to obtain by plunder and embezzlement, in a common calamity, what he ought to possess upon the purest maxims of social justice." 2 *Mason*, 332. The rule which restricts the claims of seamen for wages, to the effects which they save, is one of naked policy; but that which allows them against these effects some reward beyond their wages, seems to be a principle of natural equity, that is, that when property has been rescued and saved to the owner from extraordinary perils by extraordinary exertions, the fund which is thus saved owes something to the hand which has preserved it. If it be said, that the services by which it is saved were due under the contract, the nature of that contract ought also to be considered. Upon principles of public policy, contrary to natural justice and the general law of the contract of hiring in all other cases, if the ship is totally lost without any fault of the mariner, he loses his entire wages. But if a mechanic is hired to build a house, and before it is finished the building is destroyed by an earthquake or burnt by lightning, he is not, on this account, the less entitled to his wages. *Dig.* 19, 12, 59. Or if workmen are employed to build a dike, and before the work is accepted by the employer it is destroyed, not from any fault of the workmen, but from the defect of the soil, or any other extraneous cause, the laborer is still entitled to his hire. *Dig.* 19, 2, 62. The loss in such cases falls upon the owner or employer; and justly, for the whole profits, on the successful issue of the enterprise, would have gone to him. It is not so with the seaman. He can be paid only from the fund which he has brought home to the owner; and his compensation is made dependent on the accidents of fortune, as well as on his own fidelity. It is no more than a just compensation for this inequality of the contract, when by extraordinary exertions of skill and intrepidity he has saved the fortune of his employer from extraordi-

nary perils, that these labors should be acknowleded by some reward beyond his stipulated wages.

And the policy of the principle appears to me to be as clear as its justice. It is a reward held out to induce the crew to persevere and exert the utmost of their skill and courage, even beyond what a Court might think itself justified in requiring under their contract, to save what otherwise would be irretrievably lost to the owner. If they can look to nothing beyond their wages, they will naturally be inclined to relax their efforts, when enough has been saved for that purpose. They will also turn their attention exclusively to saving that which is pledged for their wages, that is, the ship, to the neglect of the cargo. An observation of Judge Peters, whose extensive experience as a maritime judge entitles his opinion on subjects of this kind to great consideration, is well deserving of attention. In the case of the Cato, he remarked: "There is a mistake evidenced by some of the counsel in this and other *salvage* cases, as to the principles regulating the payment of *wages* to the seamen in the cases of wreck. The old law was that they were payable only out of such parts of the wreck of the ship, her cables and furniture, as were saved; but it was found that under this impression the mariners were occupied in saving those articles from which they derived an advantage, and, to ensure this, they suffered the goods to perish. Modern authorities are clear that both ship and cargo, or such parts as are saved, are alike responsible; though it should seem that the old fund, to wit, the part of the ship's materials and furniture saved, should be exhausted before the cargo be made answerable." The mind of Judge Peters seems to have been vibrating between wages and salvage. Sometimes he calls the claim by one name and sometimes by the other. It seems to me that the seamen, in these cases, have two distinct claims, one for wages and another for salvage. Their wages are to be paid exclusively from the materials of the

ship, they being pledged for that purpose, and the full amount due is to be paid without deduction. But they have no claim for wages against the cargo, except for the freight due upon it. Their claim for salvage is against the general mass of the property saved, and, as in all cases of salvage, the amount is uncertain, depending upon the particular circumstances of the case.

Upon the whole, after the best consideration that I have been able to give to the subject, it appears to me that on these melancholy occasions the crew are bound to remain by the vessel and contribute their utmost exertions to save as much as possible from the wreck; that if this is done they are always entitled to their full wages if enough is saved for that purpose; but if they abandon the wreck and refuse to aid in saving it, their wages are forfeited. But that they may not rest satisfied with saving what is merely sufficient to pay their wages, and may be induced to persevere in their exertions so long as the chance of saving anything remains, the law, from motives of policy, allows them, according to the circumstances and merits of their services, a further reward in the nature of salvage. The wages are to be paid exclusively from the materials of the ship, but the salvage is a general charge upon the whole mass of property saved. I is not, however, intended to be said that they can claim as general salvors, that is as persons who being under no obligation to the ship engage in this service as volunteers, or that they are entitled to be rewarded at the same liberal rate. Such a rule might sometimes increase the hazards instead of contributing to the safety of commerce. A crew, who had from any cause become dissatisfied with their officers or owners, might be willing to see the vessel placed in danger, at the risk of some personal peril to themselves, in the hope of obtaining a large reward for rescuing her. But they are to be allowed a reasonable compensation *pro opera et labore*, as the rule is laid down in many of the old ordinances *boni viri arbitrio*. If the disaster happens in a for-

eign country, it ought to be at least a sum sufficient to pay the expenses of their return home. Such, I think, are the principles of the general maritime law. And if they have not been directly, and to their full extent, sanctioned by any judicial decisions in this couutry, the reasoning of the Courts, in the cases which have been cited, appears to lead to the same conclusion.

But it was contended at the argument, whatever may be the doctrines of the general maritime law on this subject, that it has been superseded in this country by the acts of Congress, which provide for sending home destitute seamen from foreign countries, at the public expense. The argument proceeds on the ground that the only motive for this allowance is, to furnish the seamen the means of returning home. But the maritime law, as we have seen, places it upon a broader foundation, that of general commercial policy, as well as the intrinsic equity of the claim. It never could have been the intention of these statutes, made for the benefit and relief of seamen, to abridge any of the rights derived from their service under the general maritime law. They have their origin in a great principle of public policy, that of preserving to their country the services of this most useful but most improvident and often destitute class of citizens.

The case at bar was not one of absolute shipwreck, but rather what has been called *semi-naufragium*. This vessel was brought into port in so damaged a condition, and requiring so large an outlay in repairs to refit her for sea, that for the interest of the owner she was sold as a wreck. Between the owners and the crew she must be considered, for the purposes of this case, either as a wreck, or not a wreck. Upon the latter hypothesis the sale must be considered as voluntary, and then the two months wages, under the statute, will be due. On the other, the principles of the maritime law will apply. Between the owners and the crew, it appears to me, in the present case, that the true measure of justice will be to consider her to be what the owners treated her as being, a

wreck. And as the libellant faithfully performed his duty, so long as his service was required, he is entitled to the benefit of the rule, that in addition to his wages the master shall provide for his expenses home. I shall allow for this purpose one month's additional wages.

Note. — It is impossible now to determine the precise date of the first publication either of the Judgments of Oleron, or of the Consulate. The common opinion is, that the Consulate is the oldest. But we think that Pardessus, after a very full and elaborate examination of all the evidence on the subject now existing, has shown, not perhaps to a certainty, but with a high degree of probability, that the original articles of the Laws of Oleron, that is the *first twenty-five*, were promulgated, and in force, as customary law, long before the existence of the Consulate, in the form in which we now have it. The other articles were added afterwards, at different times and in different places.

It is said by Cleirac, in his preface to the Judgments of Oleron, that they were established by Eleonora, Duchess of Guienne, on her return from the Holy Land, and were afterwards republished and augmented by her son, Richard I., of England, on his return from the same country. This would carry back the first publication to 1152, and the republication to 1192. Cleirac cites no authority for his statement, but gives it, apparently, as the commonly received opinion of the time; and, on his authority alone, it has been repeated by succeeding writers. His work was published in 1647, five centuries after the supposed establishment of this code by Eleonora. It is abundantly shown by Pardessus, in his introduction to these laws, that the story of Cleirac is a fable. For instance, Richard did not return from the Holy Land by the way Aquitaine. He was shipwrecked on his return, at Aquilea, seized and confined as a prisoner by order of the Emperor, Henry VI., from December, 1192, to 1194; and there seems to be about as little reason for believing that these laws were originally framed by Eleonora, as there is that they were republished by her son.

Pardessus supposes that the first publication of these laws was in the latter part of the eleventh century, and before the year 1200. But the first certain evidence we have of their existence, is in 1266. They were then translated by order of Alphonso X., King of Castile, incorporated into a code under the name of *Partidas*, and ordered to be observed in all suits between navigators. *Pardessus, Lois Maritimes, vol.* 1, *page* 201. They must have been in existence for a considerable period, and have acquired an extensive authority as a common law of the sea, before they would be formally adopted into the legislation of another country.

It seems to be equally uncertain where they were first promulgated. All

the editions bear the attestation, *Witness the Seal of the Isle of Oleron*, 1266; but as they were certainly published before that time, this is probably only a notarial certificate of a copy taken from one in the public archives of that place. They bear no internal marks of having been originally made at Oleron, and they in fact constituted the common law, not only of the ports of Aquitaine, to which Oleron belonged, but of the ports of Brittany, Normandy, and the whole western coast of France.

There is quite as much uncertainty as to the precise epoch of the appearance of the Consulate of the Sea. It was probably sometime in the fourteenth century. The first document in which it is mentioned is an ordinance of the magistrates of Barcelona, in 1435. Some of the editions of the Consulate contain a document which declares that it was adopted as law by the public authorities of a large number of states on the Mediterranean sea, commencing with the year 1095, and ending in 1270. But this document is manifestly spurious.

The original Consulate was written in the Romanesque language, a dialect of the Provençal and Catalan, which was the common language of the southern coasts of France and Spain. It may, therefore, safely be presumed that it had its origin in one of these countries, and probably the author, or authors, if there were more than one, belonged to Marseilles or Barcelona, as the usages, moneys, and measures mentioned in the Consulate were common to these two ports. But the work itself shows that it was not all produced at once, but additions were made from time to time. Pardessus thinks that the probabilities are in favor of Barcelona; the language in which it is written is in fact still spoken in that part of Spain.

In comparing the Roles of Oleron with the Consulate, one can hardly doubt that the former are the more ancient. They have all the marks of a primitive compilation, a first rude and imperfect essay towards a digest of the law of the seas. The whole of the primitive Roles is comprised in twenty-five short articles, treating but few subjects, and those in a style of great simplicity, with very little development. But the Consulate is extended to two hundred and fifty-two chapters, and was evidently intended as a complete and systematic digest of the whole law, as far as it was then established in practice. Principles are largely developed, with distinctions and limitations, showing that the law must then have arrived to a state of great maturity. Most of the original articles of the Laws of Oleron are found in the Consulate, and some of them in the same words. Cleirac has inferred from this fact that the compilers of the Laws of Oleron borrowed from the Consulate. But if they had possessed this rich and copious collection, is it probable that they would have confined themselves to so small a number of articles? It is scarcely credible that they should not have taken more. Besides, when the articles of Oleron appear in the Consulate, they are found improved and more fully developed, showing that they were probably borrowed from that source, and were altered and amended to conform to the

jurisprudence of that time. The Consulate must have been written at a time when the science of maritime law was in a much more advanced state than it was at the era of the Roles of Oleron. Pardessus has shown, in his introduction to these two compilations, that the Consulate must have been nearly two centuries posterior to the Roles. Many, however, of the laws and customs from which the authors of that work have derived their materials, may have existed, and probably did exist, as customs in the Mediterranean, before the epoch of the Laws of Oleron.

THE UNITED STATES VERSUS BRADBURY ET AL.

When a debtor owing another several sums and on various accounts makes a payment, he may appropriate the payment to which debt he pleases. If he does not make the appropriation, the creditor may.

If neither party makes an appropriation at the time of payment, the law intervenes and makes the appropriation.

In open and running accounts, the law appropriates a partial payment to extinguish the oldest item in the account.

When an appropriation is made by a receipt, *prima facie* it is the creditor who makes it, because the language is his.

By the Roman law, when no appropriation of a payment is made by either party, the law applies it to the extinguishment of that debt which will be most beneficial to the debtor.

June Term, 1841. This was an action of debt on a bond given by William Bradbury, late Postmaster at Levant, with sureties for the faithful performance of the duties of that office, dated January 26, 1838. The bond was in the penal sum of $500, with the condition, among other things, that "he shall pay the balance of all moneys that shall come to his hands for the postage of whatever is by law chargeable with postage, in a manner prescribed by the Postmaster General for the time being; and shall account with the United States for all moneys, bills, bonds, &c., which he shall receive for the use and benefit of the General Post Office," then to become void. It appeared in the case that Bradbury had been appointed post-

master as early as 1831. In January, 1838, in conformity with the act of Congress of 1835, ch. 270, § 37, he was required by the Postmaster General to give a new bond, which is the bond in question. At the time of its execution he was indebted, for arrearages of postage, to the amount of $465 60, and on the same day when the bond was executed, he paid the sum of $227 91, and took a receipt therefor, in the following words: "Mail Route No. 93. Received this twenty-sixth day of Jan'y, 1838, from William Bradbury, Postmaster at Levant, State of Maine, two hundred and twenty-seven dollars and ninety-one cents, being the amount due from him to the United States for the quarter ending December 31, 1837, as shewn by his account current, including all previous dues, *back to October* 1, 1836." The receipt was printed, except the filling up with the name, date and sum, and the last words, *back to October* 1, 1836, which were added to the printed form with a pen. Bradbury remained postmaster until the close of the quarter ending September 30, 1838, when his account terminates. From January 1st to September 30, he is charged with three quarters of postage, amounting $157, and he is credited with three payments, made April 6, July 7, and October 8, meeting the three quarterly debits precisely in amount, excepting the first, when the payment is nine cents less than the debit. The balance due, on the whole account, is $237 78. The receipts taken for the last three quarters were in the same form with that above copied, with the exception of the additional words at the close — *back to October*. The jury, under the direction of the Court, returned a verdict for the penalty, and now a motion was made by the defendant's counsel to set aside the verdict and grant a new trial for misdirection of the Court in matter of law.

The case was argued by *Holmes*, District Attorney, for the plaintiffs, and by *C. S. Daveis*, for the defendants.

WARE, *District Judge.*

The instruction to the jury was, that when a debtor makes payment to a creditor, to whom he is indebted in several sums and on various accounts, as by note, bond, and book account, he has a right to direct to what account or what debt the payment shall be appropriated. This is a rule which arises out of the nature of the act. The payment is the act of the debtor, and he has a natural right to determine the quality of his own act, that is to make the appropriation of his own money. If the debtor pays generally on account, this right results to the creditor; he may then make the appropriation, and apply it to the payment of which debt he chooses. But the imputation, whether made by the debtor or creditor, must be made at the time of payment; *in re presenti, hoc est statim, atque solutum est. Dig.* 46, 3, 1. If not then made, it is not permitted to either party to go back afterwards and apply the payment, but the law intervenes, and makes the application according to its own notions of justice, between the parties. In cases of open, running accounts, where there have been a number of successive charges and payments, from time to time, if neither of the parties has imputed these payments to extinguish any particular charges in the account, the law applies them to the payment of the debits in the order of time in which they stand in the account, each payment being appropriated to the extinguishment of the oldest charge on the debtor side of the account. Such was the direction to the jury, and, as a general rule, this is too well established to be brought into doubt. *U. S.* vs. *Kirkpatrick*, 9 *Wheat.* 720. *Postmaster General* vs. *Furber*, 4 *Mason*, 333. *U. S.* vs. *Wardwell*, 5 *Mason*, 82. *Clayton's case*, 1 *Merivale*, 572.

The Roman law, from which our rules for the imputation of general and unappropriated payments are in part derived, looks generally to the interest of the debtor, and is governed by what may be presumed to have been the will of a prudent

and discreet man, if his attention had been particularly called to the subject; *quod verisimile videretur diligentem debitorem admonitu ita suum negotium gesturum fuisse. Dig.* 46, 3, 97.

When there were several debts, and the payments were general, the law imputed it to a debt which the debtor owed on his own account, rather than to one for which he was liable as surety; to one which bore interest, before one which did not; to a debt secured by mortgage or by sureties, rather than to one which was not; to one having a penalty attached to it, rather than to one which had none, and generally to extinguish the debt which was most onerous to the debtor. It proceeded upon this principle, that, as the right of making the appropriation belongs of right to the debtor in the first instance, when none is made by either party and it is left to be made by the law, that ought to look to the supposed will of the debtor rather than that of the creditor. But if the debts were all of the same character, this preference was abandoned; for though the debtor, on some accounts, may have an interest in extinguishing the more recent rather than the more ancient debts, the law adopted the more equitable rule between the parties, and applied the payment to the oldest. *Si nihil eorum interveniat, vetustior contractus ante solvitur. Digest* 46, 3, 97 and 5. *Pothier des Obligations, No.* 565, 571. *Toullier, Droit Civil, Vol.* 7, *Nos.* 173, 186. In this rule, therefore, the common and civil law agree, and the rule itself has its foundation in principles of natural justice. There was then no error in the instruction given to the jury in laying down the principles of law applicable to the general question, independent of the specialties belonging to the particular case.

The only question which can considered as fairly open, is whether there is in this case such an appropriation, of the payments made by the debtor, as will take it out of the common rule. It is contended that there was, and that this as a

fact may be justly inferred from the circumstances under which the payments were made, and from the receipts which were taken.

The bond bears date January 26, 1838. Bradbury remained postmaster for three quarters after; and at the end of each quarter paid the amount of postage which had accrued during the quarter, and took a receipt for the sum, which described it as "being the amount due from him to the United States for the quarter ending, &c., as shown by his account current, including all previous dues." It is argued that this receipt makes an appropriation of the payment, first to extinguish the debt which accrued the past quarter, and that the excess only, if any there were, was to be applied towards paying the old balance; and that such was the intention of the debtor is a just inference from the fact that each payment was the precise amount of postage which had accrued during the preceding quarter. Undoubtedly it was the right of the defendant to have the money so applied, if he chose to make the application. But to carry this intention into effect it must be made known in a clear and intelligible manner, either by positive directions or by circumstances equivalent to a direct order. The fact that the payments were in each case precisely equal to the postage of the preceding quarters does undoubtedly raise a strong presumption that they were intended to be applied to the extinguishment of that part of the debt. In the case of *Marryatt* vs. *White*, 2 *Starkie Rep.* 101, Lord Ellenborough seemed to consider this circumstance as conclusive in a case which in its leading features resembles the present. That was an action on a promissory note, against the surety, given to secure the payment for flour to be afterwards delivered to the principal on the note. He was at the time indebted to the plaintiff for goods previously delivered. There was, therefore, an open running account. By the usage of trade a credit was allowed of three months, and if payment was sooner made, the debtor was entitled to a discount. Lord Ellenborough observed "that

the payment of the exact amount of goods previously delivered, is irrefragable evidence to show that the sum was intended in payment of those goods, and the payment of sums within the time allowed for discount, and *on which discount has been allowed*, affords a strong inference, in the absence of proof to the contrary, that it was made in relief of the surety."

It will be observed that this case, in one important circumstance, differs from the case at bar. A discount was, by usage, allowed when payment was made before the expiration of the credit, and on some of the payments a discount was, in fact, allowed. This conclusively proved that the imputation was to the new, and not to the old debt; because if it had been applied to the old account no discount could have been claimed. Two circumstances here concurred to indicate the intention of the debtor, but one of which exists in the present case. That, it is true, Lord Ellenborough seems to have considered as conclusive when standing alone and unconnected with any circumstances contributing either to confirm or weaken the presumption.

As a universal proposition, this will perhaps be found to be not wholly free from difficulty. But in the present case it does not stand alone; a receipt was taken, and an appropriation of the payment may be made by the form of the receipt. 2 *Vernon R.* 607, *Manning* vs. *Westerne.* Does this receipt, in its legal construction, make the appropriation which is contended for? In its terms it professes to be for the amount of the last quarter, including the previous dues. This form of expression seems to contemplate the whole debt due as one mass, and to impute the payment to the aggregate. The language of the receipt also implies that it is in satisfaction of the whole debt, the old balance, if any there was, as well as the last quarterly charge. It appears to me that the legal and proper import of the words renders it a payment on the general account; and if so, the law applies

it to extinguish the oldest debits, leaving the last quarter unsatisfied.

But if the receipt admitted the construction for which the defendant's counsel contends, it would not relieve his case. When the appropriation of a payment is make by a receipt, it is by the creditor and not by the debtor that it is made. He executes the instrument, and the words are his. If the debtor objects to the appropriation, he may require a receipt in a different form, or he may by his own act impute the payment to the extinguishment of a different debt; for he is not bound, provided he objects, by the imputation of the creditor. But he must object at the time, and if he takes it without objection he will be considered as consenting to the application made by the creditor, and it will be binding upon him unless he has been overreached by fraud or surprise. *Pothier des Obligations*, *No.* 566, *Part* 3, *Ch.* 1, *Art.* 8. Now, if it had been the intention of the agent of the post office to impute the payment to the last quarter, to the exclusion of the antecedent balance, and this had been done in terms ever so precise, it would not have been binding on the United States, because it would have been in direct opposition to the law. Nothing can be clearer both in principle and authority, than that a public agent, acting under the authority of law, cannot bind the government when he exceeds his powers, or when his act is repugnant to the law. *Johnson* vs. *United States*, 5 *Mason*, 425. The agent who gave the receipt had no authority to impute the payment to any particular part of the debt, for this had been already done by law. By the act of July 2, 1836, ch. 270, § 37, it is provided, when a new bond has been given by a postmaster, and there is an unpaid balance remaining against him, "That payments made subsequent to the execution of the new bond by said postmaster, shall be applied first to discharge any balance which may be due on the old bond, unless he shall at the the time of payment expressly direct them to be applied to the credit of his new account." The

construction of a receipt is therefore wholly immaterial, unless it be shown by other evidence that a receipt in this form was specially required by the debtor, or that the appropriation might be considered as his act. But there was no evidence of this kind in the case. In whatever point of view this case is considered, it appears to me that judgment must be for the United States.

Another question remains, and that is, for what sum the parties on this bond are liable. The whole balance due and now claimed is $ 227 78. If the payment made at the time when the bond was executed be imputed upon the debt which accrued back to October, 1836, then the whole of the old balance will be of more than two years standing, and by the act of Congress of 1825, ch. 275, § 3, (Story's edit.) the sureties of a postmaster are not liable for any default which occurred more than two years before the suit was brought. This period of limitation had passed before the date of the writ. The receipt expressly imputes the payment upon that part of the debt. But, as has been already observed, when an appropriation is made by a receipt, it is, *prima facie*, the act of the creditor. It can only be construed to be the act of the debtor when it appears by other evidence that he required the receipt in that particular form. But if it be taken as the act of the agent of the General Post Office, he had no authority to make the appropriation. It was already made by a general law. The bond however by its terms is made to operate only prospectively. The condition is that "if the said Bradbury shall well and truly execute the duties of said office, &c., and shall pay the balance of all moneys that *shall* come into his hands, &c., and shall faithfully account with the United States for all moneys, &c., which he shall receive, &c." The bond, therefore, can have no retroactive effect to render the parties liable for antecedent defaults. Now, the whole amount of postage which accrued, after the date of the bond, was $157, and for this amount, and this only, are the parties in this action liable.

Judgment for the penalty, and execution to be issued for $157 and interest from the date of the service of the writ, December 31, 1839.

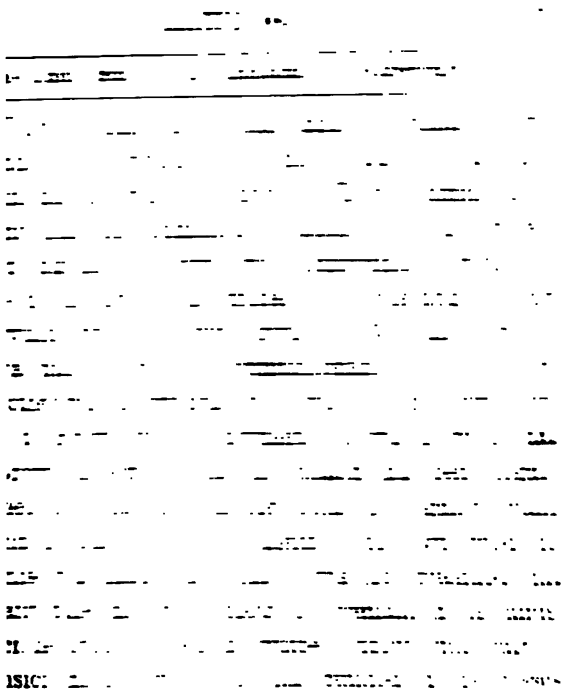
THE UNITED STATES VERSUS THE INHABITANTS OF WATERBOROUGH.

A fraudulently obtained a pension from the United States, and B received the money as the agent of A, and retained $200 as a compensation for aiding in obtaining the pension. The town of Waterborough having a claim against A, the pensioner, for support as a pauper, commenced an action against him to recover it, and summoned B as garnishee, the town having notice of the fraud in obtaining the certificate. The suit was compromised by the payment of a certain sum. Held, that the United States might recover of the town the amount they received in an action for money had and received.

When property is transferred, which is subject to a lien, or is affected with a trust, *with notice*, the lien, or trust, follows it into the hands of the assignee, and remains attached to it as long as the identity of the thing continues.

The identity of a sum of money, or a debt due, does not exist in the pieces of coin, but in the fund. If it is affected by a trust, it may be followed as long as the identity of the fund can be traced, and whoever receives it, with notice, will be affected by the trust.

September Term, 1841. This was [illegible]ction of assumpsit, for money had and received, f[illegible]on the following facts. One Susannah Brown, t[illegible] Jeremiah [illegible] had applied for, and obtained [illegible] the [illegible] as widow, of Flood, her for[illegible] tionary soldier. She em[illegible] her husband, to do the [illegible] sion was obtained he[illegible] with her consent r[illegible] sation and rewa[illegible]



Court [illegible] the money paid. [illegible] notice that it was illegally and fraudulently obtained. (as it was not ded that Nathaniel Brown had any other money of fendant in his hands,) the m[illegible]d might be con- d as part of the pension m[illegible]gh the identical of money received fo[illegible]n had not been them by Nathaniel, bu[illegible]efendants could not liable for any more [illegible] they had actually that is, $30.

y, under this d[illegible]ned a verdict for $3 ion was now [illegible]ide the verdict, [illegible]

misdirection of the judge in matters of law. It was argued by *Holmes*, District Attorney, for the plaintiffs, and by *Appleton*, for the defendants.

WARE, *District Judge.*

The ground on which it is sought to charge the defendants in this case is, that the money paid to them by Nathaniel Brown, on the trustee process, was part of the same money which was received by him of the plaintiffs, for the pension of Susanna Brown. While that was in Nathaniel's hands, there does not seem to be any good reason for questioning the plaintiff's right to recover it back. He received it as the agent and attorney of the pensioner, and holding it for her, the plaintiffs would have the same right to recover it from him as they would from the pensioner herself. She had clearly no legal or equitable right to retain the money. It is altogether immaterial whether it had been obtained by fraud and deceit on the part of the person receiving it, or had been paid under an erroneous opinion of both parties, innocently entertained, that she was legally entitled to it. In either case, it might be recovered back as money unduly paid, or as money paid that was not due. The private agreement between the pensioner and her agent, that he might retain a part of it as a reward or compensation for his services, could not affect the rights of the plaintiffs. They were strangers to any considerations of that kind, and this was an affair that must be settled between the principal and her agent.

If it might be recovered from Nathaniel Brown, why may it not from any one into whose hands it has passed, with notice of the infirmity of his title. The maxim that no one can transfer a better title than he possesses himself, — *nemo plus juris in alium transferre potest quam ipse haberet*, — applies in all its force, both in law and equity, when the assignee takes the thing with notice of the infirmity of the title of the assignor. As the defendants were apprised of the circumstances under which the money was obtained, and of the equitable

claim which the plaintiffs had to recover it back, they can have no better right to retain it, against the party from whom it had been unduly obtained, than Brown himself. Suppose, instead of money, it had been a chattel or a quantity of merchandise, and this had been transferred to the defendants, with notice that it had been delivered to Brown by mistake, or that the plaintiffs had been circumvented by fraud. There can be no doubt that the plaintiffs could recover either the property itself or its value.*

Indeed I did not understand it to be denied at the argument, that the plaintiffs might have recovered, provided the identical pieces of money which Brown received of the plaintiffs had been paid over to the defendants. But it was argued that the suit could not be maintained unless the identical thing could be traced into the defendant's hands. If it should be admitted that this would be necessary in an action of trover,† it will not follow, as a matter of course, that this is essential to maintain the present action. The action for money had and received, is an equitable action, and lies in almost all cases where a party has received money which *ex æquo et bono* he ought to refund, or pay over to the person who is entitled to it. 3 *Black. Comm.* 163. The suit is not to recover the possession of any particular pieces of money, but so much money, belonging to the plaintiffs, as the defendants had received and withhold against equity and good conscience. The real question then in this case is, whether the money, which the defendants received of Nath'l Brown, was the plaintiffs' money; that is, whether in the legal sense of the words it was part of the pension money of Susanna Brown. If it was, then it was taken subject to all the legal and equitable claims which the plaintiffs had against it while it was in his hands; for as they had full notice of these claims, they succeeded only to his rights.

* Buffington v. Gerrish, 15 Mass. Rep. 156.

† Mason v. Waite, 17 Mass. Rep. 560. But see Viner's Abr. Action Trover R. Bacon's Abr. Trover D. Chitty's Pleading, 149.

The facts proved in the case are, that after Nathaniel Brown had received the pension, and while he still retained in his hands about two hundred dollars of it, the defendants in this action commenced a suit against Jeremiah Brown, his father and the husband of the pensioner, for money expended by them for the support of him and his wife, as paupers, and summoned Nathaniel as his trustee. Whatever money of his father's Nathaniel had in his hands, was attached by that process to answer the defendant's claim. But it has not been pretended that he had in his hands any money to which his father had a claim, unless it was that which he received for the pension, or that he was indebted to him on any other account. It was on the ground of his having that money, and to obtain it as money belonging to his father, that he was summoned as trustee. If any thing was attached, it was then this money, and it was this that was intended to be attached. The suit was not prosecuted against the trustee, but was compromised by the payment of part of the sum claimed. The payment was an admission on the part of Nathaniel that he had money of his father's, to that amount, in his hands. If he had, what money was it, and from whence was it received? Certainly it was that which he received for the pension, for there is no pretence that he was indebted to his father on any other account. The payment was then from this money; not indeed made in the same pieces which he had received, but from that fund. Why then was it not, in a legal sense, part of that money? The identity of money considered as a debt due, or a credit, that is, as a general value in account, does not consist in the identity of the coins or pieces, but in the identity of the fund. If Nathaniel had been indebted to his father on several accounts, he might have imputed this payment to either of the accounts he pleased. It would then have been payment from that fund to which it was imputed, and would have reduced that debt in his account, and that credit in his creditor's, to the amount of the payment. As he owed but a single debt, it must be im-

puted to that. It reduced his father's credit so much, and of course it was a payment from that fund; and it passed into the hands of the defendants with notice of the claim which the plaintiffs had against it. Why then should this transfer withdraw it from the claim of the plaintiffs, and defeat their right to recover it? Certainly no reason can be given which has its foundation in justice, nor does any occur to me derived from positive law or public policy. When property of any description is transferred from one to another, which is affected by a trust, or upon which any lien exists in favor of a third person, and the person to whom it is transferred has notice of the fact, the trust or lien will follow it into his hands. The assignee will be bound by the trust. The property will be subject to the lien, to the same extent as before the transfer was made and the possession changed. The assignee will merely succeed to the rights of the assignor, and will be subject to the same duties and liabilities with respect to the property. This is not only a principle of natural justice, but one that is familiarly enforced by Courts of Equity, in a great variety of cases. 1 *Story's Equity*, § 533. If this is a rule with respect to specific property, as real estate or chattels, it is no less just that it should be applied to money, so long as its identity is preserved; and its identity as money is preserved so long as it can be followed and distinguished from all other money, not regarding the individual coins or pieces of money, but so long as it can be followed as a separate and independent fund or value, distinguishable from all other funds.

This principle was acted upon by the Court of King's Bench, in the case of *Taylor et al., assignees*, vs. *Sir Thomas Plummer*, 3 *Maul. and Selw.*, 562, after a very full and elaborate argument. Sir Thomas Plummer had placed in the hands of a broker, £22,200, to be invested for him in Exchequer Bills. Part was invested, and the bills delivered. The residue, the broker invested in American

stocks and bullion, intending to abscond with them, thus converting the money to his own use. He was arrested, and the stocks and bullion obtained. It was contended that the property having been wrongfully converted by the bankrupt to his own use, it became incorporated into the general mass of the bankrupt's property, and passed to his assignees as part of the assets of the bankruptcy. But the Court decided that the money having gone into the hands of the broker covered with a trust, notwithstanding any change it had undergone in form, that it remained affected by the trust, and the lien of the owner continued as long as the property was capable of being identified and distinguished from all other property. The argument that the owner loses his right to follow his property after it has been tortiously converted into another form, is unfounded in principle and unsupported by authority. It being proved that the stocks and bullion were purchased with the money of Sir Thomas, it was decided that he was entitled to hold them against the assignees.

Upon the whole, after the best consideration that I have been able to give to the case, it appears to me that the money which Nathaniel Brown paid to the defendants was, in the legal sense of the words, part of the money which he received of the plaintiffs for the pension of Susanna Brown. It was paid to them with notice of the infirmity of his title, and of the claim which the plaintiffs might have against it, and they therefore merely succeeded to his rights, and it is in their hands equally subject to repetition as it would be in hands of the pensioner herself, or of her agent.

Judgment for the Plaintiffs.

THE WALDO.

The master of a vessel is bound to secure the cargo under deck. If he carries goods on deck they are at his own risk, and if they are lost or damaged he cannot protect himself under the usual exception of the dangers of the seas, — at least, unless the accident by which they are lost would have been equally fatal if they had been under deck.

A shipper, whose goods are lost or damaged by the fault or neglect of the master, has for his damages a remedy against the owners, and a lien on the ship.

But it is only those acts of the master which are within the scope of his duty as master, that bind the owners and create a lien on the vessel.

If the shipper consign his goods to the master for sale, the master, in all that relates to the safe stowage and transportation of the goods, acts in his quality as master. He is the agent of the owners, and his acts bind the owners of the ship.

But in what relates to the sale and disposition of the goods, after they are carried to the port of destination, he acts as agent of the shipper, and neither the owners nor the ship are responsible.

December Term, 1841. This was a libel *in rem*, brought for the non-performance of a contract entered into with the master by a bill of lading. The libellant shipped at Bath, on board the schooner Waldo, bound for Atakapas in Louisiana, 144 barrels of potatoes, to be delivered at that port, at the freight of fifty cents a barrel, and consigned to T. H. Merrill, the master, who signed the bill of lading. It is in the common form and is dated November 23, 1840. The potatoes were stowed on deck and well secured there and covered with boards. About the time they were laden, the master was taken sick and unable to go the voyage, and after the vessel was prepared for sea, she was delayed some days before another master was engaged. She sailed December 2, under the command of W. C. Wyman, the new master. A few days after leaving port, they met with heavy gales. The sea run high, and broke over the vessel, and wet every

thing that was exposed to the water on deck. When about ten days out, the weather having become more moderate, the potatoes were partially overhauled, and found to be wet, and many of them rotten. On their arrival at Key West, there was a more thorough examination; the rotten potatoes were separated from the sound and thrown away, and forty barrels of sound ones were repacked. With these, and forty barrels more, which had not been examined, they sailed for Atakapas. When they arrived there, it was found that all the potates were rotten and spoiled, except fifteen barrels, which were sold at two dollars a barrel, and pay taken in molasses. On the return of the vessel, no account of sales was rendered to the shippers, and this libel was brought against the vessel for the non-performance of the contract.

It was argued by *Sewall* and *Howard*, for the libellant, and *Groton*, for the respondents.

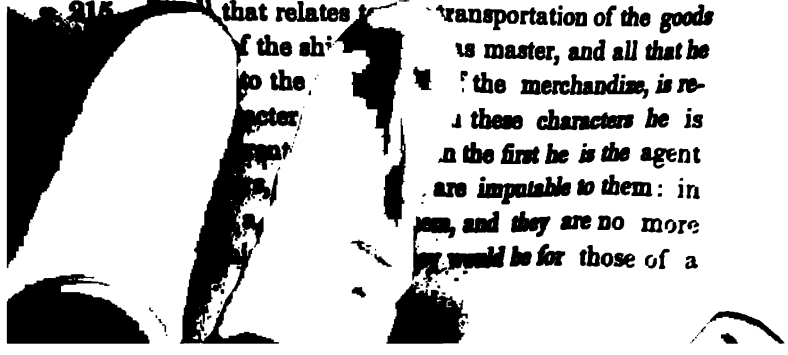
WARE, *District Judge.*

In a contract, by a bill of lading, for the transportation of merchandise, the master and owners of a vessel take upon themselves the responsibilities of common carriers. They can excuse themselves for the non-delivery of the goods, only by showing that it was prevented by some fatal accident, against which human prudence could not provide, by an act of the public enemy, or by some event expressly excepted in the instrument itself. 3 *Kent's Comm.* 216. The master is bound to take the greatest care of the goods, so that they shall not be liable to injury by the motion or leakage of the vessel, or exposed to damage by the wea[illegible] Abbot on *Shipping*, 224. In respect both to the l[illegible] of the goods, he is chargeable with th[illegible] In all cases he is bound to have t[illegible] der deck, unless he is authorize[illegible] usage, or by the consent of [illegible] all other cases, if he car[illegible]

his own risk, and he becomes an insurer against the usual perils excepted by the bill of lading.

If the goods of the shipper are lost, or receive any damage through the fault or neglect of the master or of the crew, his remedy is not confined to a personal action against the master or owners. The ship in specie stands as his security, and is by the maritime law hypothecated to him for his indemnity. But then it is not every wrongful act of the person who acts as master that will bind the owners, or will operate an hypothecation of the ship. It is only those which fall within the legitimate range of his authority, as master, that have this effect. While acting within these limits he binds the owners, because he is their authorized agent, and he binds the ship directly, because the policy of the maritime law has given to the shipper this additional security. The duties of the master as carrier extend to all that relates to the lading, transportation, and delivery of the goods. But when they are carried to the place of destination and delivered, his duties and responsibilities as carrier terminate. His functions as master are then accomplished.

If the shipper consigns his goods to the master for sale and returns, in proceeding to dispose of them he does not act under any authority derived from his appointment as master, but in an entirely new character, that of supercargo or factor. And his duties and liabilities under these two characters are as distinct and independent as they would be if the trusts were confided to different persons. *Story's Agency*, § 36. *Livermore on the Law of Agent and Principal, vol. 2,*



third person, to whom the shipper should consign his goods. In the transaction of that business he is the agent of the shipper.

In the present case, the goods of the libellants were consigned to the master, Capt. Merrill. It is true that he was prevented from going the voyage by sickness; but that portion of the potatoes, which arrived at the port of destination in good condition, were sold by the new master, not by virtue of his general authority as master of the vessel, but under the authority of that consignment. In the sale, therefore, he acted as the agent of the libellants and not of the ship-owners. It is clear, then, upon principle, that the owners cannot be chargeable for so many of the potatoes as were sold. With respect to them, all was done which the master had contracted to do, as master. They were carried to the port of destination and delivered; that is, the master had transported them as the agent of the ship-owners, and he had sold them as the agent of the shippers. The precise question which arises in this part of the case, was presented in the case of *Williams* vs. *Nichols*, 13 *Wendell R.* 58, and it was decided, on the grounds that have been stated, that when goods are consigned to the master for sale, and he sells them, and neglects to account for the proceeds, no action will lie against the ship-owners. It is an affair exclusively between the shipper and the master, to which they are strangers.

If no action will lie against the owners *in personam*, for an equally good reason none will lie *in rem* against the vessel. It is only those acts of the master which come within the scope of his duty as master, that bind the vessel. When a new character is superinduced on that of master, by his being made by the shippers the consignee of the cargo, his responsibilities in this capacity are entirely distinct from his obligations as master. In the latter case he is a common carrier, in the former a factor. And for any want of fidelity in that trust, his employers have the same remedies against

him that they would have against any other person, and no other. As consignee he neither represents the vessel nor its owners.

Perhaps when by a known custom of a particular trade the master is entrusted with the disposal of the cargo, a different rule may apply. This was the case in *Kemp* vs. *Coughtry*, 11 *Johns R.* 107. That arose in the trade between New York and Albany. It was proved to be the usual course of the trade, to send goods with orders to the master to sell either for cash or credit, and for him to return the proceeds to the shipper. No commissions were allowed the master for this service, nor to the owners, beyond what was involved in the freight. It was decided when the master had sold the goods, and failed to pay over the proceeds to the shipper, that the owners of the vessel were liable. The liability, in that case, was not founded on the general maritime law, but arose out of the particular custom. Under that custom the ship-owners undertook to act in the character of factors, as well as carriers, and entrusting the whole business to the master as their servant, they would be answerable for him *personally* in one character or the other. It is another question, whether for his defaults in the character of factor the shippers would have a remedy against the vessel *in rem*, which it is unnecessary to consider in the present case, as in this trade no such custom is proved. The case of *Emery* vs. *Hersey*, 4 *Greenleaf*, 407, turned upon the same principles, and was decided upon the ground of a similar custom prevailing in the trade between Saco and Newburyport. See also, *Emerigon*, *Contrats a la Grosse*, *Ch.* 4, *Sect.* 11, and *Des Assurances*, *Ch.* 12, *Sect.* 3.

As to that portion of the potatoes which perished on the passage, the evidence leaves no room for doubt that the loss arose from the damage they received by exposure on deck. They appear to have been as faithfully secured in that place as they could be, but nothing could protect them from wet, when the sea was breaking over the vessel. It appears prob-

able, also, that they were injured by the frost. The double injury, of frost and wet, will in a short time destroy so perishable an article as the potatoe. And it was accordingly found, when they were overhauled at Key West, that out of 144 barrels examined, only 40 remained sound and fit for use; and when they arrived at Atakapas there were but 15 sound and merchantable barrels left out of the whole 144. They were undoubtedly lost by sea damage, and although the damages of the seas are excepted by the bill of lading, the master, by carrying the goods on deck, waives the exemption in his favor, and takes the responsibilities of sea damage upon himself; at least, of any damage that would not have happened to them if they had been secured under deck. It was the right of the shipper to have his goods stowed under deck, and it was the fault of the master that they were placed above. And it is a general rule, that a party will render himself liable for loss or damage, to which he would not usually be subject, by the law of the contract when this loss has been preceded by some fault on his part, without which it would not have happened. *Toullier, Droit Civil, vol.* 6, *No.* 227. *Pothier, Des Obligations, No.* 142. Upon general principles, therefore, there is no room for questioning the liability of the master, and through him that of the vessel, for the potatoes that were lost, unless the respondent can bring the case within some special exception to the general rule.

The defence set up in this case claims the benefit of such an exemption. It is contended that the goods were carried on deck with the consent of the shippers. This does not appear by the bill of lading. That is what is called a clean bill; that is, it is silent as to the mode of stowing the goods, and contains no exceptions to the master's liability, but the usual one of the dangers of the seas. The usual, and only safe mode of carrying goods, is under deck, and when the contract is entered into, it is presumed to be the intention of

the parties, that the goods shall be stowed and carried in the usual way, unless there is a special agreement to the contrary. This is a condition that is silently understood by the parties, and implied by the law. A bill of lading therefore imports, unless the contrary appears on its face, that the goods are to be safely secured under deck. The written contract therefore not only fails to show any such consent, but impliedly negatives it. 3 *Kent. Com.* 206. 3 *Sumner R.* 405. *Curtis' Rights and Duties of Seamen*, 212.

The respondents then proposed to prove this consent by parol evidence. The general rule is, that parol evidence cannot be received to contradict, vary or control, the effect of a written instrument. It is true that the bill of lading does not say, in express terms, that the goods shall be stowed under deck. But this is a condition tacitly annexed to the contract by operation of law; and it is equally binding on the master, and the shipper is equally entitled to its benefit, as though it was stated in express terms. The parol evidence is offered then, to control the legal operation of the bill of lading, and it is as inadmissible as though it were to contradict its words.

But, admitting this rule of evidence, it is contended that the bill of lading was executed under such circumstances that it is not legally binding upon the master, as a written contract. The testimony is, that when he signed it, he was confined to his bed by sickness, and was so feeble as to be unable to sit up, but was supported by others while he wrote his name; and that he had been delirious before, and was after it was signed. The papers were brought to his house, filled up, and ready for his signature. His friends objected to his being called upon to execute them, on account of his sickness, but when he was informed that the shippers were in the house, and of the purpose for which they had come, he said it was proper that the papers should be signed by him, and they were accordingly brought to him and signed. It is not pretended that he was in a state of mental aliena-

tion at that time. On the contrary, his physician, who was present, states that he was in the possession of his faculties, and that he perfectly understood the nature of the business he was doing. The agreement had been made with the shippers before he was taken sick, and he had himself directed the manner in which the goods should be stowed. It appears, that at the time when he executed the papers, he recollected and understood what had been done.

Although, upon the whole evidence, it does not appear that the master was laboring under such a degree of mental debility as to be legally incompetent to an act of this kind, yet it is true that he was in a state of extreme weakness, with the powers of his mind probably enfeebled by disease. And if there was anything in the evidence, which looked like a design, on the part of the shippers, to take advantage of his condition, and draw him into different engagements from what had been understood and intended, I have no question but it would be the right of the Court, and I think its duty, to look into the matter with great care. A Court of Admiralty is not, in such cases, governed by the narrow doctrines of the common law, which will not allow a man to plead his own disability, or, in the ungracious language of that law, to stultify himself. *Coke, Litt.* 247 *a* and *b*. 2 *Black. Com.* 291. 1 *Story's Equity*, § 225. But the only circumstance that has the slightest tendency to awaken such a suspicion is, that the shippers brought the bill of lading ready filled up, and this alone, when the state of the master's health is considered, would be a very narrow foundation for supporting a charge of fraud. But still, under the circumstances of the case, the Court may have a right to look into the evidence, as it will probably be most satisfactory to the parties that it should. It seems hardly proper for a Court, which is, by the Constitution, required to decide between parties *ex æquo et bono* upon the most liberal principles of Equity, to close its ears against evidence on technical objections, if it be doubtful whether the objection be fair-

ly applicable to the facts; and being less restrained in its course of proceedings by technical and arbitrary rules, it is perhaps its habit to be less rigorous in upholding such objections.

I have therefore looked into the whole evidence to see if there is any satisfactory ground of belief, that there was any agreement or understanding between the parties that the goods should be carried on deck. In the first place, it is to be observed that the presumption in every contract of affreightment is, that the goods shall be secured under deck. It is for the master who would exempt himself from the risks of a deck passage, to remove that presumption. The ordinary and proper evidence would be a memorandum to that effect on the face of the bill of lading. But in the present case the only evidence, which has any tendency to prove the fact, is the testimony of the mate and one of the crew. The mate says that the libellants were on board the vessel on the 23d of November, after the goods were laden; that they were then on deck, carefully covered with two thicknesses of boards on the top and at the sides, and as well secured from the weather as they could be in that situation, and that the libellants expressed themselves satisfied with the manner in which they were secured. On a further examination he said that he did not understand them as expressing themselves satisfied with the fact that the potatoes were on deck, but only that he had done his duty in securing them well in that place. The other witness said merely that they knew that the potatoes were on deck, and made no objection to it. It appears also, that when the bill of lading was executed, no complaint was made to the master on this subject. If this evidence stood alone, it might justify the inference that the shippers assented to their goods going on deck, and in that case the risk of a deck passage would be shifted from the master to them. But although there is no testimony directly contradicting it, there is evidence leading to an opposite conclusion. The contract of affreightment was made sever-

al days before the goods were actually received and laden, and the price of the freight settled. The potatoes were taken by the master in his boats at Bath, and carried to Phipsburg, where the vessel lay, several miles from the residence of the shippers. When they went to get their bill of lading, the vessel was completely loaded and ready for sea, and it was evident that the goods must go as they were, or not go at all. Now there is no evidence that when the agreement was made any thing was said of the goods being carried on deck, or that any thing was said between the master and shippers at any subsequent time. The bill of lading was executed in pursuance of this previous agreement, and no objection to it was made by the master. And if it be said that the state of the master's health will account for his not giving particular attention to the form of the bill of lading, it will equally account for the shippers not making the lading on deck a matter of discussion at that time. Now it is very material to be remarked that the full under deck freight was agreed to be paid, and was secured by the bill of lading. Certainly, it is not easily to be believed, that any prudent merchant would consent to take upon himself all the risks of a deck passage, after agreeing to pay full freight. The most then that can be said of the parol evidence is, that part of it leads to the inference that the shippers may have consented that their goods should go on deck, and another part, of quite as much stringency, leads to an opposite conclusion. Indeed, it seems to me that it would be putting the case quite as favorably to the master as the facts would warrant, if it stood on this testimony alone, to say that it was a balanced case. And then the common presumption which arises in the absence of any special agreement, that the goods are to be secured and carried in the usual manner, turns the scale in favor of the shipper; because this presumption must prevail until it is removed by the master.

There can be no doubt from the evidence, that the potatoes were destroyed by being wet by the sea breaking over

the deck of the vessel, and in part probably by being touched by frost. The bill of lading contains the usual exceptions of the master's liability for the dangers of the seas. But, as has been already observed, this will not excuse him if he carries the goods on deck, unless the calamity by which they are lost would have been equally fatal, if they had been properly secured below deck. But if this had been done it is plain that they would have gone safely, as was the case with the rest of the cargo. Some evidence was introduced to show that potatoes are as liable to rot under as above deck. That may be the case if the vessel has uniformly moderate and dry weather, but it cannot be if they are exposed as these were to wet and frost. It is to secure goods from such dangers, as well as for other reasons, that the master is required to have the cargo put under deck. If after filling the hold he chooses to encumber his deck with goods, in order to increase the amount of his freight, he voluntarily assumes the responsibility upon himself. The additional expected profits of the voyage constitute the premium for the risk of the deck load.

The damage which the libellants have sustained is the value of the potatoes which were lost, at the port of delivery, deducting the freight. The testimony of the mate is, that the potatoes which arrived sound were sold for two dollars a barrel; and 129 barrels, the amount that perished on the voyage, after deducting 50 cents for freight, will amount to $193 50; for which sum a decree is to be entered for the libellants.

STINSON VERSUS WYMAN ET AL.

By the common law, the owners are responsible for all the obligations contracted by the master, whether arising *ex contractu* or *ex delicto*, within the scope of his authority as master, to their full extent.

But by the general maritime law of Europe, their liability for his obligations *ex delicto* is limited to the amount of their interest in the ship and cargo, and by abandoning these they are discharged from all personal responsibility.

The Revised Statutes of Maine, Ch, 47, § 8, (and the act of 1821, Ch. 14, § 8,) limit the responsibility of the owners "for any embezzlement, loss, or destruction, by the master or mariners, of any goods or merchandise or any property put on board a ship or vessel," to the amount of their interest in the ship and freight. The reason and policy of the act extend the exemption so as to include losses occasioned by the negligence of the master or crew, as well as those directly caused by their wrongful act. This construction makes the act conformable to the general maritime law, and the owners by abandoning the ship and freight will be discharged from personal responsibility.

December Term, 1841. This was a libel on a bill of lading against the owners of the Schooner Waldo. The facts are stated in the opinion of the Court. *Sewell* and *Howard*, for the libellant, and *Groton*, for the respondent.

WARE, *District Judge.*

This is a libel *in personam* founded on a bill of lading, against the master and owners of the Schooner Waldo, and arising out of the same voyage as is described in the case just decided. The libellant shipped on board the Waldo, Wm. C. Wyman, master, 28 barrels of No. 1 Magdalen herring and 20 barrels of potatoes, consigned to Capt. Merrill, the former master, and his assigns, for a market, he to have for freight half the profit for which the goods were sold, above the invoice price. At Key West no sales could be made, but on their arrival at Atakapas, six barrels were sold by a barter trade, for five barrels of molasses, the molasses being valued

at twenty cents a gallon, or six dollars a barrel. The rest were so much injured that they were unsaleable at any price, and were brought back to Phipsburg, where they were found to be entirely worthless and thrown into the dock. The potatoes were wholly rotten, and the empty barrels sold at fifty-five cents each. The goods were carried on deck, and the potatoes were spoiled by exposure to wet and the frost. Magdalen herring is an article that has lately come into the market. They are dry salted, and when carried by sea are stowed with the bungs of the barrels down, or holes are bored in them, to drain off the pickle; because unless they are kept dry they are spoiled in a short time. Some evidence was introduced to show that this kind of herring is of so perishable a nature, that it will not, under any circumstances, bear a sea voyage into a warm latitude. One witness, Capt. Webb, says that in 1839 he carried 100 barrels from Bath to Martinique, that they were carefully and well secured under deck, and on his arrival they were all found to be entirely ruined and worthless; and that the same season there were several vessels at that place with these herring, and all, without a single exception, were spoiled; and he states that he had never known any of that kind of herring arrive at the West Indies in good condition. But these were all of the fares of 1839, and it appears from the testimony of their witness and also from that of Captain Bailey, who was examined for the libellant, that the fares of 1839 were badly cured, and although they looked well were all spoiled when brought in. Capt. Bailey said that he had some of the fares of 1840 which were well cured, and were found to be in good order when they arrived at a market. The fish in this case were of the fares of 1840, and it appears therefore that although these herring are an article of an unusually perishable character, yet when well cured, as those of 1840 were, they will with proper care in stowage bear transportation into warm countries. But for this purpose great care is required in stowing them so that they shall not only be

protected from wet externally, but also so that the liquor that is evolved from the fish may drain off and leave them entirely dry. The evidence in this case is, that being carried on deck, they were for several days exposed to the water breaking over the vessel, and there does not seem to be much reason for doubt that the fatal injury they received was from this cause. If they had been properly secured under deck they might have arrived at a market in a merchantable condition.

With respect to the herring which were sold by the master and the proceeds not accounted for, my opinion, for the reasons given in the other case, is that the owners were not responsible. In the capacity of consignee he was not the agent of the owners, but of the shipper. It is only in cases where it is the known usage of the trade, that the owners can be held for his default as consignee.

As to the residue of the herring and the potatoes, the strong presumption from the evidence is, that the loss arose from their exposure on deck. They were shipped by what is called a clean bill of lading, that is, it contained no other exception to the master's liability but the usual one of the dangers of the seas; and such a bill of lading imports that the goods are stowed under deck. *Curtis's Rights and Duties of Seamen, p.* 212–13. *The Schooner Reeside,* 2 *Sumner R.* 567. If the master takes them on deck, he stands as insurer, and will not be protected by the exception of the dangers of the seas; at least not unless he can show that they would have equally perished if they had been below deck. It would not be enough for him to show that, being a perishable article, they might have sustained the same injury; he must show that they would not have been exempted from it by being under deck. Whether in that case he would be protected, it is not necessary now to consider, as it is certain that if they had not been exposed to the frost and the wet upon deck they might have gone safely.

The goods were shipped on an agreement that the master was to have, for freight, one half the profits beyond the invoice price. This for the herring is $2 75 a barrel, to which is to be added eleven cents a barrel for inspection. This for 22 barrels, after deducting six which the master sold, is $62 92, and 20 barrels of potatoes at $1 06½, is $21 25. Total, $84 17.

The common law, as well as the civil law, holds the owners responsible for all the obligations of the master, contracted within the scope of his authority as master, to their full extent, whether they result from contract or tort. But, by the general maritime law of Europe, their responsibility for his obligations arising out of his wrongful acts, is limited to the amount of their interest in the ship and freight. By abandoning these they exempt themselves from all personal liability. 3 *Kent's Com. page* 218, *4th edition.* This principle of the general maritime law has never been received in this country as part of our customary law, but we have followed the common law of England, and hold the owners responsible for the full amount of any damage occasioned by the faults or negligence of the master or any of the crew. They are strictly held to all the severe liabilities of common carriers. But in this State, by statute in conformity with the principles of the general maritime law, their liability is restricted to their interest in the ship and freight. "No ship owner shall be answerable beyond the amount of his interest in the ship and freight, for any embezzlement, loss or destruction, by the master or mariners, of any goods or merchandize, or any property put on board of such ship or vessel, nor for any act, matter, or thing, damage or forfeiture, done, occasioned, or incurred by said master or mariners, without the privity or knowledge of said owners." *Revised Statutes, Ch.* 47, § 8.

The statute limits the owner's responsibility "for any embezzlement, *loss or destruction by the master or mariners*, of

any goods or merchandise." The loss in this case was not occasioned immediately by any act of the master or mariners. The proximate cause of the loss was the violence of the seas. But it would not have happened in this way, but through the fault of the master in carrying the goods on deck. The reasonable construction of the statute, it appears to me, is to limit the owner's responsibility for losses, which are occasioned by the fault or negligence of the master, as well as those which arise from direct and willful fraud. This construction of the statute brings it into harmony with the general maritime law of Europe, and is fairly within the policy and general intent of the act, though not perhaps within its very words.

If the decree which has just been pronounced should exhaust the whole value of the ship and freight, the respondents, by abandoning them, will be discharged from all personal responsibility. The damages in that case will not, I presume, absorb the whole fund; but if it should, the owners will be entitled to show the fact, and then no execution can be issued against them personally.

THE GERTRUDE.

The tackle, apparel, and furniture of a foreign vessel, wrecked upon our shore and landed and sold separate from the hull, are not goods, wares, and merchandise imported into the United States, within the meaning of the revenue laws.

Goods taken and landed from a foreign vessel wrecked upon the coast are not subject to forfeiture under the 50th section of the Act of March 2, 1799, ch. 122, by being landed without a permit from the collector.

December Term, 1841. This was a libel for a forfeiture, founded on the 50th section of the Collection Act of 1799, ch.

128. The libel alleged that on the first of January, 1840, certain goods, wares, and merchandise, of the value of $400, brought from a foreign port, were unladen from the brig Gertrude without a permit therefor having been first obtained from the collector of the port, against the form of the statute, whereby said brig became forfeited to the United States. It appeared from the evidence that she was a British brig, and that on the 9th of December, 1840, she was driven on shore in a storm, and wrecked on the north side of West Quoddy Head. On the application of the master, surveyors were appointed by Solomon Thayer, a notary public, to examine the vessel, who after visiting and examining her reported her to be a wreck, and in consideration of her exposed situation and the danger that she would go to pieces in the event of another storm, advised that she should be sold the next day where she lay, and she was sold accordingly. The day following the sale she was got off the rocks and towed into the harbor of Eastport. She had at the time no cargo on board, but her cables, anchors, and rigging appear to have been taken on shore while she lay on the rocks at Quoddy Head and before she was carried to Eastport, and this was the unlading which was relied upon as involving a forfeiture of the vessel.

Holmes, District Attorney, for the United States, and *C. S.* and *E. H. Daveis*, for the claimant.

WARE, *District Judge.*

The single question in issue, between the parties in this case, is whether there has been a forfeiture by unlading goods, wares, and merchandise from the brig Gertrude, of the value of $400, without a permit having been first obtained therefor from the collector of the district within which they were landed. The argument has indeed taken a somewhat wider range, but the judgment of the Court must follow the *allegata et probata*, and be confined to the matters that have

been put in issue by the parties in their pleadings, and which are made out by the proofs.

By the act of Congress, March 2, 1799, ch. 128, § 50, under which the forfeiture is claimed, it is provided that no goods, wares, or merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen from such ship or vessel, within the United States, without a permit from the collector of the port, and the naval officer if there be one; and if they are unladen contrary to the act, the master and all others knowingly concerned in aiding in the unlading or delivering are subjected to a penalty of $400; and when the goods so unladen shall amount to $400 in value, the ship herself, with her tackle, apparel and furniture, shall be subject to forfeiture.

There is no direct evidence that anything was unladen from the vessel, and it is conceded that she had no cargo on board. But it appears when she went ashore that she had on board two anchors and two chain cables, and certain other furniture and rigging employed in the navigation of a vessel, which were not on board when she was brought into Eastport. As no account is given of them by the claimants, it must be presumed that they were landed while she was lying on the shore near West Quoddy Head. If it were otherwise it would be easy for the claimants to show it. It is also clear from the evidence, that the value of the rigging of which the vessel had been stripped, including the cables and anchors, was more than $400.

Upon these facts two questions have been raised and argued at the bar. First, whether the tackle, apparel, and furniture of a vessel thus cast on shore, a wreck, which have been actually used or have been specially destined for the use of the vessel in navigating her, are goods, wares, and merchandise imported into the United States, within the true intent and meaning of the revenue laws. At the first blush this question would seem to admit of a very easy answer. The rigging and apparel of a ship are a part of the ship, and

herefore not merchandise in any other sense of the word han that in which the ship herself is.

But it is said that when the ship is wrecked and the rigging separated from the hull, it becomes merchandise in the ordinary sense of the word. It is sold as such and becomes mixed in the general mass of consumable commodities in the country. When thus separated with the intention of being hrown into the market and sold, as these articles take the place of others of the same character which are regularly mported, the argument is that there is the same reason for harging them with duties as there would be if they were mported as cargo, and of course subjecting them to all the estraints and safeguards imposed by the revenue laws upon egular importations. All this may be admitted to be true, nd the question will still return, whether this has been done y the legislature. However just and reasonable it may be hat goods thus introduced into the country and sold for ommon use and consumption should be subject to duties, it s quite clear that the Court has no authority to impose the ax. Our duty is limited to the inquiry whether it has been mposed by the legislature.

If we look through the whole of the numerous acts of Congress laying duties on merchandise imported, as well as those egulating the collection of the same, we shall find they uniformly contemplate the cargo; they refer to articles having he quality of merchandise in the ordinary and most popular sense of the word. They refer also to goods intended to be introduced into the country for sale and consumption, or for the general purposes of commerce. Although hey speak generally of goods imported or brought into the Jnited States, it has been uniformly held, that to constitute n importation within the true meaning of these laws, the rrival must be voluntary, with the intent to import them. f therefore a vessel not bound to the United States is by tress of weather forced into our ports, this will not consti- ute an importation, upon which the right to duties will at-

tach. This, as the authorities cited at the argument abundantly prove, has been the uniform construction given to the revenue laws. *The Mary*, 1 *Gall. R.* 206. *United States* vs. *Vowell*, 5 *Cranch*, 368. *United States* vs. *Arnold*, 1 *Gall. R.* 348. *Prince* vs. *United States*, 2 *Gall. R.* 204. *Prat* vs. *United States*, 1 *Peters C. C. R.* 256. *Peisch* vs. *Ware*, 4 *Cranch*, 347.

A like construction has been given to the navigation laws of England, (*Reeves's Law of Shipping*, 203,) and probably the same rule prevails in every civilized community. It can only be a people who have made but little progress in civilization that would not permit foreign vessels in distress to seek safety in their ports, except under the charge of paying import duties on their cargoes, or under penalty of confiscation if they were prohibited goods, which would be the consequence of applying to such cases the rigor of the fiscal law. Against such a country, the unfortunate mariner might justly exclaim —

——— "Quæ hunc tam barbara morem
Permittit patria? hospitio prohibemur arenæ."

To hold then the rigging of a vessel cast by misfortune a wreck on our shores, to be goods, wares, and merchandise imported into the United States, would be extending the operation of the revenue laws beyond what their natural and obvious meaning requires. The fiscal laws of the country which furnish the means by which the whole machinery of the government is sustained, although they impose burthens on individuals, are not to receive the strict and and narrow construction that is given to penal laws. Neither are they, like remedial laws, to be enlarged by construction, so as to include cases which seem to stand on the same reason with others which are within the express words and plain intention of the law, if it is not apparent that they were intended to be included by the legislature. They are to be applied according to their plain, natural, and obvious meaning, regard-

ıg as well the general tenor as the particular words of the ıw; as comprehending all cases which from the general cope of the law appear to have been intended and contemlated by the legislature; and neither to be extended by analgy, nor restrained by a strict construction from the notion hat they belong to the class of penal laws because they imose burthens on individuals as a condition of their being alowed the free disposition of their property. *Sumner R.* 16.

The revenue laws, in all cases, contemplate a ship as a ingle object, and when it is subjected to any fiscal charge it s imposed under the name of a tonnage duty. The rigging, urniture, and appurtenances are a part of the ship. In the ase of the *United States* vs. *a Chain Cable*, 2 *Sumner R.* 62, the very question was presented, whether a chain cable, vhich had been purchased in a foreign country for the use f the vessel, was embraced by the revenue laws under the erms "goods, wares, and merchandise" which could not be anded without a permit. The Court held that it was not. f this vessel had gone to pieces on the rocks, so that there ıad been nothing but fragments remaining, it would hardly e pretended that the broken yards, the torn sails, and damıged cordage, with the fragments of the hull, would come vithin the descriptive words of goods, wares, and merchanlise imported, and liable to duty, or that it would be necesıary for the master, under penalty of confiscation of the vreck, to obtain a permit from the collector before he could ollect the *disjecta membra* on the shore. And yet in what liscriminative features would that case differ from the presnt? It might be said of every part of these fragments that hey were goods, wares, and merchandise brought into the Jnited States from a foreign country, with the same reason ıs it is said of the rigging in this case. My opinion is, that he materials and rigging of a foreign vessel, cast upon our hores a wreck, when landed and sold do not come with-n the purview of the revenue laws as merchandise imorted.

But if this opinion is erroneous, then the second question which has been argued will arise, whether in this case a forfeiture of the vessel has been incurred by landing the goods without a permit. It is not to be readily supposed that a provision so highly penal, as this section of the law is, was intended to be applied to a class of cases in which a compliance with its terms would in some instances be impossible, and in all involve the most imminent danger of the entire loss of the property. When a vessel is thrown upon the coast a wreck, the cargo must be saved by such means as are practicable, or not saved at all; if the master, before taking measures for placing it beyond the reach of the waves, must wait until he can obtain a permit of the collector for that purpose, whose residence may be a day's journey from his vessel, it is very evident that in many cases the entire cargo would be swallowed up by the waves before the permit could be obtained. To require a compliance with this section of the law in such cases would be nearly equivalent to the revival of the old and barbarous custom by which all wrecked goods were confiscated. Such a construction of the law is wholly inadmissible if it will admit of any other. Now, if we look at this section in connection with the whole tenor of the law, it is evident that the legislature contemplated only cases of vessels which had arrived in safety at the regular port of their destination, and certainly did not contemplate cases where a compliance with the law would be impracticable. Upon the common principles therefore of construing statutes, the words of this section must be so interpreted as to carry into effect the general intent of the lawgiver, and not to defeat it, or to extend it to cases clearly beyond the purview of the law.

But this can hardly be considered as an open question. It was, as it seems to me, conclusively settled in the case of *Peisch* vs. *Ware*, 4 *Cranch*, 347, more than thirty years ago. For though in that case there was no allegation in the libel founded on this section of the law, there was one founded on

the fifty-first section, and in deciding it the Court thought necessary to give a construction to the fiftieth. In that case the goods were landed from a wreck without a permit, and it was held that upon just legal construction the landing of the goods did not subject them to forfeiture under the fiftieth section. The act of landing in such a case, the Court said, is not within the law, which is calculated for cases in which the general requisitions of the law can be complied with, and not for salvage goods in cases where they cannot be.

Upon the whole, the conclusion to which I am brought is, first, that the tackle, apparel, and furniture of a foreign vessel wrecked upon our shores, landed and sold separate from the hull, are not goods, wares, and merchandise imported into the United States, within the meaning of the revenue laws. And in the second place, if they are to be so considered, that they are not subject to forfeiture under the fiftieth section of the act of March 2, 1799, ch. 122, by being landed without a permit from the collector. At the same time it may not be improper to remark that there is something of mystery hanging over this case. The evidence before the Court is sufficient to raise the questions which have been considered, and yet it is clear that all the evidence, which it was in the power of the parties to produce, has not been before the Court. It is a little singular that the informer in this case is the purchaser of the vessel at the sale that was made in conformity with the recommendation of the surveyors; that he does not insist upon his title, and that the claimant now resisting the forfeiture is the original British owner. What might be the result, if every fact in the power of the parties to prove was spread upon the record, is not for me to say. I can act only on the allegations that are made and the facts that are proved, and on them my opinion is that the law requires me to pronounce for the restoration of the vessel; but I shall grant a certificate of probable cause of seizure.

THE BRIG CASCO.

In every contract of affreightment, whether by charter party or bill of lading, the ship is, by the marine law, hypothecated to the shipper for any damage his goods may sustain from the insufficiency of the vessel, or the fault of the master or crew.

If a vessel is let on a contract of affreightment, by charter party, the owners will not be held responsible for a loss occasioned by the violence of the elements, although the dangers of the seas are not expressly excepted by the charter party.

But if they are chargeable with any neglect or fault without which the loss would not have happened, they will be liable.

February 10, 1842. This was a libel on a charter party. The master of the brig Casco chartered her to the libellant for a voyage to Porto Rico, to carry a cargo of lumber, and from thence to her port of discharge in the United States, touching at Turks Island for a cargo of salt, if required by the charterer. The voyage was performed to Porto Rico and the cargo delivered. From that place she went to Turks Island and took a cargo of salt. On her return from Turks Island she was found to leak so badly that a large part of the salt was lost. Of 5676 bushels laden, only 3132 bushels were delivered at Portland, the deficiency amounting to 2544 bushels. This libel was brought by the charterer against the vessel, to recover damages for the loss. The questions of law which arose and were discussed in the case, together with the substance of the testimony, appear in the opinion of the Court.

The case was argued by *Rand*, for the libellant, and *T. A. Deblois*, for the respondents.

WARE, *District Judge.*

The first question, which was raised and discussed at the bar, was whether, under this charter party, the vessel *in specie* is liable for any loss, which the charterer may have

sustained from damage to the cargo. It is contended on behalf of the respondents, that there was a demise of the vessel herself to the charterer, by which the possession was transferred to him; that he, under the charter party, became owner for the voyage, and thus his own carrier, and consequently, if any damages have been sustained from the fault of the master or crew, his remedy is solely against the master, and not against the vessel. This is a question which must be determined by the terms of the instrument itself.

The charter party is in its form somewhat special and peculiar. It sets forth that it is made and concluded between Allen G. York, the master, (who is also a part owner) and John B. Brown, the libellant; and the master, in consideration of the covenants and agreements of the libellant, does covenant and agree on the freighting and chartering of said vessel to the said party of the second part, (the libellant) for a voyage from the port of Portland, "to one port in the Island of Porto Rico, and from thence to her port of discharge in the United States, touching at Turks Island for a cargo of salt, if required by the party of the second part." The charter party then proceeds to state the covenants on the part of the master; first, that the vessel shall be kept, during the voyage, tight, staunch and well fitted, tackled and provided with every requisite, and with men and provisions necessary for such a voyage; secondly, that the whole vessel, with the exception of the cabin and the necessary room for the crew, and the sails, cables, and provisions, shall be at the disposal of the charterer; and thirdly, he engages to receive on board all such lawful goods and merchandise as the charterer or his agents may think proper to ship. The libellant, on his part, agrees to furnish cargoes for the vessel at Portland and Porto Rico, or Turks Island, and to pay, for the charter of the vessel, 1175 dollars, one half to be considered as earned at her port of discharge, and so much to be paid as may be required for the vessel's disbursements, and the balance on

the delivery of the cargo in the United States, and also to pay all the expenses of loading at Portland.

It seems very clear from these covenants that the possession of the vessel was intended to be in the master. He is to victual and man, he agrees to receive on board such goods as the charterer shall choose to ship. The charterer agrees to furnish the cargoes, to pay the expenses of loading at Portland, and to advance, at her outward port of delivery, so much of the freight as may be required for the vessel's disbursements. Why should these covenants be inserted if the possession of the vessel was to be transferred to the hirer, and to be navigated by him? It is quite evident that this charter party was a contract of affreightment for the transportation of goods, and not a demise of the vessel; that the owners retained possession under their master, and must be considered therefore as carriers.

There is, in the common form of charter parties, a clause by which the ship and freight are specifically bound for the performance of the covenants in the charter party. There is none such in this, but this is a condition which, by the marine law, is tacitly annexed to every contract entered into by the master for the transportation of goods, whether by bill of lading or charter party. The ship is, by operation of law, hypothecated to the shippers for any loss she may sustain from the insufficiency of the vessel or the fault of the master or crew.

There is another peculiarity in this instrument. It is usual, in charter parties of affreightment, as well as in bills of lading, to insert a clause specially exempting the master and owners from losses occasioned by the dangers of the seas. This instrument contains no such exception, but this, as was justly contended in the argument for the respondents, is an exception, which the law itself silently supplies without its being formally expressed. It is a general rule of law, founded upon the plainest and most obvious principles of natural justice, that no man shall be held responsible for fortuitous

events and accidents of major force, such as human sagacity cannot foresee, nor human prudence provide against, unless he expressly agrees to take these risks upon himself. *Casus fortuitos nemo præstat. Pothier, Des Obligations, No.* 142. *Toullier, Droit Civil, Vol.* 6, *No.* 227, 228. *Dig.* 50, 17, 23. *Story's Bailments,* § 25. There is an exception to this rule, that is entirely consistent with the principle of the rule itself. It is, when the party to be charged has been guilty of some fault, without which the loss would not have happened. The liabilities of the owners, in this case, are precisely the same, and no more extensive than they would have been if the usual exception of the dangers of the seas had been inserted in the charter party.

Having disposed of these preliminary matters, we come to the questions which have been principally discussed at the bar. They are partly questions of law, and partly fact. In the first place, there does not appear to be any sufficient reason for questioning the seaworthiness of the vessel, when she sailed from Portland. She was carefully examined by Mr. Fickett, a caulker, before she was loaded, and he states that, with very slight repairs which were made by him, she was in perfect order for the voyage. And in point of fact, on her outward passage, and till after she left Turks Island, she did not leak more than vessels which are considered tight ordinarily do. On the 7th day after sailing on her return voyage, she was found to have sprung a leak. The weather was not at the time, and had not been, tempestuous or unusually bad. There had been, part of the time, a heavy head-beat sea, and the ship at times labored badly. Occasionally there were fresh winds, but not amounting to a gale. On the 7th of November, at 8 o'clock, A. M., it was found that the vessel leaked badly.

The entry in the log is, that the day commenced with fresh breezes and cloudy weather, with a heavy cross-head-beat sea; at 6 o'clock, P. M., took in foretop-gallant-sail, the brig laboring heavily; tried the pump every half hour; mid-

dle part of the day, high winds and heavy head-beat sea, tried the pump every quarter of an hour. At 8 o'clock, A. M., commenced leaking badly; double-reefed the mainsail, and single reefed the foretopsail; two hands at the pumps. For the whole 24 hours she kept on her course N. W. with the wind N. N. E. The testimony of the witnesses substantially agrees with the account given in the log. There was a fresh wind with a heavy swell of the sea. The vessel also had a cargo which tried her strength, but all these causes do not seem to have been sufficient materially to injure a strong and staunch vessel.

There can, however, be no doubt that she was strained at that time, and her seams were opened so as to admit a considerable quantity of water. During the remainder of the voyage the weather was variable, but the vessel encountered none of unusual severity, until her arrival off Cape Cod. There she met a heavy gale, and was obliged to carry a press of sail to keep off a lee-shore. After it was discovered that the brig leaked, fruitless attempts were made to discover where the leak was, and she continued to leak more or less until her arrival at Portland on the 23d of November. The master then made a protest and called a survey of the vessel.

After the cargo was discharged, the vessel was examined and repaired by the same caulker who examined her before the voyage. He stated that he found openings in her seams, which appeared evidently to be recent, and showed that she had been strained during the voyage. There was a leak about a foot in length in the garboard streak. The butts and wood ends were a little slack, and wanted some caulking;—there was a small leak under the forecastle, the seams were a little open at the break of the deck, and the water-ways were considerably open. The vessel, on the whole, bore evident marks of having been strained, but the injury could not have been great, as the caulker used but thirty pounds of oakum in putting her in good order for another voyage,

and the whole expense of repairs did not exceed fourteen dollars. It appears also that the ship was easily kept free of water, during the whole voyage, by one pump, except for a short time when the leak was first discovered.

If the injury to the vessel was so inconsiderable, the question presents itself, How happened it that so large a part of the cargo was lost? All the witnesses, who examined the vessel before the cargo was discharged, agree in ascribing the loss to two causes; *first*, the limber holes, (which are small holes made in the under part of the floor timbers next the kelson, making a passage for the water to flow from the forward part of the vessel back into the well,) it appears, were choked up so as to prevent the flow of the water. A considerable quantity of water, which should have found a passage back into the well, was thus constantly kept forward, between the ceiling or skin of the vessel and the outside planks. The *second* was the want of sufficient dunnage at the bilge, between the first and second thick streaks, in the forward part of the vessel. All the witnesses agree that there was sufficient dunnage on the floor, and also on the sides of the vessel in the after part. But at the bilge, between the two thick streaks, from the mainmast forward, there was on the starboard side about eighty square feet, and on the larboard side about forty square feet uncovered with dunnage. On examining the ceiling here, the seams were found to be open. On the starbord side, one seam was open for five or six feet, to the width of five-eighths of an inch, and on the larboard side there was a seam open as wide, for fifteen or sixteen feet; and generally the ceiling was not sufficiently tight to prevent the water from being forced through by the motion of the vessel. The vessel having a flat floor, when she was sailing with the wind on her beam and thrown down on the opposite side, the water, which was prevented from passing through the limbers into the well, was washed down to her bilge, and by the motion of the ship blown up through the open seams of her ceiling directly upon the salt. Nearly all

the witnesses agree that it was in this way that the salt was lost. And in point of fact the whole extraordinary wastage was in the forward part of the vessel; the loss in the after part was not more than what is usual. The evidence also is, that the salt melted most in the larboard wing, though that was better supplied with dunnage than the other side. But then it appears from the log, that the vessel, during the greater part of the passage, was sailing on her larboard tack, and this would naturally occasion the most waste there, if it was produced by the blowing of the water through the seams of the ceiling. On a view of the whole evidence, it may, I think, safely be taken as an established fact, that the loss of the salt arose from the two causes that have been mentioned.

The whole case, then, seems to be reduced to this, whether the neglect of the owners to provide means for clearing the limber holes, and the neglect of the master to place sufficient dunnage on the wings of the forward part of the vessel to protect the salt from the water, are faults of such character as to render the parties legally responsible for a loss occasioned by these very deficiencies. If no fault can be imputed to the master or owners on this ground, the loss must be ascribed solely to the dangers of the seas, and be borne by the shipper; for though these dangers were not, by the terms of the charter party, in terms excepted from the responsibilities of the master, the exception is made by the law. A person is never presumed to take upon himself the risk of inevitable casualties, which the common law somewhat irreverently calls the acts of God, unless he expressly agrees so to do. The law never requires impossibilities. *Impossibilium nulla obligatio est. Dig.* 50, 17, 25. But when a party is chargeable with a neglect or fault, without which the loss would not have happened, he will then be held responsible for a loss by inevitable accident, or an accident of major force. It is not that the casualty is imputed to him, but his own neglect or fault which is the occasion of the accident

proving fatal. Some vessels have moveable boards or plank placed over the limbers, called limber boards, so that they may be taken up to clear the limbers when they become choked; some have a rope or small chain rove through these limber holes to clear them when necessary. This vessel had neither. The board over the limbers was fastened down, and no examination was made to ascertain whether the limbers were free or not. Now, if the importance of providing a passage for the water is such that grooves are cut in the timbers for that express purpose, it certainly would seem to be a want of proper care on the part of the owners to provide no means for keeping them clear; especially as they are liable to become stopped. If this passage had been kept clear, so as to admit the flow of water from the forward to the after part of the vessel, it is certain that the pump would have easily kept her clear. The accumulation of the water forward would easily have been prevented, and of course the salt would not have been dissolved. And, in the second place, with respect to the dunnage. Upon this point, a number of witnesses of extensive experience in navigation, either as ship-owners or ship-masters, were examined. Some were of opinion that the dunnage in this case was sufficient for a tight vessel; others thought that the dunnage, whether the vessel was tight or not, for a cargo of salt ought to be carried higher up upon the wings. But all agreed that it was insufficient if the vessel was not tight. It must be admitted upon the evidence that the vessel was tight when she received her cargo, and that the leaks were produced by straining with a heavy cargo and a heavy swell of the sea. But admitting the vessel to be tight, it is still true that some water will find its way into a tight vessel; and it is certain that the ceiling, or what in the language of the sea is called the skin of the vessel, was far from being tight. The seams were open to such a width that in the rolling of the vessel the water, if it did not find its way into the well through the limbers, would be freely blown through them upon the salt.

Did then the master or the owner take all the precautions for the safety of the cargo, which were required by the nature of their engagement? The duty of the owners, under a contract of affreightment by a charter party, is to provide a vessel tight and staunch, and every way fit and prepared for the particular service for which she is hired. The sea-worthiness of the vessel, and her fitness for the particular voyage, is a term of the contract implied by law. The common law holds the owner to a warranty in this particular, and though the vessel may have been examined before sailing by skillful shipwrights and pronounced by them every way fit for the voyage, yet, if the goods of a shipper are injured from some latent defect of the vessel, the better opinion is that the owner will be responsible. 3 *Kent's Comm.* 205 and 213. *Curtis, Rights of Seamen*, 202. 5 *East.* 428, *Lyon* vs. *Mells*. And this warranty against latent defects is held by Pothier to result from the nature of the contract. In every contract of letting and hiring, the letter undertakes that the thing let is fit for the purpose for which it is hired. *Pothier, Contrat Charte Partie, No.* 30. *Contract de Louage, Nos.* 110, 112. And then with respect to the stowage of the goods, the master is held to the most exact care and diligence, and it is particularly his duty to provide proper dunnage to prevent the goods from being injured by the leakage. *Abbot on Shipping, Part* 4, *Chap.* 5, § 1, *p.* 346. The degree of care will of course depend on the nature of the cargo, some goods being more liable to injury by exposure to wet than others. My opinion upon the whole is, that the neglect upon the part of the owners to provide means by which the limbers might be kept open so as to leave a free passage for the water from the forward part of the vessel to the well, and the omission on the part of the master to provide proper dunnage for the wings of the forward part of the vessel, are such neglects as render them legally responsible for a loss that may be ascribed directly to those deficiencies.

THE LEOPARD.

Whether a vessel when engaged in an illegal employment can maintain an action for an injury received from another vessel by collision — Quære?

When there is danger of collision between two vessels, the one that is sailing before the wind, or with a fair wind, must give way for one that is close hauled on the wind.

A vessel moved by steam is considered as always sailing with a fair wind, and must, in all cases, give way for a vessel moved by the wind.

September Term, 1842. This was a case of collision. The libellants were the owners of a small steamboat plying on the Kennebec river, between the towns of Bath and Woolwich, as a ferry boat. On the 28th of April, while she was passing on her usual track from Woolwich to Bath, she was run afoul by the schooner Leopard, and considerably injured, and this libel was filed to recover the damage. The facts, as they appeared in evidence, were that the schooner was coming up the river, with a fair wind from the south-west which carried her at the rate of six or seven miles an hour, but having the tide in her favor she was actually going at the rate of eight or nine miles. At the time when the accident took place the mate was at the helm, and the master on deck standing between the bulkhead and the mast, in such a position that he could see whatever was before the vessel and on her larboard, towards Bath, and could also see three or four points over her starboard bow, but her sail being spread hid from his view anything that might be approaching from the Woolwich side, nearly opposite to her, and anything in that direction was also by the sail hid from the view of the mate. The boat was approaching from the Woolwich side, with the schooner full in sight. As the two vessels came near to each other, Capt. Delano, who was a passenger on board the boat, seeing that they must come in collision if both

held on their way, called out to the helmsman of the boat to put his helm up, and at the same time hailed the man at the helm of the schooner to put his helm down. The helm of the boat was put up accordingly, but the helmsman in the schooner, not hearing the call, she kept on her way, and the vessels immediately came in collision, the bows of the schooner striking against the side of the boat, and doing the damage complained of.

Sewall and *Howard*, for the libellants; *N. L. Sawyer*, for the respondents.

WARE, *District Judge.*

A preliminary question has been raised in this case as to the right of the libellants to maintain this suit, on the ground that the boat, at the time when the collision took place, was engaged in an illegal employment. It is provided by the Revised Statutes of Maine, ch. 27, § 1, that no person shall keep a ferry and receive pay from passengers without first obtaining a license therefor from the County Commissioners, which the Commissioners are authorized to grant from time to time, and to revoke when necessary; and the 9th section imposes a penalty on any person, who shall keep a ferry contrary to the provisions of the first section, of four dollars for each and every day it shall be so kept. As the libellants have shown no license for keeping a ferry, the argument is, that, the boat being engaged in an illegal employment, the owners can maintain no action for a tort against her by a vessel which was in the lawful use of the waters.

The libellants, in answer to this objection, claim the right to keep a ferry at this place, under the act of March 7, 1834, incorporating the Sagadahock Ferry Company. By that act, John Parshley and others were created a body politic and corporate, under the name of the Sagadahock Ferry Company, and authorized to establish and maintain a ferry across the Kennebec river, between Bath and Woolwich, at the place where this ferry is established, at any time within two

rs from the October after the passage of the act. In 1836, act was passed extending the time for establishing the y to 1837, and under this act the ferry was put in opera- ı. The company having become embarrassed, a suit was ımenced against them by a creditor, upon which, in Dec., 8, judgment was obtained, and the franchise was seized on execution and sold on the 7th of March, 1839, to Wm. M. ɟers, for the term of one hundr ed years, to satisfy the judg- nt; and Rogers, by his deed of January 26, 1841, convey- the same to the libellants, who thus became the owners the franchise, for the term of time mentioned. It is not ied that the corporation, having by a special act of the slature been created for this express purpose, might well ıblish and maintain a ferry without a license from the ınty Commissioners, the act itself constituting a license il the franchise should be forfeited, surrendered, or lost, in ıe mode known to the law. The question is whether this hority passed by the sale on the execution to the purchas- ɔf the franchise, and might by him be assigned to the li- lant. In the case of *The Maverick*, reported in the *5th w Reporter*, 106, the question arose whether a license to p a ferry was assignable under the laws of Massachusetts. e Court held that it was not. The person who keeps the y must have the license. It is a personal trust reposed in ı, upon the confidence entertained in his qualifications and ıess for the trust. The whole community have an inter- in the character of persons who keep public ferries, which travellers are obliged to use, and that none should be al- ɾed to keep them but men of sober habits, and such as l be careful and attentive to the safety of those who are iged to use them. The law, therefore, for the common ıefit of all, requires that no one shall keep such a ferry il he has been approved and has obtained a license for t purpose from the prudential Court of the county within ich the ferry is. The law of Maine appears to be a tran- pt of that of Massachusetts, having been reënacted in the

revision of the laws in 1821, and again incorporated into the Revised Statutes.

The only distinction in this point, between case of *The Maverick* and the present case, is, that in the former the ferry was kept under a license from the Court of Sessions, and in this it is kept under a special act of the legislature, granting the franchise, and with it the authority to maintain a ferry, to the corporation. But, looking to the general policy of the law with respect to ferries as well as to the special provision of this act, the franchise granted must be considered as clothed with a trust, or at least subject to certain duties to be performed on their part. By the 4th section of the act, the corporation are required to keep good boats and in good repair, suitable and convenient for the accommodation of passengers, and to cause ready and due attendance to be given at all times; and for the neglect of any of these duties, they are subjected to penalties provided by the act. The corporation are bound themselves to keep up the ferry and manage it by their own servants. It would hardly be contended that the corporation, by their own voluntary act, could have transferred with the franchise a right to keep up this ferry without any supervision or control on the part of the County Commissioners. Before the purchaser could have kept the ferry, he would be obliged to obtain the approbation and license of the prudential tribunal of the county, which the law has clothed with the authority of supervising and controlling the management of public ferries, and whose duty it is to take care that they are kept by suitable and proper persons. If this would be the case in a voluntary sale, it seems to me that the same reasons apply with equal force to a forced sale under the legal process. Otherwise the policy of the law may be defeated, and a ferry may fall into the hands of a person entirely unfit to be entrusted with its management. It appears to me therefore that the purchaser, before he can legally keep the ferry, must obtain a license from the County Commissioners. If this be a correct view of the law, then

the case of *The Maverick* is precisely in point, and this objection is fatal to the suit.

But, independent of this consideration, I am not satisfied that upon the general principles of the law of the sea, this suit can be maintained upon the evidence. The rules of the maritime law on the subject of collision are founded in common sense, and have for their object the general security and convenience of navigation. The general principle is this: when two vessels are under sail in such directions that, if both hold on their course, there may be danger of their coming in collision, the vessel that has it most in her power to vary her course and keep out of the way, is bound to do so. If she does not, and a collision ensues, she is liable for the damage. Thus, a vessel that is sailing before the wind, or with a fair wind, is bound to give place to another that is close hauled to the wind, because she has more control over her own motions and can more easily change her course. But a steamboat, that is not moved by the wind, and has her motive power within herself and entirely subject to her control, which can at pleasure be moved backward or forward, and can stop her motion altogether, has her movements more under her control than any vessel that is moved by the wind. It is always in her power to avoid a collision, if she is managed with ordinary skill and prudence, when it may be entirely out of the power of a vessel that is moved by the wind and currents and must go where they carry her. For this reason, when steamboats came into use in the business of navigation, it was decided by the maritime Courts, not by making a new rule of law, but by the application of an old and existing rule to a new species of vessel, that a steamboat is to be treated always as a vessel sailing with a fair wind, and is in all cases bound to give way to a vessel that is moved by sails. *The Shannon*, 2 *Haggard Adm. R.* 173. *The Steamboat Portland, U. S. D. C. for Massachusetts*, quoted 3 *Kent's Comm.* 231, *vol.* 3, *4th edit.* On this ground it was decided in a recent case by the District Court of the

United States for the Southern District of New York, that the rule of the maritime law relative to vessels with sails, viz: that the vessel having the wind must bear away for one that is sailing on the wind, does not apply between steamboats and vessels with sails, but that a vessel moved by steam must in all cases give way to a vessel moved by sails. In that case a vessel having a fair wind, in conformity with the old rule, bore away for the boat, and by that means, through the inadvertence of the master of the boat, a collision took place, and the vessel was damaged. The Court ruled that the vessel was in fault for not holding on her course, and consequently could not recover against the boat.

The decision in that case applies precisely to the case at bar. The schooner held on her course; and it was entirely in the power of the boat to have stopped her motion or changed her course so as to have avoided the vessel. And on the principle that has been repeatedly recognized by the maritime Courts, both of this country and of England, the collision must be considered as resulting from the fault of the boat, and consequently no action can be maintined by the owners for the damage.

Libel dismissed.

THE HULL OF A NEW SHIP.

When the local law gives a lien to material men and mechanics, for their demands against a ship, it may be enforced in the admiralty.

All the privileged creditors may unite in one libel, or if a libel has been filed by any one separately, then others may come in by petition and make themselves parties to the suit.

A valid contract of hypothecation may be made not only of things which the party has at the time of the contract, but of what he expects to have, and of things not then in existence. It will attach to, and find, the party's interest in the thing as soon as it comes into being.

A ship builder, before he commenced building the vessel, entered into a contract with a merchant by which he hypothecated the vessel to be built, for advances.

This was held to be a valid hypothecation of the builder's interest in the vessel, and to give a lien upon it.

By a statute of Maine, material men and mechanics have a lien on vessels for materials and labor employed in making it, which has precedence over the claims of all other creditors. The lien created by the contract of hypothecation was postponed to those of the material men and laborers.

Nor was the hypothecary creditor subrogated to their privilege, merely by paying their claims on orders drawn by the builder.

But when he actually furnished materials, he was allowed to claim concurrently with them.

When a creditor transfers his debt, the assignment of the debt carries with it all the accessory obligations, as pawns, hypothecations, or sureties by which the debt is secured.

But where a creditor has a debt due to him on a single contract or obligation, he cannot divide it by assigning part to one and part to another so as to enable each assignee to maintain a separate action without the assent of the debtor.

September Term, 1842. This was a libel by Richard Abbot, a carpenter, against the hull of a new ship, for work and labor performed by him in building her. She was launched March 31, 1842, and the libel was filed the next

day, April 1. He claimed a privileged lien on the vessel for his pay, under a law of the State which provides, that "any ship carpenter, caulker, blacksmith, joiner, or other person, who shall perform labor or furnish materials, for or on account of any vessel, building or standing on the stocks, or under repairs after having been launched, shall have a lien on such vessel for his wages and materials until four days after such vessel is launched or such repairs have been completed," (*Revised Statutes of Maine, Ch.* 125, § 35,) and giving them a priority and precedence over all other creditors of the owner. After the vessel was arrested on this libel, a large number of other creditors, amounting to thirty-one in all, intervened by petition, claiming to have similar demands and praying to have their liens allowed, and to be paid out of the proceeds of the ship.

The libel and all the petitions were committed to S. Longfellow, Esq., a Master in Chancery, to examine into the several claims set forth, and to report to the Court,

First — What sum is justly due to each of said libellants and petitioners for labor performed and materials furnished for and on account of said ship.

Second — Where any of the parties have furnished materials for or on account of said ship, and the whole of the same have not been used in the building of the vessel, to distinguish and report,

1. Such as have been used, from such as have not been used.

2. What part of the materials not used were furnished by the material men, under a just belief and expectation that they were wanted for the vessel and intended to be used in the construction of the same.

Third — To report what sums, if any, are claimed as liens on the vessel for money paid to the workmen for labor in satisfaction of their wages, or to material men for materials furnished, and at whose request they were paid.

The vessel was sold on an interlocutory order for $13,000, and the proceeds paid into the Registry.

The master reported a large number of debts due to laborers and material men about which there was no controversy. With respect to two large debts, which were claimed as chargeable on the vessel in concurrence with those of the material men and mechanics, he reported the facts specially. One was a claim of Purinton for $7,727 15, and one of Richardson for $1,558 20. The owner, Knight, made no defence, but the question, whether these were liens on the vessel, and if so whether they were of the same rank and entitled to be paid concurrently and *pro rata* with the material men and laborers, the fund being insufficient to pay the whole, was argued by *Willis* and *Davis*, for Purinton and Richardson, and *Fox*, for the opposing creditors.

WARE, *District Judge.*

With respect to most of the claims that were presented and proved before the master, there was no controversy before him, and there has been no opposition to their allowance before me. Being for labor performed and materials furnished for the vessel and actually used, it is admitted that under the statute they attach to her as privileged debts, and the suits having been commenced within four days after she was launched, the vessel is bound for them in specie. Being maritime liens, there is no doubt that they may be enforced by process in the admiralty where all may join and have their rights settled in a single suit, or may intervene for their own interest, after a libel has been filed, and have the whole matter disposed of in, or under, one proceeding or one attachment, instead of having as many suits as there are creditors. Where the local law gives a lien, it may be enforced in the admiralty. *Peyroux* vs. *Howard*, 7 *Peters*, 324. *The Gen. Smith*, 4 *Wheat.* 438.

Two of the claims against the vessel have been contested; not by the owner, he admits them, but by the other creditors, and the contest has been not so much whether these are privileged debts against the vessel, as whether they stand in the same rank of privilege with the others. The first, and the most considerable, is Purinton's claim.

Before Knight began to build the ship he entered into a contract by which Purinton agreed to make advances to him for the purchase of materials and payment of the laborers, while the ship was being built, and on the part of Knight it was agreed that he should have a lien on the ship for his security. A doubt was suggested at the argument whether a contract for the hypothecation of a thing not in existence at the time of the contract is not *ipso jure* void. It is true that one cannot give an interest or lien on future things by way of pawn or pledge, because the delivery of the possession is necessary for the completion of this contract. But an interest may be given by a contract of hypothecation independent of the possession; and I see nothing in the nature of the thing that should prevent one from giving such a right, not only in what he has in present possession, but in what he may afterwards acquire. A man may by a valid contract of sale dispose not only of what he has at the time of the contract, but by such a contract he may bind his future acquisitions. As when one sells his harvest of corn before it is grown, or his share in a fishing voyage before the fish are taken. There is no doubt that such contracts are binding on the parties when not prohibited by any special law, although there is nothing in being at the time to which they apply. They attach to and bind the thing as soon as it comes into existence. If future acquisitions, not in existence at the time, may be bound by a contract of sale, so that the interest passes to the vendee as soon as they come into existence, no obvious reason occurs to me why they may not as well be bound by a contract of hypothecation. In the case of *Macomber* vs. *Parker*, 14 *Pick.* 497, such a contract for the hy-

pothecation of bricks, before they were made, was held to be a valid and binding contract, and that it attached and gave to the creditor an interest in the bricks as fast as they were made. *Story's Bailments*, §294. A contract for the hypothecation of one's future acquisitions not yet in being was clearly valid by the Roman law. *Quæ nondum sunt, futura tamen sunt, hypothecæ dari possunt; ut fructus pendentes, partus ancillæ, fœtus pecorum, et ea quæ nascantur, sint hypothecæ obligata. Dig.* 20, 1, 15. *Domat, Liv.* 3, *Tit.* 1, *Sect.* 1, *No.* 5.

There is then no reason why the contract of Knight should not operate as a valid hypothecation of the vessel, and bind the property while it was in progress and as fast as it was built. It was obligatory between the parties, and it binds Knight's interest in the vessel. Whether Purinton could hold it under this contract, against a third person, as a purchaser or an attaching creditor without notice, is not necessary to be considered in this case. The only question here is, whether it gave him a lien holding the same rank of privilege with those of the mechanics and material men.

The lien of Purinton stands on his contract, and can have no other force and extent than what is derived from that. That of the material men and laborers has its origin in the law independent of contract, and is to be allowed such an extent and operation as will carry into effect the intention of the law maker. The lien of Purinton covers the whole interest which Knight had in the vessel, but no more. He could give no more. *Nemo plus juris in alium transferre potest quam ipse haberet. Dig.* 50, 18, 54. If this had been a contract of sale instead of hypothecation, the vendee, when the ship was completed, would have taken precisely the interest which the vendor then had. That would have been the whole ship, subject to the unpaid demands for labor and materials used in her construction, and would have taken precedence of these, if process was not sued out within four days after she was launched. But during that time the

rights of the material men and laborers continued under the statute, as privileged liens having precedence over all others. The builder could give no more extensive rights by a contract of hypothecation than he could by a sale. The title of Purinton under his contract must therefore be postponed to the liens of the opposing creditors who claim under the statute.

There is another ground on which he claims to be paid part of his demand concurrently with those who claim under the statute lien. It is this, that the advances made by him were in payment of this very class of creditors. The amount under this head is $2,368 43, and the argument is that he may be substituted as a privileged creditor in the place of those whose claims he has paid. These payments were made by him on orders drawn by Knight in favor of the workmen, and the payments extinguished the debts. They were not kept alive by an assignment of them by the creditors, but by the payment they were absolutely extinguished and gone, and Purinton became a creditor of Knight, not as assignee of the original debt, but by virtue of the order which was paid. When the debt was extinguished, the lien which was incidental to it was gone also. The only way by which the lien could be preserved would have been by an assignment of the debt, unless there had been a special agreement with Knight, the debtor, that, upon the payment, the lien should be continued in his favor. *Domat, Lois Civiles, Liv.* 3, *Tit.* 1, *Sect.* 6, *No.* 5. By such an agreement, in the Roman law, the new creditor might be subrogated to the privileges of the old one without an assignment of the debt, and in our law perhaps the same might be allowed where it did not conflict with the rights of other parties. But these advances and payments were made under the contract. The ship was hypothecated as a security for them, and by this contract Purinton was put in the place of the owner. If either of these precautions had been taken, it is at least doubtful whether it would have strengthened his claim.

Another part of his demand, for which he claims an equal privilege with the material men and mechanics, is for money procured by him and expended on the ship, in payment for materials and of the wages of the workmen. In this is included $838 75, obtained on notes of Knight, endorsed and taken up and paid by him, and also $2,500 procured on Knight's note, endorsed by him, which remains unpaid, and which, as Knight is insolvent, must be paid by him.

Here again, the security originally contemplated was the hypothecation of the ship. Purinton agreed to make these advances on the security of the ship. It is a good and valid security, and covers all Knight's interest in it. But its operation is merely to put the lender of the money in the place of the builder. It gives him no greater rights than Knight had. It does not enable him to come in competition with those who have the statute lien.

There is a small part of his demand, amounting to $30, which is admitted to be for materials furnished, and which were actually used in the construction of the ship. For this, I think, notwithstanding his contract, he may be allowed to claim in concurrence with the other material men and mechanics. He claims also another small sum of $11 21 as assignee of Foss. For this, Foss had a lien under the statute, as it is admitted to have been for materials furnished for the ship. If Foss had a lien, why should not the privilege follow the debt into the hands of his assignee? The debt is the principal and the lien is the incident, and the general rule is that the principal carries with it the accessory. When a debt secured by a mortgage is assigned, in Equity it carries with it the mortgagee's interest in the land. The interest in the land is in fact nothing independent of the debt, and, after the assignment of the debt, the legal interest remains in the mortgagee as a mere naked trustee for the benefit of the assignee of the debt. 4 *Kent's Com.* 194. 2 *Story's Equity*, § 1016, 1023, *note.* A payment of the debt

extinguishes the interest in the land without any formal reconveyance. *Gray* vs. *Jenks*, 3 *Mason*, 520. Why should not the same doctrine hold in the mortgage or hypothecation of personal chattels. There is the same reason in one case as the other. If a lien creditor cannot transfer his privilege with his debt, he does not have the full benefit of his contract. For if the debtor happens to be insolvent, as in this case, the creditor cannot avail himself of the debt by an assignment unless he can transfer his privilege with it. For this sum, Purinton succeeds to all the rights of his assignee, and is entitled to the lien. The same principles prevailed in the Roman law. A creditor, by a simple assignment or cession of the debt, transferred to his assignee all the accessory obligations and securities by which it was secured to him. The assignee had the same benefit from pawns and hypothecations to which the assignor was entitled. *Dig.* 18, 4, 6—14—23. *Domat, Liv.* 3, *Tit.* 1, *Sect.* 6, *No.* 1. *Warkœnig Jus Romanum Privatum*, § 443, 444. *Toullier, Droit Civil, vol.* 7, *No.* 120. The accessorial being a mere dependency on the principal obligation, could not be assigned separately from it. *Warkœnig*, § 440, *No.* 3.

It is objected that if a creditor, having a lien, may thus assign his privilege with his debt, he may, by assigning his claim to different persons, split a single demand into a number of debts, and thus harass the debtor by a multiplicity of suits. But this consequence will not necessarily follow. In strict law a chose in action cannot be assigned at all. The ancient rigor of the common law in this particular, has, in favor of commerce, long been relaxed. An assignment will be supported in law, and the assignee may enforce his rights by a suit in the name of the assignor. But a creditor is not allowed to divide a single debt into parts, so as to give to each a separate action in his name, without the assent of the debtor. The debtor has a right to insist on the singleness of the obligation, and to be protected against a multiplicity of suits. An order, drawn by the creditor for the whole

debt, is an assignment of the fund, and as soon as the debtor is notified, he becomes, even without his own consent, obligated to pay to the assignee; but an order drawn for a part of it will not bind him unless he assents to it by accepting the draft. *Mandeville* vs. *Welch*, 5 *Wheat.* 277. *Tiernan* vs. *Jackson*, 5 *Peters*, 580.

This equitable temperament of the creditor's right, which prevents him from dividing a single obligation into several by assigning part of it to one and part to another, is recognized in the Roman law. He might assign part of his debt, but not so as to make it more onerous to the debtor. When a single debt was divided into several, the debtor was not rendered liable to several actions, but he might require all the assignees to join in one suit and receive the whole debt at one time. *Warkœnig Jus Rom. Priv. vol.* 2, *No.* 442. 7 *Toullier*, *No.* 120, *note.*

The other contested claim is that of Richardson. This amounts to $1,552 20, and is admitted to be, for the greater part, for materials actually used in the construction of the ship. The whole were furnished under a special contract, by which it was agreed that "Richardson is to hold a lien on said vessel and the timber until paid for, and it is also agreed that the said timber and planks are to be paid for when said vessel shall be built and ready to launch, or within four days after being launched." The lien which was intended to be created by the contract, is precisely coëxtensive with that given by the statute, and to the extent of the materials actually used in the construction of the vessel, it is entitled to all the privileges of the statute lien. If the excess had been small and had been furnished under a belief that the whole was wanted and intended to be used in building the ship, I should think that the lien ought to extend to the whole. But the excess here was considerable, and it is in proof that, at the time when the contract was made, Richardson was informed that the whole might not be wanted for the vessel. Now, though the contract might create a valid

hypothecation of the vessel for the whole amount of the debt, against the owner and all claiming under him with notice, this will not place him, as to the portion of materials not used, in the same rank of privilege with the laborers and material men who claim under the statute. For this part of the debt his lien must be postponed to theirs. The statute privilege extends only to materials which are furnished for the vessel and actually used in building it.

For interlocutory and final decrees in this case, see Appendix A.

PETTINGILL VERSUS DINSMORE.

In a libel for a marine tort, the libellant must set forth, in a distinct allegation, each separate and distinct wrong on which he intends to rely, and for which he claims damages.

If he intends to rely on general ill treatment and oppression on the part of the master, in aggravation of damages, it must be propounded in a distinct allegation, to enable the master to take issue upon it in his answer.

The proofs in the case must be confined to the matters that are put in issue by the libel and answer.

When a master is prosecuted in the admiralty for punishing a seaman, he may be permitted, in justification or in mitigation of damages, to show that the seaman was habitually careless, disobedient, or negligent in his conduct.

But in order to be admitted to this defence, he must set forth such habitual misconduct in a defensive allegation in his answer, in order that the libellant may be enabled to meet the charge by counter evidence.

May 22, 1843. This was a libel *in personam* for an assault and battery on the high seas. The libellant shipped as steward, in October, 1841, on board the barque Massasoit, of Bath, for a whaling voyage. He was, in the language of seamen, a green hand; that is, it was his first voyage as a seaman. For the first two weeks he was so much affected by sea-sickness as to be unable to perform his duty. After that time

he entered on his duties, and no difficulty, or at least none of a serious nature, occurred until the 28th of November. On that day the cabin boy, in shaking the cabin table cloth over the side of the vessel, accidentally dropped it into the sea, and it was lost. He mentioned the fact to the steward, who told him to inform the master. The boy replied that he was afraid, and requested the steward to do it for him, who accordingly did, and the first assault complained of was then made. The next morning the libellant was called on deck and seized up to the rigging and kept so for from half an hour to an hour, which is the other wrong complained of. The material facts are stated in the opinion of the Court.

Scwall, for the libellant; *Tolman*, for the respondent.

WARE, *District Judge.*

This is what in the language of the Admiralty is technically termed a cause of damage. It appears from the testimony of the libellant's witnesses that, when the table cloth was lost by the boy, he mentioned the fact to Maxwell, the cooper, who advised him to mention it to the master. He replied that he was afraid the master would flog him. He then advised him to inform the steward, and ask him to communicate the facts to the master. This being done, the steward came on deck and informed the master. He was irritated and answered very roughly. The steward replied that he would pay for the cloth. The master answered that he wanted no other pay than what he could get from his hide; that he had promised him a flogging, and that he would keep his promise. Pettingill replied that if he flogged him he would have satisfaction if he lived to get home; upon which the master struck him and brought him to the deck, either by the violence of the blow or by throwing him down. While down he shook him violently, brought his knees or feet upon his breast, seized him by the hair with such violence as to pull or tear a considerable quantity from his head,

so as to leave a spot bare, and after holding him in this manner for some time, allowed him to get up and ordered him into the cabin.

The next morning all hands were called aft, and the steward was called from the cabin on the quarter deck. The mate was then directed to seize him up by both hands to the rigging, with his arms spread and extended upwards to their full length, and as high as they could be to leave him standing on the deck. In this position he was kept for from half an hour to an hour. Two of the witnesses state that his shirt was stripped up, so that his body was left bare. The other witnesses do not mention this fact, and the witnesses for the master deny it. While the libellant was in this position the master called the attention of the crew to him, and walked the deck forward and back, apparently in great passion, applying to the steward various insulting and degrading epithets, and observed that this was what he called a spread eagle, and that he would make an example of Pettingill. Except where the hair was torn from his head there were no marks of violence apparent on the person of the steward. For two or three days afterwards he complained of a severe pain in his head, though he was not so injured but that he immediately returned to the performance of his duty. The witnesses for the master give a more subdued and mitigated account of the assault on the 28th, and of the seizing up to the rigging on the morning of the 29th. They saw no blows inflicted, no stamping, or jamming, with the knees or feet, on the breast of the libellant, and no pulling of hair, nor did they hear any complaint of the steward; but they say he acknowledged his fault and asked the master's pardon. But with respect to the cause or the occasion of the punishment there is no discrepancy between the witnesses.

This is the substance of the testimony so far as it applies to the allegations of the libel in the form in which it was originally drawn. But after the evidence was taken and

the cause ready for a hearing, the counsel for the libellant moved for liberty to file an amendment to the libel. The amendment offered sets forth more particularly the assaults on the 28th and 29th, and also contains two new substantive allegations, one of another distinct assault in the cabin in the evening of the 28th, and another of general ill usage and oppressive cruelty on the part of the master. The amendment is objected to on the part of the respondent.

The Court without doubt has the power to allow an amendment in any stage of the proceedings before a final decree, when the purposes of justice require it. But a motion to amend is addressed to the discretion of the Court, and, when it will necessarily lead to delay and an increase of expense, it will not be allowed unless the Court sees that substantial justice cannot be attained without an amendment. The practice of the Admiralty does not insist on all that technical exactness in pleading, which is required by Courts proceeding according to the course of the common law. But the libellant is required to state in clear, distinct and intelligible allegations, the whole gravamen of his complaint. He must set forth every material and substantive wrong, upon which he intends to rely and for which he claims damage, in a distinct allegation. If he intends to claim damages for separate and independent assaults, they should be separately set forth; otherwise the respondent will not know what he has to answer. And the proofs in the case must follow the allegations. It is not intended to be said that every circumstance of aggravation attending an assault and battery must be minutely described, but, when the libellant proposes to offer proof and claim damages for separate assaults at different times, he is bound to set them out in separate allegations. And so if he means to rely on general harsh treatment and continued and systematic oppression and cruelty, either in aggravation or as an idependent and substantive wrong, the libel should contain, in a separate article, an allegation to that effect, in order that the respondent may take issue on

the matter and prepare his defence accordingly. 4 *Mason's Rep.* 541, *Orne* vs. *Townsend.* 1 *Sumner's Rep.* 390, *Treadwell* vs. *Joseph.*

Now, in the libel as originally framed, there is no mention of an assault in the cabin, and yet, as it is alleged in the amendment, it can in no sense be considered as a continuation of that which took place on deck, nor is there any distinct charge of habitual ill-treatment and oppression so formally set out as to give notice to the respondent that this matter would be insisted upon as an independent ground of damages, or that it would be relied on in aggravation to enhance the damages for the assaults particularly articled in the libel. The answer is drawn to meet the allegations in the libel, and consequently neither of these matters are put in issue. If the amendment is allowed, the master must have liberty to amend his answer, and time must be given to produce evidence on the new issues presented by the pleadings. This will necessarily lead to delay, and involve an increase of expense, and as the necessity of an amendment to reach the whole justice of the case, if any such necessity exists, of which I am not convinced, was occasioned by the fault of the libellant himself, in my judgment the amendment ought not to be allowed.

The master in his answer justifies the act as a necessary and proper act of discipline, and alleges "that at the time, the said libellant was not obedient to the respondent's commands, but assumed and took upon himself to do and act as he saw fit, in subversion of the necessary discipline and subordination of the crew of said ship, and in a manner to destroy the objects of the voyage and produce mutiny;" and he then proceeds to state that he gently laid him down on the deck and detained him there a short time, and on his promise to conduct better he was allowed to get up; but notwithstanding his promise he still manifested insubordination and insolence to the respondent, upon which he told him that he would seize him up in the rigging, and that "thereupon

Pettingill threatened and dared him to do so, alleging if he did, that he the said Pettingill would make this respondent sweat for so doing;" and that afterwards, on mature consideration the following day he did cause him to be seized up for a short time and in a manner not to produce pain or injury, and that the chastisement was mild, necessary, and proper.

Evidence has been offered by the master, in his defence, tending to prove that Pettingill was careless and negligent in the performance of his duty. I have no doubt that evidence of general and habitual negligence and carelessness in the discharge of duty, may be admitted in justification of punishment, when in a proper case it is administered to correct such habits of sloth and negligence, and may go in mitigation of damages when it does not amount to a full justification. The right of the master to correct a seaman by some kind of punishment, for habitual and systematic sloth and negligence, seems to result from his peculiar relation to the crew and the nature of the authority with which the law has entrusted him. He is invested with a sort of domestic authority, but it is of a peculiar character and of limited extent. It has an analogy to that of a parent over his children, or a master over his apprentice or pupil, but the analogy does not hold throughout. He has not the authority of a *custos morum* to correct his crew for general immorality of conduct. His power is limited to the correction of such delinquencies as are connected with the due performance of their special duties on board the vessel. But when the law imposes on the master the responsibility for the government of the vessel and the discipline of the crew, it clothes him with an authority commensurate with his duties and responsibilities. The safety of the ship, the comfort and health of the crew, and the success of the voyage depend on the prompt and punctual performance by each man of his appropropriate duties, and it is a part of the master's duty to see that these duties are performed in a proper manner and with

reasonable diligence. It would seem, then, that habitual sloth and negligence or wanton carelessness, if persevered in after proper admonition, may be corrected by suitable punishment.

When a seaman brings a suit for damages against the master for illegal and unjustifiable punishment, he puts in issue his general conduct and character during the voyage, or rather enables the master to put it in issue. But when the master means to rely on such matter in justification, or in mitigation of damages, he must set it out in his answer in a distinct allegation. The libellant has then notice of the defence and may be prepared to meet it. But if the answer contains no such defensive allegation, the libellant has no reason to suppose that his general conduct for the voyage is intended to be called in question. The evidence therefore to this point, in the actual state of the pleadings, is not properly admissible. But if it were in the case, it is not of such a character, in my judgment, as ought to have a material influence on the decision.

How then stands the case on the evidence that is properly applicable to the matters in issue between the parties? The cabin boy lost a table cloth overboard. He being, from some cause, afraid to communicate the fact to the master, at his request the steward does it for him. Whereupon, without further apparent cause, the master commences a violent assault on the steward, knocks him down on the deck, shakes and jams him violently against the floor with his feet or knees, and seizes him with such force as to tear out a considerable quantity of his hair. The only offence, that Pettingill had committed, was his reply, when the master told him that he would flog him, that he would then seek redress from the laws of his country. But this threat, as the master calls it, was not uttered, according to his answer, until after the assault on the deck; and it is represented in the answer as encouraging a mutinous spirit in the crew and as a justification of the punishment the next day. The next morn-

ing, without any further cause than that of avowing his intention to seek redress when he returned, and, as the master in his answer says, for an example, he caused him to be seized up by both hands, with his arms extended, as the master facecetiously remarked, like a spread eagle, and kept him suspended in that ignominious posture before the crew for from half an hour to an hour, not, it is true, in a manner to cause great bodily pain, but exposing him to derison and ridicule, and accompanying the whole with a copious effusion of taunting and opprobrious language.

I can find in the evidence no cause for this punishment except the state of irritation into which the master was thrown by the loss of the table cloth; and the punishment was inflicted not on the boy who lost it, but on the steward who brought him the information. Pettingill might well say after this experience, the "bearer of ill tidings hath but a losing office," when he was obliged to expiate by a vicarious punishment in his own person, the offence which he only announced as a messenger. It is now indeed said, by the way of extenuation, that the steward was habitually remiss in his duty. But this, as has been before observed, was not relied upon in the answer and is not properly in issue, and, from the character of the evidence which is offered in support of it, seems brought in by an after-thought as a palliation of a gross outrage that is entirely without justification. On the whole evidence the punishment appears to me to have been a wanton abuse of power without any cause which could operate on the mind of a reasonable man, and I shall award damages to the amount of eighty dollars, with costs of suit.

JANE SHAW, BY HER NEXT FRIEND, S. J. SMITH, VERSUS NATHANIEL MITCHELL, ASSIGNEE.

ALPHEUS SHAW, ADMINISTRATOR, VERSUS THE SAME.

A husband has only a qualified interest in choses in action belonging to the wife. He has, at common law, the right to make it absolute by reducing them to possession.

But if he is obliged to seek the aid of a Court of Equity for the purpose of obtaining possession, it will be given only upon the condition that a suitable settlement out of the property be made for the benefit of the wife.

Where property descended to the wife of a bankrupt before a decree of bankruptcy, and at that time he had not reduced it into possession, it was held that the wife was, in Equity, entitled to an allowance out of the property, for her support against the assignee of the bankrupt.

October Term, 1843. This was a petition by Jane Shaw, wife of Alpheus Shaw, who was decreed a bankrupt March 2, 1842, praying that certain notes, which had descended to her from her father, and which were included in the schedule of the bankrupt's property annexed to his petition and delivered to his assignee, may be re-delivered to the administrator of her father's estate, in order that the same may be administered by him and distributed to her as her distributive portion of her father's estate.

The following are the material facts. Mr. Doughty, the father of Mrs. Shaw, died Sept. 4, 1838, leaving four children, and certain notes, secured by mortgage, which was all the property that descended. Mr. Shaw was regularly appointed administrator Dec. 4, 1838. The notes in question came into his hands as administrator, and so remained, nothing having been paid upon them, until the decree of bankruptcy and the appointment of an assignee. They were included in the schedule of his property and delivered to his assignee. No distribution has been made of the estate by

the administrator, and no account has been settled at the Probate Court, but the notes still remain due and unpaid.

Mr. Shaw has also filed a petition, that the assignee may be ordered to relinquish the notes and restore them to him in his quality of administrator, to be administered and distributed according to law, and for the payment of the debts of the deceased, if necessary for that purpose.

Notice of the petition was acknowledged by the assignee, and the case is submitted to the Court on the facts stated in the petitions, which are not controverted.

WARE, *District Judge.*

This case has been submitted on the facts disclosed in the petitions of Mrs. Shaw and the bankrupt, which are admitted to be true, for the purpose of having the rights of the assignee and the petitioner determined by the Court.

By the common law, marriage amounts to an absolute gift to the husband of all the personal goods and chattels of the wife, of which she is in possession, at the time of the marriage, in her own right, and also of all that may accrue to her during the marriage. With respect to such of the wife's personal property as is not in possession, as debts due to her by contract, or money coming to her by inheritance, these do not pass to the husband as an absolute gift. 2 *Story's Equity*, § 1402. Such choses in action are a qualified gift. He has a right to sue for and recover them, but they do not become absolutely his until he has reduced them into his possession. And the same principle applies, whether they belong to her at the time of marriage, or accrue to her during coverture. A legacy, or a distributive share of an inheritance, accrues to her, it is true, for the benefit of her husband, but these do not become at once incorporated into the general mass of his property without distinction. They bear an ear mark, if such an expression may be allowed, by which they are discriminated from his other property; and if he dies without reducing them into his possession, they do

not go to his administrator, but survive to the wife, and she is entitled to them against the personal representative of the husband. And the choses in action of the wife, as debts due to her, or stock standing in her name, are not reduced into the husband's possession so as to exclude the wife's title by survivorship, merely by the notes or certificates, that is, the evidences of property coming into his hands. 9 *Vesey*, 174, *Wildman* vs. *Wildman*. The debts due to the wife are not reduced to the legal possession of the husband until the money is paid, or, having the present power to reduce them into possession, he has assigned them for a valuable consideration. 1 *Russell Rep.* 66, *Purdew* vs. *Jackson*. 3 *Russell R.* 65, *Honner* vs. *Morton*. A judgment in the lifetime of the husband, it seems, is not sufficient, at least unless the suit was in the name of the husband alone. 2 *Story's Equity*, § 1405. 2 *Kent's Comm.* 137. If he dies in the lifetime of the wife before this is done, her choses in action will survive to her and not go to his personal representative.

But although the husband has only a qualified interest in his wife's choses in action, he has always the power of making that absolute by a reduction of them into his actual possession; nor does the common law furnish the wife any means of preventing the husband from so reducing them into his possession as wholly to extinguish her separate interest. But Courts of Equity have long been in the habit of interposing to protect the interest of the wife. Whenever the husband is obliged to seek the aid of a Court of Equity to obtain possession of the wife's property, the Court will give its aid only on the condition, that the husband settle part of the property on the wife, to be held for her benefit, independent of the husband and his creditors. This right of the wife to a reasonable provision out of her own property, for the support of herself and her children, is called the wife's Equity. The general principle, on which the Court interposes in her favor, is said to be, that he who seeks equity shall do equity; and the present disposition of Courts seems

to be rather to enlarge than curtail the beneficial operation of the rule in favor of married women.

This is the established rule in all cases where the husband himself, or his general assignee, for the payment of debts, or under insolvent laws, or in bankruptcy, is obliged to have recourse to a Court of Equity to obtain possession of the wife's personal property. Ordinarily, it is said, that Courts of Equity will not interfere to control the husband when using the common remedies of the law to obtain the possession of such property. But it is admitted that this rule is subject to some exceptions. Where a legacy to a wife is sued for in the Ecclesiastical Courts, it is settled that an injunction will be allowed to enforce the Equity of the wife. 2 *Story's Equity*, § 1403. And for the same reason it has been said, that a suit at law, for a legacy, or a distributive share of an inheritance which has descended to a married woman, ought to be restrained, because such rights of action are of an equitable nature and of equitable cognizance. 2 *Kent's Com.* 140, *4th Ed.* 6 *John. Ch. R.*, 178, *Haviland* vs. *Bloom.* Indeed, upon the ground on which Courts of Equity interfere at all, that is, that it is equitable that the wife should have a support secured to her out of her own property and placed beyond the reach of the husband and his creditors, it is not easy to perceive what just and reasonable distinction can be made between her legal and equitable rights of action. And it has been suggested by high authority that no such distinction ought to be allowed, but that the Court ought, on the principles of justice, to restrain the husband from availing himself of any means at law, or in Equity, from possessing himself of his wife's property in action, except on the condition of making a competent provision for her. 2 *Kent's Comm.* 139. *Story's Equity*, § 1403, *note.*

From this view of the law, it appears to me that the wife would be entitled to her Equity out of this property against her husband. It is property which has descended to her by inheritance. It has never by the husband been reduced to

possession, but was, at the time of the bankruptcy, in the hands of the administrator of the estate of her deceased father. It makes no difference that the husband, in this case, was the administrator. For he holds this property, not in his personal, but in his representative character, and, like every other administrator, is bound to account for it to those who are legally and equitably entitled to it. The case has occurred in which the wife's Equity attaches in all its strength, the husband having, by bankruptcy, been deprived of the means of supporting his wife and her children. It is property, as observed by Chancellor Kent, of an equitable nature and of equitable jurisdiction. If the husband had died after the bankruptcy, it is clearly settled that the wife would have been entitled to the whole fund by survivorship. 2 *Simons' R.* 167, *Pierce* vs. *Thornby.* The case appears to me to fall within the general principles on which this jurisdiction is exercised by Courts of Equity. And as this Court, sitting in Bankruptcy, has all the powers of a Court of general Equity jurisdiction, it has the authority to allow the claim of the petitioner. If it would be allowed against the husband, it will be equally against his assignee. An assignment by operation of law in bankruptcy, passes the property in the same plight and condition as it was possessed by the bankrupt himself, and subject to all the Equities that affected it in his hands. 2 *Story's Equity*, § 1411. 9 *Vesey*, 100, *Mitford* vs. *Mitford.*

What proportion of the property ought to be allowed to the wife, is a proper subject of inquiry before a master, and a reference to a master will be made for that purpose.

THOMAS CARLETON, LIBELLANT,

VERSUS

WILLIAM P. DAVIS.

The master of a vessel has a right, in cases of necessity, to correct a negligent, disobedient or mutinous seaman, by corporal punishment. But the punishment must be reasonable, and not inflicted with unlawful instruments.

When a seaman prosecutes the master for an assault, and it is proved that he has been guilty of a fault which would justify some punishment, to entitle himself to damages he must show that the punishment was excessive in degree, or unlawful in its kind.

April 4, 1844. This was a libel for what is technically called, in the Admiralty, a cause of damage. The libellant alleged that he shipped on board the brig Androscoggin, at Baltimore, as cook and steward, in March last, for a voyage to Portland, and that during the whole voyage he faithfully performed his duty; and that on the 17th of March, between the hours of ten and eleven o'clock at night, all hands being called on deck, as soon as he heard the call he dressed himself and went up; that when he got on deck he was seized by the Captain, who struck him over the head with a large piece of wood, called a belaying pin, severely wounding him and causing the blood to flow profusely from the wounds; that after striking him about a dozen blows, he called the mate and told him to kill him, the libellant, and throw him overboard; that he then again assaulted the libellant with a rope, giving him, over the head and face, a large number of blows, severely injuring him, and he prays the Court to pronounce for the damages he had sustained. The answer denies that the libellant did his duty as a faithful seaman, but avers, on the contrary, that he was negligent, disobedient and insolent; it denies that the master struck him with a piece of wood, but admits that he did strike him several

times with a small rope, and pleads a justification that the libellant refused to do his duty and made the first assault on the master.

The case was argued by *Fox*, for the libellant, and *Howard*, for the master.

WARE, *District Judge.*

The libel, in this case, states a grave and serious injury, and from the marks still remaining on the person of the libellant, it is evident that he actually received in the *melee*, one or more pretty severe wounds. If they were inflicted in the manner stated in the libel, and with the instrument that has been produced and exhibited in Court, it is a case undoubtedly that not only calls for damages, but for exemplary damages. For the instrument is one that, in the hands of a vigorous man, with the exertion of even less than his whole strength, might well effect not only a severe but a fatal injury. Now, admitting the doctrine of the law, as claimed by the counsel for the respondent, that the master has the legal authority to correct and chastise a refractory, disobedient, and mutinous seaman, it is to be recollected that the law has imposed two important restrictions on this right; first, that it must be reasonable and moderate in degree, and secondly, that the punishment shall not be administered with unlawful instruments. Now it will readily be admitted that a billet of wood, eighteen inches long, and nearly as large as a man's arm, is not a proper instrument to be used in punishing a seaman. Nothing short of some personal danger to himself, from the violence of a man, could justify the master in assaulting a seaman with a deadly instrument, and such this undoubtedly would be in the hands of a man of ordinary strength. If therefore I was satisfied, by the testimony, that the master actually assaulted the libellant with this belaying pin, which has been brought into Court, I should feel no hesitation in giving damages on this ground alone, although the

same evidence might show that the seaman was in fault and deserved some correction. For I hold it a wholesome rule to be insisted upon and to be firmly upheld, that the master shall not, in punishing his men, though they may be in fault, use instruments of correction which endanger life or limb, and may produce fatal effects.

The difficulty, in this case, is in ascertaining from the evidence whether this billet of wood was used or not. It is charged by the libel, and denied by the answer. But as no person was in sight when the affray took place, the case is left, on the conflicting allegations of the parties, each probably, as is usual in such cases, a quick witness in his own favor, very much to the conjecture of the Court. Only two witnesses have been examined who could give any account of the affair, one called by the libellant and one by the respondent, and the night being very dark, neither of them was in a position to see what took place, and from the loud whistling of the wind through the rigging, neither of them near enough to hear but very imperfectly what was said. Antonio Cook, one of the hands, was at the mainmast head, nearly over the spot where the affair took place. He says that the first he heard was the master asking Dunning, the mate, whether the cook had got on deck, and then he sung out for some one to take the helm. The next thing he heard was a number of blows, as of some one striking a man with a piece of iron or stick of wood, and he heard the captain say, take that and go forward. He heard a number of blows, and the words, go forward to your duty, several times repeated. He soon after heard Dunning sing out, let go, and immediately after heard the captain say, kill him and throw him overboard. The master, he says, spoke very loud, but he did not hear the cook's voice.

Dunning, the mate, who was called by the master, says, that when all hands were called, he came up and went forward to take in the sails, and that about twenty minutes or half an hour after, the captain called to him and asked

whether the cook was on deck, and he answered that he was not. He then called him and again went forward to complete the taking in of the sails. About fifteen minutes after, he heard a scuffle in the after part of the ship, and heard the captain say, go forward to your duty. He then went aft and found the cook holding the captain pushed backward over a spar by the companion way. The master called out to him to take him off. He then spoke to the cook and told him to let the captain go, and he not minding, he took hold of him and, after pulling him three or four times, succeeded in breaking his hold. After he had taken him off, and turned to go forward again to duty, the cook went at the captain a second time, saying, put it on, I want you to flog me, and seized the master again. The mate again returned and pulled the cook off and threw him down over some hewed timber. The cook then went forward to his duty, and continued to do duty for the remainder of the voyage. This is the material part of the testimony, for though one more witness was examined, he added nothing that materially varied the case. The mate did not observe at the time that the libellant had received any material injury, and he heard no complaint from him.

The testimony of Cook, connected with the fact that a severe injury was certainly inflicted on the libellant, if it stood alone and unaffected by any other evidence in the case, would certainly go far to convince one that a rude and violent attack was made upon the libellant by the master. He was not, it is true, in a situation to see the parties, or to hear but imperfectly, what was said. But he heard the scuffle and blows given, and heard the captain's voice loud above the wind, telling him to take that and go forward; and the libellant came out of the scuffle a wounded man. But then it is clear that the witness did not hear the whole. He heard nothing until the quarrel became loud and violent, and the beginning of it escaped him. Although, on the whole, the Court might be inclined to believe on this evidence alone,

that an unjustifiable assault was made by the master, yet it would be a conclusion to which one would come from an imperfect account of the whole affair, and of course a conclusion upon which the mind could not rest with entire satisfaction.

But then we have the testimony of Dunning, the mate, also, to a part of the affair, which, although not necessarily in contradiction to that of Cook, gives to the case, on the whole, quite a different aspect. Dunning came to the parties while they were engaged in the scuffle, and the libellant then had the master down, and it was with considerable difficulty he succeeded in pulling him off. But it does not necessarily follow that the one who has the better of a fight at the close, is the one who provoked and began it; nor is it to be easily believed that a seaman, without some strong exciting cause, would commence an assault on the master. I do not recollect a single instance, among all the assaults and batteries that have come before me, and they have been pretty numerous, where a seaman gave the master the first blow; nor do I now remember a case where he returned a blow. Indeed, it must be a very peculiar case in which a seaman could be justified in returning a blow. The marine law is very strict on this subject. "The mariner," says the Consulate of the Sea, "is bound to bear with the master if he reproves him in injurious language, and if he makes an assault upon him, he ought to fly to the prow and put himself on the side of the chains, if the master passes them he ought to fly to the other side, and if the master pursues him there, he may call witnesses and stand upon his defence." *Ch.* 165. Waiving the minute and studiously exact directions contained in this article of the Consulate, in its general spirit and object it constitutes the maritime law of the present day, and is confirmed by all the most authoritative expositions of the law. *Jugemens d' Oleron, Art.* 12. *Cleirac, page* 48. *Laws of Wisbuy, Art.* 26.

Ord. de la Marine, Liv. 2, *Tit.* 7. *Valin, p.* 553. *Emerigon, Traité des Assurances, Ch.* 12, *Sect.* 6.

It is only in very extreme cases that a seaman can be justified in turning upon the master and resisting him with force, and when he can protect himself from a dangerous assault in no other way. Nothing could be more pernicious to the police of the sea, than to admit that a seaman might, as a general rule, resist the master by force, even when inflicting undeserved punishment. It would be sure to lead to numerous scenes of violence and insubordination, and endanger all authority. The duty of a seaman, in such case, is to submit to wrong. The nature of the master's authority, which is of a *quasi* parental character, and the necessities of the service imperiously require it. On his return to port, he may appeal to the law for redress, and the master will be held to strict responsibility for any abuse of his authority. If he does not do this, but takes jurisdiction of his own wrongs, and seeks redress from his own hands, the Courts will be slow in entertaining his complaint, and taking jurisdiction of an appeal from a wager of battle, even if originally he had just grounds of complaint. He may be in danger of impairing a good cause of action by matter *ex post facto.*

Unfortunately, in this case, we get from the testimony but a mutilated account of detached parts of the affair, and have no account of the circumstances with which it commenced. In the absence of proof, the Court cannot let itself loose into speculations on probabilities. And the complainant who asks for the interposition of the Court, must make out his case. However well founded the cause of the complaint may be, if it cannot be proved, he can have no decree in his favor, for the decree must follow the allegations and the proofs. This is an infirmity that belongs to all the administration of human justice. In jurisprudence, a fact that cannot be proved is the same as a fact that does not exist. Mere probability, founded on general presumptions, however

they may incline the private judgment of the man, cannot amount to that judicial proof that is required to satisfy the magistrate. It is a remark of the most profound of all the commentators of the Roman law: *Quæ non est plena veritas est plena falsitas, non semi-veritas. Sic quæ non est plena probatio plane nulla probatio est. Cujas—cited Toull: Droit Civil, vol.* 8, *No.* 8. And this rule, when applied to the whole merits, is certainly sound, however questionable it may be in its application to the doctrine of *semi-proofs*, admitted in the jurisprudence of some of the continental nations of Europe.

Now, though it is sufficiently apparent that the libellant received a pretty severe wound in the scuffle, it does not appear how the wound was made. It might have been by a blow of the captain with a billet of wood, or it might have been received in the fall, when he was thrown down by the mate. But then whatever punishment may have been inflicted by the master, it was preceded by a gross fault on the part of the libellant. When called to duty, in a time of great peril, he had not answered the call, and when called a second time he came tardily. In such a case, some haste and impatience on the part of the master might well be pardoned; and if, in reproving a tardy and unwilling man, there was something of an overcharged manner, and even if the reproof was accompanied with moderate personal chastisement to hasten the movement of a loiterer, a maritime Court would certainly feel inclined to look upon it with indulgence. Such is not the time, as has been well observed, when we are to look for gentleness of manner and a measured caution in the appliances resorted to for the purpose of enforcing quick obedience. The necessities of the service demand the greatest promptitude, and the punishment of the moment may be indispensable to hasten a dilatory and unwilling seaman. *Boulay Paty, Droit Maritime, vol.* 1, *Tit.* 4 (*prolegomenes*), *p.* 374.

Where a seaman complains against the master for an as-

sault, and it is proved that he has been guilty of misconduct which would justify some punishment, he cannot entitle himself to a decree but by showing that the punishment was excessive in degree, or unjustifiable in kind. The master has a right to correct the disobedience of a seaman by corporal punishment, in cases where the necessities of the service call for it, and, though it should be sparingly resorted to, a Court will not hold the master amenable, if he does not pass the limit of a reasonable and moderate discretion. However the truth of the fact may have been, the libellant has failed to prove that this limit has been passed.

But there is another fact proved that places the libellant in a very unfavorable light, and that is the insolent and mutinous manner in which he turned upon the master after he was first torn from him by the mate. It is in proof, that the master was at the time in a feeble condition from ill health, and the libellant had already ascertained by trial his own superiority of strength. Now this violent and criminal attack would go far, in the judgment of a maritime Court, which is always disposed to uphold the just authority of the master with a steady hand, to impair a good cause of complaint. It exhibits him in the light of a man of unchastened and ungovernable passion. It also throws back some light on the obscurity of the preceding part of the affair, and justifies a suspicion at least, that he was not backward to engage in the fight in the first instance.

I pass over without remark the supposed acknowledgments of the libellant, after his arrival in this port, of the general good treatment he had experienced from the master. Seamen are often artfully surprised into such acknowledgments by the friends of the master, when it is apprehended that some controversy may arise, for the express purpose of using them in evidence. They are always a suspected kind of evidence, and are usually entitled to very little consideration.

Libel dismissed.

IN THE MATTER OF ALBERT MARWICK.

Whether under the bankrupt act the creditors of a partnership can be allowed to prove claims against the separate estate of one of the partners to receive dividends, in concurrence with the separate creditors of the partner, when there is no joint estate and no living solvent partner — Quære?

If there be any joint fund, however small, such proof cannot be allowed, although such fund may have been created by the separate creditors purchasing some of the partnership assets, actually worthless, for the purpose only of creating it; for if there be a joint fund, the Court cannot, under the statute, look behind the fact, to inquire how it has been produced.

May 31, 1845. This was a case of objection to a proof of a debt. Marwick, the bankrupt, in May, 1837, entered into a copartnership with one Frederick Davis, and as partners they purchased a quantity of provisions for the Georgia Lumber Company, to the amount of $800, for which they drew their bill on the company in favor of one Bradbury. Before the bill was paid, the company failed, and the failure of the company produced that of the copartnership of Marwick & Davis, by which the firm was dissolved. They afterwards gave their joint note for the sum remaining due, viz., $740 88. This note, Bradbury, for a valuable consideration, transferred to Dole, with notice that it was a partnership debt. The assignee of Marwick & Davis, rendered in his account of the joint estate, Oct. 25, 1844, shewing outstanding demands, in favor of the firm, to the amount of $13,000, which comprised the whole assets of the firm, and which were all represented as utterly worthless. Dole, the creditor, proved his debt, June 17, 1842. The assignee, after rendering his first account, applied for liberty to compromise, or sell, the claim against the Georgia Lumber Company, which was disposed of for $40, of which a supplementary account was rendered, and the amount paid into Court, April 25, 1845, to the credit of the joint estate. The final account of the assignee of the

separate estate showed assets to the amount of $545 93. Two debts have been proved and allowed against the estate, one by Charles E. Marwick, for $684 04, and the debt of Dole. Marwick objected to the admission of Dole's debt against the separate estate.

WARE, *District Judge.*

Two questions have been raised and argued in the present case. The first is whether the creditors of a copartnership can, in any case, be admitted to prove their claims against the separate estate of one of the copartners, for the purpose of receiving dividends in concurrence with the separate creditors of the copartner. The second is whether, admitting that they may in some cases, the partnership creditors can be admitted so to prove under the facts in this case.

The 14th section of the bankrupt act provides, when two or more persons become bankrupt who are partners in trade, that separate and distinct accounts shall be kept, in the settlement of their estates, of the joint effects of the firm and of the separate effects of the several partners, and when the whole expenses are paid, that the net proceeds of the joint property shall be applied to the payment of the joint creditors, and the separate property of each partner shall be applied to the payment of his separate creditors, and that the creditors of the respective estates shall be allowed to receive dividends from the other estate only after the creditors of that estate shall have been fully paid. This is in substance the rule established by the law, and it is quite clear where there is both a joint and separate estate, that the creditors of neither can prove against the other estate for the purpose of receiving dividends, except from the surplus remaining after its own proper creditors have been fully satisfied.

This general rule for marshaling the assets and claims is taken from the English bankrupt law. But under that system there are exceptions, as well established as the rule it-

self. One of these exceptions is where there is no joint estate and no living solvent partner, as is the fact in the present case. In such a case, the joint creditors are allowed to prove and receive dividends against the separate estate, in concurrence with the separate creditors. *Story on Partnership*, § 372. *Eden on Bankruptcy*, 172. But to bring the case within the exception, there must be absolutely no joint estate. If there be any, however small, the exception is not allowed, and it has been rejected where the joint estate amounted only to £1 11s. 6d. And again, therem ust be no living solvent partner — and solvent is here used not in its ordinary sense, that is an ability to pay the whole of one's debts — but in the sense of *non bankrupt* partner. For though he may be in fact insolvent and unable to pay the whole of his debts, if he be not actually in legal bankruptcy, the exception is excluded and the general rule prevails. 3 *Maddocks' Rep.* 229, *Ex parte Jansen.* The principle is, that while there is any fund, however small, to which the joint creditors may resort, they cannot come against the separate estate in competition with the separate creditors; and though a person may be insolvent, if he be not in actual bankruptcy, and thus divested of all his property, he may still have the ability to pay part of his debts, and this possibility is held to be enough to exclude the joint creditors from sharing in the separate estate of the bankrupt partner, except in the surplus after the separate creditors are paid.

Such is the general rule under the English bankrupt laws, and such the character of the exception to the rule, which it is supposed may be admitted under our law. Our statute has adopted the general rule, without taking notice of any of the exceptions. It does not appear to contemplate the case of there being no joint property, and as it passes it by in silence, it may be a grave question, whether it does not leave such a case open to the application of the general principles of equity. But as there is a joint fund in the present case, it

is immaterial whether it does or not, unless the Court may look behind the fact of there being a joint fund, to the manner in which it has been created.

It appears from the proofs in the case, or the facts which are admitted, that the assignee rendered in his first account of the partnership estate in October, 1844, in which the whole of the assets, consisting of outstanding demands, are represented as worthless; that afterwards he applied for liberty to compromise or collect a debt, on which he obtained $40, and rendered into Court a supplementary account; and it further appears, that the money to take up this note was actually advanced by Charles E. Marwick, as creditor of the separate estate. Now the argument is, that if the exception to the general rule of marshaling the assets and debts, established under the English bankrupt system, may be admitted under our statute, then, as it is founded on the general principles of equity and distributive justice, a creditor of the separate estate ought not to be permitted to defeat the equity of the joint creditor, by purchasing for a small sum a partnership demand, for which nothing could have been obtained but for this purpose. Allowing the premises on which the argument is founded to be correct, it does seem to present itself with some force to the equitable consideration of the Court. The effect in the present case will be, that the separate creditor will receive nearly the whole of his claim and the joint creditors but a small percentage, if each is restricted to his own appropriate fund.

But after considerable reflection I have come to the conclusion, that, admitting the assumption on which the argument is founded, it cannot prevail. In the first place, if this matter is viewed as a struggle between the two classes of creditors, it is a strife on the part of the separate creditors, not *de lucro captando*, but *de damno vitando*. A creditor may, without any grave imputation in the forum of conscience, be allowed all fair and legal means to avoid a loss, though it may incidentally be at the expense of another creditor. And

though it is a maxim in equity jurisprudence that *equality is equity*, yet the Court holds the maxim subordinate to legal priorities, which one party may by his diligence acquire over another. And further, the whole subject, of marshaling the assets and claims between the joint and separate creditors in bankruptcy, involves some of the most difficult problems that occur in the whole range of jurisprudence. It has hitherto been found impracticable to establish any general rule that will meet the equities of all the various cases that come up in practice; and the Courts have been finally compelled, instead of subjecting the whole to a rigorous analysis and extracting a system of rules which will carry out the principles of natural justice, to cut down the difficulties by establishing a general rule, which at first seems conformable to general equity, and then to limit and qualify it by a number of arbitrary exceptions, in order to meet the particular equities of particular cases. *Eden on Bankruptcy*, 169, 174. *Story on Partnership*, § 374, 382.

This system is admitted to be not entirely satisfactory; it has sometimes been departed from and again restored, and is now adhered to, not because it is in all respects conformable to the principles either of positive law or of natural equity, but partly as a rule of convenience, as it has been sometimes called, and partly because no system has been hitherto presented as a substitute, which is not found to be encountered by equal difficulties. 17 *Vesey*, 207, *Dutton* vs. *Morrison*. 3 *Vesey*, 238, *ex parte Elton*.

If then we admit that the equitable doctrines of the English Courts, in the administration of their bankrupt law, are applicable under our statute, how will the case stand? In the first place, if this fund had been brought into Court in consequence of the purchase of this note by any other person than a separate creditor, it is clear there would have been an end of the case. What difference does it make that he has advanced the money, and thus created the fund?

It was the duty of the assignee to make the most of the assets. If, with the knowledge that $40 could be obtained by the transfer of this note, he had rendered it into Court as worthless, he might have been compelled to pay the money out of his own pocket. The fund would then have been produced in this way, and the joint creditor would have been in the same condition he is now. It was not for the assignee to inquire who the purchaser was, or what were his motives in making the purchase. And even suppose that he might have done this and refused to sell to a separate creditor for such a purpose, the creditor might have gone to the debtor and furnished him the money to take up the note, and thus indirectly obtain the same result. And indeed this seems to have been the course adopted in the present case; for the note was nominally taken by one of the company, who was liable upon it, though the money was advanced by the creditor. So that if we were to adopt the principle of going behind the fact of there being a fund, to inquire whether that had not been inequitably created by the management of the separate creditors, the Court would at once be involved in inextricable difficulties.

The object of this inquiry is to reach the supposed equity of the case, by making a more just and equal distribution of the assets between the different classes of creditors, and to prevent the separate creditors from creating out of worthless assets a small fund for the sole purpose of preventing the joint creditors from sharing with them the separate assets. But after all, is not this supposed equity more apparent than real? Each class of creditors originally trusted to different funds and *different* responsibilities, one to the social and one to the separate responsibility. The general equity would, therefore, seem in all cases to confine each class of creditors to that fund to which they primarily trusted, unless in a case where there had been a fraudulent or improper abstraction from one estate for the purpose of increasing the other. And this is the general rule, not only in bankruptcy, but in gen-

eral equity. Each class of creditors has a right of prior payment out of the estate to which he is supposed to have given credit, and the other class can only go against the surplus. If a creditor of one partner attaches partnership property, his attachment only holds the right or interest which the parties shall be found to have in the property after an account is taken and the joint creditors are paid. *Kent's Com.* 64–5, *Note c. 5th edition. Story's Partnership*, § 363. The equity of each class of creditors against their proper fund, certainly seems to be stronger than that of the other class who never could have looked to it for their security, except so far as there might be a surplus after discharging its own proper liabilities.

The general rule therefore has its foundation in natural equity, and it is established by the law. The law itself makes no exception. Now, admitting the case of there being no joint estate to be a *casus omissus*, not contemplated and therefore not within the purview of the law, it certainly covers all cases where there is a joint fund, without inquiring into its origin. And it is a rule in the construction of statutes, that when the statute covers the whole case in all its circumstances, and makes no exceptions, none can be made by the Court.

My opinion, on the whole, is, that the proof cannot be admitted against the separate estate, in competition with the separate creditors.

NOAH BURNHAM VERSUS EBENEZER WEBSTER.

A replication which alleges two distinct and independent facts, either of which is a complete answer to the plea, is double, and is bad on special demurrer.

A former judgment is not pleaded with a profert, but a profert is tendered in reply to the plea or replication of nul tiel record.

A plea of a foreign judgment must contain an allegation that the Court had jurisdiction, or so much of the proceedings must be spread on the record as will show affirmatively that the Court had jurisdiction.

A foreign judgment is not considered as a record and a plea to such judgment of nul tiel record is bad. The opposite party may treat the plea as a nullity and take judgment.

June 2, 1845. This was an action of assumpsit on a promissory note of one thousand dollars. The defendant pleaded the general issue, and, for a second plea, a former judgment of the Supreme Court of New Brunswick, in favor of the defendant. Issue was joined by the plaintiff on the first plea, and to the second he replied that the Supreme Court of New Brunswick was a foreign Court and had no jurisdiction of the subject matter of this suit at the time when the judgment was rendered, and that the note set forth in the declaration was withdrawn from said Court by consent of the parties and by leave of the Court before the verdict and judgment.

To this replication the defendant demurred specially, and assigned for causes of demurrer that the replication was double and argumentative, and the plaintiff joined the demurrer.

Sheplcy, for the plaintiff; *Rand*, for the defendant.

WARE, *District Judge.*

By the rules of pleading there can be but one replication to one plea. The defendant may indeed put into the cause

several pleas, but each plea is distinct and must be single; it must contain but one matter of defence, that is, it must not contain two or more facts or points, each of which would be an answer or defence to the action. The replication in like manner must be single, and confined to a single answer, and if it contains more than one, each of which would be a full answer to the plea, it will be held on demurrer bad for duplicity, for it must tender a single issue.

Tried by this test can this replication stand? It alleges in the first place that the Court had no jurisdiction of the subject matter of this suit. This, alone, is a complete answer to the plea on which the defendant might take issue, and if found for the plaintiff that the Court had not jurisdiction there is an end of the defence set up by the plea. For if the Court had no jurisdiction the judgment would be considered as a nullity, and not in any way affecting the rights of the parties.

In the second place, the replication alleges that the note now declared on was, by consent of parties and leave of Court, withdrawn from the case before the verdict and judgment. This allegation admits the jurisdiction of the Court over the parties and the subject matter at the time when the action was commenced, and then shews that it was withdrawn from the jurisdiction by the leave of the Court and consent of the parties, so that no adjudication was in fact had on the note. This is also by itself, and independent of any other matter, a complete answer to the plea, on which the defendant in a rejoinder might take issue. If the defendant had rejoined instead of demurring, the rejoinder must, to answer the replication, have been double and presented two distinct and independent issues.

It is contended in favor of the replication that it is not double, because it presents but a single point, and that is that the judgment is not conclusive. But it is obvious that a judgment may not be conclusive on the parties for more

reasons than one. But in replying to a plea the plaintiff is not allowed to put in several replications to a single plea, as a defendant may put in several pleas to a declaration. When a foreign judgment is declared on, the defendant may in different pleas allege several distinct and different reasons why it should not be conclusive on his right, as the want of jurisdiction in the Court, or fraud in obtaining the judgment, or that it is invoked to affect the rights of third persons by collusion between the parties. But when it is pleaded in defence to an action, though the plaintiff may believe that the judgment is not legally binding for several reasons, he is by the rules of pleading precluded from availing himself of more than one. He must select from his various means of defence the one on which he chooses to rely. The plaintiff having in this case included in his replication two distinct matters, either of which is a complete answer to the plea, the replication must be adjudged bad.

But then it is contended that if the replication is bad, so also is the plea, and that a bad replication is good enough for a bad plea, the general rule being that where there are successive faults in pleading we must go back to the first fault. The plea it is contended is bad for two causes. 1. It is pleaded without a profert. 2. Because the plea does not allege that the Court had jurisdiction of the parties and of the subject matter.

The first objection cannot prevail. In causes where a profert is necessary, the omission can only be taken advantage of by special demurrer, and the objection is waived by pleading over. *Chitty on Pleading*, 350, 512. And when a judgment is relied on in a declaration as a ground of action, or in a plea as a defence, it is never declared on or pleaded with a profert. (*See precedents in American Precedents, page* 347, and 2 *Chitty's Pleading*, 232, and 3 *Chitty*, 227, *for Declaration.* 2 *Chitty*, 536 and 673, *plea nul tiel record, and replication.*) The profert is made in re-

ply to the plea of *nul tiel record*, and the party then has time to produce the record. 3 *Black. Com.* 331. And further, foreign judgments are not considered by the common law as records and cannot be declared on and pleaded technically as such. In the case of *Walker* vs. *Witter*, 1 *Doug.* the plaintiff declared in debt on a judgment recovered in the Colonial Court of St. Jago de la Vega, "as by the record and proceedings thereof remaining in said Court will more fully appear," and the defendant replied *nul tiel record.* The Court said the *prout patet per recordum* was observed because the foreign judgment in the view of the common law was no record, but that it might be rejected as surplusage; but that the plea of *nul tiel record* was a nullity, and gave judgment for the plaintiff.*

The second objection involves a question of more difficulty. The plea is in the common form of a plea of domestic judgment. Whatever difference of opinion there may be as to the binding force of foreign judgments, all agree that they are not entitled to the same authority as the judgments of domestic Courts of general jurisdiction. They are but evidence of what they purport to decide, and liable to be controlled by counter evidence, and do not, like domestic judgments, import absolute verity and remain incontrovertible and conclusive until reversed; and the question of the jurisdiction of the Court over the matter which it acts upon is always an open question. As to the authority and effect of such judgments they are rather assimilated to the judgments of domestic Courts of limited and special jurisdiction. Now,

* Since the union of Ireland and Great Britain, Irish judgments are pleadable as records; but when the plea of nul tiel record is pleaded it should conclude to the country and not with a verification; because the record could not be produced in Court, and it must be by an examined copy and proved by oath, and so must go to the jury. 5 *East.* 474, *Collins* vs. *Mathew.* If it is a domestic judgment the original record is brought into Court to be inspected by the Court. *See* 11 *Ad.* and *Ell.* 179; 39 *C. R. L.* 38.

with respect to the judgments of these Courts when they are relied upon, it must always appear that the Court rightfully exercised jurisdiction. There is no presumption in favor of their authority as in the proceedings of Courts of general jurisdiction, but that must appear on the face of their proceedings, or their judgments will be held not merely voidable, but absolutely void and nullities. 9 *Wheaton*, 947–9, *Walker* vs. *Turner*. 1 *Peters*, 340–1, *Elliot* vs. *Piersol*.

Formerly it was held in pleading the judgment of an inferior Court, whether of record or not of record, that the whole proceedings must be set out out at large. Nothing was presumed in favor either of their jurisdiction or of the regularity of their proceedings. It was therefore not sufficient to allege *taliter processum fuit*, but the whole must be spread upon the record by the party relying on the judgment, that it might be seen that the Court had jurisdiction and that the proceedings were regular. *Comyn's Digest*, *Pleader E.* 18. But the rigor of the old rule has been relaxed in modern times, and it is now held not to be necessary to set out the cause of action and the whole proceedings at large, but that it is sufficient to allege that the suit was for a cause of action arising within the jurisdiction of the Court. 1 *Saunders' Rep.* 92, *Note* 2. *Story's Pleading*, 134. And the regularity of the proceedings will be presumed unless excepted to by the other party. But still it must appear that the Court had jurisdiction, either by a suitable allegation of the party relying on the judgment, or by spreading on the record so much of the proceedings that the Court may see that the inferior tribunal could rightfully take cognizance of the cause. For the Court will not presume the jurisdiction unless it is distinctly alleged or is apparent on the record.

It is indeed said by Lord Mansfield, in the case of *Rowland* vs. *Veale*, *Cowper*, 18, that the same liberality holds in pleading the judgment of an inferior Court, with regard to the jurisdiction as does with regard to the regularity of

its proceedings; that is, that it will be presumed to be rightful unless the contrary is shown; and therefore that it is unnecessary to allege that the party "became indebted within the jurisdiction." For if the cause of action did not arise within the jurisdiction, it should have been shewn to the Court below; or, if it was not alleged in the Court below, it would be bad on error or in a writ of false judgment. This however was but an *obiter dictum*, for in the case before the Court it was alleged in the plea that the cause of action came within the jurisdiction. But with the exception of this dictum the precedents and the authorities are the other way.

Foreign judgments are held to have no greater sanctity or authority than domestic judgments of inferior Courts. It must appear by the proceedings or be alleged in the plea that the Court had jurisdiction of the cause, for the Court will not presume, nor can it be contended that it is a presumption of law, that a foreign Court has jurisdiction over parties who are inhabitants and residents of this country. Now it is not alleged in the plea nor is there any thing spread on the record which shews that the foreign Court had jurisdiction over the parties or the cause in this case. It appears to me, therefore, that the plea is bad not in form merely, which might be covered by pleading over, but in substance.

The only question of doubt, as it appears to me, that can arise is whether it lies in the mouth of the plaintiff to say that a Court to which he had himself voluntarily appealed, and whose authority he had invoked, had no jurisdiction to determine the matter, and that its proceedings might be treated as a nullity. If the question stood entirely clear of authority, it is one on which I should feel inclined to pause.

It seems to me to be repugnant to the first principles of social order and civil justice, that a party should be allowed

to deny the competence of a tribunal of his own choosing, and to whose authority he had compelled the other party to submit. If he may, I do not see but that he may harass the adverse party with a new suit in every new jurisdiction where he may be found, without prejudice from prior judgments which may have been rendered against him by other Courts. But the language of the authorities does not appear to indicate any distinction of the kind, or that a foreign judgment is binding any further on the party bringing the suit than on the party defendant.

JOHN R. SHEPLEY VERSUS JAMES RANGELY.

In a suit in equity for a perpetual injunction, it appeared that the plaintiff claimed title under a deed from John Spring, dated April 14, 1832. The defendant, under a levy on an execution of July 9, 1839, traced back his title to a mortgage of Spring, of January, 1830. Neither party was in possession of the land, but Spring was in possession, holding adversely to both.

Held, that if this was to be considered as in the nature of a bill *quia timet* it could not be supported until the title was determined by a suit at law.

A Court of Equity has jurisdiction in such cases, to decide on facts without the intervention of a jury, but will not usually do so when the evidence is contradictory or inconclusive.

This was more properly in the nature of a bill of peace. To maintain such a bill when the interest of the plaintiff is present, and not future, as in remainder or reversion, and he has a present right to the possession, three things must concur. 1. He must have the actual possession. 2. That possession must be disturbed. 3. His right must have been previously established at law.

Where a party cannot bring his title to an immediate judicial examination because his interest is future, as in remainder, or because he is in possession, the only bill which can be maintained, is a bill to perpetuate the testimony.

A Court of Equity will not entertain a bill, under the pretext of quieting the possession, to determine the rights of parties where there has been no suit at law to try the title.

October Term, 1845. The facts of this case as they appear in the pleadings and evidence, are shortly as follows. John Spring and Olive, his wife, on the 4th of January, 1830, mortgaged the land in controversy, together with other real estate, lying in the town of Saco, to the Saco Bank, to secure the payment of a note of $6000. Spring, April 14, 1832, conveyed, by a quit-claim deed, to Ether Shepley, the eqity of redemption of certain lands mortgaged to Sarah Parkman, and by the same deed conveyed this land now in controversy, which was included in the mortgage to the bank, for the consideration of $1000. On the 9th of May, or of June, 1833, (for the evidence leaves it uncertain which,) the bank by their attorney, Ether Shepley, the plaintiff's grantee, entered on the land for condition broken, and on the 9th of June, 1836, three years having elapsed, the mortgage, as contended for the defendant, became foreclosed, and the title of the bank absolute. On the 13th of September, 1833, the bank conveyed all its estate and effects to trustees to sell and dispose of, for the purpose of winding up the business of the bank and dividing its effects among the stockholders. On the day when the time of redemption expired, that is, on the 9th of May or June, 1836, Spring offered in payment of the debt, the check of Webster, payable at a future day, but the trustees refused to receive it as payment, and it was left with them as collateral security for the debt, and the following day Spring assigned to them a policy of insurance on his house, which was included in the mortgage as further security. On the 13th of July, 1836, one month or more after the foreclosure of the mortgage, on the payment of the full sum due to the bank, the trustees, at the request of Spring and his wife, by a deed of quit-claim conveyed the land to Webster; the money, to the amount of $5000, having been advanced by him; and the balance, $200, was paid by Spring. The deed recites, that entry had been made to foreclose the mortgage, and that the right of redemption had

expired, and that Webster having, at the request of Spring, paid the amount that would have been due on the mortgage, the conveyance was made at the request of Spring and his wife, to Webster, and was intended to discharge all the title acquired by the bank. The deed was drawn by the plaintiff's grantor, and the acknowledgment taken by him. Webster, as is alleged in the bill and not denied in the answer, conveyed the land by deed, April 12, 1832, to Daniel Burnham; but the defendant alleges, that before that time, he attached the land as the property of Webster in a suit against Webster and Burnham, and prosecuted his suit to judgment, on which execution was issued in June, 1832, and within thirty days after the rendition of the judgment levied on the land. On the 5th of April, 1843, Ether Shepley conveyed his title by a deed of gift to the plaintiff, and he claimed to hold the land under Spring's deed to his grantor, of April 12, 1832. The defendant claimed title under his levy, tracing it back to the mortgage to the bank, of January 4th, 1830.

The prayer of the bill was, that the land may be declared to stand redeemed from the mortgage, that the levy of Rangely may be declared to be inoperative and void, and that the defendant be required to release his title to the plaintiff, and be perpetually enjoined from setting it up against the plaintiff.

G. F. Shepley, for the plaintiff; *C. S. & E. H. Daveis* for the defendant.

WARE, *District Judge.*

I have not thought it necessary to examine all the questions which arise out of this record, and which have been so elaborately and learnedly argued at the bar, because, from the view I have taken of it, the decision of the cause must turn on the single question of the jurisdiction of the Court. The bill seeks to draw into equity, questions which seem to me

properly belong to the forum of law. The plaintiff claims title under a deed to his grantor, Ether Shepley, of John Spring, dated April 14, 1832, and the defendant under a levy of an execution in his favor of July 9, 1839, against Webster and Burnham, and traces back his title through Webster and the bank to the mortgage of Spring and his wife, of January 4, 1830. The titles of both parties are strictly legal, nor do I see that they are affected by any equities that should withdraw them from the cognizance of a Court of law to the jurisdiction of equity. There is nothing in them that I see, which will prevent a Court of law from doing complete justice between the parties. In truth, the bill does not suggest nor rely on any thing of the kind, or at least on any thing that should give jurisdiction to equity until the title of the plaintiff is established at law.

The bill sets out the title claimed by the defendant, and alleges that nothing passed by the levy, inasmuch as there was no foreclosure under the mortgage; first, because there was no valid entry to foreclose the three-acre lot in controversy; secondly, because the mortgage was discharged by the payment of the debt. Then, as a ground of giving the Court jurisdiction, it is contended that this outstanding claim of superior title by the defendant, may hang as a cloud over that of the plaintiff, and that he is entitled, in equity, to have that removed, that is, to have the pretended title of the defendant declared void, and to have a perpetual injunction against his ever setting it up in a Court of law in opposition to that of the plaintiff. The bill may, therefore, be considered as in the nature of a bill *quia timet* and bearing an analogy to that class of bills which are brought to have void instruments delivered up and cancelled. 2 *Story's Equity*, § 694, 698. In these cases the old practice of the Court was, when the validity of the instrument was in controversy, to direct a trial by jury, to ascertain the fact. But, as the Court has jurisdiction to determine matters of fact without the intervention of a jury, latterly the more convenient and less

expensive course, in some cases, is adopted for the Court to determine the fact itself. 5 *Johns. Ch.* 118, *Smith* vs. *Carll.* 2 *Ves. Jr.* 484, *Newman* vs. *Millner.* 7 *Ves.* 413, *Jervis* vs. *White.* Still it is the present practice of the Court when the facts are doubtful and the evidence contradictory and not entirely conclusive, to take the opinion of a jury. 2 *Story's Equity*, § 702.

The validity of the defendant's title, which the plaintiff asks the Court to declare void and restrain him from setting up at law, depends on questions partly of fact and partly of law. It is founded on a levy on the land as the property of Webster, who derived his title under a deed from the trustees of the bank. It is not disputed that the legal estate was transferred by the bank to the trustees, and that the deed of the trustees was sufficient to convey whatever legal interest was vested in them at the time of the conveyance. If any interest was transferred, and that was such an interest as could be taken in execution, then it is not denied that the levy was good to pass that to the defendant. The questions then which arise and have been argued at the bar are, whether any and, if any, what estate passed to Webster. The argument of the plaintiff is, first, that the deed was entirely inoperative and nothing passed; or secondly, if anything passed, it was only an estate in mortgage. The argument of the defendant is, that an estate in fee passed.

In the first place, was the deed wholly inoperative? If so, it must be because the title of the trustees was extinguished before the conveyance by a payment of the debt. The debt was paid on the 12th of July, 1836, and the deed to Webster bears date, July 13th, the day following. If it be admitted that the mortgage title was extinguished by the payment of the debt, and that no re-conveyance was necessary to revest the title in Spring, the mortgagor, (3 *Mason*, 520, *Gray* vs. *Jenks*,) it is still true that it is the payment of the debt that has the operation to revest the title in a mortgagor. Now the money was advanced by Webster, and the conveyance was

made to him by the direction of Spring. The payment was the consideration of the deed, and in order to carry into effect the manifest intent of the parties, both must be considered as parts of one transaction, and the deed as operating from the time of the payment. If the deed bears a later date, so as to give time for the estate to revest in Spring before the execution of a deed, and thus defeat its operation, the day of the date must be considered as a mistake, otherwise it will operate as a fraud on Webster. Indeed King in his deposition, who fixes the day of the payment, says that it was the 12th of July, the day when the deed was executed. There is, therefore, no doubt either that King is mistaken in the day of the payment, or that there is a mistake in the date of the deed. The deed must therefore be considered as having an operation to convey whatever title was vested in the trustees.

What then was the title that was transferred? The plaintiff's argument is that, if anything, it was only a title in mortgage, at least as to this lot: because there was no valid entry to foreclose the lot in question. If the deed operated merely as an assignment of the mortgage, then Webster, as mortgagee, had no interest in the land which could be taken on execution, and of course the defendant took nothing in this lot by the levy, however it might be with respect to the other lands set off. 16 *Mass. Rep.* 345, *Blanchard* vs. *Colburn et al.* 3 *Pick.* 484, *Eaton* vs. *Whiting*. The entry of the bank was into the mansion house only, and the land in controversy is a separate lot, not adjoining the one on which the entry was made. Whether the entry was sufficient to operate on this lot, the facts being admitted, is a question of law, and if the case is properly before the Court, it may as well decide the question sitting in equity as it may sitting as a Court of law, and, in my opinion, it was sufficient. It was open and peaceable, and the only objection is, that a special entry was not made on this lot. But it is well settled law, that where a party having title enters on one parcel in

the name of all lying within the same county, it is a valid entry to give him seizin of the whole, unless there are several tenants in possession claiming a freehold in several parcels. *Litt.* § 417. *Co. Litt.* 252, *b.* 8 *Cranch*, 250, *Green vs. Liter.* This lot, though not adjoining the mansion house, was in the same town and in the possession of Spring. If the entry then was good to foreclose the mansion house, it was good to foreclose the mortgage of this lot.

The entry on the land was made either on the 9th of May, or on the 9th of June, 1833, and the time of redemption expired as early, therefore, as the 9th of June, 1836. The title of the trustees then became a fee unless there was a waiver of their rights. It is said that if there was a foreclosure, the the forfeiture was waived and the title brought back to a mortgage, by the trustees receiving, after the time for redemption had expired, other collateral securities for the debt. The argument proceeds on this ground, that as the foreclosure was by entry in the presence of witnesses, that is by matter *in pais*, it may be waived by matter *in pais* and the absolute title cut down to a mortgage, and that the trustees, by receiv- additional securities for the debt after the foreclosure, virtually admitted and acknowledged their title to be a mortgage. Now if it be admitted that these securities might be received under such circumstances as would amount to a waiver of the forfeiture, and give the mortgagor further time to redeem, I think it difficult to be maintained that they might not have been deposited with the trustees under such circumstances and on such terms as would not amount to a waiver of the forfeiture; and King, who transacted the business. says in his deposition that he did not intend to do anything that would prejudice the rights of the trustees under the foreclosure. Taking then the case as it is put by the plaintiff's counsel, as this is a question of legal title depending on matters *in pais*, and to be determined on the weight and effect of evidence, if the evidence is not quite clear, it is precisely such a case as a Court of Equity is in the habit of sending

to a jury. But without going into an examination of the evidence at large, it may be safely said that it is far from being clear and free from doubt in favor of the plaintiff, and therefore I think the defendant has a right to have his title submitted to a jury. If this bill then is to be considered as in the nature of a bill *quia timet*, and to be governed by the analogy of bills brought for the delivery up and cancellation of void instruments, my opinion is, that the defendant's title ought to be ascertained to be void, by a trial at law and the verdict of a jury, before a Court of Equity is called upon to enjoin him from setting it up.

But this suit appears to me to come more properly within the analogy of one species of another class of bills, technically called bills of peace. Of these bills, there are two species, one where a party is in possession of a right, which may be successively controverted by many persons, as a parson's claim of tithes, or a person claiming an exclusive right to a fishery, or claiming tolls. He may in a single bill, by making a sufficient number of persons parties who claim adversely, have his right established against the whole. 2 *Story's Equity*, § 854. Another case is, where a person is in possession of lands and his possession is disturbed by another claiming title; he may in some circumstances maintain a bill, against the party that disturbs him, for the purpose of quieting his possession, and to enable him to have that undisturbed enjoyment to which in conscience and right he is entitled. The relief granted in such a case, is that which is prayed by the present bill.

But to maintain a bill of this kind, three circumstances must concur. The plaintiff must have the possession; that possession must have been disturbed; and his right must have been previously established at law. It is not enough that he may fear that his possession may be disturbed, or that his right may be controverted or brought into litigation. This doctrine is clearly stated by Lord Redesdale, in the case of *Devonsher* vs. *Newenham*, 2 *Sch. & Lefroy*, 208. When-

ever a person, he says, claims title against another, who is in possession and his enjoyment disturbed, a suit may be entertained by the latter, for the purpose of quieting the possession, and he illustrates this doctrine by the case where several ejectment suits have been successively tried. In such cases, after the title has been sufficiently established at law, a bill of peace will be sustained and a perpetual injunction granted, to put an end to vexatious litigation. But he adds, "when the question is merely, whether A or B is entitled to to the property, and there has been no actual suit between them, there has been no instance where such a suit has been entertained." He refers to the case of *Welby* vs. *The Duke of Rutland*, 6 *Bro. Parl. Cases*, 575, as precisely in point, to show that a mere adverse claim, and that asserted by an act which does not disturb the possession and actual enjoyment of the party, is not a sufficient foundation for a bill, simply because it may at some future time bring a cloud over the plaintiff's title. In that case, Welby, the plaintiff, claimed a manor, of which he had the possession, and the Duke of Rutland, the defendant, also claimed title to it, and appointed a game-keeper. It was said in answer to the bill, that if Welby was disturbed in his possession, he might bring an action and have his title established at law, and when that was settled have an injunction. But there must first be such a disturbance as would support an action, and then the title ascertained at law. The naked assertion of a title, or the doing an act in support of that assertion, which did not interfere with the plaintiff's possession and enjoyment of the property, would not authorize a Court of Equity to inquire into the foundation of the title and enjoin a party claiming adversely from prosecuting his rights at law.

The case of *Welby* vs. *The Duke of Rutland*, is precisely parallel to the case at bar, with this distinction against th present bill, that this plaintiff has not, and never has had th possession. Spring, a third person, has the possession, r

ding under either of the parties to this suit, but so far as ɔears from the record, adversely to both. Both parties al- set up titles, by which, if they have any rights, they have ıinst him a right to the immediate possession. The object this bill is to obtain a decree, not to quiet and protect the intiff's possession, nor to establish his own title against a nber of persons who might in separate suits controvert it, t to have the defendant's title declared void as against him. is in fact to have the Court decide, which of these two par- , each having color of title, has the better right, when, any which the Court can say in this suit, a third party, o has the actual possession, may have a title paramount to h. The defendant might, with just as good cause, file a against the plaintiff, and with precisely the same reason : the same relief against him. He might allege that the d of 1832, threw a cloud over his title, and ask the urt to declare that deed void and inoperative to affect his hts, and that he might be enjoined from setting it up. To tain a bill under such circumstances would, I apprehend, a perfect novelty in jurisprudence. If the plaintiff were actual possession of the land, and the defendant threatened listurb him by setting up a paramount title, this bill could be maintained, unless his possession and enjoyment had n actually disturbed, and his title established by a suit at r. The only bill which the plaintiff would then be enti- l to, would be a bill not to establish his title, but to per- uate the testimony, if there were danger of its being lost. t even such a bill he could not maintain, without first ob- ıing the possession. Then, being in possession and not ring the power to bring a suit at law to have the right ermined, if his title was denied and he was in danger having it litigated at a future time, when his proof ght be lost by the deaths of witnesses, he would be enti- l to a bill to perpetuate the testimony. 2 *Story's Equity*, 02. 1 *Simons & Stuart*, 83, *Angel* vs. *Angel*. 6 *Vesey*, , *Lord Dursley* vs. *Berkley*, in which all the cases on

perpetuating testimony are critically examined. 7 *Vesey*, 413, *Jervis* vs. *White*. My opinion is, that the bill must be dismissed with costs for the defendant.

WILLIAM FERSON VERSUS ZEBULON SANGER ET ALS.

In a suit in Equity by the purchaser, for fraud in the sale of a chattel, charging that the purchase was made by A for and as the agent of B, the deposition of A, taken to prove the fraud, cannot be used, if it appear that A was jointly interested in the purchase.

The prayer of the bill being, that the purchaser should take up and pay certain notes given by A and B jointly for the purchase money which were in the hands of an endorsee, a covenant, by the endorsee to A, not to sue him on the notes, will not render him a competent witness, for he would be liable over to the endorser on his taking up the notes.

Courts of Equity will not entertain jurisdiction of a suit for damages arising out of fraud, where damages are the sole object of the bill, for the remedy is complete at law.

But where other relief is sought by the bill which can be had only in Equity, and damages are claimed as incidental to this relief, Equity, having properly possession of the cause for relief that is purely equitable, to prevent multiplicity of suits, will proceed to determine the whole cause.

Whether it will entertain jurisdiction in such a case, and award damages on the ground only that discovery is sought and obtained—Quære.

The statute of limitations does not, in its terms, apply to Courts of Equity, but lapse of time, independent of the statute, is often a bar in Equity.

In cases that are within the statute, Equity ordinarily follows the law, and will hold the statute to be a bar to equitable relief, when it is a bar at law.

But in cases of concurrent jurisdiction, as of fraud, Equity sometimes goes beyond the law, and holds lapse of time a bar to equitable relief, when the prescription is not fully acquired at law.

In cases of concurrent jurisdiction, if a party sleeps on his rights until the progress of events and change of circumstances have put it out of the power of the Court to do equal justice between the parties

which, as a Court of conscience, it is bound to do, it will remain passive, and leave the party to his legal remedy.

Where Equity is not bound *ex debito justitiæ* to act on the case, the Court will not interpose with its extraordinary powers, unless the party comes in such time as leaves to it the power of fairly adjusting all the material equities involved in the case, in such a manner that, while justice is done to one party, injustice will not be done to the other.

In such cases the Court does not act on the right, but leaves the parties as it found them, to pursue their remedies at law.

October Term, 1845. On the 15th of July, 1835, Baker and Lindsey, being the owners of ⅞ of township No. 2, 5th range in Oxford county, called the Alder Stream tract, gave a bond to the defendants to convey to them the land, at the rate of six dollars per acre, the defendants paying $1000 on the execution of the bond, which, if the purchase was made, was to be in part payment for the land, and if not made, was to be forfeited. With this contract, Sanger and Richardson, two of the defendants, went to Boston, and there met John Webber, and on the 24th of July, sold and assigned their interest in the bond and rights under it to Webber, for the sum of $3000, of which $1000 were to be in part payment of the land if Webber should elect to purchase, and $2000 a bonus to the defendants for their right of pre-emption. At the time of the assignment, there was exhibited to Webber and Ferson, who were present at the making of the bargain, a certificate of Charles Stackpole, one of the defendants, dated July 16, 1835, at Waterville, stating that he had explored the township, and that there was on the land, "at least 3000 feet of good pine timber to the acre on an average, besides a large quantity of spruce," and another certificate of Eben. T. Bacon, one of the selectmen, and Nathaniel Crommet, Treasurer of the town of Waterville, stating that Stackpole had "the reputation of being a good judge of timber lands." Three other certificates were also exhibited of Berry, Deering, and Homans, dated at Boston, July 24th, the day of the assignment of the bond, each certifying that they had

explored the land, and that there was 10,000 or more of pine timber, and 3000 of spruce to the acre. After the assignment of the bond, Webber went to Waterville, took Stackpole with him, and went to view the land about the first of August. Webber states in his deposition, that an injury which he received when he first went on the land, prevented him from exploring it himself. But Stackpole made further exploration, and in another certificate, dated August 5th, confirms the first he gave, and says that he saw additional timber that he had not seen before. While Webber was on this exploration, he procured certificates from a number of other persons as to the value of the land, which were exhibited to Ferson on his return. Webber states in his deposition, that he obtained these certificates through Stackpole, who represented that the persons were acquainted with the land, and also went with him to their houses, he, Webber, not knowing them personally. On the 11th of August Webber notified Baker and Lindsey of his election to complete the purchase and take the land. On the 24th of August, the day on which the bond expired, Baker and Lindsey extended the time for one day to the 25th. On the 24th of August, probably a mistake for the 25th, Baker and Lindsey conveyed the land to Ferson, the plaintiff, by the direction of Webber, and on the 25th, Ferson re-conveyed the land to Baker and Lindsey in mortgage, to secure the payment of the purchase money unpaid, being $\$45{,}965\frac{25}{100}$, and executed a bond to pay certain notes of Baker and Lindsey. This mortgage was afterwards assigned to Martin Gore, June 1st, 1837. Ferson, by deed, gave quiet possession of the land to Gore, for breach of the condition, and the condition remaining unperformed, the mortgage became foreclosed, June 1st, 1840, and the title perfect in Gore. The bill was filed May 10th, 1841. The relief prayed in the bill was, that the defendants might "be compelled to pay to your orator all sums of money, with interest, which he has paid, on receiving a deed of release from your orator of his right

and title to said lands," and to pay and take up the notes given by the plaintiff, with Webber, which remain unpaid.

S. Fessenden, for the plaintiffs; *C. S. & E. H. Daveis*, for the defendants.

WARE, *District Judge.*

This is in substance a Bill in Equity seeking damages for an alleged fraud and misrepresentation, in the sale and assignment of the right of pre-emption of certain lands in this State. A preliminary question is presented, and was discussed at the argument, as to the admissibility of Webber as a witness in the cause. His deposition was taken, subject to the objection made when the interrogatories were filed. These are, first, that he was a party to the contract and ought to have been a party to the bill; and secondly, if not a necessary party, that he has an interest in the cause.

The contract was in fact made by Webber in his own name. He appeared not only as a principal, but as the sole contracting party. He made the purchase, and the assignment of the bond was made to him. He held himself out as the purchaser, and was certainly considered by the defendants as a principal in the contract, if not the sole purchaser. And he continued to act as a principal, if not the sole party in interest, in the purchase. He undertook a journey to explore and examine the land, and after going on the land and satisfying himself as to its value, gave notice to Baker and Lindsey of his election to purchase the land in his own name, and obtained from them an extension of the time allowed by the bond to complete the purchase, though, when the transfer was made, it was by his direction made to Ferson. But he joined with Ferson in giving the notes for the purchase money. In his deposition he says that he signed the notes as surety, but this does not appear by the notes themselves. He appears therefore, from the beginning to the end, as a principal in the contract. Indeed the only circumstance, which could lead the defendants to a suspicion

that Ferson had any interest in the contract, is the fact that he assisted Webber in raising the money to pay the price of the bond. It is true that Ferson wrote the assignment, and was present when the contract was made, but he does not appear to have taken any active part in it, but it seems to have been made entirely by Webber. Ferson put his name to the assignment as an attesting witness. It is stated in the bill that Webber made the contract as the agent of Ferson, but the defendants were not notified of it at the time, and, from the fact that he signed the contract as a witness, they had certainly a right to infer the contrary, and that, if he was to have any interest in the contract, it was to come through Webber. Further, it appears to me to be a plain if not a necessary inference, from the whole evidence in the case, that Webber was not only directly interested in the purchase of the bond, but also in the purchase of the land. In his own deposition he admits that he contemplated taking an interest in the land to the amount of one-ninth, and in the letters which he wrote to Baker and Lindsey after the purchase of the land, he writes precisely as he would have done if he had an interest in it. In a letter of June 16th, 1838, signed by him and Ferson jointly, relative to the payment of the outstanding notes, they speak of their interest as joint. "We are determined," they say, "*having the land to offer as security*, to make a desperate effort," &c. The natural if not the necessary interpretation of such language is that the land was owned by them jointly. In all Ferson's letters he speaks, in the plural number, of others being interested with him, though he names no individual. Baker, in his deposition, says that he understood that others were interested, to the number of seven in all, including Ferson and Webber. In truth, Ferson's letters distinctly show the fact that the land was bought on speculation, not with an intention of holding it, but to sell again at an advanced price. In his letter of May 9th, 1837, he says, "we did not intend to keep it, but bought with the design of selling it;"

and again, "we have used every exertion to sell, from the moment of the lands being purchased," and, May 24th, referring to the letter of the 9th, he says, "it was adopted by a deliberate consultation of my associates." Now it seems to me impossible to doubt, on the evidence in this record, that Webber was one of these associates, and that he was interested as a principal party in the contract with the defendants, in the purchase of the bond, as well as in the subsequent purchase of the land. The bond was assigned to Webber, but the legal title in the land was conveyed to Ferson, but in both cases, in trust for other parties who were jointly interested in the speculation.

If so, then undoubtedly Webber is a proper if not a necessary party to the bill. It is not necessary in this case to inquire whether the bill is demurrable for the omission, but certainly one of the joint contractors cannot, by the omission of his name as a party plaintiff in the bill, be rendered competent as a witness, for he would be a witness in his own cause. On this ground I think Webber inadmissable as a witness.

Again, the deposition of Webber is objected to on the ground of interest. A part of the prayer of the bill is, that the defendants may be compelled to pay and deliver to the plaintiff the unpaid notes, given by Ferson and Webber to Baker and Lindsey to secure the payment of the price of the land. These notes are in the possession of Martin Gore, and, in an instrument executed by him, he covenants not to sue Webber on the notes; and there is another by Ferson, which may be construed *perhaps* to release him from his eventual liability on the notes, should they be paid by Ferson. But these notes have been endorsed, and Gore does not release the endorsers. If he calls on them and they pay the notes, they will have their remedy over against Webber. The covenants of Gore do not, therefore, release him from his ultimate liability on the notes, and of course he has a direct interest in having them delivered up and cancelled.

On this ground also, my opinion is that the deposition of Webber is inadmissible.

Without the testimony of Webber, it is quite clear that this bill cannot be maintained, for he is the only witness to prove the fraud. But waiving this question, and considering the testimony of Webber as in the case and entitled to full credit, how will the case then stand? Suppose the contract to have been made, as charged in the bill, with Ferson, through Webber as his agent, it was a contract for the right and interest which the defendants had in the bond, and that only. The bond of Baker and Lindsey conveyed no interest in the land, not even in Equity. It merely gave a right of pre-emption, and that to be exercised within thirty days from its date. It gave a mere right of action, by complying with the terms of the condition, of compelling the party, by a Bill in Equity, to a specific performance of the contract, or a right to damages at law for the non-performance. All that the assignment transferred was a right to perform the condition, and thus acquire a title to the land, or a claim for damages.

But the time limited for performing the condition is expired. This is not therefore a case in which the Court can rescind the contract, and re-place the parties in the condition in which they were before the contract was made. If the contract is rescinded, the right of pre-emption, which was the object of the contract, is gone. The thing sold is extinct, and has ceased to exist. All the relief, which the Court can give, is damages for the alleged fraud, and this is substantially the prayer of the bill.

This suit must, therefore, be considered as properly a bill to recover damages for a fraud in the sale and assignment of the contract. It cannot be for a fraud in the sale of the land, because the defendants never had any interest in the land which they could sell. The right to purchase the land was what was bought of the defendants, and the land itself was afterwards purchased of Baker and Lindsey. For this fraud,

if there was one, there is a perfect remedy at law. Will a Bill in Equity lie for damages only, arising out of fraud in a contract where no other relief can be given?

It is undoubtedly true, that Equity has a general jurisdiction over matters of fraud. Fraud, accident, and trust constitute the ancient and broad foundation of its powers. *Com. Dig. Chancery C.* 2. 1 *Black. Com.* 92. 3 *ib.* 431. 1 *Story's Equity*, 59. Lord Hardwicke, in the case of *Chesterfield* v. *Jansen*, 2 *Vesey, sen.* 155, said that Equity had an undoubted jurisdiction to relieve in all cases of fraud, affirming the jurisdiction without any limitation. There is however at least one admitted exception to the universality of this proposition; it is, that Equity has not jurisdiction to relieve against fraud in obtaining a will, and in *Cooper's Equity*, p. 125, this is said to be the only case in which relief against fraud cannot be had in Equity. The jurisdiction is affirmed in terms nearly as strong in 1 *Story's Equity* § 184. With the exception that has been mentioned, it is stated that Courts of Equity may be said to possess a general, and *perhaps a universal* concurrent jurisdiction with Courts of law in cases of fraud cognizable at law. Lord Eldon, in the case of *Evans* vs. *Bicknell*, 6 *Ves.* 190, appears to have affirmed the jurisdiction of the Court in terms quite as large and unqualified. That was a suit in Equity for damages, a personal demand against the defendant; and he held that, provided an action might be maintained at law, relief could be had in Equity. He remarked that it is an old head of Equity, that if a party makes a representation to another person going to deal in a matter of interest on the faith of that representation, if the party who makes the representation knows it to be false, he shall make it good; and the rule equally holds, as it seems, that if he does not know whether it be true or false, if he affirms it to be true, he shall be responsible for its truth. 1 *Story's Equity*, § 193. And the doctrine of Lord Eldon, in this case, appears to have been fully concurred in by Chancellor Kent. *Bacon* vs. *Bronson*, 7 *Johns. Ch.* 201.

These are certainly very grave authorities, and they assert the jurisdiction in terms exceedingly broad and comprehensive. And yet, notwithstanding this array of imposing authority, it seems that practically the jurisdiction is not maintained to the whole extent that is apparently claimed by them. The right to relief in equity, for fraud in the sale of personal chattels, seems to be distinctly denied by Chief Baron Alexander, in the case of *Newham* vs. *May*, 13 *Price R.* 752. "It is not," says he, "in every case of fraud that relief is to be administered in equity. In the case, for instance, of a fraudulent warranty on the sale of a horse, or any fraud in the sale of a chattel, no one, I apprehend, ever thought of filing a Bill in Equity." And the general terms, in which the jurisdiction is claimed in the passage in Story's Equity before cited, it seems, must be received with considerable qualification in practice; for in a note to that section, it is said that Courts of Equity will not *ordinarily* give relief in cases of warranties, misrepresentations, and frauds in the sale of personal property. And in the second volume, in the chapter on compensation and damage, § 794—6, the jurisdiction of the Court is stated in terms much more limited It is there laid down as a general proposition, that Courts of Equity will not entertain jurisdiction over breaches of contract and other wrongs and injuries, that are cognizable at law, to give compensation or damages where these are the sole objects of the bill, but only as incidental to other relief, which is sought by the bill and may be granted by the Court. For whenever the bill goes merely for damages, the remedy is perfect at law, and it is more proper that the damages should be ascertained by the jury than by the conscience of the judge. And it appears to me that Lord Eldon, in the case of *Todd* vs. *Gee*, 17 *Ves.* 278—9, had materially modified the opinion expressed in the case of *Evans* vs. *Bicknell*. The bill, in that case, prayed the specific performance of a contract, and if the defendant was unable to perform it, which was the fact, then for compensation or

damages for the non-performance. Lord Eldon said, that the Court ought not, in a bill for specific performance, except under very special circumstances, to direct an issue or a reference to a master to ascertain the damages. That, he emphatically added, is purely law, and had no resemblance to compensation given out of the purchase money, where a party is unable completely to fulfil his contract. 2 *Story's Equity*, § 796. Though in the former case he seems strongly to hold that, in fraud, a bill may be maintained whenever an action will lie at law. This doctrine of Lord Eldon, is deliberately affirmed by Chancellor Kent, in *Kempshall* vs. *Stone*, 5 *Johns. Ch.* 195, and is sanctioned in many other cases. *Clinan* vs. *Cooke*, 1 *Sch. & Lefr.* 22. *Greenaway* vs. *Adams*, 12 *Ves.* 401. *Russell* vs. *Clarke*, 7 *Cranch*, 87. It is very pointedly asserted by the Court of Kentucky, in *Hardwicke* vs. *Forbes*, 1 *Bibb R.* 212, (quoted 1 *Story's Equity*, § 184, note.) On a review of all the cases, the rule practically established seems to be, that a Court of Equity will not take jurisdiction of a suit for damages, when that is the sole object of the bill, and when no other relief can be given. The reason is, that in such a case the remedy is as complete and perfect at law as it is in Equity. The same evidence will support the claim in both Courts, and the assessing of damages is a subject more proper for the jury than for the Court. But when other relief is sought by the bill, which a Court of Equity is alone competent to grant, and damages are claimed as incidental to relief which cannot be obtained at law, then the Court, being properly in possession of the cause for the purpose of relief purely equitable, will, to prevent multiplicity of suits, proceed to determine the whole cause.

Whether, in a case of damages for fraud, where a discovery is sought and obtained, the Court will proceed to ascertain the damages on that ground alone, by directing an issue to the jury, or a reference to a master, has not

perhaps been distinctly settled. The general doctrine, which is said to be pretty well established in this country, is that where the Court has jurisdiction for discovery, and it is obtained, it will proceed to give relief, although the remedy at law is complete. 1 *Story's Equity*, § 71. It would seem to follow, that in such a case, where the Court has an undoubted jurisdiction to compel a discovery, after it was obtained, that the Court would, in its own way, proceed to ascertain the damages and give the relief. This seems to be a regular and necessary inference from the general doctrine. And yet it is said by a great master of Equity jurisprudence that there is strong reason for declining the jurisdiction, as damages ought to be ascertained by a jury, and such cases belong appropriately to Courts of law. 1 *Story's Equity*, § 72. But however this may be, it is clear that jurisdiction does not attach when the discovery is not obtained. In this case, the fraud is distinctly and unequivocally denied. It cannot be pretended that the bill can be maintained on any disclosure made in the answer.

But, if the jurisdiction was as indisputable as it appears to me to be questionable, my opinion is, that in this case equitable relief is barred by lapse of time. It is true that proceedings in Equity are not strictly within the statute of limitations, because the words of the statute apply to particular legal remedies by name, and do not therefore include proceedings in Equity. But Courts of Equity have always held themselves bound by the spirit of the statute, and therefore, where there is a legal title and right and it is barred at law by the statute, Equity, acting in obedience to the statute, will hold it barred in Equity. In the present case, the legal bar had not been fully acquired, as six years had not elapsed when the suit commenced, and it may be said, as the remedy was not barred at law, it ought to be held as not barred in Equity. But this, it seems to me, would be taking an imperfect view of the effect of time on equitable

remedies. Lapse of time, in Equity, operates not only as a positive bar, extinguishing the civil title or right while it leaves the natural right to have all that effect which the law allows it, (and this is the case where the Court acts in obedience to the statute,) but it also has an operation in cases not within the statute, so that there has always been a limitation of suits in Equity of every description. It is a rule adopted by the Court, in the public interest and for the peace of society, to discourage the litigation of stale and antiquated demands. On this principle the Court refuses to interpose its extraordinary authority, unless the party prosecutes his right with reasonable diligence. If he sleeps on his rights for an unreasonable length of time, the Court will withhold its hand and leave him to his legal remedy. What delay will amount to what is technically called laches, necessarily depends on the nature and circumstances of the case. And this principle is applied, as I understand the practical doctrine of Equity, not only to cases not comprehended within the statute in any sense, that is, to rights which are purely equitable, and for which the forms of law afford no remedy, but rights and titles which are within the statute, and over which the Court has a concurrent jurisdiction with Courts of law. In these cases it not only acts in obedience to the statute denying the remedy, when the statute bar is complete, but will sometimes, on its own peculiar notion of justice, decline to interpose when the prescription is not fully acquired at law. In these cases the Court does not pretend to act on the right, but is simply passive, and leaves the party to pursue his legal remedy. If he sleeps on his rights, until the course of events and the change of circumstances have put it out of the power of the Court to administer that equality of justice between the parties, which, as a Court of conscience, it is bound to do, it will decline to act at all. In cases of concurrent jurisdiction, where a party is at liberty to apply either to the tribunals of law or Equity, a Court of law is bound by the letter of the statute,

because the statute speaks to that Court in direct and positive terms. If the prescription is full, no remedy can be given, but if it wants a single day of being complete, it does not exist at all, and the Court *ex debito justitiæ* is bound to give the remedy. To refuse to, would be a denial of justice. But it is not so in Equity. The statute does not address itself to Courts of Equity, and therefore Equity, in strictness, is not bound by it. But then Equity is not bound to interpose at all. It is no denial of justice to leave the party to such remedy as the law will give. Equity therefore says to the suitor, that while the statute bar may not be imperative, yet that in Equity there is a prescription independent of the statute, not fixed to any invariable time, but depending on the nature and circumstances of the case, which may be a bar to equitable, when it would not be to legal, relief. In these cases of concurrent jurisdiction, Equity will not interpose with her extraordinary powers unless the matter is brought before the Court in such time as will leave to it the power of adjusting all the material equities involved in the case, in such a manner that, while justice is done to one party, injustice will not be done to another. If this cannot be done, and this is the consequence of the delay, Equity will not act on the right, but leave it for the decision of law.

If this be a correct view of the practice of Equity in cases of concurrent jurisdiction, as to the influence of lapse of time on equitable remedies, it will apply with great force to the facts of the present case. This was a sale of a right of preemption of certain lands, that is of a chose in action. The gravamen of the bill, when reduced to its last analysis, is that the plaintiff was induced, by the fraudulent misrepresentation of the defendants, to pay for their right an exorbitant price. But after the purchase of the bond, the plaintiff went on the land, by his agent, for the purpose of satisfying himself by actual examination by a person who was well acquainted with timber lands, and, after such examination, deliberately made the purchase of the land. It cannot be

pretended that the purchase of the land was made principally, if it was at all, on the strength of the representations and certificates of the defendants. The plaintiff chose to trust his own eyes, or those of his confidential agent and, in fact, co-purchaser of the bond, and it was on the strength of his representations and the additional certificates he obtained, that the bargain for the land was ultimately closed. It is quite clear that the plaintiff, by this bill, can claim no relies directly for damages he may have sustained by the purchase of the land. All he can pretend to is, that he was induced by the fraud of the defendant to pay too much for the bond, and that, if the defendant made false representations, he is bound to make them good. My opinion is, that he is too late in claiming relief for this damage in a Court of Equity. He should have made his claim before the right of pre-emption expired, or, if not, at least while he had a title to the land, and the power of restoring to the defendants what he received of them, that is, the right to take the land at the bond price. Instead of that, he has held the land for nearly six years, has made constant efforts to re-sell, demanding a higher price than he gave, has gone on to operate on the land and taken off a large quantity of the timber, has mortgaged it, and finally allowed the mortgagees to foreclose and extinguish his title. Under these circumstances, my opinion is, that even admitting the fraud, (and with respect to Sanger, the only defendant who has answered, Richardson being dead and Stackpole having demurred, the evidence entirely fails, as it appears to me, in making actual fraud,) but even admitting it, my opinion is, that the plaintiff is barred of equitable relief by his own laches.

The result of my opinion is, that the bill must be dismissed with costs for the defendant.

WILLIAM SMITH, LIBELLANT,

VERSUS

HIRAM TREAT.

The arrest and imprisonment of a seaman in a foreign port, and sending him home by the public authority as a prisoner charged with an indictable offence, does not necessarily constitute a bar to a claim for wages for the voyage. Such proceedings do not preclude the Court from inquiring into the merits of the case, and making such a decree as the justice of the case requires.

The master is not ordinarily justified in dissolving the contract with a seaman, and discharging him for a single fault, unless it is of a high and aggravated character.

The causes for which a seaman may be discharged are ordinarily such as amount to a disqualification, and show him to be an unsafe or an unfit man to have on board the vessel.

November 4, 1845. This was a libel for wages. The libellant shipped as a seaman, April 25, 1845, on board the brig Benjamin, at Frankfort, for a voyage to some port in the West Indies and back, for wages at the rate of $15 per month. The brig returned August 17th, and the libellant claimed wages for the whole time; the balance due being $42 50, one month's wages having been advanced to him at the time of shipping.

The facts are stated in the opinion of the Court.

L. D'M. Sweat, for the libellant; *A. Haines*, for the respondent.

WARE, *District Judge.*

The libellant in this case went and returned in the brig, and it is not denied that full wages are due to the termination of the voyage, unless they were lost or forfeited by what took place at Point Petre, the port of discharge. The affair which is relied on as a forfeiture, or more properly as a bar to

the claim for wages, took place on the 21st of May, while the crew were dischaging the cargo. The captain being at that time on shore, the men, under the orders of the mate, were making up a raft of lumber to be floated ashore, when a difficulty arose between Tappan, the mate, and Hadley, one of the crew. While the mate was below making up his account of lumber discharged, he heard a noise on deck, and came up to put a stop to it. He found it was made by Hadley, who was on deck passing off lumber to make up the raft, Smith, the libellant, being at work with him. He ordered Hadley to stop his noise, or go below. Hadley, who had been drinking pretty freely but not so as to render him incapable of work, replied that he would not go below for him, nor for any other man. Tappan rejoined that if he continued his noise he would put him below; and Hadley, again replied, that neither he nor any one else could put him below. Tappan then called to the second mate, who was on the raft, to come on deck and assist in putting Hadley below, whose noise had then attracted the attention of persons near the vessel. Smith, who was at work with Hadley, and to whom nothing had been said, then interposed and said to the mate, "If you put one below, you must put all hands below." The difficulty, however, subsided without any act of violence, and the men returned to their work, and continued quiet for an hour, or an hour and a half, when Hadley again became noisy. It is not easy, from the varying accounts of the witnesses, to determine the precise facts which took place after this time, or the exact order in which those occurred, in which the accounts of all the witnesses agree. The noise appears to have commenced between Hadley and Smith, who were at work together; Tappan, the mate, interposed to stop it, and an affray took place. Tappan knocked down Hadley with his fist; Smith interposed and gave a blow to Tappan and they clenched. While they were clenched, Hadley got up, and some of the witnesses say that he stood by and looked on, without taking a part. But Harri-

man, the second mate, who at this time came on deck, says that both Smith and Hadley were upon the mate, and had got him down on a barrel; that as he was going to his relief, Hadley left Tappan and came towards him; that he avoided and passed him, and that he, Hadley, followed him as much as twenty-five feet towards the pump; that he then took a pump-brake, and that Hadley then struck him with his fist, and he then gave him a blow on his head with the pump-brake, which brought him partly down, and then another, that brought him to the deck; that he then went to Tappan, whom Smith had down and was beating. He told Smith to let Tappan alone, but he refused and told Harriman not to strike him. Harriman then gave him three blows with the pump-brake, before he brought him down, and then turned to Hadley, who had got up and fallen over the deck into the water. He then went on to the raft and got Hadley out of the water, and when he came on deck Tappan and Smith were again clenched. At this moment the captain came on board and put an end to the affray. The blows given to Hadley proved mortal, and he died the following night. Smith was arrested that night and confined in prison, and sent home in irons by order of the American Consul. He was indicted, at the adjourned term of the Circuit Court, on a charge of stirring up the crew to resist the officers of the vessel, and was acquitted of the charge by the jury.

Such are the most most material facts, as nearly as I can recollect them from the testimony, which though not in all respects quite contradictory, is not, in all its parts, exactly reconcilable. One month's wages, covering the whole period of his service previous to his arrest and imprisonment, had been paid in advance, and the libellant now claims wages to the termination of the voyage. For the respondent, it is contended that the misconduct of Smith, followed by his arrest and imprisonment, and his being sent home by the public authority in chains, as a criminal, is a conclusive bar to any claim for wages beyond what have been paid.

This Court, I hold, is not excluded by any of the proceedings at Point Petre, from inquiring into the merits of the case, and making such a decree as, on the whole, right and justice may require. The libellant was tried and acquitted on the charge, and even if he had been convicted, this would not have been a bar to the present suit. 4 *Mason's Rep.* 84, *The Mentor*. His claim stands entirely unprejudiced by any of the proceedings at Point Petre, and his misconduct, admitting it in all the aggravation that is alleged, cannot operate properly as a forfeiture of the wages now claimed. The wages forfeited under the marine law are properly the wages previously earned, and not those which are or may be earned subsequently. Both justice and policy require this limitation of the forfeiture. If it extended to future earnings for the remainder of the voyage, it would take from the seamen all the ordinary and most influential motives for good conduct. He would never willingly and cheerfully perform his duties, if he knew beforehand that, however diligent and faithful he might be, he could receive no compensation for his services.

But a seamen may, by misconduct, not only forfeit all wages antecedently earned, but his misconduct may be such as will authorize the master to dissolve the contract, and discharge him from the vessel. The principal question presented in this case is, whether the conduct of the seaman was such as would, by the principles of the maritime law, authorize the master to discharge him from the vessel. By the old sea laws, which are the records of the early customs and usages of the sea, the master is authorized to discharge a seaman for drunkenness, for quarrelling and fighting with the other men, for theft, for going on shore without leave, and for disobedience. *Jugemens D' Oleron, Art.* 6, 13; *Consulat de la Mer, ch.* 125. *Laws of Wisbuy* 18, *edit. of Cleirac. Laws of the Hanse Towns*, 29, 45.

Some of these laws are curiously minute and particular on this as well as on other subjects. The Consulate of the

Sea authorizes the master to dismiss a seaman for three causes; for theft, quarrelling, and disobedience to the orders of the master, and subjoins by way of amendment, perjury as a fourth cause, but adds, that he shall not be discharged for the first, but only for the fifth offence. Generally speaking, the causes which justify the master in discharging a seaman before the termination of the voyage, and especially in a foreign port, are such as amount to a disqualification, and shew him to be unfit for the service he has engaged for, or unfit to be trusted in the vessel. They are—mutinous and rebellious conduct, persevered in, gross dishonesty, or embezzlement, or theft, or habitual drunkenness, or where the seaman is habitually a stirrer up of quarrels, to the destruction of the order of the vessel and the discipline of the crew. 1 *Peters' Adm. Rep.* 168, 175. 2 *Peters*, 268. *Bee's Rep.* 148, 184. 4 *Mason's Rep.* 541, *Orne* vs. *Townsend.* 2 *Haggard's Rep.* 5, *The Lady Campbell.* *Id.* 228, *The Vibilia.*

Ordinarily, the law will not justify the master in dismissing a seaman for a single offence, unless it be of a very high and aggravated character, implying a deep degree of moral turpitude, or a dangerous and ungovernable temper or disposition. It looks on occasional offences and outbreaks of passion, not so frequent as to become habits, with indulgence, and by maritime Courts it is administered with lenity and a due regard to the character and habits of the subjects to whom it applies. They are a race of men proverbially enterprising and brave, exposed by the nature of their employment to great personal dangers and hardships, contending with the elements in their most violent and tempestuous agitations, and encountering these dangers and hardships with the most persevering courage. But with all this, they are of a temperament hasty and choleric, quick to take offence, and ready, on the excitement of the moment, to avenge any supposed wrong or indignity. The law looks on the fairer traits of their character with kindness, and as making some com-

pensation for defects and faults, which are perhaps not unnaturally, or at least are very frequently, associated with those qualities which render them so valuable to their country in peace as well as in war. And when these show themselves occasionally and are not habitual, it will not visit them with severity, but imposes its penalties with a sparing hand. From considerations of this kind, the Court will seldom punish a single offence with a forfeiture of all the wages antecedently earned, much less will it be held as a justification of a discharge of a seaman from the vessel.

But still there are causes which will justify the master in dismissing a seaman and putting an end to the contract. Was this such a case? The conduct of the libellant, up to the time when this affray took place, had been, if not entirely unexceptionable, such as had not exposed him to any special censure. But on this occasion, though, in the judgment of a jury, the part which he took did not amount to the offence charged in the indictment, it was highly censurable and approximating to mutiny. Hadley, under the excitement of liquor, had been turbulent and noisy, so much so as to attract the attention of persons in the vicinity of the vessel. Both the mates, the master being on shore, had before by gentle means attempted, and for the time succeeded in quieting him. Tappan told him if he continued his noise he should put him below. This was certainly no harsh punishment, but a very proper act of discipline unless quiet and order were restored. The answer of Hadley was insolent, but no notice was taken of that, nor was there any attempt, by the mate, to put the threat into execution. It is apparent that he was satisfied with putting a stop to the noise. But Smith immediately interposed, and in a tone of defiance told the mate if he put one man below, he must put all below. Such language and conduct, under the circumstances of the case, if not amounting to the technical offence of stirring up the crew to resist the orders of the officers, was clearly of a mutinous tendency, and subversive of

the discipline of the ship's company. Hadley became quiet and the difficulty subsided. But he soon again resumed his noise, and the disorder at this time arose from a difficulty between him and Smith. The mate again interposed to stop the noise. It is not easy, from the imperfect and somewhat conflicting accounts given by the witnesses, to determine how the quarrel now commenced. What is certain is that Smith interposed on the part of Hadley, a scuffle ensued, and blows were given on both sides. Smith and Hadley both being against the mate, they got him down and held him down until he was partially relieved by the second mate's coming to his aid. Even after Hadley was disabled by the blow, which unfortunately put an end to his life, Smith fiercely continued his assault on Tappan, the mate, nor did he relinquish his grasp, though Harriman repeatedly struck him with a heavy pump brake, but persevered until the master came on board and put an end to the fight. It is in proof, that Tappan was severely beaten and bruised by Smith, or by Smith and Hadley together. Through the whole of the affair, until it came to blows, the conduct of the officers was moderate and forbearing. There was nothing particularly irritating, and certainly nothing that excused the intemperate violence and mutinous conduct of Smith. From the beginning to the end he was a volunteer in the quarrel, and it is difficult to account for the part he acted but by supposing it to flow from a radically quarrelsome disposition. It was commenced without cause and continued with a persevering malignity not often witnessed; and in fact the melancholy tragedy in which the affair ended may be distinctly traced to the insubordination and violence of Smith as its first cause.

Whether, but for the tragic end of this affair, the master would have thought it necessary, or would have been justified in discharging the libellant and putting an end to the contract, is a question on which perhaps one might pause. Smith had, on no other occasion, exhibited a temper of dan-

gerous insubordination, and it might have been safe for the master to have retained him on board, and to have left this matter to be settled at the termination of the voyage. As it was, certainly it was the duty of the master to call on the civil authority of the place, and put the affair in a train of judicial examination. The result of that inquiry was, that Smith was sent home as a prisoner to answer for his conduct to the laws of his country. And, from the facts developed on the trial here, it appears to me that the civil authorities were perfectly justified in this course. The consequence was that the libellant was disabled from performing the service for which he was engaged, and from the whole facts in proof in the case, he may justly be considered as having disabled himself by his own voluntary act. On the principles of natural justice and universal law, he cannot claim a compensation for services which he has by his own fault disabled himself from performing. The libel must therefore be dismissed.

As a part of the history of this transaction, it may be added that Harriman, the second mate, was indicted, in the Circuit Court, for an assault with a dangerous weapon, which resulted in the death of Hadley. Under the statutes of the United States, manslaughter would not lie, since the death occurred on shore, whither Hadley was removed after the fatal blow, and without the jurisdiction of the United States. On a verdict of guilty, the Circuit Court, in consideration of the circumstances of the case, sentenced Harriman to a brief imprisonment—the penalty for the offence laid being in fact, under the statute, the same as that for manslaughter.

THE UNITED STATES versus LEONARD JARVIS.

Under the act of Congress of March 2, 1839, ch. 82, sect. 3, no officer of the United States, whose salary or emoluments are fixed by law and regulation, is entitled to any extra allowance or compensation in any form for disbursements of public money, or other service, unless the same is authorized by law.

In the construction of temporary statutes, as annual appropriation acts, the presumption is that any special provisions of a general character, contained in such acts, are intended to be restricted in their operation to the subject matter of the act, and they are not to be construed to be permanent regulations, unless the intention of making them so is clearly expressed.

The power of an agent may be revoked at any time by the principal without notice, but if the agent, in the prosecution of the business of his principal, has fairly and in good faith, before notice of the revocation of his powers, entered into any engagements or come under any liabilities, the principal will be bound to indemnify him.

So an agent, after accepting an agency, cannot renounce it at pleasure, without notice or good cause, but on the condition of rendering himself responsible for any loss which may thereby be sustained by the principal.

No one can change his will to the injury of another where mutual rights and obligations exist between the parties.

These principles, having their foundation in natural equity, apply as well between the government and an individual as when both parties are private persons.

The defendant was appointed Navy Agent for four years, but removable at any time within the four years at the pleasure of the President. He was removed six months before the term expired, and without previous notice. Before his removal he had hired an office on a parol lease, the quarter terminating three days after his removal. Not having given notice of his intention to quit he became, by the local law, bound for one quarter's rent. He had also hired a clerk for the year terminating with the close of his term. On dismissing his clerk he paid him $200, or one quarter's salary after his discharge.

It was held, that these engagements having been fairly and properly made

in executing the business of his agency, the United States were bound to indemnify their agent, and that these charges were an equitable set-off under the act of March 3, 1797.

February Term, 1846. This was an action of debt on the official bond of the defendant as Navy Agent for Boston and Charlestown, for a balance alleged to be due from him on the final settlement of his accounts. The defendant was appointed Navy Agent in April, 1838, to hold the office during the pleasure of the President, for a time not exceeding four years. The compensation allowed for his services was one per cent. on the amount of his disbursements, but not to exceed in the whole $2,000 a year. He was removed from office, September 27, 1841, six months and three days before the term of four years expired, and the first notice he had of his removal, or of an intention to remove him before the expiration of the term, was by the appointment of a successor. On the final settlement of his accounts by the accounting officers, there was found to be a balance due the United States of $715 97. The defendant claimed to be allowed $452 18, as commissions of one per cent. on $45,218 59 paid to the heirs of John Harris, for certain lands purchased by the Secretary of the Navy for the Navy Yard, as being an extra service, not coming within the regular duties of the Navy Agent, and for which he claimed to be entitled to a separate and additional compensation. And he also claimed $26 29, being the amount of several small items for office rent and charges for the remainder of the quarter ending October 1, and also one quarter's office rent from October 1 to December 31, 1841, after his removal from office. The defendant hired his office by a parol lease, and, not having given seasonable notice of his intention to surrender it before the expiration of the quarter ending in October, by the local law of Massachusetts he became liable for an additional quarter's rent, which was paid by him, and the receipt is in the case. He also claimed $200 for one quarter ad-

ditional clerk hire. His clerk was hired for a year terminating with April 1st, 1842, when the defendant's appointment would expire by its limitation. The clerk, being hired for the year, claimed his salary under the contract, but compromised for one quarter's salary instead of the whole balance, which was half a year. The amount charged for office rent, and clerk hire was the same as had been allowed from quarter to quarter in his previous settlements.

The facts in the case were not controverted, but the questions of law were elaborately argued by

Haines, District Attorney, for the plaintiffs;

Preble, for the defendant.

WARE, *District Judge*, charged the jury subtantially as follows:

The most considerable item claimed by the defendant in off-set is $452 18 charged as commissions on the disbursement of $45,218 59, paid to the heirs of John Harris, for lands purchased for the Navy Yard in Charlestown. The owner of the land not having left children, the money was to be paid to his collateral heirs, and, as the Secretary could not himself conveniently ascertain who they were, he employed the defendant to do the business. In his letter to him he says: "The money is sent to you that no mistake may occur as to paying it to the party entitled to receive it;—and to guard against any such mistake you are requested to consult the United States District Attorney, Mr. Mills, and to pay over the amount and to take the proper receipts and acquittances for the same under his advice and direction." It is apparent that the service to be performed was one not only of considerable responsibility but of some delicacy, for if the defendant had paid the money to a wrong person he might have rendered himself responsible, and if he is entitled to any compensation it is not contended that the sum charged is too

much. But it is argued, by the District Attorney, that he is not entitled to any, but that he was bound to perform this service for the compensation which he received as Navy Agent. That salary was established as a compensation for performing the ordinary service attached to the agency. Now this does not appear to fall within the range of his ordinary duties as Navy Agent, and it appears to me to be so treated by the Secretary in his letter. It was an extra service, and attended with additional responsibility. But then it is argued by the attorney that, admitting this, he is barred from receiving any additional compensation by the third section of the act of Congress of March 2, 1839. That section, so far as it applies to this case, is in these words: "No officer in any branch of the public service, or any other person whose salary and emoluments are fixed by law and regulation, shall receive any extra allowance or compensation in any form whatever for the disbursements of public money, or the performance of any other extra service, unless the said extra allowance or compensation be authorized by law." The defendant was an officer whose pay and emoluments were fixed. It must then be admitted that the case comes withint he words of the law, and must be governed by it, if the law is applicable to the case. But this is the very point which the defendant's counsel deny.

The act, in which this section is found, is one of the annual appropriation acts. Its title is, "An Act making appropriations for the civil and diplomatic expenses of the government for the year eighteen hundred and thirty-nine." The first section contains more than two hundred clauses, making as many distinct appropriations for the various branches of the public service, and embracing all the civil and diplomatic expenses for the current year. The second section contains a special provision to which I shall presently refer, and the third has the clause which has been read, and which it is contended governs this case.

The argument of the defendant is, that this section is intended to apply to the subject matter of the act only, and is to be confined to the disbursements of the appropriations contained in the act. This is, perhaps, the construction that would at first most naturally suggest itself. The act itself is one of those annual acts which spend their power in the course of the year, to which we are not accustomed to look for permanent regulations. If the legislature annex to such an act any special provision which has a proper application to the subject matter of the act, and use no words indicating an intention to give it a more extensive operation, the just conclusion would seem to be, that the special regulation was intended to be confined to the matters embraced by the act. It is remarked by Mr. Justice Story in delivering the opinion of the Court, in *Minis* vs. *The United States*, 15 *Peters*, 445, that "it would be somewhat unusual to find engrafted, on an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and when the language admits of no other reasonable interpretation."

This is emphatic language, and places this, as a rule of interpretation, on strong ground. The second section of this act also contains a special regulation applying to collectors of the customs, which is clearly intended to be permanent. It requires them to place money received on unascertained duties, or duties paid under protest, at once to the credit of the treasurer. The first words of the section are: "From and after the passage of this act all moneys paid to any collector," &c., words the meaning of which cannot be mistaken. But there are no words of the like import in the third section, and the omission of them undoubtedly favors the interpretation put upon it by the defendant's counsel. But

then, though these are the formal words most usually employed to exclude a doubt whether the regulation was intended to be permanent or not, they may be supplied by other language clearly indicating the intention of the legislature. Now it is quite certain that this section must extend to matters beyond the appropriations contained in the act. It provides that no officer in any branch of the public service, or any other person whose salary and emoluments are fixed by law or regulation, shall receive any extra allowance or compensation in any form, unless it is authorized by law. Now this act embraces but part of the appropriations for the year, so that we are necessarily carried beyond the subject matter of this act. It must extend itself over all the appropriations of the year at least; and though it may be said that that this clause of the law does not necessarily look beyond the current year, yet the second clause of the section evidently does. That provides that no executive officer, other than heads of departments, shall apply, from the contingent fund of which they have the control, more than thirty dollars annually, to pay for newspapers and pamphlets. The word *annually* here is necessarily prospective, and extends the operation of this clause to future years. There are, in the first clause, no restrictive words confining it to the current year. If part of the section was intended to be permanent, it is quite natural to suppose the whole was. It would be very unusual to unite, in a single section of a law, one provision intended to be permanent, with another intended to be temporary, without clearly distinguishing the permanent from the temporary part. My opinion is that this section is a conclusive bar to the allowance of the commissions claimed on the disbursements in question; and whatever we may think of the equity of the claim, it is not for the Court or the jury to be wiser or more indulgent than the law.

This disposes of but part of the case. The other allowances claimed involve questions of much more delicacy and

difficulty. The defendant claims an allowance of $26 29, for office rent for the three remaining days of the quarter ending October 1, and also for rent for the quarter following. These two claims stand on the same ground, and may be considered together. An office or place of business was necessary for the discharge of the duties of the agency, and the rent had been charged and allowed, at the same rate, in previous quarters. It is admitted that it was hired and used by the defendant for the purpose of the agency and for no other, he not being engaged in any other business that required his having an office. It was hired on a parol lease; and, not having given reasonable notice of his intention to quit before the termination of the quarter, by the law of Massachusetts he became bound for another quarter's rent. *Mass. Rev. Stat., part 2, tit. 1, c. 60, § 26.* The ground of the claim is this: that, having been dismissed from office when it was too late to give the notice required by law, and having himself no previous notice that he was to be superseded, this is a loss which he incurred without fault on his part, in the business of the plaintiffs, for which they were bound to indemnify him. The answer is, that he held his appointment at the mere will of the President, and, being liable to be removed at any time without notice, he might have provided for the contingency in his contract.

If this was a question between two individuals, and not between an individual and the government, I cannot say that I should feel much difficulty in arriving at a conclusion satisfactory to my own mind. It was necessary, in the transaction of the affairs of the agency, that the defendant should have a place of business where he might be found in business hours. It was engaged on a parol lease, and by law he was bound to give reasonable notice of his intention to quit, or he became bound for another quarter's rent. He had held the agency for *three* years and a half, and the term for which he was appointed would not expire by its own limitation for six months. No complaint had been made against

him, and he had no reason to suppose that he would be superseded before the expiration of that time. If he had engaged his office in the usual course of business, and there was nothing unreasonable in the terms on which it was engaged, considering the tenure on which he held the appointment, the principal would be liable for the loss. The question for the jury would be, whether an agent holding an appointment of so much importance, though the agency was revokable at will, should be expected to engage his office rooms on a tenancy from day to day, or week to week. If the jury should think that he acted prudently and in good faith, with a just regard to the interest of his principal, then I should say that in law he was justly entitled to look to his principal for an indemnity for a liability fairly incurred in the prudent prosecution of his proper business.

It is true that when a man appoints an agent or mandatary without limitation of time, he may always revoke the appointment at will. A person may enter into many other engagements liable to be dissolved at will, but which, where other persons have fairly, and in the usual course of business, acquired an interest under them, the law will prevent him from dissolving them at an unreasonable time; or if it does not absolutely prevent the act, will hold him to indemnify those who may suffer an injury from it. This is a general rule of justice and equity, which is found in every system of refined and cultivated jurisprudence. The engagements may be terminated at will, but then this will must be exercised reasonably, and not in mere wantonness or malice. An illustration of the principle may be drawn from the contract of partnership. When entered into without any limitation of time, it may always be dissolved at the will of any of the parties. In that highly cultivated system of jurisprudence which forms the basis of the law of the whole continent of Europe, the Roman law, the renunciation of the partnership by one of the parties, to be

valid, must be made in good faith, and not at an unreasonable time, to the injury of the common interest; for it is not, says the law, the private interest of the individual partner, but the common interest of the partnership that is regarded.* This principle, so conformable to natural equity, to good faith, and fair dealing, was adopted from the Roman law by the ancient jurisprudence, and is confirmed by the new civil code of France.† And though no such restriction is perhaps established in the common law, yet it seems that a Court of Equity will interpose and restrain a partner from wantonly and maliciously putting an end to the engagement, to the injury of the common interest.‡

But the case of a parol lease at will, which arises in the present case, is one which perhaps still more clearly shows, that when it is said that an engagement is liable to be terminated by either party, it is, in the sense of the law, a will under the control of reason and justice. Though it is said to be a contract merely at will, yet, independent of every statute regulation at the common law, the lessor cannot, without notice, eject the tenant and turn him into the street, nor can the tenant discharge himself from the liability to pay rent without giving the landlord reasonable notice, to enable him to find another tenant.§ These restrictions on the capricious and wanton exercise of the will, where the interests of other persons are affected, have their foundation

* Semper enim non id, quod privatim interest unius ex sociis, servari solet, sed quod societati expedit.

Item, qui societatem in tempus coit, eam ante tempus renunciando, socium a se, non se a socio, liberat. Itaque, si quid compendii postea factum erit, ejus partem non fert; atsi dispendium, æque præstabit portionem nisi renunciatio ex necessitate quadam facta sit. *Dig.* 17, 2, 65, § 5 and 6.

† Pothier, Contrat de Societé, No. 150, 151. Code Civil Francais, No. 1869, 70.

‡ Story on Partnership, § 275. Note.

§ 4 Kent's Com. 111.

in a rule of universal equity and justice, arising from the social nature of men, that a man shall so use his own rights as not to injure another. *Sic utere tuo ut alienum non lædas.*

This reasonable and equitable principle has also its application in the law of agency. There is no doubt, as a general rule, that the appointment of an agent may at any time be revoked by the principal without giving a reason for it, because it is the right of every man to employ such agents as he sees fit. The agent also has the same general right to renounce the agency at his own will; for it is an engagement at the will of both parties. But the contract of agency, or mandate, involves mutual obligations between the parties; and these commence, if not as soon as the appointment is made, at least as soon as the agent or mandatary commences the execution of the agency. If he has entered on the business, even if he does not accomplish prosperously what he has undertaken, he will be entitled, from his principal, to an indemnity for his expenses and services, if the failure does not arise from his own fault. *Domat, Lois Civiles, Liv.* 1, *Tit.* 15, § 2, *No.* 1, 2. After he has engaged in the business of the agency, the principal may at any time revoke his powers and dismiss him from his service. But if his power is thus revoked, the principal will be responsible to him for any engagements he may have entered into, and any liabilities he may have incurred in good faith, in the proper business of the agency, before he had notice of the revocation. *Domat, Lois Civiles, Liv.* 1, *Tit.* 15, § 4, *No.* 1. And so the agent, after entering on the business, may renounce the agency. But then this must be done in good faith, and be preceded by reasonable notice, or the agent will be liable to the principal for any loss that may result to him from this cause. The agent cannot withdraw himself from his engagement wantonly and without reasonable cause, without rendering himself responsible for the consequences. *Domat,*

No. 3, 4. *Pothier, Mandat, No.* 44. *Dig.* 17, 1, 22, § 11. *Dig.* 17, 1, 27, § 2. And when a man has undertaken an agency, he will not merely render himself liable for damages to his principal, if he renounces the agency without notice and without just cause, but a Court of Equity will go further. If an agent is employed to make a purchase, and, finding the speculation likely to prove profitable, he renounces the agency and purchases for himself, Equity will hold him a trustee for the principal, and give him the benefit of the purchase directly, without putting him to an action for damages. 1 *Story's Equity*, § 316.

It may be true that in our jurisprudence a precise authority may not be found for all these propositions among the adjudged cases. But they rest on such clear grounds of justice and good faith, that they may be well taken for granted without the authority of a direct decision, (*Story's Agency*, § 467,) and they all stand approved by the authorities of the Roman law. They all flow from a great principle of social justice. A man cannot, wantonly and without reasonable cause, retract or annul his own acts and change his purpose, when others, in the ordinary course of business and in good faith, have acquired an interest in them, to the injury of such persons, without rendering himself liable to repair such injury. The greatest of the Roman jurisconsults reduced the rule to a short and pithy maxim:— No man can change his will to the injury of another. *Dig.* 50, 17, 75. *Nemo potest mutari consilium suum in alterius injuriam.* It is applied in some cases where no previous engagements exist between the parties, but its application is peculiarly stringent when mutual obligations by contract do exist. If I agree with a mechanic, says Pothier, to build me a house, and after the agreement I change my purpose and determine not to build, I may dissolve the engagement by giving him notice of the change of my will; but if before the notice he has purchased materials for the work and

engaged workmen, I shall be bound to indemnify him for the loss he sustains by the change of my purpose. *Contrat de Louage, No.* 440. *Duvergier, Droit Civil Francais, Vol.* 19, § 370. If this was a case between two private persons, the case put by Pothier would differ in no essential particulars from the present. Both are contracts of hiring; for the contract with a salaried agent or mandatary is essentially a contract of hiring, though in some respects distinguishable from the common contract for the hire of labor. *Duvergier, Droit Civil, Vol.* 19, *Tit.* 8, *Ch.* 3. The defendant was a salaried agent, and he had, for the sole purpose of the agency and for the sole benefit of his principal, hired an office. He held, as all agents do, the appointment at the will of the principal, and he is dismissed without notice, while under this liability for rent. If the engagement of his office was, as to the terms, reasonable and proper and in good faith, under the circumstances, the justice of the case appears to me so clear, that the very statement of the facts carries with it the answer, and that conforms to the well established principles of law.

The other charge, for clerk hire, does not appear to me to be distinguishable in principle from the rent. It is admitted that in the business of the agency a clerk was indispensable, and he had been allowed, as all officers of this description are, a reasonable sum for clerk hire. The amount claimed is the same as had been allowed and paid in previous quarters. The clerk was engaged for a year, terminating with the expiration of the term of the defendant's appointment; and, in strict law, he might perhaps have recovered his salary for the whole of the unexpired year. 2 *Smith's Leading Cases, Amer. Edit., page* 25. The defendant compromised the claim by paying one quarter's salary. Is the defendant, who has been compelled to pay this sum for a liability incurred in the business of the plaintiffs, entitled to be indemnified by his principal? If the contract with the clerk were

a reasonable and proper one under the circumstances of the case, the decision referred to, from Pothier, shows how it would be decided in a controversy between individuals. And whether the contract was, as to the period for which he was engaged, reasonable and proper, would be a question for the jury. If the duties of the clerk were such as might be safely entrusted to any ordinary person, it might be questionable whether the defendant, knowing the tenure of his own office, would be justified in contracting with him for a year. But it is to be remembered that the agency of the defendant involved great responsibilities, he having contracts and disbursements to make to the amount of several hundred thousand dollars a year, and in the transaction he required a clerk in whom he could place the most unreserved confidence. It is hardly to be expected that a person of such qualifications would be willing to engage his services on the same terms as a common day laborer. One who is fit to be trusted can usually engage on terms of more permanency; and one who would be willing to engage on such precarious conditions, as to be dismissed at any time without notice, the defendant might not be willing to trust to such an extent, that, if he proved unfaithful, he might himself be involved in ruin. Both his own safety and the interest of his principal would require him to act with more circumspection. When the defendant engaged his clerk, a year of the term for which he was appointed remained, and he had no reason to expect that he would be dismissed before that term expired. If in your opinion the contract with the clerk was, under the circumstances, reasonable and proper, and was a liability incurred in good faith, in the prudent transaction of the business of the agency, on the principles of law and equity he is entitled to an indemnity.

It will be observed that I have treated this case thus far as though it was a controversy between two private individuals; and have stated what appear to me to be the just

conclusions of law. Are there any reasons of general justice or public policy, why the same principles should not be applied to these contracts between the government and an individual? After having reflected considerably on the subject, I feel bound to say that none have occurred to me. I know that it appears to be the fixed policy of the country, to hold the tenure of all appointments of this description to be at the will of the President. So also appointments of the same character between private individuals are liable to be revoked at will, and there are very satisfactory reasons why they should be so. But between individuals we have seen that, to a certain extent, this will is regulated and controlled by the principles of equity, good faith, and fair dealing. If any just cause, for the revocation of an agency, arises out of the conduct of the agent, his powers may be revoked by the principal without subjecting himself to any of the responsibilities which have been mentioned. The agent must bear the consequences of his own misconduct or imprudence. But while he is in good faith prudently engaged in the business of the agency, if his authority is revoked suddenly and without notice, and he thereby suffers loss, the principles both of law and justice require the principal to indemnify him. Why should not the same measures of justice apply between the government and an individual?

If there are no grounds of justice to vary the decision, then I think there are reasons of public policy for holding that the same principles of law apply to one case as to the other. If the tenure of the appointment is merely at will, it is to be remembered that it is equally at the will of both parties. If the principal may revoke the agency without notice, and leave the agent to meet all the liabilities which he has incurred in the prosecution of the business of the agency, then the agent may renounce the agency without notice, and leave all the inconvenience to fall on the principal. I may have taken a very incorrect view of this subject, and, if

so, I am happy that my error may be so easily corrected, but it appears to me that one can hardly overstate the public mischiefs that might arise from the establishment of such a doctrine. All the most important officers of the government hold their employments by this tenure. If they may, at any time, renounce and abandon the public business entrusted to them, with impunity, without first giving reasonable notice to the appointing power of their intention, so as to enable the government to supply their places, it is easy to see that inconveniences of the gravest nature might arise. Take a single branch of the public service, the collection of the revenue. Every officer, from the highest to the lowest, holds his office at will. Suppose the principal revenue officers of one of our large ports should at once come to the determination of abandoning their offices, and send by the mail notices of their resignation when there were cargoes in port, duties on which, to a large amount, would be due. In some ports it is not uncommon for duties to accrue to the amount of half a million, by the arrivals of a single day. There would be nothing to prevent all the goods from being smuggled ashore before the President could replace the officers by new appointments. If it be said that this is putting an improbable case, it at least fairly tries the principle, and it must be allowed to be a possible case. If the law be as I suppose it to be, and the same measure of justice and the rules of good faith and fair dealing hold between the government and an individual in public agencies, as do between individuals in private agencies, then the officer, before renouncing his trust, is bound to give reasonable notice to the government, that the appointing power may have time to put another in his place; and if he abandons it without giving such notice, whether it is done corruptly and in bad faith, or in mere wantonness and caprice, he is legally bound to indemnify the government for all the loss that may be thereby sustained.

On the whole, the view, that I have of the law, is this: The principal may at any time revoke and withdraw the power of an agent at his pleasure, and without notice. This is a right that is fully reserved to him by the law. But if the agent has entered on the business of the agency, and has fairly, in the ordinary course of business, and in good faith, entered into any engagements, or come under any liabilities, in the prosecution of the proper business of the principal, before notice of the revocation of agency, the principal will be bound to indemnify him, unless the agent had given just cause for such revocation. In the same manner the agent may at any time renounce the agency, but then he is bound to give the principal reasonable notice of his intention beforehand, to enable him to procure another agent; and if he does not, he will be bound to indemnify the principal for any loss he may sustain. And the same principles hold whether the government and an individual are parties, or both parties are private persons.

If the law be as it has been stated, the determination of this cause depends on a question of fact, which properly belongs to the jury to decide. If the jury are of opinion that the defendant, in engaging his office and his clerk on the terms he did, acted in good faith according to the usual course of business, and that the conditions, as to the time on which they were made, were reasonable and proper, and such as a faithful and prudent agent would make, acting for the benefit and interest of his principal, the jury ought to find for the defendant. They were liabilities incurred solely in the business of the plaintiffs and for their benefit, from which the defendant himself derived no advantage, and for which the plaintiffs are bound to indemnify him. The defendant having actually paid these sums, under the statute of the United States of March 3, 1797, ch. 74, they constitute an equitable set-off against the plaintiff's demand. But if, under the circumstances of this case, the defendant hav-

ing been appointed to his agency for four years, of which six months remained, but liable to be removed at any time at will before the expiration of the four years, the jury are of opinion that he ought, as a prudent agent, to have engaged his office, and also his clerk, from day to day, or from week to week, or what would come to the same thing, merely at will, with the liberty of surrendering the office and of discharging his clerk at any time, without notice, and consequently liable at any time to be turned out of his office, and to be left by his clerk, without notice, then you will find your verdict for the United States for the amount of these items, with interest from the time when they should have been paid.

The jury returned a verdict for the United States, for the sum of $532 26; allowing the set-off for office rent and clerk hire, as charged by the defendant, and disallowing the commissions charged on the disbursements to Harris's heirs.

IN THE MATTER OF STILLMAN THORP.

The principles on which Courts of Equity charge trustees, assignees, and executors with interest on trust money in their hands, are, that they have either used it in their own business, or improperly neglected to invest it.

Where there has been gross neglect, the Court will sometimes make annual rests and charge them with compound interest.

If the trustee uses trust money in trade, it is a breach of trust, and he will be charged with all the profit he has made, but if there has been any loss, that must be borne by himself.

Under the bankrupt law, assignees are chargeable with interest on all money which they have collected, if not paid into the registry within sixty days after it is received.

June 12, 1846. In this case, objections were made by True, the only creditor who had proved a debt, to the allowance of some of the charges of the assignee for his personal services; and he also asked, in his petition, that the assignee might be charged with interest on the amount in his hands, from the time that the money was received until it was paid into the Registry. The case was submitted, without argument, on the statement of the assignee.

WARE, *District Judge.*

The objections of the creditor to the charges of the assignee, I feel no difficulty in overruling. It appears, from his statement, that he had considerable difficulty in disposing of the property. He obtained an authority in the first instance, to sell by auction. But having reason to believe that a combination was formed between the bankrupt and his neighbors, to prevent competition at the sale, for the purpose of allowing the property to go back to the bankrupt at a nominal price, he applied to the Court and obtained authority to sell at private sale. Under this authority, he sold the property, which was a small piece of land and all the assets of the bankrupt, for 75 dollars, which was believed to be a fair price. The assignee appears to have acted with prudence and good judgment, and for the best interest of the creditors, and his charges are moderate and not at all beyond what are allowed in such cases.

He received the money in April, 1844, and deposited it in January, 1846. By the 9th section of the bankrupt law, the assignee is required to pay into the registry all assets received in money, within sixty days after they come into his hands. In this case, the assignee retained it about a year and a half, after the law required him to deposit it in Court. For this time, the creditor contends that he ought to pay interest. But the creditors can equitably demand interest only on the sum to be distributed, after deducting the charges of

administration. These amount to $42 45, leaving but $32,-95 for distribution. The assignee makes no objection to being charged with interest, although he offers as an excuse for not depositing the money, the smallness of the sum and his expectation that more property might come into his hands, and that he delayed paying the money over in order to make, of so small a sum, but a single deposit.

The principles, on which Courts of Equity charge Assignees in Bankruptcy, Executors, and other Trustees with interest on money collected and retained in their hands after it ought to be paid over or invested, are perhaps as well settled as any rules in Equity jurisprudence. The general result of all the cases is stated by the Master of the Rolls, in *Rocke* vs. *Hart*, 11 *Vesey*, 58, to be that they are charged with interest on two grounds, either that they have made use of the money themselves or neglected to invest it for the benefit of the estate. For a simple neglect to pay over or invest the money, when that is part of their duty, the practice of the Court of Chancery in England is, to charge them with interest at the rate of four per cent. But if they use the money in their own business, they are charged interest at five per cent. And if they mix the trust money with their own, as by depositing it to their own credit with a banker, they are presumed to use it in their trade or business. *Treves* vs. *Townshend*, 1 *Brown*, *Ch. Rep.* 384. *Newton* vs. *Bennett*, 1 *do.* 361. Where there has been gross negligence, and the money has been kept by the trustee for a long time, the Court, in taking the account, will direct annual or semi-annual rests to be made, carrying the interest into the principal and making compound interest. *Raphael* vs. *Boehm*, 11 *Ves.* 92, *S. C.* 13 *Ves.* 407. These rules have been adopted and steadily acted upon by the Courts of this country. The general principle on which the Court acts is, that the trustee shall not be allowed to make a profit out of the trust property for his own benefit. If he uses the trust money in his own business or trade, it is a breach of trust, and he is

held to account for all the profit he has made by the use of the money, but if, in this misappropriation of the trust fund to his own use, there is a loss, it must be borne by himself. The rule of the Court may appear to have something of rigor and severity in it, but it is firmly upheld in practice. All the profit, as far as the trust money can be followed, shall go to the *cestui que trust* or equitable owner, but all the risk of loss is imposed on the trustee as a penalty for the violation of his duty. 2 *Story's Equity*, § 1277–8. 1 *John. Ch. R.* 620. *Scheiffelin* vs. *Stewart*, 1 *do.* 508. *Dunscomb* vs. *Dunscomb.* The object of this strictness is, to secure a faithful administration of the trust by removing from the trustee all temptations to a departure from his duty, as well as to do justice to the *cestui que trust.*

The rules adopted by the Courts of Equity on this subject substantially agree with the decisions of the Roman law from which they were perhaps borrowed. By that law, a tutor was allowed six months to invest the money of his pupil or ward, which he received at the time of his appointment; and if not invested in the purchase of land, or loaned within that time, he was charged with interest for simple neglect. *Dig.* 26, 7, 15. But for money which he afterwards collected in the administration of the trust, he was allowed but two months. *Dig.* 26, 7, 7, § 11. If he applied the money to his own use, he was not charged merely with the customary interest of the place *ex more regionis*, but was held to pay *gravissimas seu legitimas usuras*, a higher rate of interest by way of penalty for a breach of trust, as a Court of Equity will charge a trustee with compound interest under the like circumstances. *Dig.* 26, 7, 7, § 10. *Voet. ad Pand.* 26, 7, 9. Such a coincidence on a particular subject between two highly cultivated systems of jurisprudence, whether the decisions of one were borrowed from the other, or the Courts of both were led to the same conclusions by independent reasoning, serves but to show that the doctrines are founded in natural justice and in a wise policy.

In the present case, I am fully satisfied that the assignee acted with conscientious fidelity in administering on the estate, and made the most that he could out of it for the benefit of the creditors. The amount, with which he is on any principle chargeable, is but a trifle, but the principle involved is important. The law requires the assignee to pay into the registry all money within two months after it is received, giving the same time to pay over money which a Roman tutor was allowed to re-invest money that he had collected. It does not add in default of paying within the time that he shall be charged with interest. But having fixed the time for paying or depositing the money, the law of Equity comes in and says that, if not paid at the time, the assignee shall be chargeable with interest, if he has not a reasonable excuse for not complying with the order of the statute. When the sum is small, or the assignee is prevented by the distance of his residence from the Court, or other causes, from depositing money punctually, the rule is not so rigorous but that a reasonable indulgence may be allowed as to the time. In the present case, interest will be charged for one year and a half.

Ex Parte STORER.

A specific execution of a parol contract for the sale of lands will be decreed by a Court of Equity, when it has been partly performed.

But in the sense of Equity, when a specific performance of such a contract is sought, those acts only are considered as part performance which would operate as a fraud on parties unless the whole contract is executed.

The payment of part of the price is not such an act. But admitting the purchaser to take possession under the contract, and to lease the land, or make improvements upon it, is, in the sense of a Court of Equity, a part performance.

By the statute of limitations in Maine, in an action on a mutual and open account current, the right of action for the whole balance is deemed to

have accrued at the time of the last item proved in the account. But if a party sleeps on a demand without entering it on his account, until the period of limitation is elapsed, he cannot extract it from the statute by entering it afterwards on his account.

Where a party has an unliquidated demand, the limitation begins to run from the time when the right of action accrues.

But if the parties, after the right of action has accrued, come to a settlement, and determine the sum due by mutual agreement, the limitation, begins to run from the time of such settlement.

June 12, 1846. This was the case of a proof of debt offered by Seth Storer, against the estate of Jonathan Tucker. The material facts are stated in the opinion of the Court.

WARE, *District Judge.*

Storer offered proof of a debt against the estate, consisting of various items of account and promissory notes. The commissioner admitted the proof on the account to the amount of $469 33, and rejected all the other claims, either as barred by the statute of limitations or inadmissable for other causes. The statute was admitted by the creditor to be a bar to all except two items, and, as to these, he has excepted to the decision of the commissioner, and asked the judgment of the Court.

1. The first is for rent, or interest in the nature of of rent, on a lot of land in the town of Saco, at the rate of $42 per annum, from Nov. 26, 1827, to the time of the bankruptcy.

The facts, either as admitted by the parties or proved, are these: Some time before the date mentioned, but how long does not appear, Tucker, by a parol agreement, bargained with Storer for the purchase of this lot, for $700. At the time of the agreement, Storer's office was standing on the lot, and it was agreed between the parties, that the building should remain on the land until Tucker should give notice to have it removed, and in the meantime the rent of the land should

be an equivalent for the interest which would be due on the price. In this state the business remained until the time above mentioned, when Tucker gave Storer notice to remove his office, which he did; Tucker then intending to put up a building on the lot the following season. He however changed his purpose, and the lot remained vacant until 1835, when Tucker let the land to one Banks, at the rent of $60 a year. Banks placed an old house upon it, and occupied it for the greater part of a year, while he was building a new house, and then left it. The lot has since remained vacant. Banks and Tucker having an open account, the rent remained unsettled until a short time previous to Tucker's bankruptcy, when it was allowed to Tucker in the settlement, to the amount of $56. At first Tucker hesitated at receiving the rent, urging that the land was Storer's, and thereupon Banks applied to Storer, who told him that the land belonged to Tucker, and he finally settled with Tucker, and allowed the rent in the account. No conveyance of the land and no agreement for the sale had been made in writing. By the original agreement, Tucker was to pay interest upon the agreed price from the time that he gave notice to Storer to remove his office. Storer's claim, disallowed by the commissioner, is for interest on the price from that time, or, if he in Equity is to be considered as the owner of the land, for rent for the same time.

The true question, as it appears to me, is, Who under this parol agreement, partly performed, is in equity to be considered as the owner of the land? If the agreement, followed by the acts in part performance, is such an agreement as Equity would deem to be sufficiently executed, then the equitable title is in Tucker, if not, then it is in Storer.

Are then the acts of part performance of such a character as, in the consideration of a Court of Equity, will take the contract out of the statute requiring all agreements for the transfer of land to be in writing. In my opinion they are. The general principles by which Courts of Equity are gov-

erned in decreeing a specific execution of a parol agreement for the sale of lands, on the ground that the agreement has been partly performed, are, *first*, that an act shall, or at least may, be deemed part performance when it is clearly apparent that the act was done with a view to the agreement being fully carried into execution, and solely with a view to that. *Secondly*, that an act will be deemed to be done in part performance, when the act might operate as a fraud on the party unless the agreement were fully performed. 2 *Story's Equity*, § 761, 2. Such acts, and such only, are permitted by a Court of Equity to extract a parol contract from the statute. Upon these principles it is now well settled that a payment of part of the price is not a part performance, although the payment can be referred to no other cause than the parol agreement for the purchase. This does not, in the sense of a Court of Equity, operate as a fraud on the party, though it may be a violation of good faith, and may be the cause of a loss to the party, if the other become insolvent. Still, as he can have what the law considers a complete indemnity, by the recovery of the money paid with the interest, Equity does not hold it to be a fraud cognizable in that tribunal. But it is well settled that when the purchaser is admitted into possession under a parol contract, that is a part performance. 2 *Story's Equity*, § 761. For if he enters and takes possession under the agreement, unless the agreement will protect him, he will be liable to an action of trespass. If the vendor in this case were allowed to treat the agreement as a nullity, it would clearly operate as a snare and a fraud. To defeat the fraud of the vendor, Equity will hold the contract, connected with such acts of part performance, valid to give an equitable title to the land, and will compel a conveyance.

The case stated is precisely the present case. Tucker was allowed to go into possession of the land. For years he considered himself as the owner, and, more than eight years af-

ter the contract, exercised acts of ownership by letting the land. He at this time certainly considered the contract valid in Equity. Though he did, on the eve of his bankruptcy, hesitate about receiving the rent at first, he afterwards received it, thus, as it appears to me, deliberately reaffirming the contract.

The act of Storer also, in removing his office, it is not pretended can be referred to any other cause than the agreement for the sale. It appears to me therefore that it is a contract partly executed, perhaps on both sides, and that either party would have a right to claim, in a Court of Equity, a complete and specific execution of the entire contract; and if not on both sides, at least on the part of Tucker.

If this be the correct view of the case, the claim, in the form in which it is presented, cannot be allowed. It results in this; Tucker, in Equity, is to be considered as the owner of the land, and Storer has a lien on the land for the purchase money with the interest from November 27th, 1827, when he removed his office, till the time of the filing of Tucker's petition in bankruptcy; and a right of prior payment out of the land in preference to the other creditors. The just and equitable mode of settling the claim will be, to have the land sold and the proceeds applied to the payment of Storer's debt, and the excess over that sum will go into the estate, or, if there is a deficiency, Storer will be allowed to prove in concurrence with the other creditors. Or, as it seems probable that the land will not sell for enough to discharge the lien, it may be referred to a commissioner to ascertain the value, unless the parties can agree on the value, and, on this report, the assignees will be ordered to release the bankrupt's right, and the creditor be admitted to prove the residue of his debt.

The second claim, rejected by the commissioner, arose in this way. In 1821, James Read & Co. recovered judgment

against E. Tucker and Dyer, in which suit property had been attached on the original writ, which was redelivered to the debtors on the accountable receipt of Storer to the officer. The defendants in that suit placed property in the hands of Jonathan Tucker, the bankrupt, to be held in trust for the security of Storer, and the proceeds, when sold, to be applied to indemnify Storer against his receipt. Storer was called upon and was obliged to pay the execution. The amount and the time when paid are not stated, but if the claim is allowed, the execution is to be referred to, to ascertain both the amount and time of payment. The payment is admitted to have been made between 1821 and 1825.

There is no doubt that Jonathan Tucker, after receiving the property, was bound to hold and apply it to the discharge of the trust, and that Storer, by a bill in Equity, might have enforced the execution of the trust, and compelled him, after the goods were converted into money, to pay over the amount of the execution, if so much had been received upon them. 2 *Kent's Com.* 307 — 4 *Ibid.* 533. But as all these transactions took place as long ago certainly as 1825, and probably in 1821, it appears to me that, if the claim is put upon the ground of a trust, the remedy is barred by the lapse of time. Equity, as a general rule, will not lend its aid to enforce stale demands. But besides this general objection to the antiquity of the demand, which is a defence peculiar to Equity, the demand is clearly barred by the statute of limitations. The statute does not indeed, in its terms, apply to proceedings in Equity, and there are certain peculiar trusts to which the statute is held not to apply. 7 *Johns. Ch. Rep.* 111, *Kane* vs. *Bloodgood.* But in all cases of concurrent jurisdiction, where there is a remedy at law as well as in Equity, the statute is held to apply with the same force in Equity as at law; and the Court holds itself bound by the statute. 2 *Story's Equity*, § 1520. 7 *Johns. Ch. Rep.* 90, *Kane* vs. *Bloodgood.* 2 *Sch. & Lefroy*, 607. *Hovenden*

vs. *Lord Annesly*. 4 *Mason*, 150, *Robinson* vs. *Flook*. And in cases where the jurisdiction is exclusively in Equity and there is no remedy at law, if a party has been guilty of such laches as would have barred his right if it had been a legal right, Courts of Equity hold the equitable right to be lost by the lapse of time, in analogy to the statute. 1 *Sch. & Lefroy*, 413, 429, *Bond* vs. *Hopkins*. Whether this trust then was one that could or could not be enforced at law, the result will be the same. In the first case the statute will be a direct bar, and in the second it will be held a bar, in analogy to the statute.

But it is said that the claim may be allowed in the open and running account between the parties, and that, as the last item of charge in the account is within six years, this, under the law of this State, takes the whole account out of the statute. By that statute, in an action on "an open and mutual account current," the cause of action is deemed to have accrued at the time of the last item proved in the account. Of course, as in the account there is one item within six years, this will extract the whole account from the statute.

In the first place it is to be observed that this is an unliquidated claim against Tucker. It is not for the amount paid on the execution, but a claim of indemnity on the trust fund placed in his hands. The amount realized from that may be less than the execution, and to ascertain what the claim amounts to, an account must be taken. This has never been done. Now until the amount is ascertained, it does not appear to me that it can properly be entered as an item in an open and running account. And this seems to be the view which the creditor himself took of the matter, for though the account comes down to 1836, this is nowhere entered on his books as an item of charge. Now it may be admitted that, if this amount had been ascertained and entered on Storer's books as a debit, the latter items in the

account would have taken this out of the statute. But certainly the current account can extract nothing from the operation of the statute, which does not appear in the account. It can only save such claims, of more than six years standing, as have been entered by the party in his books, in the regular and ordinary course of his business.

But it is further contended by the creditor, that, as the demand is uncertain, the statute will not begin to run against it, until the amount is ascertained, and that when it is, and not before, it may be entered on the account as a debit. This in a certain sense is undoubtedly true. Where A has a claim against B of an uncertain amount, and they come to a settlement and determine the amount by mutual consent, the limitation will not begin to run but from the time of settlement, though the claim and right of action may have originated some years before. But this is because the settlement and acknowledgment of the debt amount to a new promise, and the debt, in relation to the statute, is considered as having its commencement at that time. If Storer and Tucker had made such a settlement, even after six years had elapsed, this would have taken the demand out of the statute, for here would have been a new promise. It might then have been entered on his account and escaped the limitation. But no such settlement and acknowledgment of debt has ever been made.

This claim had its origin, it is admitted, as far back at least as 1825. Before that time, Storer had paid the execution, and Tucker had sold the property. At that time Storer could have enforced his right, by an action of account or of assumpsit at common law, or at least by a bill in Equity, and the limitation began to run from the time that the right of action accrued. Now it will not be contended, where there is an open and running mutual account, that a party, who has slept on a demand for more than six years without entering it on his account, can save it from the statute by en-

tering it on his current account after the period of limitation has completely elapsed. Such a construction of the statute would open a door to unlimited confusion and fraud. Besides it is clearly inadmissible on the plainest legal principles, because the statute bar is complete and perfect before the entry, and such an entry on the books of the party cannot restore life to a claim already dead.

I should have been well satisfied if I could have found my wayon firm and safe grounds to another conclusion, for, from the admissions of the parties, as I understand them, especially connecting them with the unsettled account in Tucker's books with E. Tucker and Dyer, there is reason to believe,or suspect at least, that there was a balance in favor of Tucker and Dyer, which ought to have been applied to the indemnity of Storer. If therefore I could see any legal ground on which the claim could be supported, I would refer it back to the commissioner for further explanation. But in every view which I can take of the case, on the facts which are undisputed, it seems to me that the statute is a conclusive bar, and the Court cannot bend the established rules of law to meet the Equity of particular cases.

MASON ET AL. IN EQUITY,

VERSUS

CROSBY ET AL.

A contract, by which a right of pre-emption is given to a party for a certain time at a fixed price, on a *bona fide* expectation that he may become a purchaser, will not constitute him an agent of the vendor, although he sells his interest in the contract at an advanced price before the expiration of the term.

But if the right of pre-emption is given not with an expectation that the party will become a purchaser, but solely for the purpose of enabling him to make sale of the thing, and to get his compensation in the advanced price, this will render him the agent of the owner, and the consequences of agency will follow so as to render the owner responsible for his acts.

Generally, poverty is no excuse to a suitor, for delay in commencing a suit. But, when the statute of limitations does not create a bar to the legal remedy, the pecuniary embarrassments of a plaintiff will so far excuse delay, not beyond the period of legal limitation, as to relieve his claim from the imputation of staleness; especially when his embarrassments have been occasioned by the acts of the defendant.

October Term, 1846. This was a bill in Equity, brought to rescind a contract for the sale of 6000 acres of timber land lying in the County of Washington, on the waters of the Schoodiac, on the ground of fraud or mutual mistake. The land was originally purchased of the Commonwealth of Massachusetts, by Munroe, who took of the Commonwealth a bond for a deed. He assigned his bond to one Stephen Smith. Smith re-assigned the bond and the equitable title to the land to the defendants, at the price of two dollars and a quarter, an acre, and they, having paid the balance due to the Commonwealth, took a deed to themselves. The legal title was conveyed to the defendants, Crosby and D. Brastow, but five other persons, viz: Boynton, Wilson,

Thurston, B. Brastow, and Porter were interested in the purchase, in different proportions, to the amount of two thirds of the whole, so that these defendants owned but one sixth each of the land, and held the other two thirds in trust for the other purchasers. All the parties being desirous of selling, it was agreed between them to offer the land for sale at the rate of six dollars an acre, or $48,000 for the whole. Thereupon a bond was given by Boynton and Porter, two of the equitable owners, to Nathaniel Fifield, giving him a right of pre-emption of the land at that price, for a limited time. With this bond Fifield went to Massachusetts and agreed to sell the land to the plaintiffs for eight dollars an acre, the difference of two dollars being his own profit.

When Smith transferred the bond of the Commonwealth of Massachusetts to the defendants, he delivered to Boynton two certificates, one of Samuel Sawyer and one of Joseph Sawyer, one of them stating that he had recently explored, and the other that he had worked on the land in getting off timber in 1832, and both certifying that there was then standing on the land 6000 feet of pine timber to the acre on an average, and from 4500 to 5000 feet of spruce; and also another certificate, signed by five persons of St. Stephens, certifying to the good character of the Sawyers. It was principally on the reliance placed by the plaintiffs upon these certificates, with the strong assurances of Fifield and some of the owners of the land, that they might be entirely depended on, that the purchase was made. Mason, it is true, went from Boston for the purpose of going upon the land and exploring it himself, but by the artifices of Fifield he was prevented from going to it, or, if he actually went on any part of the land, from exploring it.

Before the sale of the land by Smith to the defendants, he agreed with one Samuel Darling, Jr., to give him one quarter of the profit he would make on the sale, in consideration of Darling's assisting him in making the sale. For this purpose, Darling procured these certificates of the Sawyers,

writing them himself, and they signing them. And he was one of the five persons who afterwards signed a certificate that the Sawyers were honest men, and that perfect reliance might be placed on their certificate. These certificates were proved to be grossly false, there not being one tenth of the amount of timber on the land that was stated in them. Nearly the whole had been taken off in the years 1831–2 & 3. There was no evidence that Boynton and the other purchasers knew the manner in which the certificates had been obtained, or that they were false. Other representations were made, with regard to the expense and facilities of getting the lumber to a market, which were proved to be untrue.

The plaintiffs charged in the bill that Fifield acted as the agent of the owners. The defendants denied, in their answers, the agency of Fifield and all knowledge of fraud or falsehood in the certificates; and stated that they had no personal knowledge of the land, and had purchased it on the credit of written reports exhibited to them. Part of the purchase money was paid when the deeds were executed, and notes were given for the residue with a mortgage of the land. The defendants have since entered on the land for the nonpayment of the notes, and foreclosed the mortgage, and thus regained a complete title to the land. The bill prayed that the defendants may be required to repay the money they have received, and deliver up the outstanding notes, and be perpetually enjoined from suing them at law. These are briefly the material facts.

The case was argued by *Bishop* and *S. Fessenden*, for the plaintiffs, and by *W. P. Fessenden* and *Kent*, for the defendants.

WARE, *District Judge.*

The first question, that arises in this case, is whether there was such a fraud in the making of this contract, as will furnish a just ground, on the principles upon which Courts of

Equity are accustomed to deal with such cases, for rescinding the contract, and replacing the parties, as nearly as may be, in the same situation as they would have been if the contract had not been made.

Upon this question, it appears to me that there is no reasonable ground for hesitation. It is clear that the plaintiffs, in making the purchase, relied mainly on the certificates of the two Sawyers, supported by the strong representations of Fifield and some of the owners, that full confidence might be placed in them. The plaintiffs did indeed at first decline to consummate the bargain without examining and exploring the land themselves, and Mason went for the purpose of making the examination, in company with Fifield, and Fifield set out with him for that purpose. But before arriving at the land, Fifield was, or pretended to be taken sick, and after remaining near the land for two or three days, he informed Mason that his bond would expire in a short time, and that he should lose the opportunity of selling and they of buying, unless he immediately returned to Bangor; and they accordingly returned, without any examination of the land, and completed the bargain. So that the plaintiffs purchased entirely upon their reliance upon the representations made to them by Fifield, corroborated by that of some of the owners, that entire confidence might be placed on the certificates of the Sawyers, who were men of good character. Now it is proved to a demonstration, that these certificates were grossly false. In the years 1831--2 and 3, one William Todd had a general license from Munroe, who was then the owner, to cut timber from the land, paying for his license the gross sum of $1500 for the three years. During those years, nearly the whole of the valuable lumber was taken off. So that when the plaintiffs purchased, according to the testimony in the case, instead of there being 6000 feet of pine lumber to the acre, there was not more than half a thousand, or about one twelfth of the amount which the certificate stated.

The manner in which these certificates were obtained throws some light on their character. In the spring of 1835, Smith engaged one Samuel Darling, Jr., to aid him in disposing of the land, and promised him, for his services, one quarter of the profit he should make in the sale. Thereupon Darling obtained these certificates of the Sawyers, writing the certificates himself, and signing another paper to go with them, certifying to the good character of the men. It is immaterial whether Darling and the Sawyers did or did not know that they were false. They would be equally fraudulent in one case as in the other. That the object, in obtaining them, was to delude and defraud purchasers, cannot be doubted. These certificates were delivered by Smith to Boynton, one of the purchasers, and by them put into the hands of Fifield.

There is no evidence that the present defendants, or those interested with them in the purchase, had any knowledge of the manner in which these certificates were obtained, or that they were so grossly inflamed and false. But it is fully proved that they received them, that they were put into the hands of Fifield, and that he made use of them to induce the plaintiffs to purchase; that Fifield and some of the parties in interest gave the strongest assurances that they might be depended upon. Fifield said that there was a larger amount of lumber on the land than the certificate stated, and that he would guarantee 10,000 feet to the acre.

It is said by Lord Eldon to be an old rule of Equity, that if a representation is made to a man going to deal on the faith of it, in a matter of interest, he that makes the representation shall guarantee its truth. *Evans* vs. *Bicknell*, 6 *Ves.* 183. And it makes no difference, in law or morals, whether he knew or did not know it to be false. *Ainslee* vs. *Mellicott*, 9 *Vesey*, 21. 1 *Story's Equity*, § 193. It is equally a fraud to aver a fact to exist, the reality of which the party is ignorant of, as it is if it is known to be false. There is no doubt that the representation was made that the certifi-

cates were entitled to full confidence, and that there was even more timber than they stated. Nor is there any more doubt that Fifield knew that the plaintiffs relied mainly, if not wholly, on these representations, in making the bargain. Whether he knew them to be fraudulent and false, or not, is not material in this case. He made himself responsible for their fairness and substantial correctness. But I think it may be fairly inferred, that if Fifield did not know that the certificates were false and procured for the purpose of fraud, that he had reason to suspect, and did, in fact, suspect it. If this suit were against Fifield therefore, no hesitation could be felt in coming to the conclusion that the contract ought to be rescinded, as being deeply tainted with fraud.

This brings us to one of the important questions in the case, whether Fifield, in making the contract, acted as the agent of the defendants, so as to render them responsible for his acts. This is charged in the bill, and is fully denied in the answers. It becomes then necessary to consider the terms of the contract entered into with Fifield. The instrument itself is not produced, but it is proved, by the evidence, and admitted to have been a bond, giving him a right of pre-emption of the land for a limited time. Fifield was not therefore an avowed agent, nor did he assume to act as such. If he was made an agent, it was rather as a legal result from the facts, than from the avowed intention of the parties, for it is not pretended that the owners, by this bond, intended formally to make him an agent. But an agency may be implied from the circumstances and mode of dealing, and forced by law on the parties, which will, when the rights of third persons have become involved, be equally binding as if it were created by the most formal instrument.

It is certainly true, that an agreement, giving a party a right of pre-emption of a thing, for a fixed price and a limited time, will not *per se* constitute him an agent of the vend-

or. Even if the party sells his bond or his interest in the contract before the expiration of the time, this will not render him an agent. Such engagements are of frequent occurrence in commercial transactions, and it was never imagined that they constituted the party, having such a bond or contract, an agent of the owner, so that he became responsible, as principal, for the contracts which the party made with others. If such a right of pre-emption is given to one, with the *bona fide* expectation that he may become a purchaser solely, or in company with others whom he may induce to join him in the purchase, this can in no sense make him an agent of the vendor, nor will it render the vendor responsible for any fraud, or misrepresentation, which the party having this right of pre-emption may make in a resale of the thing. The owner has nothing in contemplation but the sale of the thing to the person with whom he has made the engagement. On no principle of law or public policy, can he be held, as a principal, for the misconduct of his vendee, in a subsequent sale of the thing to a stranger. Whatever passes between them, is *res inter alios acta*. If he makes false and fraudulent representations to his vendee, and these are communicated to the second purchaser, who relies upon them, he may in some cases become directly liable to the second purchaser for his fraud. *Langridge* vs. *Levy*, 2 *Meeson & Wells.*, 532. *S. C. on error*, 4 *M. & W.* 337. *Pilmore* vs. *Hood*, 5 *Bing. N. C.* 97. *Crocker* vs. *Lewis*, 3 *Sumner R.* 1. But this liability does not result, properly, from the principles of the law of agency.

On the contrary, if the vendor gives this right of pre-emption to a party, not with the expectation or understanding that he is to become a purchaser, either solely on his own account or in company with others, but merely to enable him to make sale of the thing to strangers, leaving him to get his commissions or compensation in an advanced price, then, I hold, he becomes in law the vendor's agent, whatever color

may be given to the contract. In the interpretation of contracts, the law looks to the substance and effect of the contract, and will not be blinded by the disguise which the parties may throw over the essential characters of the engagement. Such an engagement has all the effects of an agency, and, according to the intention of the parties, it has no other. It is true that the party who has this pre-emptive right may, if he chooses, become a purchaser himself. But this forms no part of the original intention. The sole object is to clothe him with the power to sell, and he may sell under it just as well as he can under the most formal agency. The law will not and ought not to allow a man, under such a disguise, to reap all the advantages of an agency, and escape from all its liabilities. If this can be done, it is easy to see how he may practice frauds to any extent through a simulated vendee on the unsuspecting and unwary, may securely pocket the fruits, and leave the victims of the fraud to seek their remedy from an irresponsible man of straw.

To which of these categories does the engagement with Fifield belong? Was this right of pre-emption given with any expectation that he would become a purchaser, or was it merely to enable him to effect a sale of the land for the benefit of the owners. On the whole evidence there can be no doubt, I think, that it belongs to the latter. This appears in various parts of the record, but perhaps as clearly as anywhere, in a letter of Brastow, one of the defendants, to Mrs. Leland, the wife of one of the plaintiffs, under the date of April 5, 1837. In speaking of the sale of the land, he says, "We told two of our company that they had better put the land into the market at six dollars an acre. Wm. F. Boynton" (the son-in-law of Brastow) "and Joseph Porter, according to the usual custom, gave a bond of said land to Nathaniel Fifield." There is not an intimation in this letter, nor in any part of the record, that Fifield was expected to become a purchaser. The bond was given to him *to put*

the land into the market; that is, to enable him to make a sale of it. Can there be any doubt that the sole object of the owners was to enable Fifield to sell the land for their benefit? I think not. My opinion therefore is, that Fifield was substantially made an agent, and that the legal consequences of an agency must follow.

Brastow, in his letter, says, "*we told two of our company* they had better put the land into the market, and in pursuance of this advice the bond was given to Fifield." Who are included under this plural designation, *we*, does not appear; and it cannot therefore be determined, who concurred beforehand in this arrangement with Fifield. It is certain that Brastow did, and there can be no difficulty in holding him responsible. But Crosby, in his answer, denies that he took any part in it, and there is no evidence tending to show that he did, or that he knew of its existence until some time after it was completed. He admits however that he consented to sell his interest in the land at six dollars an acre. And when the pre-emption contract became known to him, he did not dissent but acquiesced; and, after the sale was made by Fifield, finally ratified it without any inquiry into the circumstances or authority under which the contract with Fifield was made, or the proceedings of Fifield in making the sale. Brastow and the other owners derived no authority to sell the interest of Crosby, from the naked fact that they were jointly interested in the land. Yet when they had all determined to sell for a fixed price, an authority to act for all, in making the preliminary arrangements, might be more easily inferred than it would be under other circumstances. It is a fair and reasonable deduction from the whole evidence, that Crosby passively acquiesced and allowed the acts of Brastow and the other owners, and this silent acquiescence, all the parties living in the same neighborhood, and the subsequent ratification of the sale, under the circumstances, will, in law, be equivalent to a prior mandate. A Court of Equity would be going a great way in covering up wrong to al-

low a part owner to lie by silently and permit his co-owner to practice a fraud in the sale of the joint property, and to take with impunity the fruits of the fraud, merely because he was not actively engaged in perpetrating it. My opinion on the whole case is, that though Crosby had no active participation in constituting Fifield an agent to sell, nor in any of the representations that led to the sale, he must be held as a principal, for the acts of Fifield, at least so far as he has been enriched by the fraud at the expense of the plaintiffs. *Jure naturæ æquum est, neminem cum alterius detrimento et injuria fieri locepletiorem. Dig.* 50, 17, 206.

This brings us to the last question in the cause, and which was strongly contested at the argument. If the right to rescind the contract ever existed, has it been lost by lapse of time? I have found more difficulty in coming to a conclusion satisfactory to my own mind on this point, than in any other part of the case.

In cases of fraud, time begins to run against the remedy only from the discovery of the fraud. *Brookshank* vs. *Smith*, 2 *Younge & Collier*, 52. *Blennerhassett* vs. *Day*, 2 *Ball & Beatty*, 129. The contract was, in this case, made in August 1835, but the deception, which had been practiced on the plaintiffs, was not in fact discovered until the fall of 1836. Suspicions had indeed before arisen in their minds, that the representations which had been made to them were highly exaggerated and untrue, but the real state of the facts was not known to them till something more than a year after the contract was made. The bill was filed in August, 1841, so that even the six years limitation at law had not expired when the suit was commenced. If then the plaintiffs are barred, by lapse of time, of equitable relief, it is not by the statute of limitations operating, by analogy, in Equity, as it does directly at law. If relief is denied on this ground, it will not be by the application of the legal prescription, but on the more general ground, that the plaintiffs have slept on their rights for such a length of time that the claim has be-

come stale and antiquated. The ancient brocard, *vigilantibus non dormientibus subvenit lex*, is applied in Equity, in some cases, with more stringency than at law, and therefore Equity will sometimes, under peculiar circumstances, hold a party barred of equitable relief when he is not of his legal right. Then it simply withholds its hand and leaves a party to his remedy at law.

It would have been more satisfactory if legal proceedings had been instituted, in this case, at an earlier period, and while the matter was fresh. But the delay is in part accounted for. In the first place, negotiations were undertaken to effect a compromise. They failed, but some time was consumed in this way. And in the second place, the plaintiffs had been ruined and stripped of their whole property by the fraud, and were destitute of the pecuniary means of prosecuting their rights at law. It is said by Lord Redesdole, that the Court cannot take into consideration, as an excuse for delay, the pecuniary embarrassments of suitors, for if this were done, there would be an end of all limitation of actions for distressed parties. *Hovenden* vs. *Lord Annesly*, 2 *Schoales & Lefroy*, 639. But this was said in a case where the plaintiffs had slept on their rights sixty years, and in which the Court held, on a full consideration of the subject, that every equitable right must be prosecuted within twenty years, or it would be barred by the statute of limitations operating by analogy on equitable rights, as it does directly at law. But when the delay has not been so great as to create a statute bar at law, it is not so clear that the pecuniary embarrassments of a suitor may not excuse some delay, so far as to relieve the plaintiff's claim from the imputation of staleness, especially when his embarrassments have been occasioned by the acts of the defendant. On the contrary, it appears to me entitled to consideration. For when a defendant relies for his protection, in Equity, on lapse of time, independent of the statute bar, he addresses himself peculiarly to the conscience and discretion of the Court. This

is not an exemption which he can claim of strict right; but he puts his defence either on the particular equities of his own case, or on the general policy of discouraging the litigation of stale and antiquated demands. Now when the plaintiff pleads, as an excuse for delay, his inability to meet the necessary expenses of prosecuting his rights, and this inability is occasioned by the very fraud for which he seeks redress, this plea certainly goes far towards overcoming the defendants' objections, whether addressed to the conscience or prudence of the Court. Such is the case with the present plaintiffs, and my opinion is, that they have not come into Equity too late to be heard, though they may not be entitled to all the relief they might have had if they had come earlier.

The legal title to the land was in the defendants, and the deed was executed by them. But by an agreement between the parties concerned in the speculation, these two defendants were to have but one sixth each of the interest in the purchase of Smith. Two thirds was in several other persons, and this was known soon after, if not at the time when the bargain was completed. The money which was paid was distributed among the parties in proportion to the interest they had under this agreement. These persons should properly have been made parties, and if not known when the original bill was filed, should have been brought into the case by a supplemental bill. As this has not been done, the decree cannot affect their rights. Still, as Crosby and Brastow held the whole legal title, and were ostensibly the sole contracting parties, they might perhaps, if the suit had been commenced as soon as the fraud was discovered, have been held for the whole and left to seek contributions among the other parties in interest. But since that time some of them have become insolvent, and it is not equally in the power of the defendants now to recall the money, as it would have been had the suit been promptly commenced. The delay has occasioned this inconvenience to them, that if they are now held to refund the whole of that part of the purchase money received,

the decree will operate, as to them, not simply to put them back in the same situation as they would have been in, if no contract had been made, but they will sustain an actual loss. It would be throwing on them a loss occasioned by the act, that is, the delay of the plaintiffs. If the defendants had been actively engaged in concocting the fraud, they might have been held responsible *in solido*, and left to bear the loss arising from the insolvency of the other parties. But there is no ground for imputing to them fraud, personally, certainly not to Crosby. They had not, and did not pretend to have, any personal knowledge of the land, but bought on the representations of others. It appears to me therefore that it would be inequitable to visit upon them the consequences of this delay of the plaintiffs. And a Court of Equity has authority not only to prescribe the terms on which it will grant relief, but to mould and temper its relief so as to meet all the equities of the case.

My opinion, on the whole, is, that the sale should be declared void, as to so much of the land as, by the agreement of the vendors, belonged to Crosby and Brastow; that the outstanding notes in the hands of the defendants be ordered to be given up and cancelled; and that each of the defendants be decreed severally to restore to the plaintiffs so much of the purchase money as they each severally received to their own use, and that it be referred to a master to examine and report the amount so received and to be repaid, and that the plaintiffs be required to release to the defendants such undivided portion of the land as equitably belonged to them according to the agreement aforesaid, and that all further action be reserved to the coming in of the master's report.

THE ELIZA.

Every engagement to perform a future act is subject to an implied condition, that the performance of it is not rendered impossible by an accident of major force, or a fortuitous event.

An unusual difficulty in obtaining a master and crew to navigate a vessel is not one of those events that will ordinarily excuse an owner from performing a contract of affreightment for the conveyance of goods.

March, 1847. This was a libel filed against the Schooner Eliza, for the breach of a parol contract for the transportation of a quantity of lumber from the port of Saco to New York. The libel was filed on the 4th of February, and the contract was entered into on the last day of November, or the first of December. The cargo was put on board, December 1st, while the schooner lay at the upper ferry, and she then dropped down to the lower ferry to avoid being detained by the ice, which began to be made in the river. She lay there, without proceeding on her voyage, to the time of the filing of the libel, and in fact continues there to this time, with the cargo on board. The schooner, though a small vessel, was proved to be in a good condition and every way fit for the voyage, though at that season of the year the voyage is one of considerable danger. She is now ready for sea and is said to be about sailing on the voyage. The libel was for damage for not proceeding on the voyage within a reasonable time.

Haines, for the libellant; *Howard* and *Leland*, for the owner and respondent.

WARE, *District Judge.*

The fact, that a contract of affreightment was made and the cargo taken on board in pursuance of the contract, is admitted. The controversy is, What were the terms of the contract? The libellant contends that it was a contract in

the ordinary and usual terms of such engagements, to receive the cargo on board and to proceed on the voyage without unnecessary delay. The owners allege that it was conditional; that it was to receive the cargo on board where the schooner lay, and drop down to the lower ferry, and then to proceed on the voyage as soon as a master and crew could be obtained to navigate her; the vessel being small and the voyage at that season being hazardous, that their engagement to perform the voyage was made subject to the condition that a master and crew could be obtained, and that they have made all reasonable efforts to procure a master and have not been able to succeed. It is proved that they applied to several masters to take charge of the vessel, who all, for various reasons, declined; but not particularly on account of the dangers of the voyage.

The question then, which is before us at this time, is this, What were the terms of the contract? Was it absolute or conditional? It was not reduced to writing, and no witness appears to have been present when it was concluded. The terms cannot therefore be learnt from direct evidence. One witness has been examined, who was present when the application was first made by Davis, the libellant, to Gilpatrick, one of the owners. He says he went with Davis and introduced him to Gilpatrick, and that Gilpatrick offered him the vessel for $100 for the run. No condition was annexed to the offer, and nothing was said about a master. The contract was not made at this time, but the witness went with Davis to examine the vessel. Ellis, another witness, was present at a subsequent conversation on the first of December, and at this time it appears that the contract had been made, or that it was then made, for the price was mentioned which was to be paid for the run. At this time, Gilpatrick stated to Davis that he had no master or crew, that his clerk was to be absent, and that he could not attend to loading her that day. To which Davis replied that he had men whom he could employ, and that he, Davis, would assist in

loading, and the cargo was in fact put on board that day, in part by men employed by the owner, and in part by Davis.

The testimony of this witness brings us nearer to the contract than any other part of the evidence, as it seems probable that the bargain was then concluded. But, unfortunately, he heard but part of the conversation. He says that Davis offered eighty dollars for the run—the sum that was finally agreed—and this, connected with the remark of the owner that he had no master engaged, renders it highly probable that the bargain was not concluded before. Why was this difficulty interposed by the owner, that is, the want of a master and crew? The circumstances, I think, easily and naturally explain it. The vessel was lying at some distance up the river, and it was about time for the navigation to be closed by the ice. If the schooner was to perform the voyage, she must be ready immediately, or the voyage would be prevented by the ice. The cargo must be taken on board at once. The owner therefore objected that he had no master and crew; and to obviate it, Davis replied that men might be employed for that purpose, and that he would himself assist; and the vessel was in fact loaded that day. It seems therefore altogether probable that the want of a master and crew was mentioned in reference to the necessity of immediately putting the cargo on board, and not to the ultimate performance of the voyage, if she could be loaded and carried down to the head of winter navigation before the river closed. There is other testimony that bears more or less on this matter, the want of a master; but taken altogether, it does not materially vary the posture of the case as it is left by the testimony of this witness.

The conclusion to which I am brought by the evidence is, that the contract was not made dependent on a condition that a master and crew could be found, but that it was, as charged in the libel, in the ordinary form, that the vessel should proceed on her voyage without unnecessary delay. It is true that every engagement to perform a future act is,

in one sense, conditional. If it becomes impossible by any event not imputable to the party who is bound to perform it, unless he assumes the risk of all contingencies, he is excused. The law compels no one to impossibilities. *Poth. Oblig.* 148. 6 *Toull.* 227. Those events called accidents of major force, or fortuitous events, or the acts of God, always constitute an implied condition, in every engagement, for a future act. If the vessel had been burnt by an accidental fire, or destroyed by a tempest, this would have been a valid excuse. But the difficulty of obtaining a master and crew is not one of those contingencies implied in a contract of affreightment, to excuse a non-performance of the contract. It is not unusual for an owner to engage a vessel for a voyage before he has engaged a master, and a crew is rarely engaged until the voyage is determined upon and the vessel nearly ready for sea. These contingencies the owner takes on himself. I do not mean to say that the difficulty of obtaining a master and crew to navigate a vessel may not be such as to amount to an impossibility, and thus come within the class of fortuitous events that will excuse a party from performing his engagement. But the circumstances must be very extraordinary to amount to a justification. It is proved by the testimony, that the owner made efforts to obtain a master. Five different persons were applied to without success. But others might have been found, if not in Saco, in some of the neighboring towns. And I do not think that any such extreme case is proved, as will excuse the owner from his engagement, under the notion that it has become impossible by a fortuitous event or an accident of major force.

Decree for Libellant.

IN THE MATTER OF HENRY WARREN, A BANKRUPT.

A partnership may exist in a single as well as in a series of transactions. If there is a joint purchase, with a view to a joint sale and a communion of profit and loss, this will constitute a partnership.

There may be a partnership in buying and selling lands as well as merchandise; and so far as third persons are concerned, it may be proved by the same evidence, though, as between the partners, it may be necessary to prove the partnership by written evidence.

Generally, when a member of a firm makes a note, or draws a bill, in his own name, though it is known to be on the partnership account, the firm will not be bound.

But this rule does not prevail where there is a secret partner unknown to the creditor.

Nor when one of a firm has been in the habit of drawing and endorsing bills in his own name for the use of the firm, and the other partners have treated them as binding the firm.

Where two persons, who are partners, unite in drawing a bill or making a note, though they sign their several names and not that of the firm, if it is in fact on the partnership account, it seems that it will be treated throughout as a partnership security.

On the dissolution of a partnership, in cases of insolvency, the rule of Equity is, that the partnership creditors have a preferred claim against the assets of the firm, over the separate creditors of the partners, and the separate creditors have a like preference over the partnership creditors, against the separate assets.

This rule of Equity is established as the rule of distribution, by the 14th section of the Bankrupt Law.

September, 1847. In this case, the bankrupt petitioned both as an individual and as a partner in the late firm of Warren & Brown. The firm and both partners were insolvent. The separate assets of Warren were considerably more than the partnership assets, and a question arose between the different classes of creditors, whether the partnership, which was originally entered into in the busi-

ness of attorneys and counsellors at law, extended to their speculations in lands, and if so, by what criterion the debts, which originated in land transactions, should be distinguished from the separate debts.

The case was argued by *Jewett* and *Hobbs*, for the separate creditors of Warren, and by *Adams* and *Rowe*, for several creditors, whose claims originated in the land transactions of Warren & Brown, and who, it was contended on the other side, were partnership creditors. The material facts are stated in the opinion of the Court.

WARE, *District Judge.*

In the spring of 1834, Warren and Brown formed a partnership for carrying on the business of attorneys and counsellors at law. There were no written articles of partnership, but the understanding between them was, that it was to be confined to their professional business. Without any additional agreement, they began soon after buying and selling timber lands. There was no formal agreement as to the terms on which this business was to be carried on, but they do not appear originally to have contemplated a general partnership in land transactions, and probably did not anticipate the extent to which their speculations were eventually carried. It was understood between them that either might purchase, but that the other was not bound to take a share in the purchase without his own consent to each particular purchase, but when both parties assented to the purchase, they were to share in equal portions in the profit or loss. According to the usage of the time, they sometimes purchased and sold lands directly, and sometimes preëmption bonds or contracts for the sale of lands.

This land business was commenced in the fall of 1834, and was continued on an extensive scale through the ensuing winter and summer, until the period of speculation was over. Though they did not contemplate originally a gener-

al partnership, and each was considered at liberty to purchase and sell on his own private account, there were in fact no timber lands purchased by either, except what were taken on joint account. When they commenced the business, they gave their joint notes, signing separately and not the partnership name, but more frequently the securities, for the convenience of negotiation, were in the form of bills of exchange, drawn by one and accepted by the other. It was not long, however, before the name of the firm was freely used in these land securities; at first, it seems, by Brown, but not objected to by Warren. This trade in timber lands appears to have led to the lumbering business, in which they seem to have been engaged in the same way without any special partnership agreement. Whatever may have been the private intentions of the parties, it seems that they must have soon come to be considered, and dealt with by others, as a firm. A list of notes or bills of exchange is produced, taken from the books of Warren, more than sixty in number, commencing with the spring of 1836, and continued to the fall of 1839, growing out of land and lumber transactions, in which the name of the firm is used as promissor, drawer, acceptor, and endorser for various amounts, from small sums up to two, three, and five thousand dollars, and in the whole exceeding $50,000. It is quite impossible that such an amount of business, continued for such a length of time, could have been done in the partnership name, without its being generally understood that a partnership in the business existed. Third persons must have dealt with them and given them credit on that understanding.

The earliest land transaction in which they were engaged was with Thacher and Parker. This was an obligation of Thacher and Parker, to convey to them 12,040 acres of land at the price of two dollars an acre, part to be paid in cash, and part on credit of one, two, and three years, provided satisfactory security was given in sixty days. This obligation

is in the hand-writing of Warren, and the obligation runs to them in their partnership name; so that from the very commencement of their speculations, whatever may have been the private intentions of the parties, the business was transacted in a way that must have led those who dealt with them to suppose that a partnership existed, and that the trade was on partnership account. Between the parties themselves, in the earlier part of their speculations, each purchase was treated as a separate and independent transaction, and, when the land was sold, the parties settled it and divided the profits and loss. But this was a private affair between themselves, and not known to third persons with whom they dealt.

A partnership may exist in a single transaction as well as in a series. *Story on Partnership*, § 21. *Pothier, Contrat de Societé, No.* 54. 3 *Kent's Com.* 30. If there is a joint purchase, with a view to a joint sale and a communion of profit and loss, it is a partnership trade, although it is confined to a single thing. *Dig.* 17, 2, 5. Now every purchase was made with a view to a joint sale on joint account, so that, without any general agreement for a partnership, they were, in law, partners in every purchase, and, by the habit of buying and selling in this way, they held themselves out to the public as general partners in the business.

There may be a partnership, in buying and selling lands as well as in ordinary commercial business. 21 *Maine Rep.* 418. *Dudley* vs. *Littlefield. Story on Partnership*, § 23. And so far as the rights of third persons are involved, it is not perceived why it may not be proved by the same evidence. To give full effect in law to the partnership, between the partners themselves, it seems to be necessary that the articles be in writing. For if the partnership is by parol only, and one of the partners makes a purchase in his own name, but intended for the benefit of the firm, the other, on the mere ground of the partnership, that being by parol, can-

not take advantage of the contract, for, if he could, he would acquire an interest in lands by parol, directly in opposition to the Statute of Frauds. 3 *Sumner*, 435, 471, *Smith* v. *Burnham*. But this is only between themselves. Third persons, dealing with them, are not affected by any private arrangements between the partners unknown to them. If they hold themselves out to the public as partners, those who deal with them have a right so to regard them, and they will be bound as partners.

It appears to me that there is abundant evidence to prove a partnership in their land speculations, as to third persons. Their very first contract was in the name of the firm, and every succeeding one, whether made in form in the name of the firm or not, was adopted by them and taken on joint account. Though the securities, they gave in their earlier transactions, were not given in the partnership name, yet when they gave their joint note, or one drew a bill and the other accepted it, it was as well understood to be a partnership transaction, as if the name of the firm had been used. But the business having been transacted in this way, a question arises of some difficulty, whether, on the bankruptcy or insolvency of the partners, these debts are to be placed to the partnership account, or are a charge on the separate estates of the partners.

By the general rule of law, if one member of a firm makes his separate note, or draws a bill of exchange in his own name, he will be bound, and not the firm, although it is on account and for the benefit of the partnership. *Story on Partnership*, § 124, 127. The general reason by which this decision is vindicated is, that the creditor, by accepting the separate security of the individual partner, is supposed to have elected to take that in preference to the security of the firm. As the decision proceeds on the ground of a supposed choice in the creditor, it does not hold in cases where it appears that no choice could have been made; and consequent-

ly where there is a dormant partner, and not known to the creditor, if the contract is for the benefit of the partnership, he will be bound, although he is not named. And for the same reason, where one of the partners has been in the habit of drawing and endorsing bills and notes in his own name, for the use and benefit of the firm, if it appears that the other partners have treated such signature as binding on the firm, the name of the partner will be held as standing for that of the firm, and be binding upon them. So it was ruled in the case of the *South Carolina Bank* vs. *Case*, 8 *Barn. & Cresw.* 427. *Story on Partnership*, § 142. The creditor will be held as trusting not the partner alone but the firm. It is not therefore universally true, when a contract appears on its face to be the separate contract of one partner, that it will not be binding on the firm if it is understood to be, and is in fact, for their benefit. The presumption, that arises from the form of the security, that the separate name of the partner was taken from choice, may be overcome by proof that no such election was made. The true and more general principle seems to be, that when the intention of the contracting parties is that the firm shall be bound, and the contract is within the scope of the partnership business, the contract will bind the firm in whatever form it may be made.

But when a partnership consists of two persons, and they both sign a note or bill with their individual names and not by the name of the firm, or one draws a bill and the other accepts it, if it be in fact for a joint or partnership object, there would seem to be strong reasons for putting it, in the marshaling of securities, to the partnership account. Indeed it has been held, that if two persons, who are not partners, unite in drawing a bill of exchange, they are to be considered as partners in that bill. It is said that the public are to infer their relation to each other from the face of the paper. 3 *Kent's Com.* 30. *Carvick* vs. *Vickery*, *Doug.* 653, *note*. And a like decision has been made on a joint and several promis-

sory note, so that a demand or notice to one is a demand or notice to both, though perhaps the weight of authority is, where the parties are not in fact partners, the other way. *Story on Promissory Notes*, § 239, *note*. *Story on Bills of Exchange*, § 197. But where two persons, who are partners, unite in drawing a bill or making a note, though they sign their several names and not that of the firm, if it is in fact for partnership purposes, I am not aware that it has been decided that such a note or bill is not to be treated throughout as a partnership security; that a demand or notice to one is not a demand or notice to both, or that a creditor holding such a security would not have, in the administration of assets, a preference against the joint estate, over the separate creditors of the partners. The general language of elementary writers leads to the conclusion, that such a note or bill is to be treated for all purposes as strictly a partnership security. The reason for so doing, in the marshaling of assets and securities, is certainly very strong. The fruits of the contract have gone to increase the social fund, and there is a natural equity in allowing the creditor a preference against that fund which his contract has contributed to augment.

On the dissolution of a partnership, in cases of insolvency, the rule in Equity is, that the partnership creditors have a preferred claim against the partnership assets, over the separate creditors of the partners, and the separate creditors of the individual partners have a like preference over the partnership creditors, against the separate assets. The principle is, that each class of creditors is thrown on that fund to which he has given credit, and which he has contributed to enrich, and neither class can come on the other estate, until the appropriate creditors of that estate have been fully satisfied. 3 *Kent's Com.* 64, 5, *note*. The same general rule holds in bankruptcy. In England it is indeed, in bankruptcy, qualified by some exceptions partly founded on technical

reasoning, and partly on some supposed convenience, but certainly not standing on any plain and intelligible rule of equity or justice. *Story on Partnership*, § 377, 381. *Eden on Bankruptcy*, 170, 175.

The rule of distribution, established in the general jurisprudence of Courts of Equity, has been incorporated in express terms into our bankrupt law. The 14th section directs that after the expenses and disbursements of the assignee are fully paid, the whole of which are a charge on the whole property, "the net proceeds of the joint estate shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate of each partner shall be appropriated to his separate creditors; and the balance, if any, of each estate, after paying the debts primarily chargeable upon it, shall be carried to the other estate." The language of the law is clear and explicit, and the only question left is, Which are partnership and which separate creditors? I have already expressed my opinion that the speculations in land were, from the beginning, on partnership account, and in whatever form the securities were given, the presumption is that credit was given to the firm. That presumption however may be overcome by proof that credit was in fact given to the individual partners.

J. W. CARR, ASSIGNEE OF S. C. HEMENWAY,

VERSUS

STEPHEN GALE AND S. C. HEMENWAY.

In an action of Trover against Gale and Hemenway, by the assignee of Hemenway, for the conversion of a store of goods in the possession of Hemenway, claimed by Gale as owner, and by Hemenway as the agent of Gale, and claimed by the plaintiff as part of the assets of Hemenway's bankruptcy, it was held that the Circuit Court had jurisdiction against Hemenway as well as Gale.

The District Court has, under the bankrupt law, exclusive jurisdiction of all controversies, between the assignee and the bankrupt, arising out of his bankruptcy, and depending on his quality or *status*, and involving his rights and immunities as a bankrupt.

But when the bankrupt has possession of property claimed by the assignee as part of the assets of the bankruptcy, and the bankrupt claims to hold them, not as a bankrupt but under an independent title as the agent of a third person, he is simply a person claiming an adverse interest, and the Circuit Court has jurisdiction.

The assignee, to maintain his title to sue, need prove only the decree of bankruptcy and his appointment. This is *prima facie* evidence of his title under the law, without producing the bankrupt's petition to be declared a bankrupt.

In Trover, it is not necessary to prove a demand of the goods and a refusal, where there has been an actual conversion.

When a party objects to the testimony of a witness, part of which is admissible and part inadmissible, he is bound to point out that part to which the objection lies, or the objection will be overruled as covering too much.

In a case where fraud is charged, and the fraud is attempted to be proved by circumstantial evidence, facts which have no tendency to prove the frauds charged, but merely tend to create a personal prejudice against the party, are inadmissible; but if the Court can see that they have any tendency to prove the fraud, though it be but slight, they are admissible to be submitted to the jury, who are the proper judges of their weight.

October, 1847. This was an action of Trover brought by Carr as assignee of Samuel C. Hemenway, one of the defendants, against Gale and Hemenway, for the conversion of a store of goods in Bangor. The plaintiff claimed them as part of the estate of Hemenway, which should have been surrendered to him as his assignee. The defendants claimed them as the proper goods of Gale, in the possession of Hemenway as his agent. The defendants pleaded separately the general issue, and the jury returned a verdict for the plaintiff for $5,030 45.

The defendants filed a motion for setting aside the verdict and for a new trial.

The case was argued by *Daveis* and *Rowe*, for the defendants, in support of the motion, and by *Deblois* and *McCrillis*, for the plaintiff, against it.

WARE, *District Judge.*

The first question raised by the defendants' counsel is one as to the jurisdiction of the Court. It is denied that this Court has jurisdiction over the case, at least as to one of the defendants, Hemenway, and that if any action can be maintained against him, this can be only in the District Court. The 6th section of the bankrupt law gives to the District Court jurisdiction over all matters and proceedings in bankruptcy in the most comprehensive terms, and this jurisdiction is declared to extend to all cases and controversies arising between the bankrupt and any creditor or creditors claiming any debt or demand under the bankruptcy, to all cases between such creditor or creditors and the assignee of the estate, and to all cases *between such assignee and the bankrupt.* By the 8th section, concurrent jurisdiction is given to the Circuit Court, with the District Court, of all suits at law and in Equity, which may or shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person or persons against

the assignee, touching any property or rights of property of said bankrupt transferable to, or vested in, the assignee. The jurisdiction of the Court is then free from doubt as to Gale, as he appears claiming an adverse interest. But in carving out a portion of the jurisdiction of the District Court to be exercised by the Circuit concurrently with the District Court, the act omits controversies between the assignee and the bankrupt, and it is therefore said that Hemenway is not bound to answer in this Court.

It may be admitted that the Circuit Court has no jurisdiction over controversies between the assignee and the bankrupt, arising out of his quality or *status* as a bankrupt, and dependent on that. For instance, by the 3d section of the law, all the property and rights of property of the bankrupt are, by virtue of the decree of bankruptcy, declared to be, by mere operation of law, transferred to and vested in the assignee, subject to certain exceptions. The proviso enumerates these exceptions. They are—the wearing apparel of the bankrupt and his family, and such household furniture and other necessary articles as shall be set apart for his use by the assignee subject to the decision of the Court. These do not pass to the assignee. A question may arise whether a watch, or articles of personal ornament, for himself, or his wife, or children, fall within the exceptions, as wearing apparel, or other necessary articles. *In the matter of Grant*, 5 *Law Rep.* 11. This would be a matter arising out of the bankruptcy, and involving his rights as a bankrupt under the bankruptcy, and if a controversy arose on the subject, would seem to be exclusively within the jurisdiction of the District Court. Again, a bankrupt may acquire property after he has filed his petition, and before a decree of bankruptcy, or before his discharge, by his own industry, or by contract, inheritance, devise, or gift. And a question will arise between the bankrupt and his assignee, whether this passes to the assignee as part of the assets of the bankruptcy, or is an acquisition for the benefit of the bankrupt himself. The solution of this question involves the consideration of his rights and immu-

nities as a bankrupt. *In Re Williams*, 5 *Law Reporter*, 155. The clause in the 6th section of the law, giving jurisdiction to the District Court over cases and controversies between the assignee and the bankrupt, naturally refers to cases of this description, involving the consideration of his personal *status* and the rights which he may claim in his quality as a bankrupt; and as no similar language is used in the 8th section, it may be that the jurisdiction over this class of cases is exclusive.

But in the present suit, Hemenway sets up no claim as a bankrupt; he insists on no right in relation to this property derived from his bankruptcy, or any way connected with it. The goods which he is charged with converting are indeed claimed by his assignee as part of his assets, but he makes no claim to them as such. His defence is that the goods were never his, but belonged to Gale, and were in his possession as the agent of Gale; and the suit is not against him as a bankrupt, but simply as a wrong doer. I cannot see that he is any more exempted from the jurisdiction of this Court than he would be if the property, the conversion of which he is charged with, had belonged to another estate. In this case he is simply a person claiming an interest adverse to the assignee.

Another ground, on which a new trial is demanded, is that the plaintiff has shown no title to claim the property, admitting that the goods belonged to Hemenway before his bankruptcy, and so constituted a part of his assets. The plaintiff, to prove his title, offered in evidence the decree of bankruptcy and his appointment as assignee, but this, it is said, is insufficient without offering the petition also. The ground of this objection is, that the District Court, sitting in bankruptcy, is a Court of limited and special jurisdiction, and that, as such, no presumption can be made in favor of its jurisdiction, but that this must be made to appear affirmatively by spreading before this Court the whole proceedings. The decisions under the English bankrupt law and those of our own

Courts under the former bankrupt law, have been referred to in support of this position. The former bankrupt law was borrowed, with some alterations, from the English system, (5 *Mass. Rep.* 249–50, *Lummus* vs. *Fairfield*,) and was widely different from the last law. It was far more complicated in its details, and operose in its modes of proceeding. Under the English system, it is necessary for the assignee to prove—1st, the commission,—2d, the petitioning creditor's debt,—3d, the trading,—4th, the act of bankruptcy,—and 5th, the assignment. *Eden on Bankruptcy*, 252. The 3d section of the late act seems to have been framed with a view to supersede the necessity of proving such facts. It provides that all the property and rights of property of the bankrupt, who has been declared such by a decree of the proper Court, shall, by mere operation of law, from the time of such decree, be deemed to be divested out of such bankrupt and without any conveyance shall, by force of the decree, be vested in such assignee as the Court shall appoint. It appears to me, from the plain words of this section, that all which is necessary for the assignee to shew in the first instance, is the decree and his appointment under it. It obviously was the intention of the statute to simplify the proceedings and dispense with the cumbrous machinery of the former law. The analogies therefore, derived from the practice under that law, apply with less force. That dispensed, in favor of the assignee, with two of the requisites of the English law, that is, proof of the trading and the act of bankruptcy, which were held to be conclusively proved by the commission. *U. S. Laws*, 1800, *Ch.* 19, § 56. The policy of the last act was to render the proceedings still more simple, expeditious, and cheap. The assets, instead of coming to the assignee through a conveyance by commissioners, passed directly, without any form of conveyance, by operation of law. Under the voluntary branch of our law, no one of the five things required to be proved by the English law can be properly said to exist, or at least no one is essential to the proceedings. No com-

mission of bankruptcy is issued; there is no petitioning creditor, and under the English law his petition need not be proved; no trading is necessary, and no act of bankruptcy is required, and no assignment is made. The title deed of the assignee is the decree, and it appears to me that the statute makes this *prima facie* evidence of the assignee's right to the property. If this title may be impeached for any irregularities in the antecedent proceedings, the burthen of impeaching is thrown on the other party.

Another objection to the verdict is, that there was no evidence sufficient to support the action, there having been no proof of a demand of the goods and a refusal to deliver them, before the action was brought. The action is trover, an action of tort, but the tort consists not in the taking but the conversion. If there was an unlawful taking, this was waived by the form of the action, and the defendant is admitted to have obtained the possession lawfully, that is, by finding. A conversion must therefore be proved. If the defendant has done nothing with the goods beyond what he might do as finder, this action cannot be maintained until there has been a demand by the owner and a refusal to deliver them. A refusal is then ordinarily held to be equivalent to a conversion, because it ordinarily amounts to a denial of the owner's right. But if the refusal is justified, or excused, by any reasonable or just cause, as if it be on a fair doubt whether the person who makes the demand be the true owner, the refusal will not be equivalent to a conversion, provided the party acts in good faith, and does not intend to make any appropriation of the goods to the injury of the real owner. *Archbold's Nisi Prius, Vol.* 1, *page* 458. 2 *Greenleaf's Evid.* §644–5, and the cases cited. A demand and refusal is only one mode of proving a conversion. But a sale is a conversion, as much as an actual consumption of the goods would be. *Featherstonhaugh* vs. *Johnson*, 8 *Taunt.* 237. A demand then would have been a useless and unmeaning formality.

Another reason urged for a new trial is, that certain parts of the evidence offered by the plaintiff were irrelevant and improper to be submitted to the jury. This objection relates principally to the deposition of Sylvester and the testimony of Bryant. To understand the bearing and applicability of this evidence, it will be necessary to advert to some antecedent facts. In 1836 Hemenway failed in trade and transferred a large amount of property, being his whole stock in trade, to assignees, for the benefit of such of his creditors as should become parties to the assignment and release him from his debts. Some of his creditors refused to come in under the assignment, so that, after the distribution of his estate, there remained a considerable amount of outstanding claims against him. Hemenway then left Bangor and was absent a considerable time, and returned in 1838, when he again went into business as the agent of Gale, his brother-in-law, residing in Portland. While thus engaged in business, one of his old creditors sued him and summoned Gale as his trustee. Gale was discharged on his disclosure, a copy of which was offered in evidence in this case by the plaintiff. The ground assumed by the plaintiff was, that all this time, from 1838 to 1842, Hemenway was trading on his own capital, was in fact the owner of the goods, and that the title of attorney of Gale was a mere cover, he having no interest in the store. As proof of the good faith of the parties and that the property was in fact Gale's, evidence was offered by the defendants tending to show that Hemenway was poor and utterly destitute of property. The testimony offered by the plaintiff was to show that Hemenway had property of his own, and to overcome the presumption of good faith arising from his apparent poverty. Sylvester testified that he paid Hemenway a bill after he made his assignment, and that Hemenway stated to him that he had drawn off bills to the amount of $4,000, and balanced the accounts in his books before delivering them to his assignees, which were then due and unpaid. Bryant testified that after the books came in-

to his hands, as one of the assignees, several persons called on him and stated that they were indebted to the estate, but that on turning to the ledger he found the accounts balanced. He also testified that after the keys of the store were delivered to him a considerable amount of goods were abstracted from the store, and that Hemenway was concerned in taking them away. From this evidence, the counsel for the plaintiff argued that Hemenway had reserved to himself, from the wreck of his fortune in 1836, a considerable sum, and that it was with this capital that he commenced business in 1838. Connecting this with the disclosure of Gale, who said that he had no interest in the store, and the further fact that, though a large business was carried on under Gale's name, he gave no attention to it, and never visited Bangor from 1838 to 1842, the plaintiff's counsel contended that this title of attorney was a mere blind to enable Hemenway, under Gale's name, to resume business for himself and set his creditors at defiance. There was other evidence besides this, from which the jury might infer that Hemenway had an interest in the store beyond that of a mere agency. If any credit was due to this evidence tending to show that he had an interest in the goods, it could not be considered immaterial to show that Hemenway had property of his own. Whether he had or had not, was a fact to be inferred altogether from circumstantial evidence. Now it is evident that circumstances of this kind may be made to bear with more or less force, according to their connection with other facts admitted or proved in the case. How far they contributed to sustain the plaintiff's case was a question for the consideration of the jury. The question now is whether the jury ought to be allowed to hear such evidence; that is, whether it had any tendency to prove the plaintiff's case. The plaintiff's case stood on the charge of a fraudulent covering of Hemenway's property to screen it from his creditors. Unless this was made out, he failed. It was therefore very material to show that he had property to conceal. The evidence in question went to prove this fact, by showing that he

had fraudulently abstracted a portion of his assets on the occasion of a former failure in business; and that at a period not so distant but that he might reasonably be supposed to have retained a portion to recommence business in 1838. It was not therefore evidence that went merely to create in the minds of the jury a personal prejudice against him, but to a certain extent tended to sustain a material point in the plaintiff's case. It appears to me therefore that it was evidence proper to be submitted to the jury. It is said that this matter had before been submitted to arbitration, and it was contended that it was not now open to be reëxamined. But that was between Hemenway and the parties to the assignment. The present plaintiff, and the creditors whom he represents, were no parties to that arbitration, and the decision of the arbiter is not binding on them. It is true that fraud is not to be presumed, but it is also true that it may be inferred from circumstances, and often can be proved in no other way.

Another objection was made to a part of the testimony of Bryant. In answer to a question of the plaintiff's counsel he stated, that several persons called on him and said that they were indebted to the store, but on turning to the books he found the accounts balanced. The defendants objected to this testimony without the production of the books. But Bryant did not testify here to the contents of the books. He was not asked who called on him, nor how many, nor what was the amount of the accounts so balanced. The fact, to which he testified, was not one which appeared in the books, but was collateral to them. It was simply that persons called on him and stated that they were indebted to the store, but when he looked into the books he found the accounts balanced. The production of the books could neither confirm nor disprove the statement of the witness. All that they would have shown was, that there were some accounts which were balanced and others which were not, but the material fact, whether there were any persons who called on him as he stated, was a fact known only to the witness himself.

There is however one fact stated by Bryant, which perhaps, in strictness, was not admissible without the production of the books. It is that when persons called on him and said that they were indebted to the store he looked at the ledger and found the account balanced, but that in examing the day-book he found no corresponding entries in that. No names of individuals were given and no sums mentioned, but the naked fact alone was stated. Now an inspection of the books might have verified or disproved the fact, and for this purpose perhaps they ought to have been produced. But when the objection was made, this distinction was not noticed. The objection was general and in my opinion covered too much, and so it was properly overruled. The party objecting to the testimony of a witness, part of whose testimony is admissible and part of which is inadmissible, is bound to point out and discriminate the part to which the objection applies. If however the discrimination is not made, and objectionable testimony is permitted to go to the jury, the Court may undoubtedly in its discretion grant a new trial for this cause. But it ought not to do it, when the testimony is of such a character as probably would not and ought not to have changed the verdict. And such I think this testimony to have been in this case.

The defendants offered the schedule annexed to Hemenway's petition in bankruptcy, to prove the property in Gale. This was objected to and ruled to be inadmissible. The defendants contend that it ought to have been admitted. It is generally true that, in an action by the assignee, the bankrupt is a competent witness to diminish but not to increase the fund. *Eden on Bankruptcy*, *p.* 361, 366. His interest in the surplus is an obvious reason for excluding his testimony when it goes to increase the fund, but when it goes to diminish it, he is testifying against his own interest. But the evidence here offered was the mere declaration of the bankrupt, under oath it is true, but still only his declaration,

without any opportunity of the present plaintiff to cross examine him. And here the bankrupt is a party and of course he cannot give in evidence his own declaration in his own favor. But it is said that it ought to have been admitted in favor of Gale. To determine this, let us look at the posture of the case. The plaintiff proceeds on the ground that there was a fraudulent agreement between the parties to cover the property of Hemenway and keep it from his creditors under the name of Gale. And this evidence is nothing more than the declaration of one of the parties to disprove the fraud. It appears to me on this ground that it is inadmissible.

There was other testimony admitted which was objected to, as irrelevant and as having a tendency to create a prejudice against the defendants. This related to the mode of conducting the business in the store, and the contemporaneous declaration of Hemenway after the sale by Gale to Hersey. Hersey was a connection by marriage both of Hemenway and Gale, they each having married a sister of his, and he had for several months prior to the sale been employed as a clerk in the store. This testimony tended to show that Hemenway claimed and exercised the same control over the business after the sale, when, if it had been in fact what it purported to be, he was a mere clerk in the store, that he had done when carrying on the business as the agent of Gale. Now the question at issue between the parties was whether, at the time of the sale to Hersey, the property was in Hemenway or Gale. The ground, on which the admission of this testimony was claimed, was that if it satisfied the jury that Hemenway had an interest, that is, was the owner of the goods after the sale, it threw back its light and tended to illustrate the antecedent state of things. Whether it was legally admissible for that purpose is now the question. It appeared to me that it was. In a case where fraud is charged, and the charge is to be made out by circumstantial evidence, it is not easy to draw the precise line separating those

circumstances which are fairly admissible to prove the fraud from those which ought to be excluded. Evidence which has no connection with the matters in issue, but merely tending to create a personal prejudice against one of the parties, certainly should be excluded. But if it have a connection, how near that must be to render it admissible, or how remote to exclude it, is not easy to determine by any universal and exact definition. The acts of the parties near the time when the fraud is alleged to have been committed, and connected with it, seem to be properly admissible. The evidence in question was of this description. The jury might infer from it that Hersey, the apparent owner, was not the real owner; that though he was clothed with the ordinary indicia of ownership, this was but a disguise to conceal the real ownership of Hemenway. Now, as the great question is whether the goods belonged to Hemenway before the sale, if it be shown by probable evidence that they belonged to him after, and notwithstanding the sale, this is a fact that would tend, connected with other circumstances, to satisfy the mind that they were his before; and that this sale was but a continuation of that system of disguised ownership which was alleged to exist from 1838 to the time of the sale. It appeared to me at the trial that it was evidence competent to be given and not wholly irrelevant, and how far it tended to support the plaintiff's case was for the consideration of the jury.

Another decision of the Court, to which exception is taken involves rather a rule of practice than strictly of law. Hersey, the purchaser from Gale, was called as a witness by the plaintiff to prove the bill of sale, and nothing further. The defendants then claimed the right to cross examine him to to the whole cause. This was objected to by the plaintiff. It was ruled by the Court that the cross examination must be confined to the subject matters inquired of in the direct examination; that, if the defendants wanted him as a wit-

ness, they must call him after they had opened their case to the jury, and examine him as their own witness. Subsequently he was called by the defendants and examined. The practice of Courts in this respect is not uniform. The rule in the English Courts is, that if a witness is called and sworn, though he is asked but a single question, the other party has a right to cross examine him to the whole case as a witness of the adverse party. 1 *Greenleaf's Evidence*, § 445. And the same practice prevails in some of the Courts in this country. In this Court the rule has been different. It has been repeatedly laid down by the late Justice Story, in the terms in which the Court ruled in the present case, and by the decision in *The Philadelphia and Trenton Rail Road Co.* vs. *Stimpson*, 14 *Peters*, 448, it is established as a rule of practice in the Courts of the United States.

After the evidence was closed, and the arguments of counsel, the counsel for the defendants asked the Court to instruct the jury that the plaintiff could not maintain the action because there was no evidence of a conversion by either of the defendants. The Court declined to give that instruction, but instructed the jury that if they were satisfied from the evidence that in 1838, when the letter of attorney was given by Gale to Hemenway, it was given for the purpose of enabling Hemenway to do business on his own capital and for his own benefit, and was so used, the property being in fact and in truth in Hemenway, then, by force of the statute, the property became vested in the assignee of Hemenway, and that the sale by Gale under color of this disguised title was evidence of a conversion by Gale. And secondly, that if the sale was made by an arrangement and contrivance, between Hemenway and Gale, to place the property still further beyond the reach of the assignee, it was evidence of a conversion both by Gale and Hemenway. Under these instructions the jury found a verdict for the plaintiff.

It is quite certain that the Court could not give the direction asked by the defendants, because, if the jury found that the property was in Hemenway, the sale was a conversion. To maintain the action of trover, the plaintiff must prove property and the right of possession. It is not necessary to prove that he has had the actual possession and that it has been disturbed by the defendant. An executor, who has never had the possession of the goods, may maintain trover for a previous conversion of the goods of his testator. 2 *Greenleaf's Evidence*, § 461.

The last ground, on which the defendants asked for a new trial, is that the verdict is against the weight of evidence. There was evidence on both sides, and it was the province of the jury to determine on which side the balance inclined. By the theory of the common law, they are the exclusive judges of the weight of evidence. But it is also true when the Court is satisfied that the jury, from any cause, have fallen into an error and decided against the clear preponderance of the evidence, the verdict will be set aside and the case sent to another jury. If however there is contradictory evidence, and the conclusion is dependent on the degree of credit given to the witnesses, or if the facts proved, or admitted, are such that different conclusions may be inferred from them, the Court will not disturb the verdict, unless the jury have decided against the clear preponderance of the evidence. In this case there was but little if any conflict in the testimony, that is the facts, proved by the testimony on one side, were not impugned by contradictory testimony on the other so as to bring them into doubt. The conflict was in the facts themselves. There is one series of facts proved by the defendants which, standing alone, lead directly, if not irresistibly, to one conclusion, but there is another series, part of which are equally well proved and which, if not controlled by any facts tending to a different conclusion, would lead directly to the opposite decision. When the verdict is to be deduced from opposite and conflicting analogies, it belongs

exclusively to the jury to determine the force and value of these analogies. All that the Court can do is to assist their judgment, by general observations on the nature of the evidence. It is not pretended that there were any such remarks in this case as had a tendency to preöccupy the minds of the jury by any notions adverse to the defendants. It would seem that they were rather of an opposite tendency, for one of the reasons urged for a new trial is that the verdict is against the opinion of the Court. But the Court has no authority to substitute its own judgment for that of the jury, when they have deliberately considered and decided the case. It is only when they have, from wantonness, or caprice, or negligence and inattention, rendered a verdict palpably erroneous, that the Court will interfere. And the Court will sometimes infer this want of due attention on the part of the jury, when the verdict is clearly against the weight of evidence. But to do this, when the evidence is nearly balanced, would be an encroachment on the proper province of the jury. On the whole my opinion is that judgment should be entered on the verdict.

New trial refused.

THE PALO ALTO.

A remission of a forfeiture by the Secretary of the Treasury, under the act of March 3, 1797, ch. 13, granted before a libel or information has been filed, operates directly to revest the right of property and possession in the petitioner, and the collector, on his presenting the warrant of remission, is bound to restore it.

But, after the filing of a libel or information, the property is in the custody of the law, and the collector is the keeper of the Court. The remittitur, being filed in Court, is a bar to further proceedings to enforce the forfeiture, and the Court will direct the suit to be dismissed and issue a precept to restore the property. But the property being in the custody of the Court, the collector cannot restore the possession without an order of the Court.

If the remission is on the payment of costs, this is a condition precedent, and the remission is inoperative until the costs are paid.

A tender of the costs, after a reasonable time allowed for taxing them, is equivalent to actual payment, to revest the right of property and possession. A neglect of the collector, seasonably to furnish the attorney with the cost of seizure and custody, will not defeat or suspend the right of the claimant to the possession of the property.

The Secretary has the power, after a remittitur has been granted and communicated to the claimant, to revoke the warrant.

If the remission is *free* and *unconditional*, the power of revocation continues after the remittitur is filed and an order of restoration passed, and until the precept is finally executed by a delivery of the property into the possession of the claimant.

The order of restoration, made by the Court, is not properly a judicial but a ministerial act. It is the remission of the Secretary that restores the right of property and possession, and the order of the Court, carrying that into effect, may be demanded by the claimant *ex debito justitiæ*.

If the remission be conditional, the Secretary has no power to revoke it after the condition has been performed, whether the possession of the goods has been delivered to the claimant or not.

After the remission has been made known to the claimant, if the Secretary revokes it, the revocation is inoperative until the knowledge of it is brought home to the claimant; and if the condition has been per-

formed before he has knowledge of the revocation, the rights of the claimant become fixed, and the remission is irrevocable.

In all engagements formed *inter absentes* by letters or messengers, an offer by one party is made, in law, at the time when it is received by the other. Before it is received it may be revoked. So the revocation, in law, is made when that is received, and has no legal existence before. If the party, to whom the offer is made, accepts and acts on the offer, the engagement will be binding on both parties, though before it is accepted another letter or messenger may have been despatched to revoke it.

The exception to this rule, established by the jurisprudence of the Courts, is, that if the party making the offer dies or becomes insane before it is received and accepted, the offer is then a nullity, though accepted before his death is known.

October, 1847. The manner in which this case came before the Court will appear by a recapitulation of the antecedent facts. The Palo Alto, a small vessel of 20$\frac{11}{95}$ tons burthen, built and licensed for the fisheries, was seized July 15, 1847, by the Collector of Wiscasset, and libelled for being engaged, while under a fishing license, in a trade other than that for which she was licensed, in violation of the act of February 18, 1792, ch. 8, § 32, for Licensing and Enrolling Vessels, 1 *Statutes at Large*, *p.* 305. On the 21st of July, a claim was interposed by C. F. Barnes, and on the 23d he filed a petition confessing and praying for a remission of the forfeiture. On this petition, a summary inquiry was had into the circumstances of the case, according to the provision of the act of March 3, 1797, ch. 13, § 1. 1 *Statutes at Large*, *p.* 506. A number of witnesses were examined and the following statement of facts made out and transmitted to the Secretary of the Treasury, together with a copy of the libel and the petition:

"*Special District Court, Portland,* }
Sept. 11, 1847. }

"And now on a summary examination into the facts of of the case (notice having been given to the attorney of the United States and the collector who made the seizure,) it has

been proved to my satisfaction that the said Barnes purchased said schooner Palo Alto, June 4th, 1847, of about 20 tons burthen, built and intended for a fishing vessel; that his intention was to sell her again, but that he made a conditional agreement to let her for the fishing business if he did not succeed in effecting a sale; that in the early part of July he went in her to Portland, for the purpose of making a sale; that he advertised her for sale and made attempts to sell her, but failing in making a sale, he purchased the goods named in the bill of parcels (which was annexed to the petition,) at Portland, and returned with them to Wiscasset. Most of the goods purchased are such as are used in fitting out fishermen, but the quantity was much greater than would be required for fitting out a single vessel of her size. He returned in the vessel to Wiscasset, and arrived at a wharf near the custom house, between 11 and 12 o'clock in the forenoon, making no attempt to conceal what cargo he had on board from the custom house officers. The goods which he carried all belonged to himself, and he had none for other persons. It was in proof that the collector told him when he sailed for Portland, that he could not take goods under a fishing license. Barnes is by trade a sail-maker, and has heretofore been interested in two vessels which were engaged in coasting. He has also bought and sold small fishing vessels and pleasure boats. It was in proof that fishermen which came to Portland were in the habit of taking their outfits there."

On the 13th of September the Secretary remitted the forfeiture, on condition of the payment of costs, and the warrant of remission was transmitted to the attorney on the 20th. This having been filed in Court, on the 30th an order was made for the restoration of the property to the claimant, and a precept issued to the marshal to carry it into execution. The deputy marshal, in his return on the back of the precept, stated, that he called, on the 5th of October, and demanded of the deputy collector the property, but, the collector being absent, he refused to deliver it, and on the 8th he called on the

collector at the custom house, and again demanded the property, and he refused to deliver it; and he returned the writ in no part satisfied.

Upon the 29th of September the Secretary wrote to the attorney, requesting him to return the warrant of remission. The attorney in reply informed him that it having been filed in Court and become a part of the record, it was not in his power to return it. And on the 4th of October, the Secretary again wrote to the attorney, stating that he had requested the warrant to be returned "for the purpose of revoking it, as on a full examination of the case, relief ought not to be granted to Mr. Barnes." On the 7th of October the attorney filed a motion for an order to the marshal to stay the execution of the writ of restoration and to return it unexecuted. The Circuit Court being then in session and remaining so until the last of the month, the parties were heard on the motion on the 4th of November.

Haines, District Attorney, for the United States; *S. Fessenden*, for the claimant.

WARE, *District Judge.*

The questions now to be determined arise on a motion of the District Attorney for a supersedeas of the writ of restoration issued by this Court. But as that has been returned unexecuted since the motion was filed, in the actual posture of the case the questions would arise more regularly on a motion of the claimant for an alias execution. But as the parties are disposed to waive matters of form, and wish for an early decision, we may perhaps dispose of the questions which have been discussed, on the attorney's motion.

It is argued by the attorney in the first place, that the writ was improvidently issued, there being no authority in law for issuing such a writ in any case; and in the second place, if there is any authority, that the remission being

made on the precedent condition of payment of costs, and the costs not having been yet paid, the writ was issued prematurely.

The argument on the first point is, that the remission of the Secretary operates *per se* and independently of any action of the Court to retransfer and revest the property in the petitioner. The act of March 3, 1797, ch. 13, § 1, (1 *Stat. at Large*, 506,) under which the remission is made, provides that when any person shall have incurred any penalty or forfeiture, or is interested in any vessel or goods, which have by law become liable to seizure and forfeiture in the cases therein mentioned, on certain proceedings being first had on petition to the judge of the district, in which the penalty or forfeiture accrued, they may be remitted by the Secretary of the Treasury, if in his opinion it was incurred without willful negligence or any intention of fraud; and he may direct the prosecution, if any has been instituted, to cease on such terms as he shall deem reasonable. In the case of a seizure of goods, if no prosecution has been commenced, it may be true that the warrant of remission operates directly to restore to the claimant his right of property and possession of the goods, and on the presentment of the warrant, the collector may be bound to restore them. If a suit has been commenced the remission may be pleaded in bar of a further prosecution of it. If it be for the recovery of a penalty, its operation is to discharge the obligation by putting an end to the suit and by being a bar to any future suit. No further action of the Court is required than dismissing the action. But if the prosecution be for the purpose of enforcing a forfeiture *in rem*, the property libelled is placed in the custody of the Court. It is in the keeping of the law. The warrant of remission does not then give the claimant a direct authority to retake the goods, but on filing the remittitur and complying with its terms, the Court will direct a precept to be issued for the restoration of the property, and

order the suit to be dismissed. Such has always been the practice in this and, it is believed, in other districts. The statute does not indeed in such cases direct a writ of restoration, but it is necessary to the orderly course of judicial proceedings, so that the record may show what disposition is made of the property.

But it is said that in this case the remission is conditional on payment of costs, and that this being a condition precedent, the remission is inoperative until the costs are paid. This as a general proposition is undoubtedly true. A precedent condition must generally be performed before the right vests, or that must be done which the law holds to be equivalent to performance. After the remittitur in this case was received and filed, the claimant was present in Court and tendered the costs to the attorney. He declined to receive them, because the collector not having furnished him with the items of the costs of seizure and custody, he was unable to complete the taxation. It was not, therefore, the fault of the claimant that the costs were not paid, but that of the collector in not seasonably presenting his bill of charges. Now it is a general rule of law that a condition, on the performance of which a right vests, shall be considered as performed, so as to perfect the right, where the party, for whose benefit the condition is made, has by his own act or fault prevented it from being performed. The Roman jurisconsults put this doctrine into a formula, and it is inserted in the digest among the general rules of law as a universal rule. *In omnibus causis pro facto accipitur id in quo per alium morœ fit quo minus fiat.* Dig. 50, 17, 39. *Tunc demum pro impleta habetur conditio cum per eum stat, qui, si impleta esset, debiturus erat.* Dig. 35, 1, 81, § 5.*

* The following are some of the texts of the Roman law in which this general rule is applied in contracts, legacies and other cases. Dig. 35, 1, 24 and 12. Dig. 12, 1, 50. Dig. 19, 2, 38. Dig. 22, 7, 20 and 23. Dig. 45, 1, 25, § 7. Dig. 50, 17, 161.

This rule is equally well established in the common law. It was the very point on which the decision turned in *Hotham* vs. *The East India Co.*, 1 *Durn. & East*, 639. Ashurst, J., in delivering the opinion of the Court said, that if any authority was necessary for this principle, which was a plain dictate of common sense, it was so held in *Rolle's Abridgement*, 445, and in many other books. The same doctrine is held in *Jones* vs. *Barkley*, *Doug.* 684; *Merrit* vs. *Rane*, *Strange*, 458; *Blackwell* vs. *Nash*, *Strange*, 535; *Kingston* vs. *Preston*, *Doug.* 689; 3 *Salk.* 108. It was also the point directly decided in *Brown* vs. *Bellows*, 4 *Pick.* 179, 195. Indeed it is one of those obvious rules of justice and right, that finds a place in every system of jurisprudence that makes any pretension to cultivation and refinement, and flows directly from a great principle of natural equity and universal justice, which binds every one to answer for the damage occasioned by his own act. *Pothier*, *Oblig. No.* 212; 6 *Toullier*, *Droit Civil*, *No.* 609. A condition, says the *French Code Civil*, is considered as performed when it is the debtor, bound under this condition, who has prevented it from being performed. *Art.* 1178.

It is a familiar principle of law that a tender of performance, at a fit and convenient time and place, is for many purposes equivalent to a performance. A tender of money due on a bond or other contract, it is true, does not, like payment, discharge the debt, for the plaintiff may reply a subsequent demand and refusal, but it is a bar to further damages. And it is universally true, that when a right or title is made dependent on a precedent condition, and the party is ready and offers to perform it, and is prevented by the default of the party for whose benefit it is reserved, the title vests absolutely and the condition is so far discharged that the right cannot be defeated. In this case the collector might undoubtedly claim a reasonable time to make out his bill of charges. The remittitur was dated September 18th, and transmitted to

the attorney on the 20th, and the collector was immediately informed of it. Between that and the 30th there was, it would seem, ample time for him to ascertain and make out his bill of charges, and upon the payment, and, in my opinion, on the tender of payment, the claimant was entitled *strictissimo jure* to an order of restoration. On this state of the case the Court ordered, on his depositing in the registry $150, a sum believed to be more than sufficient to cover all costs that would have accrued, that the usual precept for the restoration of the goods should be issued, and the deposit having been made, a precept was accordingly issued to the marshal to restore them to the claimant. He had already been kept out of the possession of the vessel and cargo for two months and a half, and it appeared to me that he ought not longer to be deprived of them, with a further accumulation of expense. My opinion is, that the order of restoration was properly made at the time and ought not further to have been delayed.

But the bill of charges is now presented, amounting to $211 50, and therefore, exclusive of the fees usually taxable on a libel, considerably more than the whole deposit; and it is now said to be apparent that the deposit does not cover the costs, and thus that they cannot be considered as paid. If the collector's charges are allowed, they certainly will exceed the deposit. But without intending to intimate any conclusive opinion, before the parties are heard in the taxation of costs, I will only suggest that some of the charges appear at the first blush to be of a novel and somewhat extraordinary character. There is a charge of twenty dollars for a journey to Portland of the deputy collector, to consult the attorney on the filing of a libel, and another twenty dollars for his own attention to the case. When we come to a hearing on the taxation of costs, I may have occasion to ask the collector in what part of the fee bill established by law, or in what usage of the Court, he finds an authority for taxing

these items in a revenue seizure as a personal charge on the claimant. In some cases of expensive, perplexed and protracted litigation, where the collector has incurred extraordinary expenses, and been at unusual trouble in procuring evidence to establish a forfeiture, he has been allowed by the Secretary of the Treasury, on a certificate of the judge, to charge these against the United States' share of the fund; but I am not aware that it was ever thought that such expenses would be introduced into the bill of costs as a personal charge on the claimant. Without adverting to other items particularly, some of which appear of unusual amount, considering the nature of the case, I will only observe, that the deposit is more than sufficient to meet all costs that are usuly allowed in such cases. But if it were not, an execution may be issued on his stipulation, for the balance. But the ground of my opinion is, that the tender was, under the circumstances, equivalent to payment for the purpose of vesting in him a right to the possession of the property.

The principal question that arises on the motion, and that which has been mainly discussed at the argument, remains to be considered, and that is, the effect of the revocation, by the Secretary, of the *remittitur*. But it ought first to be observed, that there is no actual revocation before the Court. The letter of the Secretary of October 4, states that he had ordered the warrant of remission to be returned, *for the purpose of revoking it.* That however having been filed, an order of Court passed upon it, and having become part of the record, there ought to be a regular and formal revocation placed on the files of the Court. But the letter of the Secretary is only a communication to the District Attorney, expressing an intention to revoke, and not actually revoking and annulling the formal warrant of remission. That intention however having been expressed, for the purpose of raising the question, which has been elaborately argued, we may suppose the warrant of revocation to be made and entered on the files of the Court.

On the part of the claimant it is argued that the Secretary having once remitted the forfeiture and promulgated the warrant, and an order of Court having passed thereon for the restoration of the property, this is a judgment of the Court, and that the remission has thereby passed *in rem judicatam* and become irrevocable, and the rights of the claimant have become so vested that they cannot be divested by the act of the Secretary.

In the first place, I think it may well be doubted, whether the act of the Court, granting an order of restitution, is in strictness a judicial act. The power of remitting penalties and forfeitures, belongs exclusively to the Secretary. The Court has no authority to revise his decision or inquire into the grounds on which it is made. If a remission is granted, which on its face appears clearly to be illegal and beyond his power, it has indeed been suggested that the Court may disregard it as having been improvidently issued by mistake. 1 *Gall. R.* 521. But if nothing of that kind appears, all the Court has to do, is to carry it into execution by an order of restoration. In the preliminary steps for procuring a remission, the Court, in the first instance, inquires summarily into the facts and circumstances of the case, and reports them to the Secretary. It reports facts and not the evidence of facts. In making this statement the judge acts judicially. The facts must be proved by legal and competent evidence, and of the competency of the evidence he must judge. 2 *Gall. R.* 515, *The Margaretta.* The evidence must not only be competent and conduce to prove the facts stated, but must satisfy the judicial conscience of the judge that they are true. But whether, when proved, they are sufficient to establish the further fact that the forfeiture was incurred without willful negligence or intention of fraud, is referred exclusively to the judgment of the Secretary of the Treasury. It does not belong to the judge to express an opinion on this point. The Secretary forms his opinion on the facts stated alone, and,

under the law, no evidence can be submitted to him by either or both parties, as it is not on the evidence, but on the facts found and stated, that he is to act. If either party is not satisfied with them as stated by the judge, I by no means intend to deny that he may properly express his dissatisfaction to the Secretary, but then the Secretary cannot legally act on his representation, or on evidence produced by him in making up his judgment, whether the forfeiture was or was not incurred through excusable ignorance and without fraudulent intention. But he might in his discretion return the statement of facts to the judge for further inquiry and for hearing further evidence, and on such re-examination the facts may be re-stated or the statement be amended. It will then be on such re-statement that the Secretary will act, and not on the evidence of facts. But the power of remission is confined exclusively to his discretion, and when he has decided, the Court has no judgment to exercise on the subject, but is bound *ex debito justitiæ* to issue the order of restoration. The act of the Court, therefore, in making this order is more in the nature of a ministerial than of a judicial act, for it is simply to carry into effect the remission.

That the Secretary has a right to revise his decision after it has been made and made known to the parties, it seems to me, cannot well be questioned. If, in making up his judgment, he is supposed to act judicially, then, in analogy to the practice of other Courts, it would seem that he must have the power, if he thinks injustice has been done, to review and revise his judgment. Every Court has that power. If a decision once made and promulgated is irrevocable, it must be equally so, whether the decision is to remit or not to remit. Yet, it would scarcely be contended, that when once the Secretary had determined not to remit, and his decision had become matter of record by being placed on the files of the Court, he could not revoke that determination for the purpose of admitting the proof of further facts. Still there

must be some time when his power over his decision must cease. The question is, what that time is. If the order of restoration, awarded by the Court, was strictly a judicial and not a ministerial act, I should admit the conclusion of the claimant's counsel, that the Secretary could not by his act annul a judgment of the Court. But how far that would beneficially relieve the claimant, is by no means certain. For if it is a judgment of the Court, it is a judgment grounded upon a single fact, and if the Secretary should certify that the warrant of remission was improvidently issued, it would be the duty of the Court to stay its proceedings, and, if a writ of restoration had been awarded and not executed, to issue a supersedeas, till he could have time to re-examine the case, and, if on such re-examination he should determine not to remit, to reverse its judgment. Such it seems to me would be clearly its duty, because it would then be apparent that the only foundation, on which it rested, failed. If so, it is not very material whether the order of restoration, on which the writ issues, be a judicial or ministerial act. *Jones* vs. *Shore*, 1 *Wheat.* 462. The question would again return, When the power of the Secretary, over his determination, is at an end?

We come then to the question, When does the remission become irrevocable? The argument of the District Attorney is, that it does not become irrevocable until the goods are actually restored to the possession of the claimant. In support of this position, he cited the case of the *U. S.* vs. *Morris*, 10 *Wheat.* 246. The question in that case arose on a remission after a decree of condemnation. The power to remit, after a final condemnation, was contested. The same question had occurred in the Circuit Courts, and had been differently decided in different circuits. In this it had been held that the rights of the parties became fixed by the decree, and particularly that the title of the seizing officers to their shares in the forfeiture, became consummated and perfect beyond

the Secretary's power of remission. *The Brig Hollen*, 1 *Mason*, 431. *The Margaretta*, 2 *Gall.* 515. A contrary doctrine had prevailed in other circuits. 10 *Wheat.* 296. The case was very elaborately argued by eminent counsel, and was fully considered by the Court. It was decided that the rights of the officers were inchoate by the seizure, but that they remained imperfect and contingent during the whole procedings in Court and after a final decree of condemnation, and did not become consummated and indefeasible, until the money was actually paid over to the collector for distribution. Until the actual delivery over of the property, or its proceeds, under the decree, the rights of the officers, and, it would seem to follow, the rights of all others claiming an interest in the property or fund in litigation, whether legal, equitable or precarious, like that of a petitioner confessing a forfeiture, were held to be dependent on the will of the Secretary, under his power to grant or refuse a remission. The decision appears to me to be placed on the broad ground that all rights to the fund are subordinate to the Secretary's power to remit or not to remit, until the process of law is finally closed by putting the party entitled into actual possession of the fund. The Supreme Court having established this principle, it appears to me to govern the present case, and after some reflection, that opinion was intimated to the parties. If the remission had been a free and unconditional remission, I still think that the decision in the case cited must have governed this; and that the Secretary might revoke a warrant of remission, at any time before the precept of a Court carrying it into effect was finally executed by the delivery of the goods to the claimant. Perhaps, independently of that decision, we might be brought to the same result from a more general principle of law. The forfeiture being confessed, and therefore the title of those claiming under it admitted, the remission, by which the property is restored to the claimant, partakes of the nature of a gift or donation, and

being without consideration, it is in its own nature revocable at any time before the actual delivery of the thing. A donation after it is delivered, and not before, in the common law, takes the nature of a grant or contract executed, and becomes irrevocable. 2 *Black. Com.* 440, 1; 2 *Kent Com.* 438, 40; 2 *Strange*, 955, *Smith* vs. *Smith*; 6 *Cranch*, 87, *Fletcher* vs. *Peck.*

But, however this may be, there is a circumstance that distinguishes this case, and takes it out of the principle of the decision of the Supreme Court, and also extracts it from the more general principle of law, by which gifts are revocable until they are executed by delivery. It is this, that the warrant of the Secretary is not a free and unqualified condonation or remission, but is coupled with a condition precedent to be performed by the grantee. Now it is an unquestioned rule of law, that if a grant is made on a condition precedent, no title vests until the condition is performed, so that if the condition be illegal or impossible, the title never vests. 2 *Black.* 157, *Co. Litt.* 206. But being legal and possible, when it is once performed it vests absolutely, and the title becomes pure and perfect and discharged of the condition. 2 *Cruise Real Property*, 41. *Com. Dig. Condition B*, 3. It then vests as a purchase, and, if the condition be an onerous one, as a purchase for a valuable consideration. It has already been stated that the tender under the circumstances was equivalent to a performance, not for discharging the obligation to pay the costs, but for perfecting the title and rendering it indefeasible. It became thus a contract perfect by the mutual consent and concurrent acts of both parties, and cannot be dissolved but by the concurrence of both.

There is however another fact in the case to which it is proper to advert before closing this opinion. The tender of performance was made on the 30th of September, and the letter of the Secretary to the attorney, requesting him to return the warrant, bears date the 29th, the day before. If

this letter is to be considered as an actual revocation of the remittitur, it may be said that it was revoked before the condition was performed. Considering it as such, when does the act of revocation take effect so as to annul the remission. This raises a question of no small difficulty, on which there has been no small diversity of opinion. The conclusion to which I have come, after considerable reflection and consulting all the authorities within my reach, is this, that the revocation has its effect to annul the remission at the time when it becomes known to the other party, and not before. To borrow a convenient phrase, more familiar in other systems of jurisprudence than in ours, if things had remained entire, until the revocation had been brought home to the knowledge of the claimant, that is, if nothing had been done on the part of the claimant to change the relation and condition of the parties in respect to this matter, the revocation would have annulled the warrant of remission, and the parties would have stood as though none had been issued. But the remission having been received and accepted by him, and the condition performed as far as it could be without the concurrence of the other party, the revocation then came too late. The remission had taken effect and become irrevocable.

My opinion proceeds on this general principle, that in all engagements *inter absentes*, when the negotiations are carried on by letters or messengers, an offer by one party, until it is made known to the other, is but an intention not expressed, *propositum in mente retentum*. If the messenger or letter can be overtaken before it arrives at its destination, it may be revoked; but if the revocation does not arrive until after the offer is received *and accepted*, and especially not until it has been acted upon, then it is too late. For the revocation is but a simple act of the will, a *propositum*, not *res gesta*, an act done, until after it is known, and of course can have no more effect than an intention not expressed, but confined within the breast of the party. It is a remark of one

of the most profound jurists of the last age, that an act of the will not known is, in jurisprudence, as if it did not exist. *Une volonté qui n'est pas connue est en jurisprudence comme si elle n' existait pas.* 6 *Toull. Droit Civil, No.* 29.

This is the conclusion to which my mind has been brought after the most careful consideration I have been able to give to the subject; so that if the letter of September 29th be considered as a revocation, it must only be considered as such when the knowledge of it was brought home to the claimant, and this was after the condition was performed.

At the same time it is freely admitted that this is a question of general jurisprudence, of no little intricacy, and that it is not easy to determine by any universal and inflexible rule when engagements entered into by letters or messengers, between persons residing at a distance from each other, become irrevocably binding on both parties. The question was pretty fully considered by the Court of King's Bench, in the case of *Adams* vs. *Lindsell*, 1 *Barn. & Ald.* 681, and the decision was in conformity with the principle that I have adopted. But I infer from the reasoning of Best, C. J., in the case of *Routledge* vs. *Grant*, 4 *Bing.* 653, that this decision was not entirely satisfactory to the Court of Common Pleas, or at least it receives but a qualified approval. The same general question was presented to the Supreme Court of Massachusetts, in *McCulloch* vs. *The Eagle Ins. Co.*, 1 *Pick.* 278, and to the Court of Errors in New York, in *Mactier* vs. *Frith*, 6 *Wend.* 103, and these Courts came to opposite conclusions. It has been found not free from difficulties by the civilians, and perhaps it will not be found an easy task to reconcile all these opinions. The subject has been examined by Pothier, *Contrat de Vente, No.* 32; by Toullier, *Droit Civil, Vol.* 6, *No.* 30, 31, and *notes, Vol.* 7, *No.* 321, and *notes;* and it was discussed by Merlin in a very elaborate argument before the Court of Cassation, with his usual logical acuteness and copiousness of learning. *Repertoire de Jurisprudence, Vente,* § 1, *Art.* 3, *No.* 11, *bis.* To the general

rule that has been stated there is one well established exception. If the party who makes the offer dies or becomes insane before it is received and accepted, the offer is then a nullity, though accepted before the death is known.

On the whole, my opinion is, that the conditional remission having been received and accepted by the claimant, and he having tendered full performance of the condition and performed it as far as he could, without the concurrence of the other party, and so far as was necessary to vest and render perfect his title before the revocation became known to him, his title thereby became absolute and indefeasible. It then became a contract executed.

Motion overruled.

THE SCIOTO.

When a collision takes place between a vessel under sail and one at anchor, the *prima facie* presumption, if there be any fault, is that it is on the vessel under sail.

A vessel entering a harbor is bound to keep the most vigilant watch to avoid collision with other vessels in motion or lying at anchor; and if in the night time she ought to have her whole crew on deck on the look out.

When a collision takes place by the fault of one of the vessels, she is responsible for all the damage.

But if it happens without fault in either party, or if there was fault and it cannot be ascertained which vessel was in fault, or if both were in fault, then the damage and loss are divided between them in equal shares.

A vessel ought not to be moored and lie in the channel, or entrance to a port, except in cases of necessity; or if anchored there from necessity she ought not to remain there longer than the necessity continues. If she does and a collision takes place with a vessel entering the harbor, she will be considered in fault.

A vessel lying in the channel of a port, from necessity, is bound in the night time to show a light.

The Scioto.

In cases of collision, a fault of one vessel will not excuse any want of care, diligence, and skill in another, so as to exempt her from sharing the loss and damage.

December, 1847. This was a case of collision occurring in the harbor of Portland, between the Scioto, as she was entering the harbor, and the Falcon lying at anchor. The material facts are stated in the opinion of the Court. It was argued by *Haines*, District Attorney, for the libellant, and by *Shepley* for the respondent.

WARE, *District Judge.*

The Scioto, on the evening of the 15th of December, being on her passage from Calais to Boston, deeply laden with a cargo of lumber, in consequence of the threatening aspect of the weather, put into the harbor of Portland. The wind was from the N. N. E., so that she could not lay her course into the harbor, but was obliged to beat in. Two other vessels were entering at the same time. As they entered, the Scioto put in upon one tack, as the other two did on the other, and each tacking at the same time, they passed each other in the channel. After making three or four tacks, the Scioto in her passage from the eastern to the western side, came in collision with the Falcon lying at anchor about 40 rods north west of the block house on House island, where she had been lying for a week. This was about one o'clock in the morning. The moon was then just setting, the sky moderately but not heavily overcast; some of the witnesses say that stars were visible, and others that they were not. During the first part of the night, there were flying clouds sometimes obscuring the moon and sometimes leaving it bright, but in the latter part, the clouds became more dense and heavy. Still it was light enough to see objects at considerable distance which were broad off on the water, unless land lay behind, so that the shade of the vessel was melted into that of the land beyond. It was in such a position that the Falcon lay when

seen from a vessel entering the harbor, the high land of the town covering her hull. She lay also in the channel or passage way, not precisely in the track of a vessel entering the harbor with a fair wind, but within the range taken by vessels beating in, and very nearly in the track of a vessel going into Hog Island roads; and she showed no light.

In the case of a collision of vessels by which damage is done, the first rule, a rule dictated by natural justice, is that the vessel, by whose fault the collision took place, shall be answerable for all the damage. The first inquiry therefore is, by whose fault this collision was occasioned.

It may be assumed as a general rule, that when a collision takes place between a vessel under sail and one not under sail, the *prima facie* presumption is that the fault is imputable to the vessel that is in motion. It is said in *Jacobson's Sea Laws*, *page* 339, generally and without limitation, that when a vessel in full sail occasions damage to one that has no sail set, she will be held liable for all the damage. The same is also stated as a rule of law by Boulay Paty, *Droit Maritime*, *Tit.* 12, § 6, *vol.* 4, *p.* 492, and it is assumed to be law in the case of *Strout* vs. *Foster*, 1 *How. Rep.* 29. Undoubtedly the rule must admit exceptions. But the first presumption will place the blame on her, because she has the power of changing her course, and a vessel at anchor is stationary. The vessel under sail must therefore clear herself from the imputation, by showing that every practicable effort was made to avoid the collision.

It may be safely stated as another general rule admitting perhaps of no exception, that a vessel entering the harbor in the night time, is put on her utmost vigilance; and this is more especially the case if the port be one much resorted to in bad weather as a harbor of refuge, as that of Portland is. When there is reason to expect that the harbor may be crowded with vessels, and this is always to be anticipated of Portland harbor after a few days of bad or doubtful weather, the highest degree of vigilance may be justly required. The

master and crew ought to be on deck, and in such parts of the vessel as to be able to control her motions, and to see any vessel that lies in her track, and which they may be approaching. If this is not done and a collision takes place, there will be great danger that the fault will be placed to her account.

Under these general rules of the law, the *prima facie* presumption of fault, if there was any, will be against the Scioto. She was the moving vessel, and she was entering, on account of the doubtful aspect of the weather, a harbor much frequented by vessels on this coast for the very purposes for which it was sought by her. Consequently, we have a right to demand of her the utmost care and vigilance.

Taking the testimony of the crew, and I have seen no reason for questioning their fairness, I think that there was that degree of vigilance which the case required. The whole of the crew were on deck and stationed in those parts of the vessel where they had the best opportunity of controlling her motions and seeing any object which they might be approaching. But the fact was, that the Falcon was not seen from the Scioto until she was so near that it was impossible to avoid a collision. The master, who was forward, and the mate, at the helm, with one of the hands, saw her at the same moment, and the mate immediately put up the helm to bear away. She was moving in a direction that would have brought her on the Falcon's bow, but the helm changed her motion, so that she struck her quarter. At first, it may appear surprising that the master, mate, and one of the hands should all have seen her at the same moment when she was just under the Scioto's bows, at not more than the distance of thrice the length of the vessel. The testimony explains it. As they were approaching the Falcon, another vessel beating into the harbor was approaching them, between the Falcon and the Scioto, and entirely concealing her, and she was seen as soon as this vessel had so far passed as to clear her. It may still be asked why the Falcon was not seen before, when

they were approaching her, and before the stranger vessel intervened to prevent it. The first answer is, that the Falcon showed no light. If she had suspended a lamp in her rigging, that would undoubtedly have been seen. But as the night was sufficiently clear to see objects at a considerable distance, it is contended that with a good look out, she might and would have been seen sooner. It is not a satisfactory answer to this point in the case, insisted upon for the libellant, that the Falcon was seen from the Scioto as soon as the Scioto was seen by the watch in the Falcon. I fully agree with the libellant's counsel, that the obligation of a vessel entering a harbor, to keep a vigilant watch, is more stringent than it is on a vessel lying at anchor, for the obvious reason that, being in motion, she is in danger of collision, not only with vessels in motion like herself, but with those at anchor. And besides, the fault of the Falcon, if she was in fault, will not excuse the neglect of any precaution on the part of the Scioto. If by any reasonable degree of watchfulness the Falcon might have been seen, I hold that she ought to have been. A vessel entering a harbor under the circumstances of the Scioto, is responsible *de levissima culpa*.

Might then the Scioto, with a vigilant watch, be supposed to have seen the Falcon while she was approaching her, before the view was intercepted by the other vessel, which was beating into the harbor at the same time; or was the night so obscure that, with a watch intently on the look out, she might have escaped their sight? Undoubtedly there was light enough to see a vessel broad off on the water, considerably further than these two vessels were apart before the view was cut off by the intervening vessel. But then the Falcon was within the land, so that in the direction in which she would be seen as she was approached in any direction, the land rose behind her, above the line in which her hull would be seen, and then the shade of the vessel would be lost in that of the land; and, in the position in which she lay, she could in fact be discovered by the Scioto, as she ap-

proached, at but a short distance. The testimony of the crew is that they were on a sharp look out; and fault is not ordinarily to be presumed; it must be proved. No vessel can reasonably be presumed wantonly to run into another, and in cases of collision the presumption, until the contrary is proved, is that it was fortuitous. *Repertoire de Jurisprudence Abordage. Emerigon, des Assurances, Ch.* 12, § 14, *page* 414. *Boulay Paty, Droit Maritime, Tit.* 12, *ch.* 6, *vol.* 4, *page* 494. Though there is some discrepancy in the testimony as to the obscurity of the night, without supposing it absolutely impossible to have seen the Falcon sooner, I do not feel authorized to say that the Scioto must be in fault for not doing it, or that there was a want of due vigilance on her part. Some light might have been thrown on this obscure part of the case, if the crews of the other two vessels, which were passing the Falcon at the same time, had been called as witnesses. We should then have known at what time she was seen by them. But they have not been called by either party.

The next question is, whether a fault is imputable to the Falcon, or whether the collision must be considered as a simple misfortune, without fault on either side. When the collision is purely fortuitous and preceded by no fault of either party, the common law as well as that of Rome, following the principles of the law of nature, left the damage and loss to rest where it fell, on the principle that no one was responsible for fortuitous events or accidents of major force. 3 *Kent, Com.* 231. *Abbot on Shipping, Part* 3, *ch.* 1, *p.* 1. *Amer. Edit.* 1846, *p.* 301. *Dig.* 9, 2, 29, § 2 and 4. And under the term fault are included, not only acts of positive misconduct, but every want of due care, vigilance, or skill on the part of the master and crew. *Imperitia culpæ annumeratur. Dig.* 50, 17, 133. But the maritime law, from considerations of public policy, divides the loss equally between them. The whole damage done to both vessels is put into one mass in common, and each pays one half, without regard to the different value of the vessels, when both

parties have been in fault, without attempting to discriminate whether the faults had not been greater on one side than the other. *Hay* vs. *Le Neve, cited Abbot on Shipping*, 230. If, says Valin, it should be objected that it would be more simple to leave each vessel to bear the damage which she has suffered, the answer is, that then the masters of large vessels would have little fear of striking vessels smaller and of less strength. Nothing then is more just than a contribution by moieties. *Ordonnance de la Marine, Liv.* 3, *Tit.* 7, *art.* 10. *Valin, vol.* 2, *page* 179. *Abbot on Shipping, p.* 301. 3 *Kent*, 231. And this rule in the admiralty seems to prevail in three cases, *first*, when there has been no fault, on either side; *second*, when there may have been fault but it is uncertain on which side it lies, and *third*, when there has been fault on both sides. *Story on Bailments*, § 608, *a*, *b*, *c*, *d*, 609, and *notes*.

It is contended on the part of the respondent, that two faults are imputable to the Falcon, first, that she anchored in the channel and thus obstructed the common passage way of vessels entering and leaving the port; the second, that she showed no light. The Falcon arrived on Thursday the 7th of December, just one week before this misfortune happened, and came to anchor in the place where she then lay. She was bound to Boston, and came in on account of the weather. On the very evening of her arrival, another vessel, the Medford, in entering the harbor came in collision with her. That has been the subject of examination in this Court, and damages were awarded against the Medford. The Falcon then showed a light, but a question was then raised, whether she was excusable for placing herself in that part of the channel. The facts proved were, that the Falcon came into the harbor as a port of safety on account of the state of the weather, that the captain was unacquainted with the harbor, and that he brought his vessel to anchor in a place where vessels often anchor and lay for a short time. The Medford was entering with a fair wind and could easily lay her course

directly into the harbor. My opinion then was, and I have seen no cause for changing it, that the collision happened from want of due care on the part of the Medford, without fault on that of the Falcon.*

But the facts now before the Court present a widely different case. The Falcon lay a little out of the track of a vessel entering the harbor as her home port with a fair wind, but precisely, as it was expressed by one of the witnesses, in the gang way leading to Hog Island roads, and that is the place aimed at by many, if not by most vessels which come into the harbor for safety from stress of weather. All the experienced ship masters without exception, who have been examined, say that it was not a fit place for a vessel to anchor unless in a case of necessity, but that it was a place of danger both to herself and other vessels that were entering into the harbor; and that no vessel anchoring there from necessity, ought to remain in so exposed a situation longer than the necessity continued. Now the master had been very strongly admonished by one collision that he lay in an unsafe place, yet he remained there for a week after, without attempting to change his place.

Admitting that the master of the Falcon, being little acquainted with the harbor, is excusable for bringing his vessel to anchor in that place when he first entered the harbor, is he excusable for remaining there after he had the most convincing proof that he was in a place that exposed him to collision with other vessels entering the harbor? It is contended by his counsel that he was, first, because the subject of the first collision was then under judicial examination, and he might naturally suppose that he would be chargeable with some impropriety if he removed while that matter was pending; and secondly, that there being no harbor master, or port regulations directing where vessels may lie, every master has a perfect right to choose his own place of anchor-

* The case of the Medford is not reported, an oral opinion only having been given.

age, and that he has as much right to one part of the harbor as another.

I can see no sufficient reason for his not removing his vessel from the channel where she was in constant danger of collision with vessels entering the port, from the fact that the process for the first collision was still pending and undecided. He might easily, by calling witnesses, have determined her exact position, or at least nearly enough for the purposes of that case. And though, in the absence of any harbor regulation, every master may choose his own place of anchorage, he makes the choice on his own responsibility. It does not follow, because there are no special laws or regulations for the port and harbor, that they are left without law. The general law of the sea then governs. In all situations men are bound by the common obligation of social duty, so to use their own right as not to injure others. *Sic utere tuo ut alienum non lædas*, is a principle of the law, as well as morals. The law of the State does not, it is true, attempt to enforce by penalties all the obligations of high and strict morality; but this is one in which, in a great variety of circumstances, it does come in aid of social duty and Christian charity. It requires men to care for others as well as themselves, and so to exercise their own unquestioned right, as not to violate or infringe the equal rights and endanger the security of others. Admit that in a case of urgent necessity, a master has a right to bring his ship to anchor in the very middle of the channel. Others have a right to that channel as a passage way, as well as he. He could not remain there longer than his necessities required, without encroaching on the rights which others have to the free use of the channel, in passing in and out, without dangerous obstruction. He is bound, as soon as he is able, to remove his vessel to a place where she may be safe herself and not endanger the safety of others. It is an old rule of the maritime law, that a vessel improperly moored, or in an improper place, can claim nothing for damages she may suffer from collision with another vessel. *Ordonnance*

de la Marine, Liv. 3, *Tit.* 7, *art.* 11, *and Liv.* 4, *Tit.* 8, *art.* 3. *Valin, vol.* 2, *p.* 183—579. 1 *Emerigon, Assurance, Ch.* 12, § 14, *page* 412. *Laws of Oleron, art.* 15. Notwithstanding the injury which this vessel had received in the former collision, I am entirely satisfied that she might have been moored with ease, and with perfect safety, where she would have been out of the way of vessels beating into the harbor, and in my opinion, she was in fault in not doing it. All the witnesses agree on the point, which indeed seems too plain to require proof, that a vessel ought not to lie, day after day, in that part of the channel which is in the range vessels take in beating into the harbor.

Another fault is imputed to the Falcon, that of not showing a light. If she had shown one, it seems to me nearly certain that she would have been seen from the Scioto in approaching her, in season to have avoided the collision. If she had had a light suspended in a conspicuous place, and a collision had taken place, it would, to say the least, have been extremely difficult for the colliding vessel to have excused herself. For admitting that she was anchored in an improper place, her fault would not excuse any want of care and caution in another vessel. But here it is again said, that there are no port regulations requiring vessels to show a light, and that in point of fact it is not customary for vessels to do so in this port. It is true that the testimony is, that though vessels lying in the harbor sometimes show a light, they usually do not. But whatever may be the custom, it appears to me hardly to admit a question, that a vessel lying in a channel, at the entrance of a harbor, where vessels are often passing and repassing, ought in the night time in common prudence to show a light. When she lies out of the channel way where vessels pass, it may not perhaps be required; but if she places herself in the common passage way, though she may have a right to lay there in a case of necessity, certainly it is not demanding too much to require her, while she is occupying the common high way, to give notice, by a light,

of her position to others who are passing, and who are entitled of common right to a free and unobstructed passage. If she does not, it appears to me that no Court could hold her free from fault. In some parts of this country this is said to be required by port regulations. And I apprehend that it is required by the law of the sea. In the case of *Hay* vs. *Le Neve*, cited in *Abbot on Shipping*, 230, which arose and was much litigated in Scotland and was ultimately decided on appeal by the House of Lords, the *Wells* was lying at anchor in the Frith of Forth, and, in a cloudy night, was run down by the *Sprightly* and entirely lost. The House decided that both vessels were in fault, and following the rule of the maritime laws divided the loss between them, each bearing one half. Lord Gifford, in delivering his opinion to the House, said he was strongly impressed with the negligence on the part of the *Wells* in not showing a light, and it would seem from the report of the case in Abbot, that this was the only fault imputable to her. In *Jacobson's Sea Laws*, 340, it is said that the want of a lantern, in narrow waters, has always been looked on as an omission and neglect not entitling a party to redress when injured. And it is added, that it was so decided by the Supreme Court of Holland on the advice of Bynkershoek, and there is no higher authority in maritime law than this great civilian. The Ordonnance of the Marine, *Liv.* 4, *Tit.* 3, *Art.* 4, directs that "when there are several vessels lying in the same road, that which shall be most outward to the water shall have, during the night, a light in the ship's lantern, to warn vessels coming from the sea." An extremely wise precaution, says Valin, but too much neglected, but if not observed, the vessel receiving damage would not be entitled to an indemnity for it.

On these authorities, as well as the obvious reason of the thing, I feel justified in stating that a vessel lying in the channel of this port, (and by the channel I mean that part of the water which is traversed by vessels coming into the harbor, whether they can lay their course in, or are under the neces-

sity of beating in,) is bound to show a light in the night time, whether the night is obscured by clouds, or it is star light, provided there be no moon. It is required in my opinion by the general law of the sea, independent of all port regulations. On both grounds my opinion is, that the Falcon was in fault and is not entitled to recover against the Scioto. But under the circumstances of the case, it being the first case of collision in this port which has been brought to the consideration of the Court, (except the recent instance of the Medford,) the libel is dismissed without costs.

Hooper et al. versus Fifty-One Casks of Brandy.

Inspectors of the Customs are public officers, and not the mere servants and agents of the Collector.

Where a seizure is made by a Collector under the collection act, March 8, 1799, in pursuance of information given by an Inspector of the Customs, the Inspector is entitled to the informer's share of the forfeiture.

No officer of the Customs is debarred from receiving a distributive share of fines, penalties, and forfeitures, by the act of February 11, 1846, ch. 7, allowed by previous laws, in consequence of having received his maximum of compensation allowed by law.

What is received by the officers of the Customs for forfeitures, constitutes no part of the emoluments to which the limitation of the maximum is applied.

December Term, 1848. This was a petition of John K. Hooper and Nathaniel Shaw, claiming the informer's share in the proceeds of the sale of fifty-one casks of brandy, seized by the Collector of Portland, and condemned as forfeited to the United States. It is alleged in the petition that, on the 27th of January, they found the brandy secreted in various warehouses in town, and suspecting it to have been illicitly imported took

it into their possession, and on the same day gave the Collector information; and that in pursuance of the information the seizure was made, and such proceedings were thereupon had, that the brandy was condemned as forfeited, and sold, and the proceeds paid into the registry, for having been landed without a permit, in violation of the 50th section of the collection law of March, 1799. The answer of the Collector and Surveyor, admits the facts stated in the petition, but denies that the petitioners are entitled to the informer's share, because they were at the time inspectors of the revenue, in the employment of the United States, and had received the full amount of the maximum of their compensation allowed by law. To this answer the petitioners put in a general demurrer.

The case was argued by *Haines*, for the petitioner, and by *S. J. Anderson*, for the respondents.

WARE, *District Judge.*

The proceeds of the forfeiture having been paid into the registry, there is no doubt that the Court has the authority to determine to whom they belong, and to order the money to be paid out to those who are legally entitled to receive it. *Wescott* vs. *Bradford*, 4 *Wash. C. C. R.* 492. *Ex parte Cahoone*, 2 *Mason*, 85. *La Jeune Eugenie*, 2 *Mason*, 409. It is an authority that results to the Court as an incident to its possession of the principal cause. *McLane* vs. *U. S.*, 6 *Peters*, 404.

The petitioners claim the informer's share of the forfeiture, under the general collection law of March 2, 1799.

The 91st section of that act provides, that all fines, penalties, and forfeitures, recovered by virtue of this act, shall be disposed of as follows, one moiety to the United States, and the other to be divided between the Collector, Naval Officer, and Surveyor, in equal shares, or among such of these offi-

cers as may be in the district. Then follows a proviso in these words, under which the petitioners claim: "In all cases when such penalties, fines, and forfeitures shall be recovered in pursuance of information given to such Collector, by any person other than the Naval Officer, or Surveyor of the district, the one-half of such moiety, [that is of the officer's,] shall be given to such informer, and the remainder thereof shall be disposed of between the Collector, Naval Officer, and Surveyor, in manner aforesaid." The answer admits that the seizure was made and proceedings instituted in pursuance of the information communicated by the petitioners, which resulted in a decree of forfeiture. The only question presented by the demurrer is, whether the petitioners are precluded from claiming as informers, on account of their being at the time Inspectors of the Customs. The language of the proviso is so plain that, had I not been informed at the argument that a different construction is put on the act, by the officers of the Treasury Department at Washington, I should not have supposed their right would admit of doubt. They cannot be included under the exception of Naval Officers, and Surveyors, and when the information, in pursuance of which a forfeiture is recovered, comes from any other person, he is entitled to the informer's share. On what ground then can they be debarred from a claim which is open to every other person except the Naval Officer and Surveyor?

It is true, as was suggested at the bar, that the Inspectors are employed for the special purpose of preventing frauds on the revenue, and that in seizing smuggled goods, and communicating information of violations of the laws, they are only in the performance of their ordinary duties for which they receive a regular stipend. The argument is, that being thus paid, it is not to be presumed that an additional compensation is provided by law for services for which they are already fully paid. Certainly the Courts can make no such presumption; but the inquiry is, whether the legislature has

not offered them additional reward. And it may be remarked that if this were a sufficient reason to exclude them from any extra reward, the same objection might be made to the claim of any other revenue officer. All are equally bound for all vigilance in protecting the revenue against frauds, and receive the regular emoluments attached to their offices, which are deemed an adequate compensation for their services. No presumption therefore arises from this circumstance, if they come fairly within the words of the law. But the enforcing of fines and forfeitures is always attended with more or less odium, and sometimes with danger, and though every man is supposed to be ready to do his whole duty, the legislature has thought it expedient to stimulate the activity and quicken the diligence of the revenue officers in doing what is sometimes an ungrateful service, by offering them a share in the forfeitures, which are recovered by their agency. The motive is to insure a more perfect execution of the fiscal laws, an object not only important to the government, but to every fair and correct merchant, who pays duties on his own importations; and it may be added, to the general morals of the community. There is scarcely anything more corrupting to the morals and industrious habits of a people than the practice of smuggling. It diverts men from the pursuits of regular industry, by the prospect of easily acquired illicit gains, and the transition from bold and desperate smuggling, to the more atrocious crimes of robbery and murder, has been found, by the experience of all nations, both natural and easy, and not very unfrequent.

If the diligence of any officers of the revenue is to be encouraged by the offer of extra rewards, to whom would the offers be more naturally made than to the Inspectors. They constitute the principal preventive police of the customs. They are employed for the express purpose of preventing and detecting frauds. They are the out-door guard, patrolling the streets, visiting the wharves and traversing the waters

of the harbor, while the Collector, Naval Officer, and Surveyor, by the nature of their duties, are confined to their bureaus within doors. If extra vigilance and fidelity are anywhere to be sought by the offer of special rewards, it would seem that they could no where be offered, where they would be more likely to accomplish the objects of the government than to the Inspectors.

Another objection is made to the claim of the petitioners, and to me it seems to be the only one that can overcome the plain words of the statute. If it be well founded it is a bar to the claim set up in the petition. It is this, that the inspectors are the agents and servants of the other officers, that their acts and information are the acts and information of the Collector and Surveyor. The Collector, it is true, is authorized to *employ* Inspectors, but not on his sole authority. It is only with "the approbation of the principal officer of the Treasury Department" that he can employ them. If they were the mere servants of the Collector, it is hardly supposable that his nomination would require the confirmation of the Secretary of the Treasury. Again, the Surveyor is authorized to direct and superintend the inspectors, weighers, &c., in the course of their duties. *Stat.* 1799, § 91. But this no more makes them the agents and servants of the Collector and Surveyor, than when any other subordinate officer is placed under the direction and control of his superior. An Inspector may seize goods which he suspects to be illegally introduced into the country. If he seizes them without probable cause, the owner may have a remedy for the wrong in an action of trespass. If the Collector adopts the seizure, he makes it his own, and he will be liable; but will it be pretended that, if he repudiates it, he will be responsible for the tortious act of an Inspector? Yet this consequence will follow if the Inspector is the mere servant of the Collector. For there is no principle of law more firmly established than that the principal is responsible for the wrongful acts of his agent done within the scope of his agency. *Story's Agency*,

§ 542. *Domat, Lois Civiles, Liv.* 1. *Tit.* 16, §3, *No.* 1. And yet I hold it to be quite clear that, unless he adopts the seizure of an Inspector, he is no more liable for it than the Postmaster General is liable for losses individuals may sustain from the misconduct of his deputies. *Dunlop* vs. *Munro*, 7 *Cranch*, 242. *Whitfield* vs. *Lord Despencer*, *Cowp.* 754. Inspectors are in fact public officers, commissioned and sworn as such, and are in the employment of the government, and not in the private employment of the Collector and Surveyor. They are so described in the law, (*Stat. March* 2, 1799, §39—53, 73,) and an indictment will lie under the 71st section of that act, for forcibly resisting an Inspector in the execution of his duties as an officer of the customs. *U. S.* vs. *Sears*, 1 *Gall. R. p.* 215. It is only in a very limited and qualified sense that the Inspectors are the agents of the Collector and Surveyor.

But the act of Feb. 4. 1815, ch. 31, §7, *Statutes at Large*, *p.* 198, has been referred to as an act in *pari materia*, and as giving a legislative construction to the act of 1799. The first remark that occurs on this part of the argument is, that this was a temporary act, passed to meet the emergencies of a state of war, and has long ago expired by its own limitation. It gave to the Inspector when he seized goods *out of the presence* of the Collector, twenty-five per cent. of the Collector's moiety of the proceeds of the forfeiture. The argument of the counsel is that, without this provision, the opinion of the legislature was that he would be entitled to no part. The words of the act give this to the Inspectors, "in addition to such compensation as may be allowed them;" that is, as I understand the act, in addition to any compensation allowed by law.

If it were necessary to give a construction to this obsolete act, that to which my mind would incline is, that when the Inspector made a seizure *out of the presence of the Collector*, on information from a private informer, the informer would

be entitled to one half the Collector's moiety, this being expressly directed by the act as a reward for the information; and the Inspector would be entitled to twenty-five per cent. of the moiety for making the seizure and securing the goods. But if he made the seizure on his own motion and on his own information, that the law did not intend to debar him of any right he had under existing laws to claim as informer, but gave the twenty-five per cent. in addition when the seizure was made out of the presence of the Collector, and, of course, on the sole responsibility of the Inspector. The reward for giving information was left as it stood before, and this was offered as an additional encouragement to Inspectors, to stimulate their diligence and activity at a time when the execution of the laws was attended with much difficulty and some danger. Though this interpretation of the act may be open to some objection, I by no means think the act of 1815, as a legislative construction of former laws, is so clear against the right of Inspectors to claim as informers, as to overcome the plain terms of the act of 1799.

We come now to the principal objection set up to the claim of the petitioners, and I understand that it is mainly for the purpose of having a decision on this, that the present case is brought before the Court. If this prevails, it is admitted that it applies as well to the Collector and Surveyor as to the Inspectors. It arises out of the first section of the act of February 11, 1846, ch. 7, which is as follows: "That Collectors and all other officers of the customs, *serving for a less period than a year*, shall not be paid for the entire year, but shall be allowed in no case a greater than a pro rata of the maximum compensation of said officers respectively, for the time only which they actually serve as such Collectors or officers, whether the same be under one or more appointments, or before or after confirmation. And no Collector or other officer shall receive for his services, either in fees, salary, *fines*, *penalties*, *forfeitures*, or otherwise, for the time he may be in service, beyond the maximum pro rata rate provided by law."

The objection to the claims of the petitioners, drawn from this act, is this. They are officers of the customs, and have received the full maximum of their compensation, as established by law, for the whole time they have been employed, and therefore under this act, it is argued, they can receive nothing more, in the way of compensation, whatever may have been their services, whether as shares in fines, penalties, and forfeitures, or otherwise.

This act is certainly not of very easy interpretation. I will proceed to state that which, after the best consideration I have been able to give the subject, seems to be the most reasonable; which puts it in harmony with other acts relating to the same subject matter, and which carries into effect what appears to me to be the real intention of the legislature. In the first place it appears evidently, on its face, to be an act supplemental to former acts fixing a limitation to the emoluments of certain officers of the customs. The first of these, and that which lies at the foundation of all which follow, is the act of May 7, 1822. *Statutes at Large, Vol.* 3, 693. The ninth and tenth sections of this act establish a maximum of compensation, for certain officers therein described, to be allowed *in any one year*, but they do not prescribe a maximum for part of a year. The consequence was, that when two or more Collectors held the same office for parts of the same year, no limitation being applied to a part, except that which was established for an entire year, each officer might receive and retain, to his own use, the maximum for a full year, if the fees and other emoluments allowed by law amounted, during the period for which he held the office, to a sufficient sum. For all these fees he received, under the existing laws, to his own use, until they amounted to the maximum fixed by the law, and there was no maximum except that for a full year. This construction was given to the law by the Courts, and it seems to be the only one that it admits. *U. S.* vs. *Pearce*, 2 *Sum. R.* 575.

It is very clear, that the first clause in the third section, does

no more than extend the principle of the limitation to a part of a year, which the act of 1822 had established for an entire year. It allows the officer a compensation for a portion of the year, that he has held an office, only in proportion to what he would have had, if he had remained in office a full year, though the fees and emoluments may have amounted to a larger sum; and here it is to be remarked that the limitation, in the act of 1822, applies only to the ordinary emoluments allowed by law. Whenever the *emoluments* of any Collector, &c., exceed the maximum, the excess shall be paid into the treasury. The 11th section expressly excludes, from the operation of the law, what the officers may receive from the distribution of fines, penalties, and forfeitures.

The first clause of the act of 1846 does not in its terms, and manifestly is not intended to extend the limitation of the maximum to any other sources of emolument than those to which it was applied by the act of 1822. The whole difficulty grows out of the mention of fines, penalties, and forfeitures in the latter clause. After considerable reflection I have come to the conclusion, that these words have been introduced into the act through inadvertence. And I will now proceed to state the grounds on which this opinion is formed. The true sense intended by the legislature I suppose to be this. In all cases where a maximum of compensation is established for any particular service, or derived from any particular source for an entire year, the officer shall be allowed for that service only a *pro rata* sum for a part of a year. For instance, the Collector is allowed in some districts to receive for his own use a sum not exceeding $6000, derived from fees, commissions, and all other ordinary emoluments, and, if they amount to more, the excess shall be paid into the treasury. This is a limitation of his whole emoluments derived from these sources. But there is a maximum also fixed for a particular class of services. By the act of March 3, 1841, the Collector is directed to render, in his account, a return, 1st, of all sums of money received for fines, penalties, and forfeitures; 2d, of all sums received on account of suits instituted

for frauds on the revenue; 3d, of all sums received for rents and storage of goods in public stores, and if it appears that the excess received for storage in any year, above what he pays for store rent, amounts to more than $2000, that excess should be paid over to the treasury. But this act, like that of 1822, fixes no maximum for what he may receive for his distributive share of fines and forfeitures. And the maximum for the excess of storage is fixed *only for a year.* If therefore he was in office for half a year only, and the excess in that time amounted to $2000, as there was no limitation for part of a year, below that which he might receive for a whole year, he might retain the whole for his own use, provided it did not carry up his whole emolument above the limitation fixed by law. Now under this clause of the act of 1846, when the Collector is in office but part of a year, his fees and emoluments, for the excess of his receipts of storage, are apportioned and cut down to a *pro rata* allowance, that is to $1000, and this seems to be the proper operation of this clause. It operates distributively, for a part of the year on each and every source of his emoluments to which there is by law a limitation, to reduce them to a *pro rata* sum. No Collector, or other officer, shall be paid for a part of a year, above a *pro rata* of the maximum for a full year *provided by law*, that is, established by prior and existing laws. But there is no law establishing a maximum for what a Collector, or other officer, may receive for their distributive shares of fines, penalties, and forfeitures, and there can be no *pro rata* maximum for a part of a year, when there is no maximum for an entire year.

The limitation, in this clause, for a portion of a year, cannot, without doing violence to the language, be extended to any emoluments, to which there was no limitation by existing laws. It is by its own terms expressly confined to a maximum *provided by law;* that is, most certainly, laws then in force. If the Court were to extend it to emoluments received from fines and forfeitures, it would create a new limitation not known to the existing laws then in force. The whole of

the first section, of the act of 1846, applies only to officers who are in office for a period less than a year, and its whole operation, (and such is, I think, the manifest intention of the legislature where a maximum had been established by prior laws for an entire year,) to extend the principle to the service of part of a year. The second clause of the section, as I understand it, operates distributively, and where there is a maximum fixed by law to an officer's emoluments for any branch of his services, it apportions these for a part of a year as the first clause does the whole.

This interpretation of that act, it is admitted, is open to the grave objection that it leaves the words fines, penalties, and forfeitures, nearly unmeaning, and it is one of the fixed rules in the interpretation of statutes, that every word is presumed to have an appropriate office and meaning. The sense in which I understand them is, that no officer shall receive, in his distributive share of fines, penalties, and forfeitures, any thing beyond the proportion fixed and allowed by law; that is, it leaves the existing laws without alteration. But with respect to the present case, it might perhaps be sufficient to observe that the petitioners do not claim in their *quality as officers* of the revenue, but simply as informers, claiming under the law precisely as every other person may, except the Naval Officers and Surveyors.

My opinion is, on the whole, that where a seizure is made by the Collector, under the act of March 2, 1799, in pursuance of information given by an Inspector, and there is a decree of condemnation, the Inspector is entitled to the informer's share.

And no officer of the customs is debarred from receiving a distributive share of fines, penalties, and forfeitures, by the act of February 11, 1846, which is allowed by prior acts of Congress, in consequence of having received the maximum of his compensation established by law, there being no law establishing a maximum for what an officer may receive as his distributive share of forfeiture.

GODDARD ET AL. VS. COFFIN ET AL.

When there is an equal division of opinion in the court, on a motion for any rule or order, the motion is not allowed, and fails.

If the motion be such that an affirmative decision is indispensable to the progress of the cause, the case stops, and the parties go out of court.

If it be such as only arrests the progress of the cause, and there is an equal division, the motion not being allowed is in effect overruled, and the case proceeds as though no motion had been made.

When there has been a verdict and the motion has been made for a new trial on which the court is divided, the motion is overruled, and no new trial is allowed. But whether judgment can be entered on the verdict or not, depends on the state of the case when the motion is made.

If, after verdict, there is any rule or order, general or special, for judgment nisi, no new motion being made, the party in whose favor the verdict is, is entitled to judgment.

If there be no such general rule, and no special order has been made for judgment nisi, and the court is equally divided on a motion for a new trial, the case stands precisely as though no motion had been made.

The rendering of judgment is a judicial act, and must be done by the court, and the record must show that it is the judgment of the court.

In this court, judgment is rendered only upon the motion of the prevailing party. If no motion is made the case stops. And upon such a motion, the court being equally divided in opinion whether judgment should be rendered, *it seems* that nothing can be done but to dismiss the case without costs and without prejudice.

April Term 1849.

This case was tried before the District Judge, and a verdict having been rendered for the plaintiff for $ 8,353,52 damages, a motion was made by the defendant for setting aside the verdict and for a new trial. On this motion, after argument, the court were divided in opinion; one of the judges being for, and one against the motion. After the judges had delivered their opinions, a question arose and was shortly spoken to by counsel, whether judgment could be entered on the verdict, the motion for a new trial having been overruled by an equal division of opinion. The Circuit judge was in favor of rendering judgment. The District judge doubted whether this could be

rule. The entry would then be a mere ministerial act as much as though there was a special order, and the judgment would be that of the court under its general rules. But in this court there is no such general rule, and no special order has yet been made. The verdict therefore stands naked and alone; and without an order general or special, it may be asked how the clerk is to make up the judgment, and in what form it is to be entered. The common formula is *Ideo consideratum est per curiam*, it is considered by the court. It is true, as is said by *Blackstone*, 3 *Com.* 396, that the judgment is the determination of the law, but the law can only speak through its regular organs, and therefore the conclusion of law must be pronounced by the court. But the court has pronounced no conclusion. If the clerk should therefore enter the judgment in the usual formula, it would not be according to the truth of facts. It would not be by the consideration of the court. The record must show that it is the judgment of the court, and the record must speak the truth. And therefore, in the case of *Hill vs Fiernam*, 4 *Missouri Rep.* 316, *Supplement to United States Digest, article Judgment*, II, it was decided, that an entry by the clerk, that judgment was confessed in open court, and that the amount was liquidated by the clerk at a certain sum, was not a judgment on which a recovery could be had.

The whole question, then, appears to resolve itself into this—whether the rendition of judgment is a judicial act, to which the direct agency of the court is indispensable, and to which the mind of the court is to be judicially applied; or whether, after verdict has been rendered, it is a ministerial act, which may be performed by the clerk without an order by the court. When presented in this elementary form, the question appears to me exceedingly clear and free from doubt. If there be any one thing done in the progress of a cause, from its commencement to its conclusion, that is peculiarly and emphatically a judicial act, it is the rendition of judgment.

Viewed then as a question of principle, to be determined by the general analogies of the law, and the practice of its tri-

bunals, it appears to me that the plaintiff cannot have judgment but by the order of the court. He has his verdict, that, the court having refused to set it aside, stands, and he is entitled to all the advantages that may be derived from it. What these may be, beyond the question now before the court, it is not necessary to determine at this time. Certainly judgment does not follow of course; for after verdict, and after a motion for a new trial has been overruled, the party, against whom a verdict has been rendered, may move in arrest of judgment, or he may move for judgment in his favor *non obstante veredicto*, for matter appearing on the face of the proceedings. *Taylor vs Whitehead*, *Douglass*, 745, 6. *Rex vs Hays*, 2 *Strange* 845. *The King vs Holt*, 5 *T. R.* 445. *Tidds Practice* 840. 3 *Black. Com.* 393.

This seems to me to be the necessary conclusion from legal principles. But it is supposed by the plaintiffs counsel, that a different conclusion has been established by the decisions of the courts, and a number of cases have been referred to, which are supposed to sustain his view of the question. In the case of the *Antelope*, 10 *Wheaton* 66, the vessel had been seized and brought into the United States as a slaver, for an alleged violation of our laws relative to the slave trade. The negroes were claimed as the property of foreigners, and there was a decree of the Circuit Court for their restoration. On the appeal, the question was whether this decree should be reversed, and upon this question the Court was equally divided. Consequently the judgment stood. The claimant had obtained a decree of a competent tribunal, which remained in force until it was annulled. For an appeal, or writ of error, does not annul, it only suspends the judgment. The question before the Supreme Court was not whether a judgment could be rendered by a divided court, but whether a valid and subsisting judgment could be reversed and annulled by a divided court. *Etting vs The Bank of the United States* 11 *Wheaton*, 59, is to the same effect. In cases of appeal and writs of error in the supreme court, the question always is on reversing, and not on affirming the decree or judgment.

Bridge vs Johnson, 5 *Wend.* 342. That requires no affirmance, for it stands and is valid, until reversed.

The cases of *U. S. vs. Daniel*, 6 *Wheat.* 542. *Packer vs. Nixon*, 10 *Peters* 408. *Smith vs. Vaughan*, 10 *Peters* 366. *Davis vs. Braden*, 10 *Peter* 286, were all cases certified to the Supreme Court on a division of opinion between the judges of the Circuit Court, not on questions of pure law, but on questions resting in the discretion of the court, and all they decide is, that when the court is divided on such a question, it is not one which can be brought before the Supreme Court on such a certificate, under the act of 1802, *ch.* 21, *Sec.* 6. In the case of *Lanning vs. London*, 4 *Wash. C. C. R.* 332, it was decided that when the court is divided on a motion for a new trial, the motion fails and a new trial is not granted. So we say; but that decision stops there, and determines nothing as to the ulterior proceedings in the case.

The case of the *U. S. vs Worrall*, 2 *Dall.* 384, 396, requires a more careful consideration. As it seems to have been understood, it is indeed directly in point for the plaintiff. The defendant was indicted for an attempt to bribe an officer of the United States, and a verdict was returned of guilty. A motion was made, by Dallas, in arrest of judgment, on the ground that the court had no jurisdiction over the offense; the act charged not having been made punishable by any act of Congress, and it was contended that the court could not take cognisance of it as an offence at common law. On this motion the court was divided; one of the judges holding that the court had jurisdiction, the other that it had not. The court being thus divided, a doubt arose whether sentence could be pronounced, and a wish was expressed from the bench, that the case might be put in such a state that it could be carried to the Supreme Court for a decision. The counsel for the prisoner declined to enter into any compromise for that purpose; and the court, after a short consultation, sentenced the prisoner to a mitigated punishment. The case has been referred to as establishing the principle that when, on a motion for an arrest of judgment, and for a new trial,

the court is equally divided, judgment must be rendered on the verdict, 6 *Peters Cond. R.* 222, *note.* If such is the decision, in my opinion it is not law. But I think no such decision is to be inferred from the report of the case. The reporter has given no rubric of the points which he supposed to be ruled in the case. In the index, though this case is referred to four times, for other minor points raised or ruled, this leading and most important one I do not find noticed; and if it had been understood to have been decided, it certainly would not have escaped the attention of so learned and accurate a reporter as Mr. Dallas; especially as he was counsel in the case for the prisoner, and argued the motion. I think that no such principle was decided; but that, on consultation, one of the judges waived his opinion and concurred with the other on the main question of the jurisdiction.

Cahill vs. Benn, 6 *Binney* 99, is another case which was strongly insisted upon. In this, a motion for a new trial, after verdict, had been made, on which it does not appear that any decision had been made, but it may be inferred that it was overruled by a divided court. Afterwards a motion was made for judgment, two judges being present. One ordered judgment to be entered, and the other objected and ordered his objection to be entered on the record. It was held that the judgment was a good judgment. Tilghman, chief justice, said that the court considered the dissenting judge, in entering his objection on the record, as merely expressing his opinion that a new trial ought to be granted, and not as intending to arrest a regular course of the law. But he further adds that the judgment is undoubtedly the judgment of the court, and the prothonotary only their agent in entering it. In one view, the decision appears directly in point for the plaintiff. But if that be the decision, it appears to me to be in direct opposition to every other case in the books, and not only so, but the opinion is inconsistent with itself. For the chief justice says that the judgment must be that of the court, and yet says that a judgment which the record shows

was not rendered by the court is a valid judgment. The only way of reconciling the apparent contradictions in the opinion is by supposing, what does not appear in the report, that there was some general rule, analogous to the English four day rule, by which a party, who had obtained a verdict, was authorized to enter an order for judgment nisi. Then the party would be entitled to his judgment, under the general rule, unless it was rescinded. This would require a majority of the court, and the judge, who prohibited the entry of judgment, would be chargeable with an attempt to obstruct the course of justice, as is intimated in the opinion of the Chief Justice.

When a court, consisting of a plurality of judges, is equally divided on any motion, rule, or order, it seems to be a proposition too plain for argument that the court can do nothing. If an authority is asked, it will be found 12 *Coke R.* 118, *Proctor's case;* 3 *Chitty's Practice* 10. The whole power of the court, so far as relates to that subject, is paralyzed.— So it was considered by congress; and therefore it is provided by law, when such a division occurs, that the question on which it takes place, shall be certified for a decision to the supreme court. If an equal division arise in that court, it is a *casus omissus*, and the law not providing what shall be done, if a decision is indispensable to its progress, the case stops, and the parties must begin anew. In England, as long ago as 14 *Edward* 3, this difficulty was felt and a remedy provided by parliament. If the Court of King's bench or Common Pleas is equally divided, the case shall be adjourned to the Exchequer Chamber, and be there argued before all the justices, and if that court is equally divided, it shall be determined by Parliament, *Comyn's Digest, Court, D.* 5. *Coke, Litt.* 71.

What will be the precise effect of a division on the cause, depends on the nature of the action, and the position of the case when it occurs. If the question is one which must be decided *affirmatively*, before any thing further is done, the cause stops, and the parties must seek other means of

settling the controversy. But if the motion or question was only to arrest the progress of the cause, as a motion for an amendment of the pleadings, or the continuance of the action, then if there be an equal division, the motion fails, and the cause proceeds; for the obstacle interposed is removed.

This may be illustrated by several decisions of the English courts. In the *Dean of Rochester vs. Pierce*, 1. *Camp.* 466. Lord Ellenborough, at Nisi Prius, ordered a nonsuit. It was carried before the full court by a motion to set aside the nonsuit. The court, on this motion, was equally divided, so that no order could be made. The consequence was that the nonsuit stood. In *Iveson vs. Moore.* 1. *Salk.* 15, reported also 1. *Lord Raymond*, 495, a verdict had been rendered for the plaintiff, and an entry made under the general rule, which is the four day rule of the English practice, for judgment nisi. But a further rule was afterwards obtained by the defendant, that judgment should be arrested nisi. On motion to set aside this latter rule the court were equally divided, and no judgment could be rendered. The last order was for a stay of judgment, and as the court could not agree to rescind it, the rule stood. The Reporter, (Ld. Raymond) adds, that if the court had been divided on the first motion, the plaintiff would have had judgment. That is, the first order, under the general rule, being entered for judgment nisi, this would have been an authority for the plaintiff to sign judgment, unless it was rescinded, and a divided court could not rescind.

The remark of the reporter illustrates the latter branch of the proposition and is confirmed by the case of *Chapman vs Lamphire*, 3 *Mod. R.* 155. There the plaintiff had a verdict, and, under the general four day rule, an order had been entered for judgment nisi. A motion was made for arrest of judgment. The reporter says, "The judges were divided in opinion, two against two, so the plaintiff had his judgment, there being no rule to stay it, so that he had his judgment on his general rule for judgement; but if it had been on demurrer or special verdict, then it would have been adjourn-

ed into the Exchequer Chamber." For, on a special verdict, there must be a rule made for entering judgment, and the court, being divided, could make no rule. And on a demurrer, if the court be divided, the demurrer, it is true, is in effect overruled; that is, it is not allowed. But judgment does not follow of course, without a rule or order of court; and the judges, who were in favor of sustaining the demurrer, would, for the same reason, be opposed to rendering judgment. If however, after entry of the general rule, which is always for judgment nisi, a special order be obtained, for a stay of judgment, or that judgment be arrested nisi, this being the last order, the case in Salkeld shows what the result will be. In *Walmsley vs Russel* 6 *Mod.* 203, it is said, "If the case be ruled to be put in paper for argument, or the rule be a *curia advisare vult*, and the court is divided, there can be no judgment," and it is added, "the case of *Iveson vs. Moore*, stands upon that point to this day."

The other cases, cited in the learned argument for the defendant, both from the earlier and later reports, fully support this view of the case. *Vincent vs. Preston* 12 *Mod.* 667. *The King vs. the Justices of Leicestershire*, *Maula and Selw.* 442, *Davis vs. Jackson*, *Palmer*, 257. *Attorney General vs. Jeffries*, *M'Cleland* 270-308, *Atkins vs. Hart*, *M'Cleland & Younge*, 213-245. In England, when such a division occurs, it is said, when there is much property at stake, or it is for other reasons important to have the question decided, to be usual for one of the judges to withhold his opinion and thus have a *pro forma* judgment entered, for the sake of allowing an appeal to the House of Lords. 3 *Chitty's Prac.* 10, *Dean vs. Clayton*, 7 *Taunt.* 536.

This case now stands on the verdict alone. There is no subsequent order of the court for judgment nisi, nor for a stay of judgment. All that the court has decided is, that there shall be no new trial. A division of opinion, on a motion for a new trial, is not one which can be carried to the Supreme Court, on the certificate of the judges. But if a motion is now made for any ulterior proceedings, and the court should

be divided, a question will be presented affecting the strictly legal rights of the parties, over which the Supreme Court may take jurisdiction, under a certificate of the judges. It is agued for the plaintiff that, a new trial having been refused, he had a right to judgment, without any motion on his part, *ex debito justitiæ*. I think otherwise. A motion for arrest of judgment, in the order of judicial proceedings, comes after one for a new trial, and may be sustained after a motion for a new trial has been overruled. It is certain therefore, that the court ought not to enter judgment as a matter of course, for then the defendant might be precluded from making such a motion.

In this posture of the case, the counsel ask the court what is next to be done? It seems to me that this question may with more propriety be addressed by the court to the counsel. Ordinarily the court is not expected to act but on the motion of one of the parties. Subject to the rules of law, the parties are to determine what disposition shall be made of their case. But if no motion is made, it appears to me that all we can do is, to dismiss the case without cost and without prejudice to either party. In the case of *Veazie vs Williams*, 3 *Story*, 632, in this court, the judges were divided, one being of the opinion that the bill ought to be dismissed with costs, the other that the plaintiff was entitled to a decree in his favor. It was then our opinion that the only decree, we could make, was an order to dismiss the bill without costs.

If I could, consistently with my views of official obligation, waive my opinion on the former motion, I would most cheerfully do it. But having heard the trial, and after the most careful examination which I have been able to give to the subject, having been brought to the conclusion that the interests of justice, and the rights of the parties require that the case should be submitted to another jury, I do not feel that I have any right to withhold from the party the benefit of that opinion. It is true that a motion for a new trial is addressed to the discretion of the court; but this is a judicial discretion, and though from its very nature it cannot be lim-

ited by any precise and arbitrary rule, it is to be determined by the judicial conscience of the court; and when that is convinced, by the view of the whole case, that justice requires a new trial to be had, the court is as much bound so to decide as when the decision of the question before it turns on a positive rule of law. The court has no more moral or judicial right to violate the sanctity of its own conscience, than it has to violate the rules of law. When a question is addressed to discretion, the obligations of conscience are as imperious, as those of law when the question is addressed to the law. And if a party is successful in convincing the conscience of the court, that justice, consistently with the rules of law, requires the interposition of its discretionary action, he is as much entitled to it, as when he claims the benefit of the positive rules of law, and the court is as much bound to render that justice which he asks.

But though I do not feel at liberty to waive my opinion on the former motion, the plaintiff is not without remedy. He may move for judgment, and if, on that motion, the court should be divided, and it seems to be assumed that it will be, and refuse to enter judgment on the verdict, he may apply to the Supreme court for a mandamus, and, if he is right in his view of the law, an order will be sent to this court to enter up judgment. *Life & Fire Ins. Co. vs. Wilson's Heirs*, 8 *Peters* 291.

DISTRICT COURT.

SKOLFIELD, LIB'T., *vs.* POTTER ET AL.

When a vessel is let to the master, to be employed by him, and he to pay to the owners a certain portion of her earnings, the owners will be liable to the seamen for their wages, though by agreement the master is to have the entire control of the vessel, to victual and man her, and furnish supplies at his own expense; unless, at the time of shipping, this contract is made known to them, and they are informed that they are to look to the master as the only owner.

The money, that is paid over by the master, is paid as freight, and the owners as receivers, and having an interest in the freight, are liable to the seamen for their wages.

The freight is hypothecated for the wages, and every part of the freight is liable for the whole wages. The owners, who have received freight under such a contract with the master, are liable for wages to the full amount of the freight in their hands, and not merely *pro rata* in proportion to what they have received.

The merchandise is bound to the ship for the freight, and the freight to the seamen for their wages.

When the owners of the ship are also the owners of the cargo, the cargo owes freight to the ship, and this freight is pledged for the wages.

The decision in the case, Poland *vs.* the Spartan, reviewed and affirmed.

JUNE 9, 1849.—This was a libel *in personam* against the owners of the schooner Arrowsic, for seamen's wages. The libellant shipped at the port of Bath, as mate, on the 22d of September, 1848, on a general trading voyage, and continued on board, and did duty as mate of the vessel, in several voyages, two of which were to foreign ports, until the return of the vessel to Bath, on the second of May following. On his discharge, the master delivered to him a barrel of flour, part of the cargo belonging to the owners, and gave him an order on the owners for the balance of his wages due, amounting to $128, including the flour. The owners paid him $25 on the presentment of the order, and promised to pay him the residue in a few days. But after calling on them several times, and being put off from time to time, he sued out a libel. The owners, in their answer, not denying that the services have been rendered, set forth a defensive allegation, denying their liability for the wages. The defence relied upon is, that the vessel was let to the master on a verbal agreement; under which he was to have the use and control of the vessel, to employ her as he should choose, to victual and man her at his own charge, and to pay the owners for the use and charter of the vessel, one half of her gross earnings, deducting one half of port charges. It was contend- that having, by this contract, parted with the possession and control of the vessel, the master became owner for the voyage, or the term during which he employed her under

this contract, and, as such, was exclusively liable for supplies and seamen's wages, and that they, as the general owners, were exempted from all liabilities for these charges.

J. M. Adams for the Libellant; *P. Barnes* for the Respondents.

WARE, *District Judge.*

It is admitted in this case, that the services have been performed, and that wages are due. Some question was made on the evidence as to the balance that remains unpaid. Two charges of ten dollars each, made by the master for money advanced before the termination of the service, are objected to by the libellant. To prove these, the master produced his memorandum book, in which these sums were charged; and this, with his suppletory oath, would be sufficient as *prima facie* evidence even if the suit were against the master himself. They stand charged in the same book, which contains all the other charges, which are not objected to, and which agree with the account kept by the libellant himself. They are the two last charges in the account; and, at the time of his discharge, the parties came to a settlement, and a draft or order was given, and accepted by the mate, for the balance found due. In this settlement these sums were allowed, and it appears without objection at the time. I see no objection to their allowance now.

The important question, in the case, is, however, whether the respondents are liable for the wages. The schooner was let by a parol contract, by which the master, as hirer, was to have the possession and control of the vessel, was to navigate, to victual, and to man her at his own charge, and employ her in such business as he should choose, and to render to the owners, for the use of the vessel, one half of her earnings. It was objected at the argument, that it was not competent to a party to prove such a lease of a vessel by parol evidence, at least to affect the rights of third persons. It is true that by the general maritime law, it is held that the title to vessels must be shown by writing, 3 *Kent's Com.* 130,

and the contract of letting and hiring also should regularly be, and usually is, proved by a charter party in writing. But it has been held by a variety of decisions in this country, that such a parol lease is valid, not only between the parties, but to conclude the rights of third persons, who are strangers to it.

It seems also to be settled by the general current of the decisions, that under a letting of the vessel herself, whether by a written charter or parol contract, when the possession of the vessel is transferred to the hirer, and he appoints the master and crew, and sails her at his own expense, and has the entire control, that he is to be considered, with respect to third persons contracting with the master, as the owner, and that he succeeds to all the rights and liabilities of the owners. The general owners, or proprietors have then no lien on the merchandize, for freight, nor are they personally liable for supplies furnished to the vessel on the contract of the master, but the hirer is substituted in their place, both as to their rights and liabilities. 3 *Kent's Com.* 136. *Conkling's Jurisdiction, Law, and Practice of the Admiralty*, 135. Nor does it make any difference, according to the decisions, though the charterer goes himself as master. *Reeve vs. Davis*, 1 *Adol. & Ellis*, 135, 23 *Eng. C. L. R.* 95. The cases in this country go further, and decide, when a vessel is taken by the master on the terms that this was, and he is to have the control, and direct the employment of her, and the earnings are to be divided between him and the owners, that this is to be considered as a lease or charter of the vessel. The master is held, under such an agreement, to be the special owner, and the general owners are not liable on his contracts for supplies furnished the vessel while thus employed. *Taggard v. Loring*, 16 *Mass. R.* 336. *Emery vs. Hersy* 4 *Greenl.* 407. *Thompson vs. Hamilton* 12 *Pick.* 425. *Cutler vs. Thurlo*, 20 *Maine* 213. *Thompson vs. Snow*, 4 *Greenleaf*, 264. *Cutler vs. Winsor*, 6 *Pick.* 335.

But it is evident, when the owners put their vessel into the possession of the master on such terms, that the contract is

of a mixed and somewhat ambiguous character. In one aspect, it may be considered as a charter of the vessel, and this as a mode adopted to determine the amount of the charter, or hire, to be paid. Viewed in another light, it partakes of the nature of a partnership, in which one partner furnishes the capital, and the other contributes his time and labor in the transaction of the business; and the profits to be divided. In a third view, it may be considered as a contract of hiring of the master, he to receive a share of the earnings of the vessel, instead of a certain and stipulated sum for his wages. In the various cases in which the subject has been brought before the courts for adjudication, it has been presented in these various lights; and without any great violation of legal analogies, or legal principles, the contract may be considered as belonging to one class or the other. In a case before Lord Ellenborough, (*Dry vs. Boswell*, 1 *Camp.* 329,) the evidence, first offered, being that the owners and master were to share equally in the profits, he declared that it was a partnership adventure, and that the master and owner were liable as copartners; a joint participation of profit and loss constituting a partnership; and when on further evidence, it appeared that the master was to have a share of the gross earnings, and not to be liable for losses, he pronounced it to be a contract of hiring of the master by the owners, and that this was only a mode of determining the amount of his wages. Generally, however, the courts have considered the contract as a charter of the vessel, and the master as owner for the voyage; and, as a corollary from this decision, it is held that the general owners are not liable for the master's contracts for supplies and repairs in the course of the voyage.

But though this is the general language of the authorities, there are exceptions. The case of *Rich vs. Coe*, *Cowper* 636, is a strong decision the other way. Lord Mansfield, in delivering the unanimous opinion of the court in that case, observed, that whoever furnished supplies to a vessel, on a contract made by the master, has a three-fold security. 1. The person of the master. 2. The specific ship. 3. The personal

liability of the owners;—and he added, that it makes no difference in the liability of the owners, that there is a private agreement between them and the master, by which he is to furnish the supplies and keep the ship in repair, unless the creditor has notice of the contract, and gives credit to the master individually.* The doctrine of Lord Mansfield seems to have been entirely satisfactory to Mr. Justice Story; for in his treatise on *Agency*, §298, he states the law nearly in the words of this great master of maritime law, though the more recent decisions, which seem materially to qualify, if they do not directly overrule the doctrine, must have been quite familiar to his mind. Indeed, with respect to some of them, he has on other occasions not hesitated to express his doubts in very pointed terms. *Arthur vs. The Cassius*, 2 *Story Rep.* 93. *The Nathaniel Hooper*, 3 *Sum. R.* 577; and Chancellor Kent, though he seems to have yielded to the authority of the later decisions, expresses his own opinion in terms very nearly, if not entirely, agreeing with the doctrine of Lord Mansfield. "To whom was the credit given, seems to be the true ground on which the question ought to stand." 3 *Comm.* 135.

Now if this contract between the hirer and the owners is not known, the supplies are always furnished on the personal credit of the owners, as well as on that of the master. In the opinion, therefore, of Chancellor Kent, as well as of Judge Story and Lord Mansfield, although the owners have let the ship by a charter party, under which the master, if he is their hirer, is bound to bear all the expenses of supplies, they ought to be held bound to third persons on the master's contracts, which fall within the scope of his ordinary authority as master, unless this private agreement is made known; for if it is not, supplies are always furnished on the credit of the owners. The owners, by putting the master in posses-

* In the case of *Reeve vs. Davis*, 1 *Adol. & Ellis* 312 which seems directly to overrule this decision, the case itself was not referred to, either by the counsel or the court.

sion of the vessel, hold him out to all who are ignorant of the special contract, or at least enable him to hold himself out, as authorized to bind them personally, by all contracts relating to the usual employment of the vessel. And if any one must suffer from his acts, it is more reasonable that the loss should fall on them than on strangers, who have given him credit on the ground of his official character.

It is admitted, however, that the current of judicial decisions is in favor of exempting the owners from their liability for ordinary supplies, while the vessel is employed under such a contract. But no decision has yet gone so far as to relieve them from their liability for seamen's wages. *Curtis' Rights & Duties of Seamen*, p. 336. The seamen have always this triple security, besides a direct hypothecary interest in the freight; and in all ages of the maritime law, their claim for wages has been highly favored, both on the ground of general commercial policy, and from the consideration of their own habits of carelessness and characteristic improvidence. They habitually enter into their engagements in reliance on these securities, and they ought not, on principles of public policy and natural justice, to be deprived of them by any refined and subtle distinctions of law, which are so alien from all their habits of thought and action.

This form of contract, of letting vessels to the master, to be employed on shares, has become very common in this part of the country, especially with respect to small vessels employed in the coasting trade. The master to whom the vessel is entrusted by the owners, is usually an enterprising and industrious young man, but ordinarily of limited pecuniary responsibility; for as soon as he acquires sufficient capital or credit, he becomes a part owner himself. These contracts are almost invariably by parol, and the terms are settled by a well understood usage. The master, under the usage, is to bear the whole expense of victualling and manning her. The port charges in the various ports visited, are first to be paid from the gross earnings of the vessel, and the balance of the freight is to be divided in equal shares between

the master and owners. The seamen often, and perhaps usually, have no knowledge of this private contract between the master and owners, and they engage their services in reliance upon the ordinary security, which the general marine law gives them.

If this mode of letting the ship to the master, to be employed on shares, relieves the owners from their liability for wages, the contract will operate on the seaman, probably in the great majority of instances, as a perfect surprise. After the termination of his service, he finds one part, and an important part, of his security, the personal liability of the owner, is gone, under a private contract unknown to him; and that of the master may be, and often will be, worthless. There remain, it is true, the freight and the vessel, but the freight is received from time to time, and there may be, and usually is, little remaining due at the end of his service. The ship is indeed an ample security. But since the act of *March* 3, 1847, *ch.* 55, respecting costs in admiralty proceedings *in rem*, by which all costs are denied to the libellant, except for the payment of witnesses, unless he recovers more than one hundred dollars, the remedy against the vessel for all useful purposes, is taken away, when the suit is for less than the sum named. And in these coasting and trading voyages, the balance of wages will rarely amount to so much as one hundred dollars. The consequence will be, that practically the seamen will have for their security nothing beyond the personal liability of the master.

No judicial decision has yet extended this modern doctrine so as to deprive the seamen of their ancient right of recourse against the owners. The whole doctrine in the cases, to which it has been applied, is not free from difficulties on the principles of our law, except with the limitation mentioned by Lord Mansfield, that the creditor is notified of the non-liability of the owners at the time the credit is given. Because when he contracts with the master, he always has a right to believe that he is contracting with the owners, if he

is not advised to the contrary. If he is informed, and then gives credit, he knows to what security he trusts. To extend the principle so as to bar the right of the seamen, would be repugnant to the general spirit of the maritime law, which has studiously provided in their favor the greatest security for their wages. I am unwilling to be the first Judge to give it that extension. Indeed, the original doctrine of Lord Mansfield, appears to me to be the most just, and most in harmony with the general principles of our law. The master, by the known rules of law, represents the owners as their agent, and is authorized to bind them by all contracts relating to the usual employment of the ship. The seamen enter into their engagements with the full confidence that the owners are bound for their wages. If it must be admitted that the decision of Lord Mansfield is overruled by the later decisions, these go no further than to exempt the owners from their liability for supplies furnished by men who are in the habit of looking well to their securities. Rather than extend these decisions by analogy, to the claims of the crew, unless I can clearly see that on principle, the owners are exonorated, I am ready to say, *Malo cum Platone errare*—I will not add, *quam cum cœteris vera sentire*, but—sooner than follow the analogies of decisions, the soundness of which is so questionable, and carry them out, to the exclusion of the seamen from their recourse against the owners, unless at the time of their engagement they are plainly told that they are to look to the master as the only owner. The concealment of a fact of such importance, is a fraud on the men.

But I do not put the decision of the case on this ground alone. There is another on which I think the owners are bound for the wages.

By the ancient maritime law, the title of seamen to wages is made to depend on the issue of the adventure, for which they are engaged. Unlike other contracts of hiring, their right to compensation does not depend alone on the fidelity and skill with which they perform the services for

which they engage; but with whatever perseverance and courage they exert themselves, their right to compensation is suspended on contingencies, which may affect the ultimate result of the voyage; it is made dependent on what has been termed the fortune of the vessel. What then is this fortune to which the seamen must look? The ship, says Emerigon, in the condition in which she was at the time of her departure from the port of outfit, together with all the freight which is gained in the course of the voyage, form that fortune of the vessel which constitutes the pledge to the seamen for their wages, *Trait Des Assurances ch.* 17, *sec.* 11. The privileged hypothecation, then, he adds, allowed to the mariners, comprehends every part of the ship and every part of the freight, according to the nature of hypothecation, which is *tota in toto et—tota in qualibet parte.* Their privileged lien is entire over the whole, and is entire in every part. The ship and the freight, with respect to wages, form one mass, and all that remains of either, at the end of the voyage, is pledged for their payment. The contract of the mariners, Emerigon goes on to say, is a species of copartnership. It is not indeed a partnership as to all the effects of that contract, but as to some of its consequences; for the seamen have no claim to a remuneration, but to the extent of the effects embarked in the enterprise, which they bring home. If all is lost, the mariners lose their wages, and they cannot then enforce the payment by a personal action against the master or owners. But if all is not lost, whatever remains of the ship or freight, is specifically pledged for their payment. Freight earned and put ashore, is saved from the effect of a supervening shipwreck, by which all that remains is lost. It is a partnership fund, that has entered the common chest, and is hypothecated to the seamen for their wages.

It is now more than twenty years since I was first called upon to examine this right of the seaman to claim their wages out of the earnings of the vessel. It was in the very ably contested case of *Poland vs. The Spartan, Ware's Rep.*

145–6. In that case, it was held, that when goods of the owners themselves are shipped, they owed freight to the vessel; and though no stipulated freight could be agreed, that the seamen could proceed against the goods in specie, to enforce their rights to the amount of a reasonable freight, to be determined *boni viri arbitrio*. I am not ignorant that the doctrine was then considered by some of the profession as somewhat startling, for its supposed novelty and boldness. But after ample time to review and reconsider the subject, I have seen no reason to retract or qualify the doctrine of that case. It is, in my judgment, a just and logical deduction from the peculiar character given by the law to the seamen's contract; and is supported by the highest authority in the maritime law. The owners, says Emerigon, who are shippers in their own vessel, have two qualities which ought not to be confounded. In quality of shippers, they owe a freight to the ship herself; and in their quality of owners, the ship owes a freight to them; and he adds, this freight is pledged to the crew. *Des Assurances, ch.* 17, *sect.* 10, *No.* 2. It constitutes a part of that fortune of the vessel to which the crew are to look for their pay. To them, it makes no difference who owns the cargo. So far as they are interested, there is a freight earned, and, to the amount of their wages, it belongs to them.

I am aware of the *dictum* in the case of *Sheppard vs. Taylor*, 5 *Peter's Rep.* 712, that "the cargo is not in any manner hypothecated or subjected to the claim of wages." This was but a *dictum*, and the point was not necessarily involved in the cause. It may be true that the cargo is not directly, but it certainly is indirectly bound for the wages. For it is a first principle of the maritime law that the cargo is bound to the vessel for the freight, and another equally ancient and undoubted that the freight is pledged for the wages. Indirectly, therefore, to the amount of the freight due upon it, the cargo is bound for the wages. The master is not obliged to deliver it until the freight is paid or secured, and if not paid he may sell so much as is necessary to pay

the freight. The seamen may therefore indirectly, through the master, proceed against the cargo itself, for their wages to the amount of the freight due. When the owners of the ship are the owners of the cargo, the seamen's claim on the freight can be enforced in no other manner but through the merchandise; and I see no objection in principle or convenience, to allowing the seamen to do that directly in their own name, which they may do indirectly through that of the master. Such was evidently the opinion of the English Court of Admiralty, in the case of the *Lady Durham*, 3 *Haggard* 196. The court says that "a mariner has no lien on the cargo, *as cargo*. His lien is on the ship, and on the frieght as appurtenant to the ship; *and so far as the cargo is subject to freight, he may attach it, as a security for the freight that may be due.*" The doctrine maintained in the case of the Spartan seems also to have met the approbation of Judge Conklin. In his learned and valuable treatise on the *Law and Practice of the Admiralty*, *p.* 75–6, he says that "it is recommended by persuasive considerations of justice, and supported by strong analogies in the undisputed principles of the maritime law."

It appears by the testimony of the master, who was examined as a witness in the case for the respondents, that he has paid over to them, at different times, $600, and, that on a cargo of lumber carried for them, the freight was $500, which has not been paid to him, but remains as part of the earnings of the vessel in their hands. In addition to this, the freight, on the cargo brought home in the vessel on her return to Bath, was received and collected by one of the owners, and is now in their hands.

Now every dollar of this money was hypothecated to the seamen, as soon as it was earned, for their wages. To the amount due to them, it was their own hard earnings, and whoever received it *as freight*, received it subject to their claims. As the freight, says Emerigon, is the fruit of the vessel, it is just that it should first be appropriated to pay the wages of those, whose labor has produced it. This destination of

freight is derived from the nature of things, while their privilege against the vessel is against common right. *Assurances ch.* 17. § 11, *No.* 3. It is true that when the master pays to a creditor the money which he receives as freight, the seamen cannot follow it into the hands of such creditor. For it does not pass into his hands carrying with it the quality of freight. But to the owners in this case it is paid over as part of the earnings of the vessel, that is as freight. It is said, indeed, that is paid to them not as freight, but as charter for the hire of the vessel. But even admitting, under this contract of hiring on shares, that the master is to be considered as the special owner, that the general owners, as to contracts made by him with the seamen, as wel. as for supplies, are strangers to the vessel, and that these payments, made to them, are to be held as payments of charter, and not as payments of part of the freight, there will still remain in their hands all the freight earned on her return voyage to Bath, and $500 which they owe on the cargo of lumber. To this amount they have the earnings of the vessel in their hands, and the seamen might, in a suit against the master, have attached this as freight due.

It is said, if the owners are held liable for the wages, on the ground that they have received freight, that they are liable only in the proportion which the amount they have in their possession, bears to the whole amount earned. But if the decision were to be put on this ground alone, the consequence would not follow. The whole freight is hypothecated for the whole wages. And from the nature of the creditor's interest in the thing pledged, it is not subject to this division. Every part of the thing is pledged for every part of the debt, *propter indivisam pignoris causam. Dig.* 11, 2, 65. And therefore, if two things are pledged for one debt, and one chance to be lost or destroyed, the hypothecation or lien, continues entire for the whole debt in that which remains. *Domat. Lois Civiles. Lib.* 3. *Tit.* 1. *Sect.* 1. *No.* 13. *Pothier De L'Hypothéque, ch.* 3, §1. *Pitman vs. Hooper*, 3 *Sumner's Rep.* 58.

But it seems to me, that the decision may more properly be put on a broader ground. Where the owners put their vessel into the hands of a master, to be employed by him on shares, I am prepared to hold as a just deduction from the principles and general policy of the maritime law, that they will continue liable to the seamen for their wages, notwithstanding the entire control of the vessel may be surrendered to the master, unless the seamen, at the time of their engagement, are notified that the master is to be considered as the sole owner, and that they are not to be liable. The rights of the seamen ought not to be affected by this private agreement between the master and owners. Even if the doctrine of the modern decisions is admitted, and the owners are held not liable to merchants who furnish supplies, there are strong objections to extending the principle to the contracts of seamen. They enter into their engagements, in the confidence that they have the usual and legal securities for their wages. One of these, to which a seaman habitually looks, is the personal liability of the owners. But in this case, there will be in fact no owner, and the only personal security they have is that of the master. Another reason is, the freight, which is paid to the master, is the proper fund for the payment of the wages. In the hands of the master, the whole of it is liable for them. But here the freight is, from time to time, paid over for the hire of the vessel, and only one half of it remains in his hands, at the close of their service, to respond for their claims. This private agreement, between the owners and master, operates as a perfect surprise upon them. My opinion is, that they ought to be held as owners.

And further, in my judgment, they are liable for the wages as receivers of the freight. They have in their hands, according to the evidence, $1100 of the earnings of the vessel, besides all the freight received on the cargo she brought home to Bath. The money that was paid over to them, was by the very terms of their contract, paid as the ship's earnings, that is as freight. In its quality of freight, it is

liable for wages, in whoseever hands it may be. It partakes too much of the character of subtlety, to call it charter, or the hire of the vessel. It is more consistent with justice, and I think quite as much so with the analogies of the law, to leave to it the name, which the parties themselves have given it, and under that name the seamen have a right to receive their pay from it. If, indeed, the respondents were to be held liable simply as receivers of the freight, it might be necessary to amend the libel, by making the master a party, and then the services on them would operate as an attachment of the freight in their hands; and if I thought it necessary, I should not hesitate to allow an amendment to meet this posture of the case; but in my opinion it is not.

Independent of all these considerations, my opinion is, that the respondents are liable on their express promise. When the libellant presented the order of the master, a part of it was paid, and a promise given to pay the residue. The libellant had a right to consider this as a distinct admission of their liability. If this order was to be considered as a piece of commercial paper, and the principles of the commercial law to be applied to it, they would be liable upon it as acceptors. For an acceptance may be by parol, or may be inferred from the conduct and acts of the party. *Story on Bills of Exchange*, §243. In reliance on this promise, the libellant forebore to commence proceedings against the vessel, or the master. It is now too late for the owners to deny their liability.

In every point of view, I think the libellant entitled to a decree for his wages.

Wages decreed, $103 12.

THE ADA.

In suits in rem, the *locus rei sitæ* gives the jurisdiction, for it is only in the courts of that country that a *jus in re* can be directly enforced.

Every contract is binding on the parties in the sense in which it is mutually understood by them at the time when it was made.

The meaning of the contracting parties is generally to be collected from the words in which the contract is expressed.

But when the language is ambiguous, or the words have a popular sense, more or less extensive than that which the naturally import, we may look beyond the words to ascertain the intent of the parties.

When the meaning of the language is obscure or uncertain, the construction is to be against the party in whose words it is expressed. This general rule of interpretation applies in all its force, against the owners, in the construction of shipping articles.

When, in the shipping articles of an English vessel, the voyage was described to be from Liverpool to Savannah, and any port or ports of the United States, of the West Indies, and of British North America, the term of service not to exceed twelve months, it was *held*, that the voyage intended was confined to the ports on the eastern shore of the continent, and that the articles did not authorise a voyage to San Francisco, on the north-west coast.

September 12th, 1849.

This was a Libel for wages and was heard on the following statement of facts, agreed by the parties.

"The libellants shipped on board the Barque at Liverpool, according to the shipping articles, which are to be exhibited to the Judge at the hearing. From Liverpool the ship came to the port of Savannah, where she arrived about the 20th of May. She lay there about 10 days, and discharged her cargo. She then ran in ballast to Calais, Maine, where she arrived about the 20th of June. She discharged ballast immediately, and in the course of three or four weeks began to

fit up on her present voyage. The libellants asked their discharge of the master several times after they ascertained the destination of the ship. The first time was about three weeks prior to the commencement of their proceedings before the magistrate. They also through their proctor, F. A. Pike, made a demand, about a week before commencement of proceedings, upon the master for their discharge, and for their wages. In asking for a discharge, the reason given was that they did not wish to go to California, two of the men (Reynolds and Clanahan,) stating in addition that they wished to go back to Liverpool as their clothes were there.

The crew was not furnished with lime juice on their passage from Savannah to Calais, although they asked it of the steward who said there was none for them. No complaint was made to the master on this account.

The ship is now loaded for California, and has engaged fifteen or twenty passengers for that destination, but intends going to St. Andrews, in the province of New Brunswick, first, for the purpose of clearing out for San Francisco.

The first mate was discharged in Savannah; the second mate was discharged in Calais about the 10th of August.

Reynolds was absent three times from the vessel without leave; the first time, he was gone about an hour during dinner; second time, absent from eleven o'clock till evening; the third time, was absent about thirty-six hours to Eastport, to see the British consul about this matter.

Hughes was absent with Reynolds from eleven o'clock till evening, and again at the time Reynolds went to Eastport.

Clanahan was absent the same as Hughes.

Miller was absent with the others from eleven till evening, and again about two hours.

After each of the above times the men returned to the vessel and went to work as usual. The vessel had been coppered and an extra passenger house built upon deck, and two of the men had asked their discharge, before any of the above absences.

They remained on board the ship doing duty as usual, until the day of trial before the magistrate, when they refused to go on board, and have not since been on board.

The respondent claims a forfeiture, of the several libellants, for absence without leave from the vessel as aforesaid, under the provision of the shipping articles as follows:

William Reynolds,	three times	absent,	£6.
Hugh Clanahan,	twice	"	£4.
Robert Hughes,	"	"	£4.
John Miller,	"	"	£4.

The accounts annexed against the Libellants are correct, except that they claim that the charge against each of them for amounts paid in Savannah for fines, for breach of the peace, should be deducted; for this reason, after the master paid the fines, three men and two boys left the ship, and, on account of his being short handed, these men refused to get the ship under way and go to sea, and to induce them to do so the captain promised to remit those charges, and the men came with the vessel, short handed, to Calais."

Signed { *F. A. Pike*, Proctor for Libellants.
{ *George M. Chase*, for Respondents.

The case was argued by *Deblois*, for the Libellants; and *W. P. Fessenden*, for the Respondents.

WARE, *District Judge.*

This is a suit on a foreign contract, in which all the parties are foreigners, and is to be governed by the laws of the country where it was made, and to which the parties belong. The libellants proceeding on their lien against the ship herself, and that being within the jurisdiction of this court, whatever scruples may be entertained by courts of admiralty in other countries, there is no doubt according to the decisions of our courts, and in my opinion there is none on general principles, that this court, notwithstanding the alienage of

the parties, may take cognizance of the case, and enforce the lien, if by law the libellants are entitled to it. *Conklin's Law, Jurisdiction, and Practice of the Admiralty, p.* 24–37. *The Jerusalem*, 2 *Gall. p.* 191. *The Bee, Ware's Rep.* 332. In suits *in rem*, the *locus rei sitæ* necessarily gives the jurisdiction, because it is only in the courts of that country that a *jus in re* can be directly enforced, though in foreign contracts the law of the place, where the contract was made, furnishes the rule of decision.

The libellants shipped at Liverpool, April 4th, 1849, for a voyage, which is described in the shipping articles to be from the port of Liverpool "to Savannah, and any other port or ports in the United States of America, and any port or ports in British North America, and any port or ports in the West India Islands, at the discretion of the master, or consignees, as freight or cargo may offer, and back to her final port of discharge, of Great Britain and Ireland; term of time on the voyage not to exceed twelve months. The vessel's complement of officers, seamen and apprentices, eleven in number, and any over or above the number of said complement to be considered as extra hands."

The vessel performed her voyage to Savannah, and having discharged her cargo there, went in ballast to Calais. There the libellants, having learned that the master was preparing for a voyage to San Francisco, in California, refused to go on that voyage, and demanded their discharge and wages. Four and a half of the twelve months, to which the time of the service was limited, had then expired.

The master contends that the refusal of the libellants to proceed on that voyage was a breach of their duty, by which they have forfeited all right to the wages they had earned for their past services. The libellants, on the other hand, say that this new voyage to California, was a deviation from that originally contemplated and for which they engaged themselves, and amounted to a breach and dissolution of the

contract, and released them from its obligations; that they might therefore well demand their discharge, and to be paid their wages, for the time they had served.

The right of the libellants to their discharge, and to be paid their wages, has been ably vindicated by their counsel on several grounds; but they may perhaps all substantially be resolved into one, at least in the view that I take of the case, it will be necessary for me to consider only one, and that is this, admitting, what is denied by the counsel, that San Francisco is properly a port of the United States, not having been made such by any laws, whether it can in any just sense be deemed to be one of the ports contemplated by this contract.

Every contract is morally binding on the parties in the sense in which it is understood by them at the time when it is made; and it is to the same extent, and no farther, binding on them in law, when this sense can be clearly ascertained. "Whatever," says Paley, "is expected on one side, and is known to be so expected on the other, is to be deemed a part or condition of the contract." *Moral Philosophy, Book* 3, *Part* 1, *Ch.* 6. This proposition I hold to be as sound in law as it is in morals. All the rules for the interpretation of contracts have for their object to ascertain what this common understanding of the parties is, and when it is discovered, the law comes forward and applies itself to their mutual and common intention, and holds the parties bound by their agreement thus far and no farther.

It is commonly said that the intention of the parties is to be collected from the words in which the contract is expressed. This, as a general proposition, is perfectly true; but it is not universally true that we are to look at the words alone. The greatest of the Roman Jurisconsults has told us that, *In conventionibus contrahentium voluntatem, potius quam verba, spectari placuit. Dig.* 50. 16. 219. *Papinianus Lib.* 2, *Responsorum.* It is the intention that is sought. The language may be ambiguous and susceptible

of two interpretations; or it may have a popular sense, in local usage, or in its application to the subject matter of the particular contract, more or less comprehensive than the words naturally import when taken by themselves. In these cases we are obliged to look beyond the words. Now I think that the case before us is one to which the latter distinction may apply. Within the words of the description of this voyage, the master might carry his crew to any port in British North America. But the British possessions extend across the whole breadth of the continent, and without going beyond the literal sense of the language of the contract, he might carry them on a voyage to the extreme north-west coast. Can it be imagined that the owners, when they prepared this shipping paper to be read to the crew, supposed, unless some verbal explanations were given at the time, that the men would understand that they were binding themselves to go a voyage to the mouth of the Columbia river, or to Vancouver's Island, if the master chose to carry them there. The description would naturally suggest to them a voyage to those ports which were familiar to the commerce of their country, and which were frequently and ordinarily visited for the purposes of trade, and in the popular and usual sense, they would suggest nothing more. That is, it would be taken to be a voyage in which the vessel might visit any of the American or British ports on the eastern shore of the continent.

This is the interpretation that I should have given to the contract, if the description of the voyage had terminated with merely naming the ports which might be visited, in the order in which they stand in the shipping articles. They would, without some further explanations were given, suggest to the seamen a voyage embracing the ports on the eastern shore of the continent and nothing more. It was justly urged, by the counsel for the libellants, that, if there is a fair and reasonable doubt as to the true meaning of the

articles, the seamen are on every principle entitled to claim a construction favorable to themselves. It is the owners who give the description of the voyage, and on general principles applying to all contracts, if the language is ambiguous or uncertain in its meaning, the construction shall be against the party who uses it, because he is bound to express himself clearly, and this principle applies with all its force to contracts between owners, who are always men conversant in business and shrewd and watchful in looking to their own interests, and seamen, who are proverbially careless, improvident, and ignorant. The disparity in the condition of the parties imposes on the court the duty to take care that the improvidence of seamen is not entrapped, by the superior watchfulness and sagacity of owners, into engagements that they did not intend to make.

In the present case, this construction of the contract is fortified by another clause in the articles, which appears to me to be entirely decisive. It is the limitation of time. The whole period of the service was not to exceed twelve months. The first port the vessel was to make was Savannah, and if a voyage around Cape Horn to the North-western coast of the continent had been contemplated, it is incredible that the time should have been limited to twelve months. The decisions of the High Court of Admiralty in England, referred to in the argument, though not in cases precisely parallel in their facts with those of the present case, bear considerable analogy to them, and from the tone and language in which they were pronounced, I cannot entertain a doubt that an English court would hold, that the voyage to San Francisco was such a deviation from the voyage contemplated by the shipping articles, as to discharge the seamen from their contract; that the voyage was broken up as to them, and that they are entitled to their wages. *The Countess of Harcourt*, 1 *Haggard* 248. *The Minerva*, 1 *Haggard* 347. *The George, Home*, 1 *Haggard* 370. *The Cambridge*, 2 *Haggard* 243.

If wages are decreed, the master contends that there are equitable deductions to be made from the amount due; in the first place, certain sums which he paid for the libellants in Savannah, for fines imposed on them, by the local authorities of that place, for breaches of the peace. The payment of these sums is admitted, and it is not denied that they constitute an equitable set-off against their wages, unless the claim of the master has, for a valid consideration, been released, and in my opinion it has. When the vessel was ready to be got under way to leave Savannah, she was found to be short-handed, three of the men and two of the boys having deserted. The vessel's complement was eleven hands, including the officers, so that she had but barely more than half her complement left. In this state of things, the crew refused to proceed on the voyage; and to induce them to forego their determination, the master promised to release this claim against them. I should not be inclined to hold the master bound by this engagement, if it had been extorted from him under the pressure of necessity, without any reasonable or colorable pretext. But this can hardly be considered as a mere wanton refusal to do their duty, on the part of the crew. Whether, on the requirement of the master, they might have been bound to proceed on the voyage, with half a crew, being then in a port where additional hands might be obtained, I do not think it necessary to decide. By going with half their complement of men, they subjected themselves to do double duty, and if the weather should prove boisterous, to increased danger, and at the same time relieved the owners from the expense of nearly half the ordinary crew. My opinion is that their consent thus to proceed on the voyage, under the circumstances, was a sufficient consideration to uphold this release.

The master also claims a deduction of the amount of certain forfeitures, alleged to have been incurred by the libellants. These, if any have been actually incurred, arise under the statute of 7 and 8 Victoria, ch. 112, sect. 7, (Sept.

5, 1844) not for desertion, as they seem to be considered by the master, but for temporary absence without leave. This statute provides that a seaman shall forfeit, for every wilful absence from the ship, without leave, or refusal to do his duty, two day's pay, and for every twenty-four hours absence, six day's pay, or, at the option of the master, the expenses necessarily incurred in hiring a substitute; provided always, that no forfeiture shall be incurred, unless the fact of the seaman's absence, or neglect, or refusal to do his duty shall be entered on the ship's log book. These absences were for short periods, the longest but half a day, except one of thirty-six hours, for the purpose of consulting the British Consul on the subject of this deviation from the original voyage. This was a very proper and prudent act on their part, and could in no sense be called a wilful absence. But with respect to all of them there is this fatal defect in the evidence. It is not mentioned, in the agreed statement of facts, that the absences were noted in the ship's log. The admission of the absences, in the statement of facts, is not sufficient to cure this defect. This entry is not required merely as a medium of proof, but for the purpose of showing that it was regarded, at the time, as a criminal act on the part of the seamen, and to prevent the master, on any subsequent difficulty with the seamen, from bringing forward past absences, and creating forfeitures, when, at the time, they were considered, if not entirely venial, as not deserving to be punished by statute forfeitures.

Decree for Libellants.

APPENDIX.

A

[*Ante page* 208.]

(INTERLOCUTORY DECREE.)

MAINE DISTRICT ss. DISTRICT COURT, DECEMBER TERM, 1842.

In the matter of Richard Abbott and others, Libellants and Petitioners, vs. the Hull of a New Ship.

And now on the coming in of the Master's report, the parties were heard by their Counsel on the acceptance of the same; in consideration whereof—

It is ordered and decreed that the same be accepted and confirmed in all its parts, except as is hereinafter provided, and the several claims and demands therein reported and allowed, are declared to be liens on the vessel, which is decreed to be subject to the same in the order and rank of privilege hereinafter stated, viz:

[The several claims of the first class, amounting to $6213,55, are here specified in detail in the same manner as in the final decree.]

And it is ordered that the several claims above named, with the costs, be first paid from the proceeds of the sale, when in the Registry, and if there is not enough to pay the whole in full, that each be paid *pro rata* in proportion to the sums allowed.

And it is further ordered, declared, and decreed, that the several claims hereinafter named are allowed as liens on the vessel in the second rank, and are to be paid from the proceeds of the sale of the vessel with costs fully, if the proceeds are sufficient, and if not, each to be paid *pro rata* in proportion to the claim allowed, viz:

JOHN PURINTON - - -	$5634,97
JOSHUA RICHARDSON - - -	228,83
THOMAS E. KNIGHT - - -	1323,84
ROBERT H. KNIGHT - - -	1179,12
Total - - -	$8366,76

And it is further ordered and decreed that the claim of John Purinton of the sum of $2019,97 be disallowed, the same not being alien on the vessel.

ASHUR WARE.

December 10, 1842.

(FINAL DECREE.)

MAINE DISTRICT ss.

District Court of the United States, December Term 1842, holden by adjournment on the First Tuesday, being the Third day of January, A. D. 1843.

In the matter of Richard Abbott et als., Libellants and Petitioners, vs. the Hull of a New Ship.

Upon the return, by the Marshal, of the Interlocutory order of sale issued in this case, it appears that the said Hull of a New Ship was sold at public vendue, on the seventh day of November last past, for the sum of $13000.

That the costs and charges of sale, and of custody and expenses attending the keeping of said vessel, from the first day of April last past to the said day of sale, is $421,28, and the balance, being $12578,72, had been, pursuant to said order, paid into the Registry of the Court.

It is therefore ordered, that the same be paid out of the Registry and distributed among the several Libellants and Petitioners, according to the decree passed herein on the tenth day of December last, in the manner following, viz. to those in the first class of liens, as follows:

To	Richard Abbott	in full	$ 199,75
	Isaac Milliken	do.	101,33
	David Allen	do.	84,20
	Joseph A. Means	do.	9,77
	George Chase	do.	7,63
	Charles F. Safford	do.	42,59
	Ebenezer C. Field	do.	22,29
	Alpha Turner	do.	12,04
	Tristram C. Stevens	do	361,75
	Ezra Harford	do.	383,33
	Jos'h P. Chamberlain	do.	454,92
	Mathew Gerrish	do.	115,08
	Nathan Chapman	do.	20,00
	F. Bradbury & Co.	do.	22,62
	Joshua Richardson	do.	1329,37
	John C. Brooks	do.	977,49
	Staples & Bartol	do.	1088,89
	Blanchard & Foye	do.	37,08
	Forbes & Wilson	do.	432,00
	John Purinton	do.	72,21
	Elez'r Wyer, Jr. & Co.	do.	24,10
	J. R. Mathews & S. Fogg	do	95,83

John Swett	in full - - -	151,14
Reuben Allen	do - - -	20,20
James Breslin & al	do - - -	3,64
George Marston	do - - -	34
Joseph F. Sawyer	do - -	42,54
Joshua Maxwell	do - - -	18,78
J. Symonds & A. Jordan	do - -	82,64
		6213,55

And that the costs end charges taxed upon the several Libels and Petitions, be paid out to the several Proctors, Officers, and others interested therein, viz:

Amount taxed on Libel of			Richard Abbott,	$226,39
do	do	do	Isaac Milliken,	34,05
do	do	do	David Allen, & als,	34,05
do	do	do	Eben. C. Field, & als,	34,05
do	do	do	Joshua Richardson, & als,	51,05
do	do	do	J. R. Mathews, & als,	34,05
do	do	do	John Swett and als,	34,05
do	do	do	Jos. T. Sawyer,	34,05
do	do	do	Joshua Maxwell,	34,05
do	do	do	Jos. Symonds, & al,	34,05
Amounting in the whole to				$6763,39
The balance remaining in Registry				5815,33
				$12578,72

And it is further ordered that after the payment of the aforesaid sums, the balance remaining being insufficient to pay in full the claims allowed as liens on said vessel, in the second rank, there be paid out to each of said claimants *pro rata*, in proportion to the claim allowed, as follows, viz:

To John Purinton, whose claim as allowed is the sum of	5634,97	3916,60
To Joshua Richardson, whose claims as allowed is the sum of	228,83	159,05
To Thos E. Knight, whose claim as allowed is the sum of	1323,84	920,14
To Robert H. Knight, whose claim as allowed is the sum of	1179,12	819,54
	$8366,76	$5815,33

And it is further ordered that the several aforesaid sums be paid out of the Registry, for the use and benefit of the respective Libellants and Petitioners, to their respective Proctors of record.

Attest John Mussey, *Clerk*.

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EVIDENCE.

EXECUTOR.

FEES OF PUBLIC OFFICERS.