RIGHTS AND DUTIES

OF

MERCHANT SEAMEN.

A TREATISE

ON THE

RIGHTS AND DUTIES

OF

MERCHANT SEAMEN,

ACCORDING TO THE

General Maritime Law,

AND THE STATUTES OF THE UNITED STATES.

Herein are the good ordinances of the Sea, which wise men, who voyaged round the world, gave to our ancestors, and which constitute the books of the science of good customs.

The Consulate of the Sea.

By GEORGE TICKNOR CURTIS,

OF THE BOSTON BAR.

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TO

THE HONORABLE

JOSEPH STORY, LL. D.,

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES,

DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY, &C. &C.

WHOSE NAME IS IDENTIFIED

WITH THE

MARITIME JURISPRUDENCE

OF AMERICA,

This Work

IS MOST RESPECTFULLY DEDICATED,

BY THE AUTHOR.

PREFACE.

The writer of this Treatise is no friend to the multiplication of law books. Yet he finds himself, at an early period, again about to commit to the public a legal publication, which, though it may need little in the way of introduction, to claim for its subject a ready attention, may require much in the way of apology for the manner in which it is treated.

Having taken the persons employed in navigation out of the general law of Shipping, I sought to trace their rights and duties back to those venerable codes of the sea, in which the spirit of a thorough jurisprudence, such as might well relieve the middle ages of Europe from the epithet of "dark," seems to have been fully equal to all the wants of maritime affairs, as they existed at the time, and scarcely falls short of satisfying the exigencies of modern commerce. The pleasure of these investigations richly compensated for any labor. It is

surprising how ample are the materials created by those early commercial states, whose positive and customary regulations constitute the sources of the maritime law, but whose magnificence and power have long since vanished from the shores of the sea, which has not refused to transmit the imperishable traces of their laws. Whoever transfuses these materials into modern jurisprudence, will not only find that they give the force and authority of antiquity to what is in daily practice at the present time, but he will be struck with the wide range of materials thus opened for enlarging and illustrating the principles demanded by new questions, as they arise. It is almost solely by the use of such materials so applied, that advances are made in the science of the law. Whoever has long studied any of its branches has found that inventions and discoveries pertain mostly to the physical sciences. "The literature of the present day," says Chancellor Kent, "'rich with the spoils of time,' instructs by the aid of the accumulated wisdom of ages."

Another reason led to this effort to treat in a separate work the rights and duties of the persons composing a ship's company. The jurisprudence of this country has done much for mariners, and an honorable credit may be claimed for it on this account. Many of the doctrines, for their protection, have been carried further by some of our courts than by any other tribunals whose decisions are recorded in the English language. But the evidences

of this lie in scattered decisions, and those only who are accustomed constantly to resort to the reported cases can know what the doctrines in fact are. To bring together these materials and exhibit the results for which the judicial tribunals and the legislative authority of the country may claim credit, has been a part of my design. It has also been a part of that design to exhibit, as a whole, the mariner's contract, as it is known to the general maritime law; a contract, differing in many essential points from all contracts of service upon land, governed by a law that is "not the law of a particular country," but the result of the usage, the tacit convention and the positive institutions of the great family of commercial nations. It seemed to me that the science of the law ought to devote great attention to the persons employed in navigation; for to ascertain and reconcile the rights and duties of those into whose hands such vast masses of property are entrusted, is one of the surest modes by which to multiply securities around national and individual wealth, and to give to the moral qualities of man a new power over the elements to which that wealth is exposed.

But in writing a treatise, the chief practical value of which should be to state the law of one's own country and time, it was of course impossible to do more than to refer the reader to those sources from which apt illustrations and kindred doctrines may be drawn, in the

institutions of other times or countries. These references I have sometimes accumulated upon general doctrines well established in our own and the English law; especially in citations from the elder marine ordinances. I have done so, because I have found that upon these subjects, investigation may be pursued into those authorities for light upon new questions, to great advantage. The texts, of which I have made use in citing the marine laws and ordinances, are those of the magnificent collection of M. PARDESSUS, published at Paris, in four volumes folio, from 1828 to 1837.[1] I should also have referred to the editions and texts of the same codes which have heretofore been in use, but for the fact that they are of very little value compared with those of the learned French advocate, who has given us, with great accuracy and laborious collation, all that the libraries of Europe have preserved of these compilations. The work is known to some of our private libraries, and it ought to be known to the public institutions.

I have cited the various cases adjudicated in our Supreme, Circuit, and District Courts of the United States, and the several State Courts, without distinguishing at all what weight of authority belongs to each. To the professional American reader, this was unnecessary; every

[1] COLLECTION DE LOIS MARITIMES ANTÉRIEURES AU XVIII.e SIÈCLE, PAR J. M. PARDESSUS, CONSEILLER A LA COUR DE CASSATION, ETC. ETC. There is a fifth volume, which I have not yet seen.

one affixes at once the proper authority to a decision when he reads the name of the tribunal pronouncing it. The foreign reader has little occasion to inform himself of the shades of distinction between the different branches of our apparently complicated judicial system. Whatever interest or attention he bestows upon our law, must in the main depend upon the intrinsic soundness of the doctrine; except in those instances, where he is inquiring for the actual state of our law, when the known reputation of the judges, or the high constitutional position of the court, add to the intrinsic merit of a decision the acknowledged weight of eminent station and authority.

I am aware that this subject might have been compressed into a very short compass. Some parts of it have occupied but a narrow space, in the text writers upon the law of shipping. But condensation is sometimes accomplished at the expense of completeness; and having never seen a treatise upon the same subjects which I felt willing to follow as a model, I have preferred my own conception of the proper outlines and limits of the subject. The profession, for whom this work is mainly intended, are rarely critical with an author, who is useful to their studies; and in the hope that the faults of the work may escape censure under this special verdict, I commit it to their indulgence.

Brooks's Buildings,
Boston, June, 1841.

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ERRATA.

Page 60, note 3, cites a decision declaring whaling voyages not to be "foreign voyages"; add a reference to the subsequent statute, giving these voyages the privileges, &c. of "foreign voyages," printed in the Appendix, p. 428.

Page 64, note 3, from "Sautayra, Sur Code de Commerce Expliquè," *dele* "Sur."

Page 249, note 3, for "Portland *v.* Stubbs," *read* "Portland Bank *v.* Stubbs."

PART FIRST.

OF THE HIRING OF MERCHANT SEAMEN.

MERCHANT SEAMEN.

PART FIRST.

CHAPTER I.

OF THE DISTINCTIVE PROFESSIONAL AND NATIONAL CHARACTER OF MERCHANT SEAMEN.

The true definition of a *mariner*, within the contemplation of the maritime law, does not perhaps include all persons who may perform labor, or render services for hire, on board the vessel. On the other hand, the definition of a *sailor*, given by Valin,[1] has reference to the municipal regulations of the French Ordinance, which required the enrollment of all the seamen of the kingdom, and divided them into classes, and contemplated a certain degree of seamanship. It is therefore to be taken in a more restricted sense than the general meaning of the term mariner, or seaman, in our jurisprudence. But although our inquiries in this Treatise will not be limited to the rights and duties of those who are merely em-

[1] "Un matelot est un homme de mer, qui a acquis une expérience suffisante au fait de la manœuvre d'un vaisseau." Valin, Tom. i. p. 509.

ployed in the navigation of the vessel, it seems proper to comprehend in our definition only those who are either employed in the actual service of the navigation, or whose services are necessary, or at least contributory to the preservation of the vessel, or of those who are employed in navigating her.[1] Following this definition, we shall probably be led to the right classification of the persons who are, or are not, for the purposes of such a treatise, to be deemed mariners. There is also another guide, coincident with the rule just stated, and in some measure founded upon it: namely, the classes of persons who have been deemed mariners or seamen, by the Courts of Admiralty, to the intent of founding their remedy for their wages in that jurisdiction. The single case of the master does not seem to depart from the general rule above given; because he is excluded from the admiralty jurisdiction *in rem*, as to his wages, for reasons peculiar to his office, not because his services are in part of a different nature from those of the common sailor: and besides, the admiralty courts, in this country, entertain his suit *in personam*.[2]

The following classes of persons may therefore be enumerated as falling within the proper scope of our inquiries. The *first* consists of those who by the universal assent of the maritime world, and in all jurisprudence, are placed under the general definition of mariners, being concerned in the actual business of the navigation; as

[1] *Trainer et al.* v. *The Superior*, Gilpin's R. 514. — "*Nautam* accipere debemus, eum qui navem exercet, quamvis *nautæ* appellantur omnes, qui navis navigandæ causâ in nave sint." ULPIAN, (cited in the notes to Abbot on Shipping, p. 91, edit. 1829.)

[2] *Willard* v. *Dorr*, 3 Mason's R. 91.

the MASTER, the MATES, the PILOT,[1] and the SEAMEN of every rank, whether they are common sailors, or hold an inferior official station, as that of *Boatswain*, *Coxswain*, &c. The *second* class comprehends persons in regard to whose maritime character difficulties may be or have been felt; but all such as I shall enumerate under this head, will either appropriately fall under the general test of services contributory to the preservation of the vessel or of those employed in navigating her, or have been specifically treated by the courts as belonging to the general class of mariners. They are the SURGEON;[2] the PURSER;[3] the COOK and STEWARD;[4] the CABIN BOY; the CARPENTER,[5] who frequently acts as a common sailor; the COOPER on board whaling or other fishing vessels;[6] and the ENGINEERS and FIREMEN on board steam vessels navigating the high seas.[7]

It is quite obvious that there may be a *third* class of persons performing various services for hire on board a vessel, in regard to whose contracts considerable difficulties would arise upon the question of whether they would

[1] By pilots are here meant, both the pilot as an officer of the vessel, and the general pilot of the coast; each of whom is properly a *mariner;* or as they are called by Valin, the sea-pilot and the coast-pilot; (Tom. I. p. 483.) See also *The Anne*, 1 Mason's R. 508; *Hobart* v. *Drogan*, 10 Peters's R. 108.

[2] *Mills* v. *Long*, Sayer, 136; *Shaw* v. *The Lethe*, Bee's Ad. R. 424; *The Lord Hobart*, 2 Dodson's Ad. R. 100, *note*.

[3] *The Prince George*, 3 Hag. Adm. R. 376.

[4] *Black* v. *The Louisiana*, Peters's Adm. Decis. 268; *Turner's Case*, Ware's Adm. Decis. 83.

[5] *Wheeler* v. *Thompson*, 1 Stra. 707; *The Lord Hobart*, 2 Dodson's Ad. R. 100.

[6] *Macomber et al.* v. *Thompson*, 1 Sumner's R. 384; *U. S.* v. *Thompson*, ib. 168.

[7] *Wilson* v. *The Steamboat Ohio*, Gilpin's R. 505.

come within the admiralty jurisdiction; such are all servants, of either sex, hired for the accommodation and to wait on the persons of passengers, or to perform any duty not defined under the general principle before stated. Whether or not their contracts would probably be cognizable in the admiralty, will be for future consideration. At present, it is merely necessary to remark, that they have not usually been included under the general description of mariners.

It may here be remarked, that the general principles of the mariner's contract, rights and duties, as they will be hereafter discussed without specific exceptions or applications, comprehend most of the first two classes of persons above enumerated. It will also be a part of my design to develop and define particular rights and duties, and to point out the limitations and exceptions to the general principles.

These general definitions seem to be all that it is necessary to premise, concerning the professional character of mariners. The remaining topic of this chapter, the national character of seamen, will occupy us with a brief summary of existing statute regulations, after a single preliminary remark.

The policy of different maritime nations, in regard to the manning of their public and private marine, has varied at different times and under different relations with the rest of the world.[1] But it is altogether a matter of national policy, in time of peace. There is no principle of the general maritime law, and no custom of the com-

[1] In France, it was for a long period, and I believe still is, the policy of the government to induce foreigners to enter both the King's and the merchant service. See Valin, Tom. i. p. 558.

mercial nations, which excludes mariners from employment in any other than a ship of their own country. The seaman, professionally, and for the purposes of his employment, is a citizen of the globe; his contract is known to a general jurisprudence, and is governed by principles in respect to which greater uniformity has prevailed for many ages, than in respect to almost any other contract of civilized man. He seeks his employment, and acquires a full title to its rewards, in the vessels of any nation, except where the policy of his own sovereign, or that of the particular country, forbid or exclude him from the ships of such country.[1]

By a statute of the United States, passed in 1813, it was declared to be unlawful to employ on board any of the public or private vessels of the United States, any person or persons, except citizens of the United States, or persons of color, *natives of the United States;* and *naturalized citizens:* and where the latter are employed, they must produce to the commander of the public vessel,

[1] These observations apply only to a state of peace. As against belligerent rights, it may often be important for the masters and owners of neutral ships, to attend carefully to the national character of the seamen whom they employ. The law of prize, held by some nations, requires that the officers, and a certain proportion of the crew of neutral ships, generally two-thirds, should not be of an enemy's country; otherwise the ship will take its national character from that of the crew. This is the law of France and Denmark. The proportion agreed on by Russia and England, by the Petersburg Convention of 1801, is a half. (See Jacobsen's Sea Laws, Book II. chap. 2. 2 Brown's Civ. and Adm. Law, 515.) England has not always been so strenuous upon this point; but the courts of that country have held, that where neutral seamen enter into the enemy's commerce, their national character is concluded by that of the vessel in which they are found. *The Frederick*, 5 Robinson's Adm. R. 8. See also, *The Emboden*, 1 Robinson's Adm. R. 16, and *The Vigilantia*, *ibid.* 1.

if it be one, or to a collector of the customs, if it be a private vessel, a certified copy of the act of their naturalization, setting forth such naturalization, and the time thereof.[1] But this prohibition is limited, in a subsequent section of the same act, to the exclusion of the subjects or citizens of such nations only, as have prohibited by treaty or special convention, the citizens and subjects of the United States from employment in their vessels.[2]

The penalty provided in the Act for the employment of the subjects or citizens of the nations against whom the prohibition operates, is a forfeiture by the master and owners of five hundred dollars for each seaman so unlawfully employed; to be recovered in an action of debt, one moiety to the use of the person suing, and the other moiety to the use of the United States. And this penalty is recoverable, although the seaman's name shall have been admitted and entered in the list of the crew certified by the collector.[3] But when in a foreign port, any deficiency of the crew may be supplied by hiring the subjects of the foreign country, if their employment is not prohibited by their own laws.[4]

But the whole of this statute is now comparatively inoperative, since there are very few nations who have excluded our seamen from employment in their ships. Foreigners are extensively employed in our mercantile marine, and while so employed, are within the protection

[1] Act U. S. 3 March, 1813, ch. 184, sec. 1, 2.

[2] Sec. 10.

[3] Sec. 8. A similar penalty is provided against receiving on board in a foreign port, any seaman or seafaring man, not of the United States, as a passenger, without permission in writing from the proper officers of his country. (Sec. 5.)

[4] Sec. 9.

of the laws made for the benefit and protection of seamen. It has been held expressly, that a foreigner, while employed as a seaman in a merchant ship of the United States, is a "mariner and seaman of the United States," within the language and policy of the Consular Act of 1803, ch. 62.[1]

By a subsequent statute, in all vessels of the United States engaged in the fisheries and coasting trade, the officers and three-fourths of the crew must be citizens; and in all vessels engaged in foreign trade, the officers and two-thirds of the crew must be citizens.[2] Fishing vessels offending against the Act, cannot entitle themselves to the bounties provided by law; and vessels engaged in the foreign and coasting trade, are subject to the foreign tonnage duty, if their crews consist of more than the above proportion of foreigners.[3] These last penalties are cumulative upon those of the former Act; so that masters and owners, shipping foreign seamen who belong to countries against which that Act operates, are still subject to the penalty of five hundred dollars for each person.

I am not aware of any decisions in the courts of this country, respecting the provisions of these Acts. But in England, under similar statutes, it has been held, that foreigners, hired to take care of a cargo of mules, on board a British ship, were not to be deemed part of the crew, within the provisions of the statutes requiring British ships to be manned by a certain proportion of British seamen;[4] and also that goods imported in a British ship

[1] *Matthews* v. *Offley*, 3 Sumner's R. 115.
[2] Act U. S. 1 March, 1817, ch. 204, sec. 3, 5, 6.
[3] Ibid.
[4] *The George the Third*, 1 Dodson's Adm. R. 320.

not manned and navigated according to law, are not liable to forfeiture, if the imperfect manning of the ship was a matter of uncontrollable necessity.[1] Such statutes, in fact, belong to a class of laws, which, although not to be weakened by minute tenderness to particular hardships, are yet subject to all considerations of rational equity; although framed for the security of great national interests, and founded on purposes of great public policy, they are yet not to be rigidly and literally enforced against offences committed only through invincible necessity.[2]

[1] *The Pelican*, 2 Dodson's Adm. R. 194.

[2] Adm. Digest, Titles "ACCIDENT," "NECESSITY and DISTRESS."

CHAPTER II.

OF THE GENERAL NATURE OF THE MARINER'S CONTRACT, AND THE PARTIES THERETO.

The contract of hire for marine service belongs in general to the entire class of contracts for the hire of services, but it also involves and is governed by principles peculiar to itself, and which carry it, in very important particulars, beyond the rules applicable merely to contracts of service upon land. Thus, by the common law, of England and of this country, when a man lets himself to hire, and neglects or refuses to fulfil his engagement, he cannot be compelled to perform it by any restraint put upon the freedom of his person; the remedy of the other party is solely in the damages he may recover for breach of the contract. The same principle prevails in the civil law; *nemo potest præcisé cogi ad factum;* and the same remedy only is afforded to the injured party.[1] But, by the law of most countries, the mariner's contract is an exception to this general principle. By the French Ordinance, the seaman, who fails to render himself on board according to his contract, can be pursued and arrested wherever he is found, and constrained to complete his engagement.[2]

The same provision for his apprehension and compul-

[1] Pothier, *Traité des Obligations*, n. 157 (Edition Dupin, tome i, p. 79.)

[2] *L'Ord. de la Marine*, liv. 2, tit. 7, art. 3.

sion, is made in England[1] and in this country.[2] There is also another peculiarity of this contract, in which it differs from other contracts for the hire of services. It is the only form of service stipulated to be rendered by a freeman of full age, known to the common law, in which the employer, by his own act, can directly inflict a punishment on the employed, for neglect of duty or breach of obligation. By the positive law of some countries, also, and perhaps by the general law of the sea, the seamen are bound to assist, at the risk of their lives, in defending the ship against pirates; and a refusal to fight is punished criminally. Such is the law of France[3] and of England.[4] All these peculiarities of the contract are founded in deep reasons of policy and necessity; and although they do not give a character to this service which takes it out of the general rules and principles applicable to the whole class of contracts for the hire of services, they are important to be stated at the outset, as the prominent features of distinction; reminding us that those general rules and principles will sometimes fall far short of satisfying the exigencies of a contract so strongly marked by principles of its own.

In other respects, the mariner's contract is, as remarked

[1] Act of 2 Geo. 2, ch. 36, sec. 3 and 4, and 31 Geo. 3, ch. 39, sec. 3; now consolidated by 5 and 6 Wm. 4, c. 19.

[2] Act U. S. 20th July, 1790, sec. 7. The authority given by this Act to arrest deserters by a warrant from a magistrate, does not supersede the authority which the master has under the general maritime law, to re-take a deserting seaman, and confine him on board the vessel. *Turner's Case*, Ware's R. 83.

[3] L'Ordon. de la Marine, liv. 2, tit. 7, art. 9.

[4] 16 Car. 2, ch. 6, and 22 and 23 Car. 2, ch. 11; 11 and 12 W. 3, ch. 7, s. 9.

by Pothier, in speaking of the hire of seamen by the month, or by the voyage, a true contract for the hire of services: and it is so regarded, both in this country and in England, whether the hire be by the month, or by the voyage, or on a share of the profits or the freight.[1] It has been well settled by the courts of common law and of Admiralty, that even in regard to that form of the contract, which, in modern times, seems to approach nearest to the principles of the contract of partnership — the fishing contracts, under which the seamen receive a proportion of the proceeds for their services — the mariners are not partners with the owners, but the share of each, when ascertained, is not only in lieu of wages, but is to be treated in all respects as stipulated wages are treated.[2] I shall have occasion to revert to the various forms of the contract hereafter.

We now pass to the consideration of the parties between whom the mariner's contract takes place, and certain of the general stipulations which it involves on the part of each of them. The parties to this contract are

[1] Most of the Continental jurists consider the contract on freight or profits, a kind of partnership. Pothier enumerates four different forms, or kinds, of the mariner's contract, (as do Valin and Jacobsen;) *au voyage; au mois; au profit*, ou *à la part; au fret;* the two first, being on a stipulated sum, he calls *un contrat de louage;* the two last, contrary to our rule, he calls, *des espèces de contrats de société*. Pothier, *Traité de Louages Maritimes*, n. 160, 161. *Edition Dupin*, tome iv, p. 399. See also, Valin, tome i, p. 676. Jacobsen's Sea Laws, book 2, ch. 2. Lord Tenterden seems to have taken the same view of the contract on profits. See Abbot on Shipping, part 4, ch. 1, p. 432. Amer. Edit. 1829.

[2] *The Frederick*, 5 Rob. Adm. R. 8. *The Crusader*, Ware's R. 437. *Wilkinson* v. *Frazier*, 4 Esp. R. 182. *Mair* v. *Glennie*, 4 M. and Selw. 240. *Day* v. *Boswell*, 1 Camp. R. 329. *Rice* v. *Austin*, 17 Mass. R. 197. *Baxter* v. *Rodman*, 3 Pick. R. 435.

three; the mariner, the master and the owner: the first being strictly a separate party in interest, or—as the phrase of the common law, discriminative of the various interests in a contract, expresses it—being *of the one part;* and the two last, though in some respects of diverse rights and obligations, being severally—although in other and most respects identified—*of the other part*, with reference to the first.

And first of the *Mariner*, or *Seaman.*

1. In general, the same legal qualifications which enable any party to enter into a binding obligation, empower and qualify him to enter into the mariner's contract: and the same disqualifications prevent him.[1] A married woman is of course excluded, under the same circumstances which exclude from any other contract; though it has been held, by very high authority, that being of the female sex is not of itself any disqualification of earning wages as a mariner.[2] Minors and apprentices, also, are not, of themselves alone, capable of entering into this contract, any more than into other contracts of service, except with the same limitations and restrictions. They cannot entitle themselves to their own wages, when they are under the power or guardianship of another: so that any advance, or any other portion of their wages, paid to them without the assent of the parent, guardian or master, may be required to be paid again to the latter;[3] and the taking a minor child on a voyage upon the high seas, by a tortious abduction or seduction, that is, by inducements, wholly without the knowledge or against the con-

[1] See Chitty on Contracts; Pothier on Obligations.

[2] *The Jane and Matilda*, 1 Hag. Adm. R. 187.

[3] *James* v. *Le Roy*, 6 Johns. R. 274, and note.

sent of the parent, is ground for an action of damages by the parent.[1] Nor is it always competent for a master to send his indented apprentice on a voyage to sea, and to receive the wages he may earn; as this may be repugnant to the terms and objects of the contract of apprenticeship; and any custom or usage so to do — as in the cooper's trade, to send apprentices on fishing voyages, on which coopers are usually taken — will not, it has been held, authorize the master to assume a power which he has not, without the custom.[2] But where the entering into the mariner's contract is not repugnant to the terms and objects of the contract of apprenticeship, the apprentice may enter into it with the master's assent.

2. *The Master.* — The master being the person to whom the owners have entrusted the navigation of the ship, and some other powers in relation to it, he has power to make certain contracts, which it is not material here to enumerate, but among which is included that of hiring the other mariners. He has been clothed with this power, under restrictions varying little from age to age, since the earliest periods of commerce. In the *Guidon de la Mer*, *the Consolato*, and *the Laws of the Hanse Towns*, his authority for this purpose is fully recognised:[3] the more modern maritime codes have followed the ancient ones, in this respect;[4] and the statute law of this country and

[1] This action may be maintained in the Admiralty. *Plummer* v. *Webb*, 4 Mason's R. 380. S. C. Ware's R. 75. The action will lie against the ship-owner. *Sherwood* v. *Hall*, 3 Sumner's R. 127.

[2] *Randall* v. *Rotch*, 12 Pick. R. 107.

[3] *Guidon de la Mer*, chap. 15, art. 2. *Consolato del Mare*, chap. 79, [124.] *Laws of the Hanse Towns*, tit. 3, art. 2.

[4] *L'Ordon. de la Marine*, liv. 2, tit. 1, art. 5; and the authorities cited by Valin, tome i, p. 385.

of Great Britain, recognises and gives effect to this authority, in the provisions respecting the shipping articles.[1] The French Ordinance required that the master should hire his crew in concert with the owners, when at the place of the owners' residence;[2] and from the commentaries of Valin and Pothier upon this provision, it is to be inferred that an engagement of a seaman by the master against the will, or without the knowledge, of the owner, if he is at the place, was held by them to be invalid as respects the owner.[3] Valin further observes, that if the equipment is made away from the owner's residence, and he has no agent or correspondent at the place, the power of the master in hiring the crew is absolute; but if the owner has an agent or correspondent at the place, the master should hire them in concert with such agent or correspondent.[4] These provisions correspond with those of some of the older codes. I am not aware that effect has been given to similar rules in our law; but upon principle, the master could not, if the party had notice of the fact, bind his owner to pay the wages of a particular seaman, whom the owner had forbidden him to employ; or to pay a price of wages which he had refused to give; whether his will were signified to the master directly, or through another agent. In general, however, the master is left to hire the seamen, at his own discretion, both at home and abroad; and un-

[1] 2 Geo. 2, ch. 36, s. 1 and 2; 31 Geo. 3, ch. 39, s. 1 and 2: now consolidated by 5 and 6 Wm. 4, ch. 19. Act U. S. 20th July, 1790, ch. 56, sec. 1.

[2] *L'Ordon. de la Marine*, liv. 2, tit. 1, art. 5.

[3] Valin, tome i, p. 385. Pothier, Louages Maritimes, n. 164, Edition Dupin, tome iv, p. 401.

[4] Ibid.

less the owner interferes, the engagements entered into by the master, within the scope of his agency, bind the owner to a performance.[1]

The master thus becomes a party to the mariner's contract. Of the manner and extent in which he obligates both himself and his owner, I shall have occasion to treat hereafter, under the remedy of seamen for their wages. It is to be observed, however, that the master is not always a *necessary* party to the making of the mariner's contract, and that his intervention at all, at that stage, may be dispensed with. The contract is not with the person of the master only, but with the ship, or rather with the owner.[2] The seamen may be shipped by the owner, before the master is appointed; if they sign the written evidence of the contract, called the shipping paper, or shipping articles, with a blank left for the name of the master, it is to be understood that they engage to go the voyage with any master whom the owner may appoint. When the master who may afterwards be appointed, signs the contract, he and the crew come into the same mutual relations and obligations, as if he had originally hired them himself.[3] So too, where the master, who may have hired the crew and signed articles with them, dies, or is removed by the owners, before the commencement or during the continuance of the voyage, the seamen having stipulated to go on a definite voyage, are bound to complete it under the substituted master.[4]

[1] Story's Com. on Agency, p. 109, 110, 111, sec. 119, 120, 121.

[2] Pothier, *Louages Maritimes*, n. 176, Edit. Dupin, tome iv, p. 405. *United States* v. *Haines et al.*, 5 Mason's R. 272.

[3] *Mayo* v. *Harding*, 6 Mass. R. 300.

[4] Pothier, *ut supra*; Valin, tome i, p. 532. *Bray* v. *The Atalanta*, Bee's

So too, the master possesses the authority at a foreign port, if he becomes disabled by illness, to appoint a new master; and the power of such new master in hiring seamen, and his relation to those already on board, are the same as those of his predecessor.[1] The mariners are bound to perform the voyage under any person who is thus lawfully substituted master for the voyage, unless he is grossly incompetent to the duties of his station, from want of due skill, or from grossly bad habits, or from profligate and cruel behavior.[2]

3. *The Owner.*—The remaining party to the mariner's contract is the owner of the vessel. He rarely becomes such, however, by a direct interference in making the contract; but he enters into the relation, and becomes affected by its consequences, through his agent, the master.[3] So too, he rarely signs the written evidence of the contract; but this, like the substance of the agreement, becomes the law of the parties, through the same agency. But the owner possesses the same general powers of revocation, either entire or partial, which belong to the relation of principal and agent, under all circumstances.[4] He also possesses a concurrent authority

Adm. R. 48. *United States* v. *Hamilton*, 1 Mason's R. 443. *Murray* v. *Kellog*, 9 Johns. R. 227. The position stated in the text, is equally true, whether the articles contain the words, "and whoever else shall be master for the voyage," or not. *United States* v. *Haines et al.*, *ut supra.*

[1] Story on Agency, sec. 120. Pothier and Valin, also, moot the question of whether the seaman, who has engaged to go on a definite voyage, is obliged to go in another ship, substituted for that in contemplation at the time of making the contract; and both decide it in the affirmative. *Ubi supra*, notes 1, 3.

[2] *United States* v. *Cassedy et al.*, 2 Sumner's R. 582.

[3] Story on Agency, sec. 120.

[4] Ibid 485, *et seq.*

with the master, to make new relations under the contract; as where a seaman has forfeited his right to wages by misconduct, the owner may absolve from such forfeiture, and the seaman be restored to his rights, to the same effect as by the master.[1] The power of the master to bind the owners to the mariner's contract; the question who are to be deemed owners with reference to it; and the extent and nature of their liability, fall appropriately under the subject of *remedy*.

There remain, to be considered in this chapter, certain of the general obligations of the parties to the mariner's contract, which may or may not be included in their written agreement; and those of the master and owners towards the seamen, come naturally first in order.

Although the articles are wholly silent upon such points, law and reason will imply certain engagements on the part of the master and owners, to the mariners, which are equally as imperative as those expressed in writing.

1. The first obligation on the part of the owner and master is, to pay the wages agreed upon.[2] This duty is of course subject to the exception of all legal defences to the claim. The terms of hiring are generally expressed in the written contract, and constitute one of the chief stipulations contained in the paper.

2. Another implied engagement on the part of the owner and master is, that the voyage shall be legal, as regards foreign or their own governments.[3] It has been frequently held, that the wages of seamen are not a lien on the vessel, on an illegal voyage: so that when the

[1] *Dixon* v. *The Cyrus*, Peters's Adm. R. 407.

[2] Pothier, *Louages Maritimes*, n. 178.

[3] *Dixon* v. *The Cyrus*, Peters's Adm. R. 407.

vessel is seized by the domestic or foreign government, and condemned for a breach of law, wages are not allowed to the mariners out of the proceeds, unless it clearly appears that they were innocent of all knowledge of, or participation in, the illegality of the voyage.[1] Where this appears, if the seamen should neglect to enforce their claim against the proceeds, they could still assert a claim for damages against the owner or master; for the latter must be estopped from setting up the illegality of the voyage into which they had drawn the seamen, without communicating to them its real objects and character.[2]

3. It is also implied in the contract of the owner and master with the seamen, that at the commencement of the voyage, the ship shall be furnished with all the necessary and customary requisites for navigation, or, as the term is, shall be *seaworthy*.[3] It may not be either necessary or proper, that the master, when he hires the seamen, should be obliged to exhibit to them a list of his stores and equipments, or to take their opinion on the sufficiency of his vessel. But he and the owner take the

[1] *The St. Jago de Cuba*, 9 Wheaton's R. 409. *The Langdon Cheeves*, 2 Mason's R. 58. *The Vanguard*, 6 Robinson's Adm. R. 207. *The Benjamin Franklin*, ibid. 350. *The Leander*, Edwards's Adm. R. 35. *Shepherd et al.* v. *Taylor et al.*, 5 Peters's Sup. C. R. 675.

[2] A suit for damages has been maintained in the Admiralty, in Massachusetts District, for a fraudulent shipment of a seaman on a fictitious voyage, the court considering the defendant estopped to deny the reality of the voyage. *Stewart's Case*. (See Dunlap's Adm. Practice, p. 53.) So too, damages are recoverable for the breaking up of a voyage, by the owner. Abbot on Shipping, part 4, ch. 4. See also Roccus, note 43; Malyne Lex Merc., p. 105; Jacobsen's Sea Laws, 457; 3 Johns. R. 518; 3 Car. and Pa. 3; Peters's Adm. R. p. 192, n.; *M'Quirk et al.* v. *The Penelope*, 2 Peters's Adm. R. 276.

[3] *Dixon* v. *The Cyrus*, Peters's Adm. R. 407.

responsibility that the vessel is seaworthy in point of fact: and in a case of clear and dangerous deficiency, the statute law of this country has provided a mode of proceeding on the part of mariners who have unwarily contracted to go to sea in a vessel in this condition.[1] This

[1] "That if the mate, or first officer under the master, and a majority of the crew of any ship or vessel, bound on a voyage to any foreign port, shall, after the voyage is begun (and before the ship or vessel shall have left the land) discover that the said ship or vessel is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores, to proceed on the intended voyage, and shall require such unfitness to be inquired into, the master or commander shall, upon the request of the said mate (or other officer) and such majority, forthwith proceed to or stop at the nearest or most convenient port or place where such inquiry can be made, and shall there apply to the judge of the district court, if he shall there reside, or if not, to some justice of the peace of the city, town, or place, taking with him two or more of the said crew, who shall have made such request; and thereupon such judge or justice is hereby authorized and required to issue his precept, directed to three persons in the neighborhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same, in respect to the defects and insufficiencies complained of, and to make report to him, the said judge or justice, in writing, under their hands, or the hands of two of them, whether in any or in what respect, the said ship or vessel is unfit to proceed on the intended voyage, and what addition of men, provisions, or stores, or what repairs or alterations in the body, tackle, or apparel, will be necessary; and upon such report, the said judge or justice shall adjudge and determine, and shall endorse on the said report his judgment, whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made, or deficiencies supplied, where the ship or vessel then lays, or whether it be necessary for the said ship or vessel to return to the port from whence she first sailed, to be there refitted; and the master and crew shall in all things conform to the said judgment; and the master or commander shall, in the first instance, pay all the costs of such view, report, and judgment, to be taxed and allowed on a fair copy thereof, certified by the said judge or justice. But if the complaint of the said crew shall appear, upon the said report and judgment, *to have been without foundation*, then the said master, or the owner or consignee of such ship or vessel, shall deduct the amount thereof, and of reasonable damages for the detention (to be ascertained by the said judge or justice) out of the wages growing due

statute has reference only to the case of unseaworthiness discovered after the voyage has begun, and before the vessel has left the land. A recent statute has provided a mode of proceeding in a foreign port, by which the condition of the vessel *at the time she left the home port* may be ascertained abroad, under the direction of the American consul or commercial agent. If the vessel is found to have sailed from the home port unsuitably provided in any important or essential particular, by neglect or design, the consul is empowered to discharge such of the crew as require it, each of whom is declared entitled to three months' pay in addition to his wages to the time of discharge: but if the deficiency is found to have been the result of mistake or accident, and could not in the exercise of ordinary care have been known and provided against before the sailing of the vessel, and the master shall, in a reasonable time, remove the causes of complaint, then the

to the complaining seamen or mariners. And if, after such judgment, such ship or vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs, or alterations, as may be directed, the said seamen or mariners, or either of them, shall refuse to proceed on the voyage, it shall and may be lawful for any justice of the peace to commit, by warrant under his hand and seal, every such seaman or mariner (who shall so refuse) to the common jail of the county, there to remain without bail or mainprise, until he shall have paid double the sum advanced to him at the time of subscribing the contract for the voyage, together with such reasonable costs as shall be allowed by the said justice, and inserted in the said warrant, and the surety or sureties of such seaman or mariner (in case he or they shall have given any) shall remain liable for such payment; nor shall any such seaman or mariner be discharged upon any writ of habeas corpus, or otherwise, until such sum be paid by him or them, or his or their surety or sureties, for want of any form of commitment, or other previous proceedings. *Provided*, That sufficient matter shall be made to appear, upon the return of such habeas corpus and an examination then to be had, to detain him for the causes hereinbefore assigned." Act U. S. 20th July, 1790, s. 3.

crew are to remain and discharge their duty: otherwise, upon their request, they are to be discharged and are to receive one month's wages in addition to the pay up to the time of discharge.[1] The master is to pay the expenses of the survey, but may deduct them, proportionally, from the wages of the crew, if the complaint is found to be without good and sufficient cause, together with reasonable damages for the detention.[1]

Both these statutes, probably, intended to leave the case of unseaworthiness *occurring during the voyage*, untouched; and that case, in regard to the obligations of the crew, must be determined by the general law.

In the case of *Dixon* v. *The Cyrus*, Judge Peters (of the District Court of Pennsylvania) intimated, that when the vessel is at sea, no defect then discovered, and nothing but an absolute inability of the ship — meaning, I presume, a state of things amounting to wreck — will justify the seamen in quitting her: and this is undoubtedly true, because it is implied in that principle of law which binds the seamen to the vessel through all perils at sea.[2] But where the vessel is in a foreign port, after having sailed on the outward voyage, whether a domestic or foreign port, and unseaworthiness of a dangerous character occurs through damage received after sailing, can the seamen, upon principles of the general maritime law, be compelled to proceed again to sea, the master refusing, or not having the means, to make the proper repairs? Upon principle, it seems to me very clear that they cannot be bound to proceed. The statute of 1790, includes among the causes

[1] Act. U. S. 20th July, 1840, s. 12, 13, 14, 15. See Appendix, for the Statute.

[2] *The Nimrod*, Ware's R. 1.

for a survey before the vessel leaves on her outward voyage, a deficiency of *provisions;* and Lord Stowell once held, that a serious deficiency of provisions, while in an outward port, justified what would otherwise have been a desertion.[1] The same high authority also justified a desertion on the ground that the master had altered the shipping articles in a foreign port.[2] *A fortiori*, it would seem, must a dangerous deficiency in the vessel itself, in port, discharge the mariner's contract, if, on a fair remonstrance, the master does not make the necessary repairs; for it can never be required by such a system as the maritime law, that this contract should imply an obligation on the part of the seamen to expose their lives to perils directly referrible to the negligence of the owner or master, when the vessel is not at sea.[3]

4. It is also an implied obligation that the voyage shall

[1] *The Castilia*, 1 Haggard's Adm. R. 59. See also *Sigard* v. *Roberts*, 3 Esp. R. 71.

[2] *The Eliza*, 1 Haggard's Adm. R. 182.

[3] These views are sustained by a decision made in the District Court of the United States for Massachusetts District, of which I have been furnished with a note by the learned judge, since the above text was written. The vessel in which the libellant was mate, was condemned at Liverpool, (Eng.) as unseaworthy. The mate sued for wages, at the highest rate in the port from which she sailed, there being no written contract, and for augmented allowance on account of the extra exposure in a defective vessel. The first allegation was sustained; but as to the other ground of demand, it was considered that the circumstances did not render the owners liable to the crew for special damage, there being no gross or wilful error or omission; that the seamen, before they shipped or sailed, must be supposed to pay reasonable attention to the character, capacity and equipment of the vessel, in reference to their safety, and, if dissatisfied, should resort to the course prescribed by the statute—application for a survey. *Per* Davis, J. *Clark* v. *Curtis*, Dist. C. U. S. Mass. Dist. Aug. 1839. See also, *Porter* v. *Andrews*, 9 Johns. R. 350. *The Nimrod*, Ware's R. 1. *U. States* v. *Ashton*, 2 Sumner's R. 13.

be definite and certain, and shall not be deviated from. The ancient maritime laws contained different provisions with respect to the obligations of the seamen, when the master, having arrived at the outward port of destination, should, of his own act, determine to go further. Under some codes, the seamen were discharged from their contract, and were not bound to go further without a new agreement.[1] By the laws of some of the other codes, the master was obliged to give them an additional compensation, which they, however, were bound to accept, without the right to elect a discharge.[2] But the modern rule is uniformly in favor of a strict compliance with the terms of the contract describing the voyage,[3] and also that it shall be fairly and sufficiently described.[4] Pothier states the entire substance and reason of the rule, when he says, that to require the mariner to go on another voyage than that which he has contracted for, is to exact of him quite another thing than that which he has promised.[5] The law of this country and of England is the same—that a spontaneous deviation of importance entitles the mariner to his discharge; and if he does not choose to leave the vessel, he is entitled to additional compensation.[6] But deviations proceeding from accident

[1] Les Assizes et Usages du Royaume de Jerusalem. Pardessus, *Lois Maritimes*, tome i, p. 279.

[2] *Consolato del Mare*, ch. 116, Pardessus, tome ii, p. 144. *Lois de Westcapelle*, Jugement xxi. Pardessus, tome i, p. 383. *Lois D'Oléron*, art. 20, Pardessus, tome i, p. 337. *Droit Mar. de Danemarck*, xxii, Pardessus, tome iii, p. 275. See also, Jacobsen's Sea Laws, p. 142—By Frick.

[3] *L'Ord. de la Marine*, liv. 2, tit. 7, art. 4. Valin, *Com.* tome i, p. 548.

[4] Act U. S. 1790, ch. 56, s. 1. Act U. S. 20th July, 1840, sec. 3.

[5] Pothier, *Louages Mar.* n. 177; Edit. Dupin, tome iv, p. 406.

[6] *Brown* v. *Jones*, 2 Gallison's R. 477. *Moran* v. *Baudin*, 2 Peters's Adm. R. 415. *Douglass* v. *Eyre*, Gilpin's R. 147. *Magee* v. *Ship Moss*, Gilpin's

or overruling authority, do not amount to a breach of the owner's contract with the mariner.[1]

The act of Congress of 1840, empowers American consuls, or commercial agents, in foreign ports, to inquire into the causes of deviation, and to discharge the crew, if they require it, and the master is to pay an advance of three months' wages, in case the deviation is in violation of the mariner's contract.[2]

5. It is further a part of the general obligations of the contract, that the mariner shall be treated with decency and humanity by the master and the officers, and by his shipmates.[3] If a seaman is cruelly beaten or ill used by an officer, without justifiable cause, in the presence of the master, and the master does not interfere, he will be presumed to adopt the conduct of his officer, and will be responsible for all its consequences and effects upon the mariner's contract.[4] Thus, if the seaman, in consequence of such ill usage, were obliged to leave the ship, and to his action for wages the master should plead a desertion, it would be competent to the seaman to show that his desertion was involuntary and compulsory, and the de-

R. 219. *The Cambridge*, 2 Hag. Adm. R. 243. *The George Home*, 1 Hag. Adm. R. 370. *The Countess of Harcourt*, 1 Hag. Adm. R. 248. *Murray* v. *Kellogg*, 9 Johns. R. 227. 1 Hall's Am. Law Jour. 207.

[1] *The Cambridge*, ut supra.

[2] Act U. S. 20th July, 1840, sec. 9. See Appendix.

[3] *Rice* v. *The Polly and Kitty*, Peters's Adm. R. 420. *The Maria*, Peters's Adm. R. 193. *Sherwood* v. *M'Intosh*, Ware's R. 109. *Steele* v. *Thacher*, Ware's R. 91. *Magee* v. *Ship Moss*, Gilpin's R. 219. *Limland* v. *Stevens*, 3 Espinasse, 269.

[4] *Thomas* v. *Lane*, 2 Sumner's R. 1. *United States* v. *Taylor*, 2 Sumner's R. 584. See also *Elwell* v. *Martin*, Ware's R. 53. *Butler* v. *M'Lellan*, Ware's R. 219. *Ward* v. *Ames*, 9 Johns. R. 138.

fence would not prevail.[1] The master is in fact bound to *protect* the seamen, not only against the cruelty of his officers, but against any oppression or ill usage on the part of their shipmates. The ancient maritime laws contain numerous traces of this obligation.[2] The rule by which the mariner's contract is held to be discharged for cruelty of the master, is subject to the limitation of a clear case of an abuse of power; without which the contract will not be held by the courts to be discharged.[3]

6. That the owners and master shall provide for the subsistence of the mariners, during the time of the continuance of the contract, in such manner and with such provisions as the positive law of their country enjoins.[4] Subsistence, unless the contrary is expressed in the contract, or implied in the usages of a particular trade—as in some of the fishing voyages of New England--is a part of the compensation for the mariner's services.[5] The importance of this topic will require its special consideration hereafter.

7. That the seamen shall be cured at the expense of the ship, of all sickness and injuries occurring while in

[1] If in administering merited punishment on a seaman, by the officers, they proceed with unnecessary harshness of manner, and thereby a severe injury is unintentionally done to the man, as the dislocation of an arm, they will be liable for the actual pecuniary damage sustained by the man, though not for vindictive damages. *Elwell* v. *Martin*, ut supra.

[2] *Lois D'Olèron*, act 12, Pardessus, tome i, p. 332. *Lois de Westcapelle*, *Jugement* 12, Pardessus, tome i, p. 378. *Droit Mar. de Wisby*, art. 26, Pardessus, tome i, p. 479. *L'Ord. de la Marine*, liv. 2, tit. 1, art. 22.

[3] *Turner's Case*, Ware's R. 83. Congress have provided a criminal punishment for cruelty on the part of any master or officer towards any of the crew. Act U. S , 1835, ch. 40, [313] sec. 3. See post, part 2, ch. 1.

[4] Pothier, *Louages Maritimes*, n. 215, edit. Dupin, tome iv, 425.

[5] *The Madonna D'Idra*, 1 Dodson's Adm. R. 37.

the ship's service, not occasioned by their own faults or vices, or while absent upon their own business or pleasure.[1] This principle has existed for ages in the maritime law;[2] it was followed in the French ordinance;[3] and is recognised in the statute law of the United States, and the fullest effect has been given to it by the courts.[4] Its limitations and applications will be considered in a subsequent chapter.

8. That the master shall bring the seamen back to their country. The provisions of our statute law upon this subject will be found in the chapter on the Discharge of Mariners.[5]

These are some of the important obligations assumed by the owner and master, in the hiring of mariners; and it now remains to enumerate those of the mariners themselves towards the master and owner, under the same general review.

1. It is the duty of a seaman to exert himself to the utmost in the service of the ship, for the compensation stipulated in his contract; so that any promise of extra pay, as an inducement to extraordinary exertion, *made when the ship is in distress*, or obtained by any unfair

[1] Pothier, *Louages Mar.* n. 188, 189, 190, 191. Valin, *Com.*, tome i, p. 721.

[2] *Droit Mar. Des Rhodiens*, Pardessus, tome i, p. 258. *Lois D'Oleron*, art. 6, 7. Ibid, p. 327. *Droit Mar. de Wisby*, art. 20, 21: and the authorities cited *infra*, part 2, ch. 3.

[3] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 11.

[4] Acts U. S. 20th July, 1790, ch. 56, sec. 8, and 2d March, 1805, ch. 88. *Harden* v. *Gordon*, 2 Mason's R. 541. *Reed* v. *Canfield*, 1 Sumner's R. 195. *Pierce* v. *The Enterprise*, Gilpin's R. 435. *Walton* v. *The Neptune*, Peters's Adm. R. 142, 152.

[5] *Infra*, part 2, ch. 5.

practices or advantage taken by the seamen, is wholly void.[1]

2. There is an implied warranty in the mariner's contract, that the party is competent in knowledge and bodily health, to the station for which he contracts. The elder maritime laws contained serious penalties for ignorance of the duties for which the seaman had engaged himself. By the *Laws of Wisby*, such a seaman forfeited the advance wages that had been paid to him, and an additional sum equal to half of all his wages.[2] By the *Consolato*, he was entitled only to the *quantum meruit* which certain of the officers should determine to have been earned.[3] The modern rule, recognised by our courts, is, that when a man contracts for a particular service, or duty, he engages both for fidelity in the performance of that duty, and for that capacity and those qualities which will enable him to perform the service in a satisfactory manner. But he does not stipulate for extraordinary talents or capacity; but for fair and reasonable knowledge and due diligence. Under this limitation, if the master finds, upon trial, that there is on the part of the seaman either a want of fidelity, or of capacity, which disqualifies him for the service, he will be justified in putting him upon a different duty. In such a case, the master cannot refuse

[1] *Harris* v. *Watson*, Peake's N. P. C. 72. *Stilk* v. *Myrick*, 2 Camp. 317. *Thompson* v. *Havelock*, 1 Camp. 527. Abbot on Shipping, part 4, ch. 1, p. 441. As to the conclusiveness of the shipping articles, on the point of wages, see *infra*, part 1, ch. 3; and as to the earning of rewards in the nature of salvage, see *infra*, part 4, ch. 2.

[2] *Droit Mar. de Wisby*, art. 2, Pardessus, tome i, p. 464. See also The Maritime Law of Hamburg, art. 20, Pardessus, tome iii, p. 371.

[3] *Consolato del Mare*, ch. 79, [124] Pardessus, tome ii, p. 122. See also Jacobsen's Sea Laws, book 2, ch. 2.

altogether to pay him wages, but he may make a reasonable deduction from the wages agreed upon.[1] But the mariner is not to be degraded for slight causes; nor is the master, when a seaman has shipped for a particular service, authorized to change the terms of the contract capriciously, and require of him duties for which he did not engage.[2] In respect to bodily health, it has been held that if a seaman ship, and represent himself as able-bodied, and afterwards die on the voyage of a disease which he had concealed at the time of shipment, his administrator can have no claim for wages.[3] It has been considered that temporary appointments made by the master on an emergency, are held at his pleasure, and stand on a different footing from that of a party making his contract for the office and for the wages belonging to it.[4]

3. That the seamen shall render themselves on board at the day and hour agreed upon, and from thence to the completion of the voyage, remain in the service of the ship. By the Statute of the United States for the regu-

[1] *Sherwood* v. *M'Intosh*, Ware's Adm. Decis. 109. *The Mentor*, 4 Mason's R. 84. *Atkyns* v. *Burrows*, Peters's Adm. R. 244. *The Orozimbo*, Peters's Adm. R. 250. The same principle is expressly adopted, by a special clause, in the new shipping paper ordered to be used throughout the United Kingdom of Great Britain, by the Act 5 and 6 Wm. IV. ch. 19, amending and consolidating the Laws relating to Merchant Seamen: the clause reads, "and if any seaman shall enter himself as qualified for a duty to which he shall prove not to be competent, he will be subject to a reduction of the rate of wages hereby agreed for, in proportion to his incompetency." *Steele's Ship Master Assistant*, (London, 1837,) p. 33. It is also adopted in the shipping paper used in the whale fisheries, out of the port of New Bedford.

[2] *Sherwood* v. *M'Intosh*, ut supra. *The Mentor*, ut supra.

[3] *The Richmond*, Peters's Adm. R. 263.

[4] *Wood et al.* v. *The Nimrod*, Gilpin's R. 83.

lation of merchant seamen, on all voyages to foreign ports, and in coasting voyages, other than to an adjoining State, the time when each seaman shall render himself on board is to be made part of the written contract, by a memorandum set against his name at the foot of the paper; and if any seaman does not so render himself on board, or deserts, so that the ship proceeds to sea without him, he forfeits a sum equal to his advance wages, over and besides such advance.[1] A justice of the peace may, upon complaint of the master, issue a warrant to apprehend a deserting seaman, and commit him to the house of correction, or common gaol, there to remain until the ship is ready to sail on her voyage, and then cause him to be

[1] "That at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall, on the day on which such neglect happened, make an entry in the logbook of such ship or vessel, of the name of such seaman or mariner, and shall, in like manner, note the time that he so neglected to render himself, (after the time appointed), every such seaman or mariner shall forfeit, for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner, or consignee, of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any court, or before any justice or justices of any state, city, town, or county, within the United States, which, by the laws thereof, have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage." Act U. S. 1790, ch. 56, sec. 2.

delivered to the master.[1] If a seaman absents himself without leave, after the time agreed on to render himself on board, *at the commencement of the voyage*, he forfeits one day's pay for every hour of absence.[2] The same provisions, by a subsequent statute, are extended to seamen employed in the fisheries.[3] In order to remove as many obstacles to the prompt performance of the contract, as can be provided against, the Act of 1790 further provides, that if any person shall harbor or secrete a seaman, knowing him to be shipped, he shall be subject to a pecuniary penalty; and debts exceeding one dollar, contracted by a seaman during the time he belongs to a ship, are not recoverable from him until the end of the voyage.[4]

[1] "That if any seaman or mariner, who shall have signed a contract to perform a voyage, shall, at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States (upon the complaint of the master) to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear, by due proof, that he has signed a contract within the intent and meaning of this act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction, or common gaol of the city, town, or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner." Act U. S. 1790, ch. 56, sec. 7.

[2] Sec. 2, ut supra.

[3] Act U. S. June 19, 1813, ch. 2, sec. 1.

[4] "That if any person shall harbor, or secrete, any seaman or mariner, belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof, before any court in the city, town, or county, where he, she, or they may reside, shall forfeit and pay ten dollars for every day which he, she, or they, shall continue so to harbor or secrete such seaman or mariner, one half to the use of the person prosecuting for the

The definition and consequences of Absence and Desertion will be considered at length in a future chapter.

4. It is an obligation assumed by the seamen, to obey all lawful commands of the master, and not to violate the discipline and economy of the ship. This obligation is almost uniformly made a part of the written contract;[1] but apart from all express contract, it results from the nature of the master's authority over the crew, and their relation to the ship.[2] This authority, and the rights which result from it, are indispensable, and ascend to the most remote periods in the history of maritime law. The provisions of different positive codes, in respect to the mode of exercising it, have varied with times and manners; but they have always been founded upon this principle, that the master must be invested with a power, which implies an implicit obedience on the part of all subject to his authority, within the limits of lawful commands. By some older writers, this authority is likened to

same, the other half to the use of the United States; *and no sum exceeding one dollar, shall be recoverable from any seaman or mariner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage, for which such seaman or mariner engaged, shall be ended.*" Act U. S. 1790, ch. 56, sec. 4.

Upon the latter clause of this section, it has been held by the Supreme Court of the State of Massachusetts, that as the law is in restraint of a general right, the defendant who pleads its protection ought to be held to a strict compliance with what seem to be its requisitions, namely, to produce the shipping paper, which is the best evidence of his belonging to the ship, and of the day he joined her; and that it is not enough, in order to let in other evidence, to show that the shipping paper is beyond the reach of the defendant, without showing that it is lost or destroyed. *Reynard* v. *Brecknell*, 4 Pickering's R. 302.

[1] Abbot on Shipping, p. 2, ch. 3, sec. 4, and Appendix No. V. Steel's Ship-Master's Assistant, (Lond. 1837) p. 23, 33.

[2] Valin, *Comm.* tome i, p. 447.

that of a parent, or of a master over his pupils or apprentices—"*quemadmodum pater in filios, magister in discipulos, dominus in servos vel familiares*;[1] but a more modern celebrated jurist prefers the analogy of the parental relation.[2] The distinction is not perhaps very important: for whatever be the exact description of the master's authority, it is the duty of the seamen to obey his commands in all lawful matters relating to the navigation of the ship and the preservation of good order.[3]

The question may often be of much practical importance, whether the duty of obedience on the part of seamen extends at all beyond the service of their own ship; as where the master should order them to go to the aid of another vessel in distress. The duty of obedience is stated by Lord Tenterden, as just cited, to attach to all lawful commands relating to the navigation of the ship, and the preservation of good order; and this is all that is usually contracted for by any express stipulation in the articles. If we go back to the acknowledged sources of the maritime law, we find the duty thus stated in the *Consolato:* "the seaman is obliged to obey every order of the master or mate, provided it be not for the service of another ship; but he is obliged to render all the service which relates to the ship for which he is hired."[4] Another chapter of the same compilation contains an exception to this general rule, founded on the necessity of rendering aid to other vessels. It declares that seamen may be sent out of their

[1] Casaregis, cited by Valin, tome i, p. 449.

[2] Pardessus, *Lois Maritimes*, tome i, p. 332, *note* (1).

[3] Abbot *on Shipping*, p. 136. Part 2, ch. 3, sec. 4.

[4] *Consolato*, ch. 117, [162.] Pardessus, tome i, 145. See also ch. 110 [155.] Ib. 140.

own ship to another, when the master of such other vessel has need of a person who knows how to do something indispensable to his manœuvres, which his own crew cannot do.[1] So too, another chapter empowers the mate to send the seamen to tow another vessel into port, provided it be not an enemy vessel.[2] These are the only traces of an exception to the general rule, which I have met with in the old law. They confirm the opinion that is to be deduced from the whole tendency of modern jurisprudence on the subject of salvage efforts, namely, that the customs and usages of the sea, as they have been tacitly acknowledged by the whole maritime world, authorize the master to employ his vessel, and perhaps his crew, in rescuing property, and *a fortiori* in rescuing life from destruction.[3] In a late case in the District Court for Maine, a *dictum* was thrown out by the very learned Judge of that Court, that when a vessel in the course of her voyage falls in with a wreck, and the master thinks proper to make an attempt to save it, the seamen are bound to obey him.[4] Notwithstanding this intimation of opinion, from a source that is upon these subjects high authority, the question is so far an unsettled one, that it may not be improper to suggest the practical difficulties that lie in the way. The question, I apprehend, must revert to the contract itself which the seaman has stipulated to perform ; and it is difficult to see why his plea that he had hired his services only to the ship to which he was attached, would not be a perfect answer to any punishment

[1] Ch. 103, [148] Pardessus, tome ii, 137.
[2] Ch. 114, [159] Pardessus, tome ii, 143.
[3] *The Boston and Cargo*, 1 Sumner's R. 328.
[4] *The Centurion*, Ware's R. 477, 482.

or forfeiture that should be sought to be inflicted on a disobedience of orders concerning any other service. When such disobedience should also connect itself with disobedience of orders in the service of his own vessel, it might have an important bearing, as showing the general spirit of the party, and perhaps might enhance a forfeiture grounded on the latter instances of insubordination.[1]

In suggesting these doubts, I have intended to say nothing that shall impair the moral sense of duty in regard to services, whether large or small, to life or property in peril on the seas; which have ever been rewarded with a large munificence by the law, and the selfish and wilful refusal of which has ever been visited with the contempt and execration of mankind.

[1] So too, it would certainly impair a mariner's claim to any share of salvage that might be awarded for services to another ship, that he refused to go to. But mariners left by the master on board their own ship, while the rest of the crew are gone on a salvage enterprise, are often admitted to share in the salvage. See *The Jane*, 2 Hag. Adm. R. 338.

CHAPTER III.

OF THE WRITTEN OR OTHER EVIDENCE OF THE MARINER'S CONTRACT; AND HEREIN OF THE FORM AND CONSTRUCTION OF THE SHIPPING ARTICLES.

The policy of most maritime nations has required that the contract between the master and owners of a merchant vessel, on the one part, and the mariners, on the other, should be evidenced by a writing, containing, uniformly, at least two of the principal stipulations between the parties: *first*, a description of the voyage; and *second*, the terms and capacity for which the mariner engages his services.[1] The reasons of this policy, growing out of the characters and situations of the parties, have been fully summed up by Lord Stowell, when speaking of the scrutiny that ought to be exercised into the contracts themselves. On the one side, says he, "are gentlemen possessed of wealth, and intent, not unfairly, upon augmenting it, conversant in business, and possessing the means of calling in the aid of practical and professional knowledge. On the other side, is a set of men, generally ignorant and illiterate, notoriously and proverbially reck-

[1] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 1, and the Commentary thereon, Valin, tome i, p. 675. Pothier, *Louages Maritimes*, n. 166. Jacobsen's Sea Laws, book 2, ch. 2. Act 5 and 6 Wm. IV. ch. 19, sec. 2. Act U. S. 20th July, 1790, ch. 56, sec. 1.

less and improvident, ill provided with the means of obtaining useful information, and almost ready to sign any instruments that may be proposed to them; and on all accounts requiring protection, even against themselves."[1]

The Legislature of this country has not been unmindful of this disparity between seamen and their employers; and has accordingly required, that in all voyages from any port of the United States to any foreign port, and in all coasting voyages from one state to any other than an adjoining state, the master, before proceeding on such voyage, shall make an agreement in writing or print, with every seaman or mariner on board, (except such as shall be apprentice or servant to him or his owners,) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped.[2]

[1] *The Minerva*, 1 Hag. Adm. R. 355.

[2] "Be it enacted, &c., that from and after the first day of December next, every master or commander of any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel, shall carry out any seaman or mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seamen and mariners, such master or commander shall pay to every such seaman or mariner, the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping: *Provided*, such seaman or mariner shall perform such voyage; or if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall, moreover, forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United

I shall consider in this connection, *first*, what voyages are within the statute; *secondly*, the requisites of a good shipping paper under the statute and according to the maritime law; *thirdly*, of what the articles are evidence, and how far they are conclusive; *fourthly*, the situation of parties not executing any written agreement.

I. The voyages within the statute are all trading voyages from a port of the United States to any foreign port, or from a port in one state to a port in any other than an adjoining state. It seems that the Act does not apply to a voyage commencing at a foreign port to the United States.[1] In regard to coasting voyages, it has been held that a general coasting and trading voyage, in which the vessel goes to ports in different states of the Union, is within the statute requiring the contract to be in writing; and that if a seaman is shipped for such a voyage, without any limitation of time, or any final *terminus* of the voyage, either party, the master or the seaman, may put an end to the contract at pleasure, provided it is not done at a time and under circumstances particularly inconvenient to the other party.[2]

II. The requisites of good and valid shipping articles are few and simple. The first of these is a fair and intelligible description of "the voyage;" which, as used in the statute, is a technical phrase, and imports a definite commencement and end.[3] This commencement and

States: and such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures contained in this act." Act U. S. 20th July, 1790, ch. 56, sec. 1.

[1] See Story's Notes to Abbot on Shipping, p. 434. *Gardner* v. *The New Jersey*, Peters's Adm. R. 223.

[2] *The Crusader*, Ware's R. 437,

[3] *Brown* v. *Jones*, 2 Gallison's R. 477.

end should always be designated, when practicable, by the ports from and to which the vessel is to sail, and to which she is to return.[1]

But it often happens that loose and indefinite expressions are made use of in describing the voyage, either from the nature of the enterprise, or by design on the part of the master or ship owner;[2] and it is then that the aid and authority of the courts is required, to protect the mariner from unfair and unreasonable requisitions. The Courts of Admiralty have frequently had occasion to declare the meaning of this part of the mariner's contract. From the cases which have been decided by these tribunals, certain rules of construction may be extracted.

In the first place, it has been held, that where a principal voyage is stated, by *termini*, as from Baltimore to Curaçoa, and then the words "or elsewhere" are added, these words are either void for uncertainty, not containing any proper description which can satisfy the meaning of the statute, or are subordinate to the principal voyage stated, and that they mean an authority for the ship, in the progress of the voyage, to pursue such course as might be necessary to accomplish that principal voyage; which is what the law would imply without the words.[3] *Secondly*, where a usage of trade is relied on to

[1] *Magee* v. *Ship Moss*, Gilpin's R. 219.

[2] In England, the master is required to cause the articles to be truly and distinctly read over to each seaman, before signing, under a penalty of £5 for each omission; (Act 5 and 6 Wm. IV. ch. 19, sec. 2,) a provision which it is desirable should have been inserted in our statute.

[3] *Brown* v. *Jones*, 2 Gallison's R. 477. 1 Hall's Am. Law Jour. 207. *The Brutus*, 2 Gallison's R. 526, 543, 545. See also *The Minerva*, 1 Hag.

give a definite meaning to the words "or elsewhere," so as to include under them an intermediate voyage not embraced in the terms describing the principal voyage, (if this can ever be done,) there must be evidence of a general and uniform course of the trade, so well known, as that all parties must be presumed conusant of it; occasional instances in which particular parties have made such second intermediate voyage, are not sufficient for this purpose.[1] *Thirdly*, where a number of ports or countries are named, as constituting the voyage, the master must avail himself of them in the order in which they stand in the articles, without returning back to any of them;[2] this rule being analogous to that applied to a policy of insurance, where it has been held that the party must avail himself of the ports as they stand in the policy, and cannot recur back again from the last to any former port.[3] *Fourthly*, where expressions are made use of clearly authorizing the master to use his discretion as to the intermediate course of the voyage, the courts will not interfere.[4]

The only other essential provision in the shipping articles is a declaration of the terms and capacity for which the mariner engages his services. In England, these are required to be specified.[5] They are not required by our

Adm. R. 347. *The George Home*, 1 Hag. Adm. R. 370. *The Countess of Harcourt*, 1 Hag. Adm. R. 248.

[1] *Brown* v. *Jones*, 2 Gallison' R. 477.

[2] *Douglass* v. *Eyre*, Gilpin's R. 149.

[3] *Brown* v. *Jones*, ut supra.

[4] *Wood* v. *The Nimrod*, Gilpin's R. 83. *Magee* v. *Ship Moss*, Gilpin's R. 225. If the articles are to the *final* port of discharge, the voyage is not ended until the cargo is wholly unladen. The owner may order the vessel from port to port, until the whole is discharged. *United States* v. *Barker*, 5 Mason's R. 404.

[5] Act 5 & 6 Wm. IV. ch. 19, sec. 1.

statutes, directly; but the 3d section of the Act of 20th July, 1840, is perhaps by implication to be considered as such a requisition. It declares that the articles and list of the crew "shall be deemed to contain all the conditions of contract with the crew as to their service, pay, voyage and all other things;"—and a subsequent section (10th) makes void all shipments of seamen made contrary to the provisions of this and other Acts. The first provision merely makes the terms conclusive, when they are inserted in the articles. The subsequent provision, declaring shipments without a written contract to be void, does not point out what the contract shall contain. But the two provisions together may perhaps indicate that the intention of the legislature was that the terms and capacity should be stated.

Beyond these, I know of no provisions which are essential to constitute shipping articles, in trading vessels, because the law will imply all the general, as well as particular rights and duties of all parties. It may be well, however, to insert a stipulation that the services contracted for shall be performed as becomes good seamen, or to that effect; and also a covenant on the part of the master to pay the wages, if those services are so performed as not to entitle him to claim any set off, or damages against the seaman. But much other matter is often inserted in shipping articles. They are sometimes long and verbose instruments, containing not only special clauses which the ship owner thinks proper and is lawfully empowered to introduce, but frequently also stipulations which are of no validity or binding obligation, and which only mislead one party into a supposed surrender, and the other into a supposed gain of rights, which

cannot be granted away by the one, or acquired by the other. This practice brings me to the consideration of the third topic.

III. Of what the shipping articles are evidence, and how far they are conclusive?

In general, a contract between man and man, though controlling the acknowledged legal rights of one party, is binding according to its terms. But it has long been a principle of British and American maritime jurisprudence, as administered in the Courts of Admiralty, that the contracts of seamen are to be interpreted by other tests than the mere meaning of the terms in which they are expressed. By that feature of their jurisdiction, which enables these tribunals to apply the principles of equity to maritime contracts,[1] they are enabled to afford a protection to seamen, which the whole experience of courts of justice shows to be both humane and necessary. I know not where the reasons for this protection are more forcibly stated, than by Mr. Justice Story in a recent case of mariner's wages. "Seamen," he observes, "are a class of persons remarkable for their rashness, thoughtlessness and improvidence. They are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value. They combine in a singular manner, the apparent anomalies of gallantry, extravagance, profusion in expenditure, indifference to the future, credulity which is easily won, and confidence which is readily sur-

[1] As to equity in Admiralty see *Harden* v. *Gordon*, 2 Mason's R. 541. *Brown* v. *Lull*, 2 Sumner's R. 443. *Ellison* v. *Ship Bellona*, Bee's R. 106. *The Nelson*, 5 Rob. Adm. R. 227. *The Prince Frederick*, 2 Hag. Adm. R. 394.

prised. Hence it is, that bargains between them and ship owners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny: for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of Admiralty, on this account, are accustomed to consider seamen as peculiarly entitled to their protection; so that they have been, by a somewhat bold figure, often said to be favorites of Courts of Admiralty. In a just sense, they are so, so far as the maintenance of their rights, and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned."[1]

To persons accustomed to measure rights as they result from the sharp competitions of business, or by the dry and technical requisitions of the common law, this language may sound strangely; for they will not readily see, why the moral or social peculiarities of any class of men, should entitle them to stand before a court of justice upon any footing other than the exact terms of the obligation which they have once stipulated to perform. Yet similar inequalities are regarded, with the same effect, in other courts dealing with other contracts;[2] and it may be said that to overlook them entirely, or to want the power of giving them some effect, would not be a creditable feature of an enlightened, liberal, and Christian jurisprudence.

In the spirit of this policy, it has been held by the Courts of Admiralty, that whenever any stipulation is

[1] *Brown* v. *Lull*, 2 Sumner's R. 449.

[2] As the cases of heirs dealing for their expectancies, and remainder-men for their reversions. See Story's Com. on Equity, sec. 331 to sec. 340.

found in the shipping articles, which derogates from the general rights and privileges of seamen, it is void, as founded upon 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 and fairly explained to the seamen; and secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby.[1]

But on the other hand, where there is no circumvention or misapprehension, and the mariner may be supposed to have known and understood the contract, the courts will uphold it. If the construction be doubtful, the court will lean in favor of the mariner. But if it appears that the meaning of the contract is not doubtful, and that the mariner knew its effect, the fair interests of the ship owner will be protected, even though the special clause may abridge a seaman of some general right. Thus in England, it is common in the Baltic trade, to insert a stipulation in the articles, to this effect: "Should the vessel winter abroad, on account of the ice, the officers and men agree to accept half wages during the time of detention." In a recent case of this kind, where it was proved to be the usage of the trade between England and the Baltic ports, and to be the general usage of other countries, to pay but half wages, in such circumstances; and that

[1] *Brown* v. *Lull*, 2 Sumner's R. 449. *The Juliana*, 2 Dodson's Adm. R. 504. *Harden* v. *Gordon*, 2 Mason's R. 541, 556, 557. 2 Kent's Com. 193. If courts of law are not able to afford this relief, as it seems from the cases of *Appleby* v. *Dods*, (8 East, 300,) and *Jesse* v. *Roy*, (1 Cromp. Jerv. and Rose. R. 316, 329, 339,) they are not, it is not that they are insensible of the necessity for it, but because it is out of their jurisdiction to administer it.

generally such a stipulation forms part of the mariner's contract upon Baltic voyages, the High Court of Admiralty saw no reason to think that the contract was signed without a knowledge of its effect, and sustained it.[1]

Another important rule is, that wherever any stipulation in the articles is contrary to the policy of a statute, it is void.[2] Under these principles, the conclusiveness of the contract will be readily ascertained. As to the parties, the shipping articles constitute a part of the documents of the ship for the voyage, and are *prima facie* evidence in respect to the contracts of all persons named therein; so that in any controversy between the master and owner, they are as much evidence of the contract between them, as they are between the seamen and the owner.[3]

The shipping articles are conclusive evidence of the voyage, under the rules of construction above stated. No instance is recollected where parol evidence, or any other means than the settled rules of construction, have been resorted to, to ascertain the voyage described in the contract. But it seems that the seaman may show by parol evidence, that a different voyage was represented to him at the time of signing, and not the voyage described in the paper.[4] So too, he may show that the articles have been altered by the master, since they were executed.[5]

In regard to wages, the articles are conclusive as to the

[1] *The Hoghton*, 3 Hag. Adm. R. 100.

[2] *Harden* v. *Gordon*, 2 Mason's R. 541.

[3] *Willard* v. *Dorr*, 3 Mason's R. 161.

[4] *Murray* v. *Kellogg*, 9 Johns. R. 227.

[5] *The Eliza*, 1 Hag. Adm. R. 182. See also Act U. S. 20th July, 1840, ch. 23, sec. 4.

terms of the engagement; and no remuneration can be recovered beyond that specified, even though upon an express promise, for duty however severe, performed in the same capacity.[1] But if, from circumstances, the capacity in which the seaman acts be altered during the voyage, as if, by the death or dismissal of the chief mate, the second mate succeed to his place and perform his duties—in that case, the former contract is superseded, and a new engagement is formed, either expressly or by implication, for the new service, entitling the party to an altered rate of remuneration.[2]

Where the articles have been signed and delivered to the master, and the amount of wages is omitted by mistake or accident, without fraud, it is competent to either party to show by parol testimony what the contract was in relation to wages.[3]

[1] *Bartlett* v. *Wyman*, 14 Johns. R. 260. *Johnson* v. *Dalton*, 1 Cowen's R. 543. *Veacock* v. *M'Call*, Gilpin's R. 305. *White* v. *Wilson*, 2 Bos. and Pul. 116. *The Isabella*, 2 Robinson's Adm. R. 241. It seems, that in respect to the wages of the master and his apprentice, the articles are open to be controverted, though they are to be taken as *prima facie* importing verity. *Willard* v. *Dorr*, 3 Mason's R. 161.

[2] *The Providence*, 1 Hag. Adm. R. 391. *The Gondolier*, 3 Hag. Adm. R. 190. Whether additional benefits and privileges, beyond the amount of the wages specified in the articles, can be recovered on parol evidence, seems to be doubtful. In an early case in the District Court of the United States for the District of Pennsylvania, it was considered that the articles contemplated by the statute did not require these additional grants to be inserted; and that parol evidence might be given. (*Parker* v. *The Calliope*, Peters's Adm. R. 272.) In a more recent case, in the same court, the contrary has been held. (*Veacock* v. *M'Call*, Gilpin's R. 305.) Lord Stowell refused it in *The Isabella*, 2 Rob. 241. As to *extra* rewards, that may be earned, of the nature of salvage, see *post*.

[3] *Wickham* v. *Blight*, Gilpin's R. 452. See also *The Providence*, 1 Hag. Adm. R. 391. *The Harvey*, 2 Hag. Adm. R. 79. *The Prince George*, 3 Hag. Adm. R. 376.

Pursuant to the rule of conclusiveness in respect to the wages named in the contract, it was held in the District Court for Pennsylvania, in the latter part of the last century, that no change of political events affecting the risk of the voyage, as a change from war to peace, would authorize a reduction of the wages agreed to be paid, whatever difference there might be between the customary war and peace wages.[1]

By the Act of Congress, passed the 20th of July, 1840, it is made the duty of the owners of every vessel bound on a foreign voyage, "to obtain from the collector of the customs of the district from which the clearance is made, a true and certified copy of the shipping articles, containing the names of the crew, which shall be written in one uniform hand, without erasures or interlineations."[2] The third section declares that "these documents," (the list of the crew and the shipping articles,) "*which shall be deemed to contain all the conditions of contract with the crew as to their service, pay, voyage, and all other things,* shall be produced by the master, and laid before any consul, or other commercial agent of the United

[1] *M'Culloch* v. *The Lethe*, Bee's Adm. R. 423; and *Shaw* v. *The Lethe*, Bee's Adm. R. 424. In these cases, the ship had sailed on the voyage, and was abroad when peace took place. In a subsequent case, the ship had fallen down the river from the port of Philadelphia, in January, 1783, and did not clear the Capes, so as to enter on the high seas, before the 20th of March following: peace was declared on the 3d of March; and the same judge held that customary peace wages only ought to be paid, after the declaration of peace, inasmuch as the risk, which was the consideration of the excess of wages in time of war, over wages usually paid in time of peace, never was incurred. I confess that I do not feel the force of the reasoning on which the case was thus distinguished from its predecessors. See *Brice et al.* v. *The Nancy*, Bee's Adm. R. 429.

[2] Act U. S. 20th July, 1840, ch. 23, sec. 2.

States, whenever he may deem their contents necessary to enable him to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance."[1] "All interlineations, erasures, or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such papers, unless satisfactorily explained in a manner consistent with innocent purposes, and the provisions of law which guard the rights of mariners."[2]

If a mariner is shipped in a foreign port, the Act requires that the master "shall forthwith take the list of his crew and the duplicate of the shipping articles to the consul, or person who discharges the duties of the office at that port, who shall make the proper entries thereon, setting forth the contract, and describing the person of the mariner; and thereupon, the bond originally given for the return of the men shall embrace each person so shipped."[3] The Act further declares that "if any master of a vessel shall proceed on a foreign voyage, without the documents herein required, or refuse to produce them when required, or to perform the duties imposed by this Act, or shall violate the provisions thereof, he shall be liable to each and every individual injured thereby, in damages, and shall, in addition thereto, be liable to pay a fine of one hundred dollars for each and every offence, to be recovered by any person suing therefor in any court of the United States in the district where such delinquent may reside or be found."[4] Any consul or commercial

[1] Act U. S. 20th July, 1840, ch. 23, sec. 3.

[2] Ib. sec. 4. [3] Ib. sec. 8.

[4] Ib. sec. 19. This Act applies to vessels which sailed from any port

agent neglecting or omitting to perform, seasonably, the duties imposed by the Act, or guilty of malversation or abuse of power, is made liable to any person for all damage occasioned thereby; and for any malversation or corrupt conduct in office, he is made liable to indictment and a fine of from one to ten thousand dollars.[1]

IV. The situation of parties not executing any written contract.

In order the more effectually to ensure the execution of a written contract, the statute of 1790 provided, that if any master or commander upon a foreign voyage, shall carry out any seaman or mariner, (except apprentices or servants to himself or owners,) without the contract or agreement before designated being first made and signed by the seamen or mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping: *Provided*, such seaman or mariner shall perform the voyage; or if not, then for such time as he shall continue to do duty on board; and shall moreover forfeit twenty dollars for every such seaman or mariner: and such seaman or mariner, not having signed such contract, is declared not to be bound by the regulations, nor subject to the penalties and forfeitures contained in the Act.[2] It seems, then, that the seaman who does not sign articles, partakes in none of the regulations, and is

of the United States from and after the first day of October in the year 1840.

[1] Act U. S. 20th July, 1840, ch. 23, sec. 18.

[2] Act U. S. 1790, ch. 56, s. 1.

not subject to the penalties and forfeitures enacted in this statute. But it has been held that he is not outlawed, and left without any control; his contract is made under the general maritime law, and he is subject to all penalties and forfeitures incurred under that law, where it is either concurrent with, or not contradicted by, the statute law; he is to be supplied with medicines, paid his wages, and dealt with in all respects as if the statute were not made, except that he is to be paid according to the rate therein designated.[1]

The statute of 1840 declares that "all shipments of seamen, made contrary to the provisions of this and other acts of Congress, shall be void; and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment.[2]

[1] See *Jameson* v. *The Regulus*, 1 Peters's Adm. R. 212. In a note to this case it is intimated, that, although the Act requires the highest price of wages, &c. to be paid, if a contract be not signed, yet evidence may be given of a verbal agreement for a less sum. The reverse of this has been held in a very late case in the District Court of the United States for Maine District, in which it has been held that if the voyage is within the statute, the seaman shipped on a verbal agreement is entitled to the highest rate of wages paid at the port where he shipped, and parol evidence is inadmissible to prove that a lower rate of wages, or a different mode of compensation was agreed upon. *The Crusader*, Ware's R. 437. See also Story's Notes to Abbot on Shipping, p. 434. It has been doubted whether a seaman, not having signed articles, is included in the provision of the statute relative to ships not seaworthy. This seems, in terms, to contemplate only articled seamen; because when designating the penalty on a refusal to proceed, the mariner is to be imprisoned "until he shall have paid double the sum advanced to him *at the time of subscribing the contract for the voyage*." See *Jameson* v. *The Regulus*, 1 Peters's Adm. R. 212, note.

[2] Act U. S. 20th July, 1840, ch. 23, sec. 10.

There is an obvious discrepancy between these two provisions, and at the same time the latter Act does not expressly repeal the former. The situation of a seaman, who ships under a parol contract, is now materially different from what it was under the old statute; and so far as the provisions of the new are inconsistent with those of the old Act, the latter are to be considered as repealed. They are inconsistent in these particulars; that whereas under the Act of 1790, the first penalty, or inconvenience, to which the master was subjected for shipping a seaman by parol, was that the seaman might demand, for as long a time as he did duty on board, the highest rate of wages which had been given at the port, for a similar voyage, within the three months preceding; then follows a further penalty of twenty dollars, for each seaman or mariner so shipped. By the new Act, the seaman may quit the service of the ship at any time; that is to say, a desertion does not forfeit his wages; and he may demand—not the highest rate of wages paid at the port within three months—but the highest rate paid to any seaman shipped for the voyage, or he may content himself with showing what the parol agreement was, and take the rate of wages for which he shipped. The forfeiture by the master of twenty dollars for each seaman or mariner shipped by parol, remains as before.

The Act of 1840 also declares that shipments of seamen made contrary to the provisions of this and other Acts of Congress, *shall be void*. This cannot, it is presumed, be intended to mean that the mariner, who has shipped under a parol contract, is not, as long as he remains on board, bound to do duty, as he would be by the general marine law. It means, as appears by the con-

text, that the mariner may leave the service at any time, the contract, by which he entered that service, being void; and that the terms of shipment are not binding upon him. But it cannot be presumed to have been the intention of the Legislature, that a mariner, however he may have been shipped, should have it in his power, in a time of extreme peril, to refuse all duty, or to do any other act inconsistent with the relation of a mariner to the master.[1]

Some strictures upon the special clauses that are often found in shipping articles may here merit the attention of commercial persons.[2]

[1] See the case of *Jameson* v. *The Regulus*, *ante*, in reference to the former Act. The Act of 1840 took effect upon contracts made on and after the first day of October, 1840.

[2] "As to the present structure of these instruments," observed Lord Stowell, "it would take me up a very inconvenient time to point out half the impertinencies with which it is stuffed, and which it is high time should be corrected." Many decisions have been pronounced by our courts upon special provisions controlling the rights of seamen; some of these provisions have repeatedly been declared void: and yet I observe that the same, or similar objectionable clauses are still retained in the instruments in common use in some of our ports whose commercial and professional classes rank as high in intelligence and cultivation, as any in this country. I allude more particularly to my own city. The Boston shipping articles, sold by the stationers and used by the merchants, contain at least three clauses that are of more than questionable validity. One of these is a stipulation that the ship shall not be chargeable with the expenses of nursing and boarding on shore, incurred by a sick seaman. As long ago as the year 1823, a similar clause was pronounced in the Circuit Court of the United States for the First Circuit to be invalid, as being repugnant to the general law, and more especially because it contravened the manifest policy of the Act of Congress. "The law," observed Mr Justice Story, "will work its way through every such contrivance." (*Harden* v. *Gordon*, 2 Mason's R. 541.) The second of these clauses is a provision that no reinstatement of a mariner shall purge a forfeiture of wages antecedently incurred; concerning which, I have no hesitation in declaring my professional belief, that no Court of

The equitable rule of the maritime law, by which freight is made to generate wages, has often been attempted to be annulled by the introduction of such a

Admiralty, and probably no other Court, would give the effect intended, to a provision so repugnant to the principles of the maritime law, and which really enervates good discipline, by driving the party to desperate terms. (See *The Mentor*, 4 Mason's R. 84.) The third clause to which I refer, provides that parol evidence of absence or desertion may be given at any trial between the parties, "*any act, law, or usage to the contrary thereof notwithstanding.*" This provision is entirely without meaning; for if the object be to affect the party in "any trial," with the forfeiture of wages declared by the statute, this can only be done by complying with the statute, and showing the entry in the log-book; which is the proof required by law. But if the object be to set up a forfeiture under the general maritime law for absence or desertion, this can as well be done without the clause as with it. The clause, however, seems to disclose its own object; which I take to be to evade the statute, and give the master or owner the benefit of the *statute* forfeiture, by means of parol proof, "any act, law, or usage to the contrary thereof notwithstanding": to which end, I also take the clause to be perfectly void. (See *Cloutman* v. *Tunison*, 1 Sumner's R. 373; *Snell* v. *The Independence*, Gilpin's R. 140; *Wood* v. *the Nimrod*, Ib. 83; *Knagg* v. *Goldsmith*, Ib. 207; *The Rowena*, Ware's R. 309.) I am at a loss to conceive, how such clauses as these have been retained, after lights and materials have so long been made known for reforming the general structure of this instrument. It has been suggested that they are probably retained *in terrorem*, and that masters and owners find their account in preserving these stipulations, although they may be themselves aware of their invalidity, in the diminution of the claims likely to be made upon them at the end of the voyage. Whether this be the case, or whether they are retained as the yet uncorrected mistakes of former ignorance, it is but too obvious to remark, that it is little creditable to persons so munificent and intelligent as our commercial classes, to make use of attempts to evade the positive commands of the Legislature in favor of mariners, which are at the same time perfectly incompetent to effect the intended evasion. The reformation of this contract, however, can best be effected by Congress, who would, it is respectfully suggested, do well to follow the example set by a late English Statute, in which a very neat and sufficient contract is given, the form of which is required to be used uniformly throughout the United Kingdom. (See The Appendix.) There is also a very frequent practice of taking the seaman's receipt, commonly in a form printed on the shipping articles, of a

clause into the articles as the following: "That in case of the said vessel being taken or lost in the course of the said voyage, no wages shall be demanded or received by the

sum, in discharge of the wages due to him, and also of a further sum, in discharge of all claims and demands for *assaults and batteries and imprisonments;* and I have seen some of these releases, which, with studied completeness, sweepingly exonerate the vessel, master and owners from "every other matter and thing, of whatever name or nature," and are then executed *under seal.* It is certainly time that the effect of a seaman's receipt were fully understood by ship owners and ship masters. The practice of printing the receipt for wages on the back of the articles is commendable; it furnishes a convenient mode of preserving the receipt itself, and when verified by the oath of the master, it is received in the Admiralty Court as evidence of the amount paid. But a seaman's receipt *of all demands*, like that of any other person, is not conclusive; it is open to explanation, and upon satisfactory evidence it may be shown that more was due than is expressed in the receipt, or that less money was paid at the time, or that the payment was made by the master in the shape of deductions which he had no right to make, or any other matter may be shewn which proves that the receipt is not in point of fact, a full and entire satisfaction of what it purports to discharge. (See *Harden* v. *Gordon*, 2 Mason's R. 561; *Thomas* v. *Lane*, 2 Sumner's R. 11; *The David Pratt*, Ware's R. 495.) Nor does it give the receipt any new binding force, which the Admiralty Courts cannot set aside, to have it executed with a seal. "A receipt or release of a seaman," says Judge Ware, "I hold to be no bar in the Admiralty to a suit for his wages, with whatever parade of seals and attesting witnesses it may be surrounded, provided it is proved that they have not been paid or otherwise satisfied." If indeed, the legal rights of a seaman, at the time of making a settlement, be doubtful, and are honestly contested by the other side, and time and opportunity are afforded him to satisfy himself upon the matter in dispute, and he finally agrees to compromise, and to accept less than in strictness he might be entitled to, the Court will hold him bound by the receipt which he gives. (*Thompson* v. *Faussat*, Peters's Circ. C. R. 182.) In respect to releases for assaults and batteries, imprisonments or other trespasses, they are not a bar to a suit for such trespasses, whether they are expressed for a nominal consideration of one cent, or for a consideration of larger amount, unless a distinct compromise or satisfaction for such trespasses was made, or unless something like a real compensation was paid. (*Thomas* v. *Lane*, ut supra; *The David Pratt*, ut supra.) The better practice would be for masters not to take such a formal receipt

subscribers, except the advance wages received by them respectively, at the time of entry on board; and if the said ship shall be restrained for more than thirty days at any one time, the wages shall cease during such restraint and no longer."[1] Similar stipulations have come under the notice of the courts in England and Scotland, and in this country; and the state of the question upon them has reached nearly the same result. In England, the courts of common law, feeling bound by the express convention of the parties, have given to these clauses the effect intended, although the vessel had earned freight on one or more outward or intermediate voyages.[2] But the Court of Admiralty, keeping in view the fact, that, in a divided voyage, cargoes successively taken in and delivered at different ports, earned freight for the owners, held that they also earned wages for the mariners; and Lord Stowell, in pronouncing this conclusion, declared that the Admiralty Court would not uphold any contract by which they were not to be entitled to any part of their wages, unless the ship returns to her last port of discharge.[3] In Scotland, similar clauses were strongly re-

from all the crew, both those who have grounds of complaint, and those who have not, for this only weakens the force of the release when it comes to be relied on in particular cases; but to make a distinct compromise with each seaman asserting any considerable grounds of complaint, and to pay him something which the master can shew he was willing to receive and did receive as an adequate compensation.

[1] This is the clause that came under the notice of the court in *Brown* v. *Lull*, (2 Sumner's R. 443.) I cite it as the latest invention of its kind.

[2] *Applehy* v. *Dods*, 8 East R. 300. *Jesse* v. *Roy*, 4 Tyrw. 626.

[3] *The Juliana*, 2 Dods. Adm. R. 504. This decision apparently created some surprise among those branches of the profession not accustomed to keep in view the equity power of the Court of Admiralty. "However, as lawyers, we may dissent from the conclusion," observes an able writer in

probated by the courts, and Mr. Bell seems to have considered that they would operate merely as a postponement of the time of payment, and not as a limitation of the right.[1] But these clauses have now met the attention of Parliament, and have been expressly declared invalid.[2]

In our own courts, the earliest case upon these inequitable agreements, now in print, occurred in the Admiralty Court in Pennsylvania. It was agreed in the articles "that no officer or seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the above mentioned port of discharge in Philadelphia:" the ship was captured on her return voyage; and certainly no terms of *contract* could more forcibly imply that with such capture, all right to wages was extinct. But the court held, that the clause was to be construed as controlling the general right only as to the *time* and *place* of payment, which was to be at Philadelphia, in a common course of events; but that the arrival of the ship was not guaranteed by the mariner, and it being prevented by a casualty not under his control, he was to be paid wages as far as the owners had received freight, that is, to the outward port, and for half the period of the

the Law Magazine, (vol. xiv. p. 325,) "it is impossible, as men, to find fault with it." Whether or not it was an assumption of jurisdiction not warranted by the constitution of the *English* Court of Admiralty, the principle of the decision has been carried into effect by the Legislature, in the late admirable statute, as will appear in a succeeding note.

[1] Bell's Com. ch. 4, sec. 1 and 4.

[2] "No clause in the agreement whereby a seaman shall consent to forego the right which the maritime law gives him to wages in the case of freight earned by ships subsequently lost, or containing any words to that effect, shall be valid or binding on any seaman signing the same." Act 5 and 6 Wm. IV. ch. 19, sec. 5.

ship's stay at such port.[1] The same point was afterwards held by the Supreme Court of the State of Massachusetts, upon a similar agreement.[2] But the question in relation to these clauses has been fully settled, so far as the relief afforded by the Admiralty courts is concerned, by Mr. Justice Story, who has placed their invalidity upon the broad principles of inequality and unfairness, before stated, and held that they are absolutely void, without the court is satisfied that they were understood and assented to by the mariners, upon an adequate additional compensation for the risk incurred.[3]

It is to be observed that the statute which entitles every mariner to demand and receive one third of the wages due to him at every outward port of delivery, unless the contrary be expressly stipulated in the contract,[4] has reference only to the time and place of payment, and does not contemplate stipulations by which wages already earned are to be made dependent on wages that are not earned, but are lost by casualties not affecting the former.

As respects the fisheries, the contract of the seamen with the master and owner is also required to be in writing, in the bank and other cod fisheries, containing the terms of shipment, the proportion of the proceeds of the voyage that is to belong to each seaman, and expressing whether the voyage is to continue for a term of time, or for the fishing season. The agreement is to be indorsed or countersigned by the owner of the vessel or his agent.[5]

[1] *Johnson* v. *The Walterstorff*, 1 Peters's Adm. R. 215.
[2] *Swift* v. *Clark*, 15 Mass. R. 173.
[3] *Brown* v. *Lull*, 2 Sumner's R. 443.
[4] Act U. S. 20th July, 1790, sec. 6.
[5] Act. U. S. 19th June, 1813, ch. 2. "Be it enacted, &c., that the mas-

The articles do not determine exclusively who are the owners, and the seamen may prove, by other evidence, who the real and responsible owners are.[1] The object of the articles is to place the fishermen's contract, and his relation to the vessel and owners and master, upon the same footing with seamen in the merchant service;

ter or skipper of any vessel of the burthen of twenty tons or upwards, qualified according to law for carrying on the bank and other cod fisheries, bound from a port of the United States, to be employed in any such fishery, at sea, shall, before proceeding on such fishing voyage, make an agreement in writing or print with every fisherman who may be employed therein, (except only an apprentice or servant of himself or owner,) and, in addition to such terms of shipment as may be agreed on, shall, in such agreement, express whether the same is to continue for one voyage or for the fishing season, and shall also express that the fish or the proceeds of such fishing voyage or voyages, which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish which they may respectively have caught; which agreement shall be indorsed or countersigned by the owner of such fishing vessel or his agent. And if any fisherman, having engaged himself for a voyage, or for the fishing season, in any fishing vessel, and signed an agreement therefor, as aforesaid, shall thereafter, and while such agreement remains in force and to be performed, desert or absent himself from such vessel without leave of the master or skipper thereof, or of the owner or his agent, such deserter shall be liable to the same penalties as deserting seamen or mariners are subject to in the merchant service, and may, in the like manner, and upon the like complaint and proof, be apprehended and detained; and all costs of process and commitment, if paid by the master or owner, shall be deducted out of the share of fish, or proceeds of any fishing voyage, to which such deserter had or shall become entitled. And any fisherman, having engaged himself as aforesaid, who shall, during such fishing voyage, refuse or neglect his proper duty on board the fishing vessel, being thereto ordered or required by the master or skipper thereof, or shall otherwise resist his just commands, to the hindrance or detriment of such voyage, besides being answerable for all damages arising thereby, shall forfeit, to the use of the owner of such vessel, his share of any public allowance which may be paid upon such voyage." Sec. 1.

[1] *Wait* v. *Gibbs*, 4 Pick. R. 298.

and to make them liable to the same restrictions and entitled to the same remedies.[1] We have already seen that the seamen on these voyages are not partners with the owners.[2]

In the whale fishery, no statute has yet, in terms, required the contract to be in writing;[3] but the invariable usage of that trade, and in fact the nature of the contract, have insured the universal adoption of a written agreement. It contains a description of the voyage; the share, or *lay*, as it is called, of each officer and seaman; a stipulation that each party will use his best endeavors to accomplish the object of the voyage; and certain regulations rendered expedient by the nature of the enterprise, and the character of the islanders in those distant seas, into which these voyages are pushed, where the lawlessness of savage life tempts the nearly equal lawlessness of men long absent from the restraints and decencies of civilization, and renders the strong arm of authority and every appeal to self-interest necessary to the preservation of common order and security.[4]

[1] *Wait* v. *Gibbs*, ut supra. 3 Kent's Com. p. 138. Act U. S. 19th June, 1813, ch. 2, sec. 1 and 2. A form of these articles will be found in the Appendix.

[2] Ante, p. 13.

[3] A whaling, or fishing voyage, has been held not to be a "*foreign* voyage," within the meaning of the statutes using that expression. *Taber* v. *The United States*, C. C. U. S. for Mass. Oct. 1839. Mss. This case will appear in 4 Sumner's R.

[4] The whale fishery is a trade conducted with much method and system, and is carried on by persons of great intelligence, as well as enterprise. So far as my inquiries have extended, the whaleman's shipping paper used in the port of New Bedford, is the best constructed instrument of the kind in use in the United States. Its regulations for the health and morals and discipline of the crew, are deserving of great praise. See the Appendix.

CHAPTER IV.

OF THE DIFFERENT FORMS OF THE MARINER'S CONTRACT.

Four various modes of hiring, or compensating the services of seamen, have been practised to a different extent in different ages and countries. Seamen are hired, *first*, by the voyage, at so much for the entire period, or run; *second*, for the voyage, at so much for each month that the voyage shall continue; *third*, for a certain voyage, at a stipulated share of the profits that shall be realized; *fourth*, for a certain voyage, at a stipulated share of the freight that shall be earned.[1] These are all important to be examined and traced to the sources from which their principles may be derived; for they are all, under one or another aspect, in use at the present day, and under some of them, as a form of the mariner's contract, vast branches of the commercial enterprise of this country are now conducted.

These different forms of the contract divide themselves into two classes; the two first, the hiring by the voyage and by the month, having some common analogies, constitute the first class; and the two last, the hiring on a share of the profits, or of the freight, being analogous

[1] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 1. Jacobsen's Sea Laws, book 2, ch. 2. Pothier, *Louages Mar.* n. 160.

throughout, form the second class. Contracts of the first class are strictly contracts of hire; those of the second class have sometimes been said to constitute a species of co-partnership between the owners and the mariners.[1] What degree of accuracy there is in this description of the latter branch of these contracts, and in what sense, if at all, they are to be treated as co-partnerships, will presently be considered.

1. The engagement by the voyage, for an entire sum.[2]

This is a very ancient form of the mariner's contract, and was used in the earlier stages of commerce, before the expansion of maritime enterprise and the uncertain duration of voyages had rendered necessary a different mode of fixing the compensation to be paid. It is one of the modes of hiring recognised in the Laws of Oleron, while there are no traces of a hiring by the month in that compilation.[3] Ascending from the period of this code, we find it also in the Laws of Rhodes,[4] and it seems, according to M. Pardessus, to have been the only mode of hiring known to the Roman law.[5] The principal distinction between this mode of hiring and the hiring on monthly wages, is, that in the latter, the pay consists in so many sums as the voyage shall be months in duration, whether longer or shorter; while in the former, it is an entire sum for a definite voyage, whether of longer or

[1] Pothier, *Louages Mar.* n. 160.

[2] This is what is called hiring *for the run*, when the hiring is only from port to port, or, for the outward or homeward voyage only. The ancient form of this contract was for the round voyage, out and home.

[3] *Jugemens D'Oleron*, art. 20, Pardessus, *Lois Mar.* tome i, p. 337, n. 5.

[4] *Droit Mar. Des Rhodiens*, ch. 46, Pardessus, tome i, p. 257.

[5] Pardessus, *Lois Mar.* tome i, p. 337, n. 5.

shorter duration.[1] Wherever it was practised, in ancient and modern times, it created the same relation to the vessel as the hiring by the month; the contract was for an entire voyage, so that the seaman could not leave at his pleasure before the voyage was finished.[2] The entirety of the contract was further observed, in favor of the seamen, by the Laws of Oleron, which declared that if, after having arrived at the place of destination, the master should determine to go further, the compensation of the mariners who had been hired in this form should be proportionally augmented; and that it should not be diminished if the master chose to shorten the voyage.[3] But as the principle of the entirety of the contract would, if carried out, sometimes deprive the mariner, or his representatives, of all compensation—as in the case of his death during the voyage—it became necessary to apply some positive provision of equitable relief; and accordingly, the same code provides that the wages shall be paid to the mariner's representatives.[4] The same provision is made in the Laws of Rhodes, and of Wisbuy.[5] Whether wages were given for the whole voyage, or only

[1] It is obvious that the last here mentioned is the most advantageous form of contract for the owner of the vessel, and the first most advantageous for the mariners; an observation that will be seen to be of importance, from further statements in the text.

[2] Pothier, *Louages Mar.* n. 172.

[3] *Jugemens D'Oleron*, art. 20, Pardessus tome i, p. 337. This provision was not extended to those hired on a share of the freight or profits, (the only other forms of contract recognised in this code,) for the obvious reason that their compensation did not admit of the application of it. See also *L'Ord. de la Marine*, liv. 3, tit. 4, art. 6. *Code de Commerce*, art. 255, 256.

[4] *Jugemens D'Oleron*, art. 7, Pardessus tome i, p. 327.

[5] *Droit Mar. Des Rhodiens*, ch. 46, Pardessus, tome i, p. 327. *Droit Mar. de Wisbuy*, art. 21, Pardessus, tome i, p. 474.

to the time of the death of the mariner, is a vexed question upon the interpretation of these texts. It is also not apparent by what method of computation the pay for a proportional period of the voyage was ascertained; though it is obvious that this was not an insuperable difficulty; and we find a simple method of apportionment, under this form of contract, in the practice of the French.[1]

The French Ordinance distinguished the application of the principle of entirety of the contract, in this form of hiring, from cases arising under contracts by the month, in a marked manner. In the case of an interdiction of commerce, before the voyage had begun, the effect of which is that the voyage is broken up, by a *vis major*, it placed those hired by the voyage, and those hired by the month, on the same footing, and gave them no wages, *eo nomine*, but merely the *days-works*, *(journées,)* employed in equipping the vessel; if the interdiction took place during the voyage, they were both to be paid in proportion to the time they had served.[2] This provision is re-enacted in the *Code de Commerce*.[3] In the case of an arrest of the vessel by order of the sovereign, that is,

[1] See *infra*, n.

[2] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 4.

[3] *Code de Commerce*, art. 253, 254. The mode of ascertaining the proportion to be paid to those hired by the voyage, held by the most eminent French jurists, (MM. Delvincourt, Pardessus, Dageville and Boulay-Paty,) is to ascertain the ordinary duration of the projected voyage; then to divide the entire sum stipulated for by the number of months in this period, and thus ascertain in effect what monthly wages would be at the rate contracted for the entire voyage, and to pay the seamen on this basis for the number of months served. Thus, a seaman hired at two hundred dollars for an entire voyage, the ordinary duration of which is ten months, would be paid, if he had served four months, eighty dollars. (See Sautayra, Sur Code de Commerce Expliqué, p. 167.)

of an *embargo*, which only suspends the voyage, the ordinance and the code provide that the wages of seamen hired by the month shall run during half the time of the detention; while those hired by the voyage shall "be paid according to the terms of their agreement;" meaning that they are not to be augmented on account of the prolongation of the voyage.[1] The reason assigned by the commentators for making this distinction, is, that the mariner who has hired his services for the voyage, at an entire sum, is deemed to have taken the risk of all accidents that may prolong it; while he who has engaged for monthly wages has taken no such risks, but has contracted to be paid so much per month for the whole period that the voyage may last; that strictly, he ought to be paid for that whole period, including the time of the embargo; but as this would be a great burden upon the vessel, half the time of the detention has been fixed upon as an equitable rule, founded also on the fact that his ser-

[1] The late British statute provides the following mode of ascertaining forfeitures, when the contract is for the voyage or the run. "If the whole time spent in the voyage shall exceed one calendar month, the forfeiture of one month's pay shall be accounted to be a forfeiture of a sum bearing the same proportion to the whole wages as a calendar month shall bear to the whole time spent in the voyage; and in like manner a forfeiture of two days' pay, or less, shall be accounted to be a forfeiture of a sum bearing the same proportion to the whole wages as the same period of time shall bear to the whole time spent in the voyage; and if the whole time spent in the voyage shall not exceed one calendar month, the forfeiture of one month's pay shall be accounted to be a forfeiture of the whole wages contracted for: and if such time shall not exceed two days, the forfeiture of two days' pay shall be accounted to be a forfeiture of the whole wages contracted for: and the master is to abate the amount of all forfeitures hereinbefore enacted, out of the wages of any seaman incurring the same." Act 5 and 6 Wm. IV. ch. 19, sec. 8.

vices are then of a lighter character, and that he is all the while subsisted at the expense of the ship.[1]

If the voyage were broken up by the act of the owners, master, or charterers, before the departure of the vessel, the Ordinance provided that the seamen hired by the voyage should be paid the days-works employed by them in equipping the vessel, and a quarter part of their stipulated pay; and those hired by the month should be paid in proportion, having regard to the ordinary duration of the voyage. But if the voyage was broken up after the departure of the vessel, the seamen hired by the voyage were to be paid their whole stipulated compensation, and those hired by the month the wages due for the time they had served, and their passage money to the home port; and both classes were to be subsisted until they reached the home port.[2] This law has been somewhat amended by the Code; under which, if the voyage is abandoned before the vessel sails, both classes are to be paid their days-works and to retain the advance money; if no advance has been paid, they are to receive a month's wages in lieu of it: if the voyage is abandoned after the vessel sails, those hired by the voyage are to be paid their whole compensation; those hired by the month, the wages earned at the time, and for half the presumed duration of the rest of the voyage. The same provisions for their return home are also reënacted.[3] Here again, the reason assigned by the commentators for the distinction, is, that as soon as the voyage has commenced, the seamen

[1] Pothier, *Louages Mar.* n. 181. Sautayra, (Code de Com. Nouv. Expliqué,) Paris, 1836, p. 167.

[2] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 3.

[3] *Code de Com.* art. 252.

hired by the voyage have a vested right to earn their whole compensation, of which the owner cannot, by his own act, deprive them; whereas the pay of those hired by the month is regulated by the duration of the voyage; they have earned it to the time when the voyage is broken up, and the half of the residue of the voyage is given them in the shape of damages.[1]

So too, upon the same general principle, both the Ordinance and the Code give to the representatives of a seaman hired for the voyage, on his death, half of his compensation, if he dies on the outward branch of the voyage, and the whole, if he dies on the return voyage; but in the case of seamen hired by the month, they give only wages to the time of the death.[2]

I have drawn these illustrations of this form of contract from the foreign law, because it has so rarely come under discussion in our own, or the English courts. A case occurred in the latter part of the last century, when Lord Kenyon presided in the Court of King's Bench, which brought a similar form of contract under discussion, upon the question of apportionment of compensation. The master of a vessel hired a seaman by the run, from Jamaica to Liverpool, and gave him a note promising to pay him thirty guineas, "providing he proceeds, continues, and does his duty as second mate in the said ship from hence to the port of Liverpool." The seaman died on the passage, and his administratrix brought an action of *assumpsit*, to recover a proportional part of the wages agreed for. It appeared that four pounds per month

[1] Sautayra, p. 165.

[2] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 14. *Code de Com.* art. 265.

were the usual wages of a second mate, when shipped by the month, on voyages to Jamaica, out and home, but that when shipped by the run from Jamaica to England, a gross sum was usually given; and that the ordinary length of the voyage from Jamaica to Liverpool, was about eight weeks. In the absence of sufficient evidence to show any particular usage, Lord Kenyon held that the performance of the entire voyage was the thing contracted for, and that this being ascertained to be the express agreement of the parties, none other could be implied; that the great disproportion between the sum agreed on, and what the mariner would have earned on monthly wages, (which would have been only eight pounds,) showed that he stipulated to receive the larger sum if the whole of that duty were performed, and nothing, unless the whole of that duty were performed; in fact, that it was a kind of insurance. At the same time, his Lordship and the rest of the court declared that if such notes were shown to be in universal use, and that the commercial world had received and acted upon them in a different sense, the court would feel bound to adopt the construction given by the usage, and apportion the contract.[1]

This decision turned, obviously, upon the peculiar form of the contract, and the doctrines of the common law applied to it in a court of common law. Whatever its authority may be as a precedent in its peculiar line of contract, I apprehend that after the well settled cases of apportionment by the maritime law, in contracts for monthly wages, rendered necessary in cases of wreck,

[1] *Cutter* v. *Powell*, 6 T. R. 320.

capture, abandonment of the voyage, and other interruptions, the only difficulty which our Admiralty courts would feel in dealing with contracts for the voyage, would be to settle the principles upon which the apportionment should be made. The contract on monthly wages is as much an entire contract for the voyage, as that on a gross sum for the entire voyage; and yet the equitable rule of the maritime law, by which freight is made to regulate wages, has too frequently interposed and modified the entirety of the contract, to be at all now brought in question.[1]

2. The engagement for a voyage, at monthly wages.

It is not easy to ascertain when this form of contract, now the most usual in the merchant service, was first adopted. There are no distinct traces of it in the Laws of Oleron.[2] It is found, however, in the *Consolato*,[3] and from thence, through the Ordinance of Louis XIV.,[4] down to modern times, it becomes a recognised and at length almost the universal mode of hiring. Throughout all the laws in which it is found, its basis is the same; namely, that it is not a contract from month to month, determinable by either party at the expiration of each month, but a contract for a definite voyage, at the rate of so much per month for the whole time that the voyage shall continue.[5] Hence it follows, also, that forfeitures incurred by offences in one month, can relate back and involve

[1] See *The Two Catharines*, 2 Mason's R. 319. *Brown* v. *Lull*, 2 Sumner's R. 443. *Thompson* v. *Faussat*, Peters's Circ. C. R. 182. *Pitman* v. *Hooper*, 3 Sumner's R. 50, 286. *The Malta*, 2 Hag. Adm. R. 158.

[2] Pardessus, *Lois Mar.* tome i. p. 337, n. 5.

[3] *Consolato del Mare*, ch. 85, [130,] Pardessus, tome i, p. 125.

[4] *L'Ord. de la Marine*, liv. 3, tit. 4.

[5] Pothier, *Louages Mar.* n. 172. Valin, *Com.* tome i, p. 676. *Walton* v.

the wages of previous months; and accidents, which interrupt and put an end to the voyage, so that no freight is received by the owner, carry with them a loss of the previous month's wages, as well as of that in which the loss of the ship takes place.[1] But this principle of the entirety of the contract, which, if no other principle intervened, would involve a loss of wages in some cases not merely of great hardship, but of great inequality and injustice as between the owner and the mariners, has been modified by the application of the principle that the earning of freight for the owners is also the earning of wages for the mariners. The entire voyage for which the mariners shipped is thus divided into as many entire periods as those for which freight has been or might have been received by the owners; the monthly wages of those periods are earned and received by the mariners; while the entirety of the contract, which has only been modified, not abrogated, by this rule, deprives them of the wages of that period preceding the loss of the vessel, in which no freight has been or might have been earned. To the monthly wages thus earned, there are added wages for half the time the vessel lay at the last port

The Neptune, Peters's Adm. Decis. 142. If indeed a seaman ship on monthly wages, on a general trading and freighting voyage, without any particular designation of the ports to be visited, and without any certain *terminus* of the voyage, and without any limitation of time for which the engagement is made, either party may put an end to the contract at pleasure, subject to the equitable restriction that this shall not be done at a time, or under circumstances, particularly inconvenient to the other party. See *The Crusader*, Ware's R. 437.

[1] This is to be understood with the exception that the advance wages, usually paid at the commencement of the voyage to all seamen, are never returned, even though the vessel does not complete her voyage, or earn freight.

where freight was or might have been earned, on the general presumption that that portion of the time was spent in unloading the cargo, or in the other business of that portion of the voyage antecedent to her arrival at such port.[1]

The various predicaments of wages in cases of capture, embargo, wreck, breaking up of the voyage by the owner, and sickness and death of seamen, will be hereafter considered.

3 and 4. The contract for a certain voyage, at a stipulated share of the freight or profits.

These two forms of contract are so nearly analogous as to constitute a class, to be considered together, in reference to their general principles.

The hiring on a share of the freight was a form of contract unknown to the Roman law, which recognised only the hiring by the voyage for an entire sum. The first traces of this contract are found in the compilation which passes under the name of the Maritime Law of Rhodes.[2] But little, however, is to be gathered from those fragments, of the nature of the contract. It is first distinctly and systematically defined in the Laws of Oleron. In

[1] See *The Two Catharines*, 2 Mason's R. 319. *Brown* v. *Lull*, 2 Sumner's R. 443. *Pitman* v. *Hooper*, 3 Sumner's R. 50, 286. *Giles* v. *The Cynthia*, Peters's Adm. Decis. 203. *Boardman* v. *The Elizabeth*, Peters's Adm. Decis. 128. *Johnson* v. *The Walterstorff*, Peters's Adm. Decis. 215. *Cranmer*, v. *Gernon*, Peters's Adm. Decis. 390. *Thompson* v. *Faussat*, 1 Peters's Circ. C. R. 182. *Moore* v. *Jones*, 15 Mass. R. 424. *Hooper* v. *Perley*, 11 Mass. R. 545. *Locke* v. *Swan*, 13 Mass. R. 76. *Swift* v. *Clark*, 15 Mass. R. 173. *Murray* v. *Kellogg*, 9 Johns. R. 227. *Blanchard* v. *Buckman*, 3 Greenleaf's R. 1. *Galloway*, v. *Morris*, 3 Yeates's R. 445. *Jones* v. *Smith*, 4 Hall's Am. Law Jour. 276.

[2] The assertion here made, may seem to involve an inconsistency; for the reader, whose attention has not been particularly drawn to the chro-

that code, it divides itself into two forms: the mariners either had a certain share in the freight that should be earned, or they were allowed the privilege of lading a certain amount of merchandise, as a venture, free of freight.[1] These privileges of taking up a certain part of the stowage of the vessel, as a mode of compensation, seem to have been introduced in the middle ages, in the navigation of the ocean, and received in France the name of *Portages*.[2] In some countries, the merchandize thus laden by the seamen was free from duties; in other countries, it did not contribute to jettison, but on the contrary, if it consisted of casks of water, which for some reason not apparent the seamen are declared to be at liberty to put on board, it was to be accounted and contributed for as wine, when thrown overboard. These

nology of these laws, will perhaps doubt the propriety of dating the Roman before the Rhodian Law. The truth is, however, that the compilation of maritime laws and usages which passes under the name of the Laws of Rhodes, does not belong to that palmy state of the Isle of Rhodes, as a great commercial emporium, which undoubtedly existed before the height of Roman jurisprudence, and to which our imaginations are at once carried back by the Colossus fabled to have spanned the harbor, in which rode the commerce of the Mediterranean. M. Pardessus has critically demonstrated that the period of this compilation belongs to the middle ages: and although it opens with a sort of prologue, speaking in the person of the Emperor Tiberius Cæsar, and reciting the sending of a commission into Rhodes, to gather and consolidate the maritime laws of that tributary island, that this prologue is nothing but one of those apocryphal documents which were often fabricated in the middle ages, and even in the earlier periods of the revival of letters, by way of giving to the work an air of authority and antiquity. He does not question, however, that it is a genuine compilation of laws and usages existing in the Mediterranean during the period to which he assigns it. See Pardessus, *Lois Mar.* tome i, p. 209, *et seq.*

[1] *Jugemens D'Oleron*, art. 18, Pardessus, *Lois Mar.* tome i, p. 336.

[2] Technically, space allowed officers and seamen in the vessel.

rights were moreover assignable to a merchant, who enjoyed them in the same manner as the seaman.[1] These provisions show that the mariners shipping in this form were not regarded as partners with the owner, but that the *portages* constituted their compensation in a contract for the hire of services. If it had been a contract of partnership, in any strict sense of that relation, as now understood, their ventures would not have been protected in this remarkable manner.

The Ordinance of Louis XIV. and the *Code de Commerce* recognise both the hiring on a share of freight and of profits. They give to the mariners so hired no compensation, where the voyage is broken up or interrupted by a *vis major*, whether before or after it had commenced; but if broken up or interrupted by the act of the master or owner, they give the mariners damages; and if by the act of the charterer, they admit them to a share of the damages awarded to the ship, dividing them between the owners and the crew in the same proportion as the freight would have been distributed.[2] Valin adds, that the owner is responsible for these damages to the crew.[3] Both the Ordinance and the Code also provide, that in cases of wreck, where merchandise is saved and pays freight, it shall be distributed between the crew hired on the freight, and the owners, according to the proportions of the contract: whereas the seamen hired on monthly wages may absorb the whole of such freight to pay the wages earned, if the materials of the ship saved, which

[1] *Jugemens D'Oleron*, art. 18, 30. *Droit Mar. de Wisbuy*, art. 33. Pardessus, *Lois Mar.* tome i, p. 336, 344, 483.

[2] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 7. *Code de Commerce*, art. 257.

[3] Valin, Com. tome i, p. 700.

are first to be applied to this purpose, are insufficient.[1] So too, in case of the death of a seaman hired on a share of the freight or profits, they give to his representatives the whole of his share, if he dies after the voyage is actually commenced.[2]

These provisions indicate of themselves what is intended by the French jurists, when they speak of these contracts as being a kind of copartnerships. They are copartnerships in this, that the seamen become directly interested in the fruits of the adventure, and they as well as the owner depend for their remuneration on its success. But it does not seem that the shares for which they contract are not treated as in the nature of wages; on the contrary, they are clearly so regarded, with the differences in the application of the general principles rendered necessary by the risks assumed in the contract by both parties.

In our own law the nature of these contracts is well defined. They create — when the engagement is for a specified voyage, as it necessarily is — the same general relations of the seamen to the ship and the master; their peculiarity consists only in the form of the compensation for the services hired. This form of compensation is used in general freighting and trading voyages, in the fisheries, and in the cruising voyages of privateers. In these cases, the contract is for the entire voyage, both on the part of the owners and the seamen: and it includes not merely the time spent in the active operations of the

[1] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 9; and Valin's Com. tome i, p. 703. *Code de Commerce*, art. 259, 260, and Sautayra's Com. p. 170. Pothier, *Louages Mar.* n. 184, 185.

[2] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 14. *Code de Commerce*, art. 265.

enterprize, as in obtaining a cargo of fish, or oil, or in taking prizes, during the period named in the articles, but likewise a return to the home port of the vessel.[1] If the whole time is not served out, by reason of death or sickness, it seems, that, in the absence of express contract on that point, the same general principles are to be applied as in cases of hiring on monthly wages.[2] It is moreover well settled that in these cases the seamen are not partners with the owners, or tenants in common with the owners in the proceeds of the voyage; but that an action of *assumpsit* at common law, or a libel in the Admiralty, may be brought to recover their shares, which are in the nature of wages, to be ascertained by a final settlement of the voyage.[3] So too, in the case of the

[1] *The Brutus*, 2 Gallison's R. 526.

[2] *Ex parte Giddings*, 2 Gallison's R. 56. See the Appendix, for the provision on this subject in the whaling contracts.

[3] *The Crusader*, Ware's R. 437. *Macomber* v. *Thompson*, 1 Sumner's R. 384. *Hancox* v. *Fishing Ins. Co.* 3 Sumner's R. 132. *Rice* v. *Austin*, 17 Mass. R. 197. *Baxter* v. *Rodman*, 3 Pickering's R. 435. See also *Wilkinson* v. *Frazier*, 4 Esp. R. 182. *Mair* v. *Glennie*, 4 M. and Selw. R. 240. *Day* v. *Boswell*, 1 Camp. R. 329. *The Frederick*, 5 Rob. Adm. R. 8. A very serious question, how far the mariners are to be treated as partners with the ship owner, in whaling voyages, might arise in cases of salvage service rendered to such a ship. The contract is ordinarily for a certain share of the net proceeds of the voyage. So far as the ship is concerned, the mariners are in no sense copartners with the owner, and would have nothing to do with the salvage paid on the ship. But for the salvage paid on the cargo, would they be liable? Would the owner have a right to deduct such salvage from the gross proceeds, before the net proceeds were ascertained? The terms of the contract would here have great weight — probably would be decisive. In this country, the contract generally imports a *hiring*, distinctly. "And the said owner and master do hereby *agree with and hire* the said seamen or mariners for the said voyage, at such share of the net proceeds, &c., to be paid pursuant to this agreement." But I have seen English whaling contracts, of different terms; and in a

master who takes the vessel on an agreement to divide with the owners the gross earnings of the vessel in certain proportions, it has been held that the owners are not partners with him, but that he thereby becomes the charterer of the vessel, paying as hire a certain portion of the earnings in lieu of a fixed and certain sum as charter.[1]

late case in the High Court of Admiralty, it seemed to be the inclination of the court that the mariners were, under such circumstances, for this question as to the salvage, copartners with the owner in the proceeds of the voyage. *The Harriot*, High Court of Admiralty, Feb. 1841, reported *Monthly Law Mag.* vol. x, p. 137.

[1] *Thompson* v. *Snow*, 4 Greenleaf's R. 264. But see *Latham* v. *Lawrence*, 13 Conn. R. 299.

PART SECOND.

OF THE INTERNAL DISCIPLINE AND ECONOMY OF THE SHIP.

PART SECOND.

CHAPTER I.

OF THE MASTER'S AUTHORITY AND OFFICE IN RELATION TO THE CREW AND PASSENGERS.

The master of a vessel holds a station, the responsibility of which has hardly a parallel in any other situation of civil life founded in all its relations upon contract. It were not to be expected that every person, who, in the arrangements of business, reaches this important station, should be actually possessed of all the qualifications which the ideal description of the office necessarily implies. It has happened, that persons in this high capacity have fallen lamentably short of these qualifications: while it has also happened, and not unfrequently occurs, that there are found in this profession men whose moral and intellectual qualities adorn human nature, and evince the height to which it may attain in the discipline of the private and active business of life.

Apart from the business qualifications of a ship-master, which, as the agent of his owners and often of other persons, he ought to possess, in no slight degree, his relation of command over the crew, and the fact that upon his single exertion, courage, prudence, knowledge, and skill,

depend the lives of all on board and the fortunes of others at home, call for the exercise of high qualities of character. Upon his personal responsibility for the conduct of those under him, and the necessity of the case, is founded his authority. He has to meet unforeseen emergencies, and to dictate the mode in which they are to be overcome; to be calm and skilful in the midst of terrible dangers; and to provide for the safety of the lives and property under his care, alike in the tempest and the calm. He is required to govern in good order a little world, the important designs of which may be as quickly and completely lost by the ungoverned passions of those who compose it, as by the elements which scatter it in fragments upon the sea. He is therefore invested with large authority and discretion, for which no other relation of private life furnishes an entirely sufficient analogy. He has been clothed with this authority from the earliest periods of which any written monuments remain to us of the nature of his office, and it has always been founded on the necessity of prompt command and instant obedience, on account of the vast interests entrusted to his care.[1]

Jurists, who have treated of the nature of the master's authority, have been disposed to seek for it an analogy in that of a parent over his child, or of a master over his apprentice or pupil. Such is the comparison made by Lord Tenterden, who fortifies it by a citation from Casaregis, on which Valin had also previously relied, in

[1] *Lois D'Olèron*, art. 12, Pardessus, *Lois Mar.* tome i, p. 332, and n. 1. *Consolato del Mare*, ch. 117, 118, 119, 120, edit. Pardessus, vulg. 162, 163, 164, 165. *Lois Mar. de Wisbuy*, art. 26, Pardessus, tome i, p. 479. *L'Ord. de la Marine*, liv. 2, tit. 1, art. 2. Jacobsen's Sea Laws, book 2, ch. 1.

making the same suggestion.[1] So far as the analogy holds, it may serve the purpose of a useful illustration. But it is obvious that it is quite insufficient to be applied throughout. On the one hand, no such emergencies arise, in the general course of a child's or an apprentice's duty, as constantly arise in that of a seaman; the acts and conduct of the former can hardly ever involve such consequences as require the instant and implicit obedience of the latter. On the other hand, it is solely in the business and service of the ship that the master's authority, at least to the extent of punishment, can be exercised; and he has no such power to correct the general immoralities of his crew, which in no way affect the ship's service, as belongs to a parent, or even the master of an indented apprentice on shore.[2] It seems to me, therefore, that it is far more accurate and scientific, not to rely on such analogies. The authority of a ship-master is *sui generis;* it has its own limits and definitions in the maritime law, the materials for which, although scattered and requiring to be brought together, are yet perfectly sufficient to furnish at least an outline, the most important features of which will be found to be entirely peculiar.

By the common and the maritime law, the master has the supreme authority over all the mariners on board, and it is their duty to obey his commands in all lawful mat-

[1] Abbot on Shipping, p. 136. Valin Com. tome i, p. 449. The passage from Casaregis is as follows: "Magister nullam habet jurisdictionem in gentem suarum navium, sed quamdam tantùm œconomicam potestatem vel disciplinam, quæ usque ad levem castigationem, pro corrigenda insolentiâ et malè morata vita seu licentia nautarum et vectorum; quemadmodum eam tenet pater in filios, magister in discipulos, dominus in servos vel familiares." *Casaregis*, Disc. 136, n. 14.

[2] *Bangs* v. *Little*, Ware's R. 511.

ters relating to the business and navigation of the vessel and the preservation of good order.[1] By supreme authority, is intended here, that the master is invested with the exclusive government of the ship; the necessities and nature of the service requiring that one mind only, and not several, should both originate and be responsible for the direction of affairs. It is true that anciently the master was obliged to confer with his crew, in certain cases, and to take their opinion upon the propriety or prudence of his course, and sometimes he was bound by the voice of the majority.[2] This was particularly the case in regard to a jettison; in which the master could justify himself even against the consent of the owners of the goods, if they were on board, by taking the opinion of the crew upon the necessity for the jettison.[3] The same provision exists in the French law at the present day.[4] These, however, are special cases excepted out of the general rule, by positive law. They have not been incorporated into the maritime law of this country. The master, under our law, has the sole authority in the

[1] The question how far the crew are bound to obey commands not relating to the service of their own ship, has been considered in a former chapter, (*ante*, p. 34.) In illustration of the *lawfulness* of commands, it has been held that a refusal by a mariner to go on shore, when discharged by the master, in a foreign country, without sufficient cause, does not constitute such a *disobedience of orders*, as will justify punishment for that alone, because the propriety of the refusal must depend upon the propriety of the order. *The Exeter*, 2 Robinson's Adm. R. 261.

[2] *Lois D'Oleron*, art. 2, edit. Pardessus, tome i, p. 324. *Lois de Westcapelle*, *Jugement* 2, p. 371.

[3] *Droit Mar. des Rhodiens*, ch. 9, 38, Pardessus, *Lois Mar.* tome i, p. 243, 254. *Lois D'Oleron*, art. 8, 9; Ib. p. 328, 329. *Lois de Wisbuy*, art. 22. Ibid. p. 475. *Consolato del Mare*, ch. 54, [99] Pard. tome ii, p. 104.

[4] *L'Ord. de la Marine*, liv. 3, tit. 8, art. 1. *Code de Commerce*, art. 410.

government of the ship, and whatever consideration it may be prudent for him to give to the advice of experienced persons in the ship's company, he alone has the right to direct, subject to his liability to answer for any abuse or misuse of his power. Thus it has been held that the crew of a vessel are not authorized to make a jettison of any part of the cargo, without the order of the master;[1] that the master alone can inflict punishment on a seaman, unless he is absent and his authority for the time is devolved upon the next person in command;[2] and that the mate, or any other person ordered to carry such punishment into effect, cannot refuse to do so, unless the master has clearly passed the bounds of his legal authority, in ordering a punishment manifestly and grossly oppressive and disproportioned to the offence.[3] In fact, the very nature of maritime service forbids the idea of a divided authority. It has been forcibly said, that if the master were *obliged* to consult the crew, or even his inferior officers, in emergencies, the mischief would be accomplished before the debate was brought to a close, and the ship and crew would be irretrievably lost, before the opinions could be collected on the best mode of warding off the danger.[4]

Such is the legal position of the master; but it does not preclude him from assisting his own judgment by that of those around him; it requires him to act upon his own responsibility. He may be a young man, for the first time invested with this important trust, and there

[1] *The Nimrod*, Ware's R. 1.
[2] *United States* v. *Taylor*, 2 Sumner's R. 584.
[3] *Butler* v. *M'Lellan*, Ware's R. 219.
[4] Ibid.

may be in the ship's company veterans who have passed twice his years in acquiring the dread experience of the sea. He will properly be desirous to avail himself of their knowledge and advice; his owners and all other persons interested will more fully justify the event, if he does so; but neither he nor they are to lose sight of the fact, that as the responsibility, so also the sole authority rests with him.

The manner of exercising the important authority of a master is worthy of some notice. On the one hand, the same degree of personal civility or moderation of language, in giving commands, is not expected on shipboard, the opposite of which might excuse some hesitation of obedience in other employments. Orders may be clothed in very harsh language; yet they must be obeyed; and no severity of mere manner, unconnected with actual oppression, can for a moment excuse the performance of duty.[1] But on the other hand, a prudent and considerate master, however energetic he may be in the exercise of his authority, will temper his energy with a proper consideration for the rights of humanity and the best interests of the service. He must especially be careful that he does not set the example of illegal conduct; that he does not commence a dispute, or incite a contro-

[1] "Disobedience of orders," observes Lord Stowell, "being an offence of the grossest kind, it is not a peremptory or harsh tone, or an overcharged manner in the exercise of authority, that will justify resistance. It will not be sufficient, that there has been a want of that personal attention and civility which usually take place on other occasions, and might generally be wished to attend the exercise of authority. The persons subject to authority on ship board are not to be captious, or to take exception to a neglect of formal and ceremonious observance of behavior." *The Exeter*, 2 Robinson's Adm. R. 261.

versy, by some act that is unjustifiable on his own part; and that he does not, by encouraging disorderly behavior, deprive himself of the power of punishing for conduct arising out of that disorder.[1]

The nature of the master's authority will be further illustrated, by examining the means by which he may enforce his commands, restrain the conduct of his crew, and preserve the discipline and good order of the ship. Here the law has invested him with a somewhat wide range of discretion; and at the same time it watches the exercise of that discretion with a jealous eye. He may inflict punishment, to prevent a recurrence of offences by the same individual, or by others: but it must be applied with due moderation; and if any unnecessary severity or cruelty is exercised, or if the punishment be disproportioned to the offence, the master then becomes a trespasser, and will be liable to the seaman in an action for damages,[2] and to a criminal prosecution under a statute of the United States.[3] If it appears that some punishment

[1] *Thorne* v. *White*, 1 Peters's Adm. R. 174. *Roberts* v. *Dallas*, Bee's R. 239.

[2] In the Admiralty: — *Thomas* v. *Lane*, 2 Sumner's R. 1. *United States* v. *Wickham*, 1 Washington's R. 316. *Relf* v. *The Maria*, 1 Peters's Adm. R. 186. *Thorne* v. *White*, Ibid. 172, 174. *Rice* v. *The Polly and Kitty*, 2 Ibid. 420. *Jarvis* v. *The Master of the Claiborne*, Bee's Adm. R. 420. *Roberts* v. *Dallas*, Ibid. 239. *Turner's Case*, Ware's R. 83. *Bangs* v. *Little*, Ibid. 506. *Butler* v. *McLellan*, Ibid. 219. *The Exeter*, 2 Robinson's Adm. R. 261. *The Agincourt*, 1 Haggard's Adm. R. 271. *The Lowther Castle*, Ibid. 384. *The Centurion*, Ibid. 161. *The Enchantress*, Ibid. 395. At Common Law: — *Sampson* v. *Smith*, 15 Mass. R. 365. *Brown* v. *Howard*, 14 Johns. R. 119. *Watson* v. *Christie*, 2 Bos. and Pul. 224.

[3] Act U. S. 3 March, 1835, sec. 3. "If any master or other officer of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred or revenge, and without justifiable cause, beat, wound,

was merited, courts of justice will not usually give damages, unless it was manifestly excessive and disproportionate to the fault;[1] and the prosecution under the statute will not be sustained, unless a wilful intention to do an injury, and a want of justifiable cause to inflict the injury are both shewn.[2]

The time and means of punishment are important considerations. It may be inflicted immediately on the commission of the offence, or after such interval as the prudence of the master may dictate.[3] Lord Tenterden recommends such delay, in cases not requiring instant correction to arrest mutinous tendencies, or to enforce the performance of a specific duty, in order that the master, by taking the advice of the persons next below him in authority, may prevent the operation of passion in his own breast, and secure witnesses to the propriety of his conduct.[4] Such advice is matter of prudence, not of

or imprison, any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel and unusual punishment, every such person so offending shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence." The words "one or more of the crew," in this statute, include the officers, as well as the sailors, and the master is liable for a malicious imprisonment of the chief mate. *United States* v. *Winn*, 3 Sumner's R. 209.

[1] *Butler* v. *M'Lellan*, Ware's R. 219.

[2] The construction of the term malice, hatred or revenge, in the statute above quoted, has come under the notice of the Circuit Court of the United States for the first circuit. It has been held that "malice" signifies wilfulness, or a wilful intention to do a wrongful act; and that, to authorize a conviction under this act, two things must be shown; first, malice, or hatred, or revenge; and secondly, a want of justifiable cause to inflict the injury. *United States* v. *Taylor*, 2 Sumner's R. 584.

[3] *Sampson* v. *Smith*, 15 Mass. R. 365.

[4] Abbott on Shipping, p. 136, edit. 1829.

legal necessity. But there is also another reason for delay, in all cases that will admit of it; that due inquiry should precede the act of punishment, so that the party charged may have the benefit of that rule of universal justice, of being heard in his own defence.[1] But if the case is one where the public manner in which the offence is committed renders investigation useless; or where the prompt reaction of lawful force is called for, to meet the disorders of a commencing mutiny, delay would be both unnecessary and dangerous.

It is not necessary that the offence immediately provoking punishment should be, of itself, such as to call for the amount of punishment inflicted, provided it is connected with similar offences antecedently committed, which, upon the recurrence of them in the particular case, will justify the punishment as a preventive measure, to guard against the inconveniences that may reasonably be expected to attend a recurrence of them. But it must be an act allied in nature to those which it follows; an act of theft will not prove a habit of drunkenness; if any act of mutiny is charged, it should be mutinous conduct of a former date that alone can be invoked with propriety, to aggravate the charge of a mutinous disposition. A reference to by-gone acts must be very distinct; and the master should not lose sight of the fact, in meting out the punishment, that the lapse of time between the several offences may have given the mariner and the crew a right to presume that they had been tacitly pardoned; and that the impunity shown to former offences may have greatly contributed to produce the pres-

[1] *The Agincourt*, 1 Haggard's Adm. R. 271.

ent.[1] In short, the master is not justified in punishing a seaman, if a state of things has intervened, which is to be taken as a pardon of former offences; as where a mariner had been discharged for improper conduct, which fully justified the discharge, and had afterwards been taken on board again, it was held that the master had no right to assault and imprison him, without any new crime.[2]

No particular mode or instrument of punishment is prescribed by the maritime law. Much latitude of discretion is here also confided to the master, subject to the same liability to answer for the propriety of his conduct. Corporal punishment does not seem to have been sanctioned in direct terms, in the ancient maritime ordinances. Severe and, in some cases, sanguinary penalties, were enacted against offences of various kinds; but they were generally to be applied by the public authorities; and probably their severity and the minute provisions into which they entered, in regard to the discipline and good order of the ship, answered, in those ages, nearly the same purpose as the discretionary power of moderate correction, which the modern law, for reasons of a wise and really humane policy, has found it necessary to confide to the master.[3] The ordinance of Louis XIV. expressly

[1] *The Agincourt*, 1 Hag. Adm. R. 271. *Sampson* v. *Smith*, 15 Mass. R. 365. It seems that a pardon granted by the master to one of several offenders has no operation as to rest. See *Relf* v. *The Maria*, 1 Peters's Adm. R. 186.

[2] *Roberts* v. *Dallas*, Bee's Adm. R. 239.

[3] *Lois D'Oleron*, art. 12, 14. Pardessus, *Lois Mar.* tome i, p. 332, 333. *Lois de Westcapelle, Jugement* 12, 14. Ibid. p. 378, 379. *Droit Mar. de Wisbuy*, art. 26, 28. Ibid. p. 479, 481. *Consolato del Mare*, ch. 117, 118, 119, 120, [162, 3, 4, 5]. Ibid. tome ii, p. 145, *et seq.*

sanctions corporal punishment, and, in the opinion of Valin, authorizes it both at sea and in port.[1] In our law, it is well settled that moderate corporal punishment may be inflicted;[2] and it is in this that the analogy between a ship-master's authority, and that of a parent or a master of an apprentice on shore has perhaps a more appropriate application than in regard to most other features of the relation. Lord Stowell says that the force of the analogy here is, that the authority is inherent in him upon the same grounds of necessity and sound discretion in the one case as in the other; not, however, to be used exactly in the way of an equal measure of punishment, because the apprentice is generally of too tender years to bear the same degree of correction that may properly be administered to a seaman of mature years and confirmed strength; and because the misconduct or negligence of the former can rarely, if ever, draw after them such consequences as follow those of the latter, which may be fatal to all the lives and property on board.[3]

Deadly weapons are not to be employed by the master or any one else, in the correction of a seaman for a past offence, nor in enforcing obedience to a specific command, unless the refusal is clearly a case of mutiny, or

[1] *L'Ord. de la Marine*, liv. 2, tit. 1, art. 22. Valin's Com. tome i, p. 447, *et seq.*

[2] *United States* v. *Wickham*, 1 Washington's R. 316. *United States* v. *Taylor*, 2 Sumner's R. 584. *Thorne* v. *White*, 1 Peters's Adm. R. 172. *Rice* v. *The Polly and Kitty*, 2 Ib. 420. *Sampson* v. *Smith*, 15 Mass. R. 365. *Aertsen* v. *The Ship Aurora*, Bee's R. 161. *Turner's Case*, Ware's R. 83. *Butler* v. *M'Lellan*, Ib. 219. *Bangs* v. *Little*, Ib. 506. *The Agincourt*, 1 Hag. Adm. R. 271. *Watson* v. *Christie*, 2 Bos. & Pul. 224.

[3] *The Agincourt*, 1 Hag. Adm. R. 271.

justifies the reasonable apprehension of a mutiny.[1] Thus, for example, if a seaman should refuse to obey a specific command, while all the rest of the crew were in a state of quietness and subordination, nothing could justify the master in shooting at him, or wounding him with a cutlass, to compel his submission. He might be flogged, or knocked down, or put in irons; but not assailed with weapons, the usual effect of which is death, or extreme bodily injury. But a case of actual mutiny, or the reasonable apprehension of mutiny, places the master in a very different attitude. The scope of this offence is the entire subversion of the master's authority, which it is his duty to prevent at all hazards. The exertion of his authority for this purpose brings his own personal safety into danger. He may therefore, both from his duty to preserve his lawful authority, and upon grounds of self-defence, make use of any force and any weapon, which the exigency of the case requires; but still, with all the caution which the law requires in all other cases of self-defence and vindication of lawful authority.[2]

Imprisonment on board the ship by confinement in irons, or otherwise, is a lawful mode of punishment. But the practice of imprisoning seamen in foreign jails, has been held to be of doubtful legality, and to be justified only in cases of strong necessity, as where the individual is to be

[1] *Jarvis* v. *The Master of the Claiborne*, Bee's R. 248. *Aertsen* v. *Ship Aurora*, Ib. 161.

[2] *United States* v. *Wickham* 1 Washington's R. 316. *Sampson* v. *Smith*, 15 Mass. R. 365. *Michalson* v. *Denison*, 3 Day's R. 294. *Thorne* v. *White*, 1 Peters's Adm. R. 168. Story's Notes to Abbott on Shipping, p. 137. See the definition of mutiny, &c. post, Part 2, ch. 4. Holding of fists to strike the master, is so near an act of mutiny, that the master may quell it by striking the first blow. *The Lima*, 3 Hag. Adm. R. 353.

brought home in irons for some crime, or is absolutely dangerous to the peace and safety of the ship, or the officers, or the crew.[1]

The advice of an American Consul does not alter the circumstances of the case, on which alone depends the master's justification.[2] It has also been held that the prison expenses cannot be deducted from the mariner's wages, if the imprisonment was improper.[3]

But the recent statute (of 1840,) authorizes the consuls to employ the local police, to reclaim deserters, and discountenance insubordination.[4]

With regard to offences which amount to public crimes of serious aspect, although the master may by force restrain the commission of them, he has no judicial authority to punish the criminal, but should secure his person and bring him home to be delivered up to the public authorities.

In respect to the passengers, the master stands of course upon a very different footing than with regard to the crew. He can restrain them from violating the peace and good order of the ship, but he can require of them no

[1] *Wilson* v. *The Brig Mary*, Gilpin's R. 31. *Magee* v. *Ship Moss*, Ib. 219. *The Nimrod*, Ware's R. 9. *The David Pratt*, Ib. 503.

[2] *Wilson* v. *The Brig Mary*, ut supra. *The William Harris*, Ware's R. 367.

[3] Where a seaman is imprisoned by the authorities of a foreign country, for a violation of its laws, the costs and charges of imprisonment may be deducted from his wages; but not so when he is imprisoned at the instance of the master. *Magee* v. *Ship Moss*, Gilpin's R. 219. So too, where a seaman is detained in jail in the home port, for a voluntary absence, until the vessel is ready to proceed to sea, the wages run during the time, but the cost of his commitment and support in jail, may be deducted from them. *Brewer et al.* v. *The Maiden*, Gilpin's R. 294. But see how far the Act of 1840 bears upon this question.

[4] Act U. S. 20 July, 1840, sec. 11.

services, except works of necessity, in time of danger, for the preservation of the lives and property on board, as to defend the vessel when attacked by pirates or an enemy, and to assist in perils of the sea; and even these services, it seems they are not bound to perform, if they choose to avail themselves of any means which may occur, whereby they can leave the vessel.[1] The master's relation to them at all other times is one of peculiar delicacy. It has been held by Mr. Justice Story that the contract of passengers with the master, is not for mere ship-room, and personal existence on board, but for reasonable food, comforts, necessaries and kindness; that in respect to females, it proceeds yet farther, and includes an implied stipulation against obscenity, immodesty, and a wanton disregard of the feelings, and that a course of conduct, oppressive and malicious in these particulars, will be punished by courts of justice, as well as personal assaults.[2]

Congress have seen fit to make special provision for the subsistence of passengers, independent of any

[1] *Newman* v. *Walters*, 3 Bos. & Pul. R. 612. *Boyce* v. *Bayliffe*, 1 Camb. N. P. R. 58.

[2] *Chamberlain* v. *Chandler*, 3 Mason's R. 242. The Court of Admiralty entertains jurisdiction of personal torts committed by the master on a passenger, whether by direct force as trespasses, or by consequential injuries. Ibid. See also *Keene* v. *Lizardi*, 5 Martin's Louis. R. 431. On the other hand, passengers are to conduct themselves respectfully, and with good breeding towards the master. It was recently held in England, that conduct unbecoming a gentleman, in the strict sense of the word, would justify a captain of a ship in excluding a passenger from the cuddy table, whom he had engaged by contract to provide for there; though it might be difficult to say in what degree want of polish would, in point of law, warrant such exclusion; but that it was clear that if a passenger use threats of violence towards the captain, the captain may exclude him from the table, and require him to take his meals in his own private apartment. In C. B.; M. T. 1837: *Prendergast* v. *Compton*, 8 Car. & Pa. 454.

private stores they may put on board, by requiring the master to have on board, for each and every passenger, the same kind and quantity of provisions as are required for the seamen; and the penalty of three dollars for each and every day that a passenger may be put on short allowance by a master who has not furnished his vessel as the law requires, is made recoverable in the same manner as seamen's wages.[1]

[1] Act U. S. 2 March, 1819, ch. 170, sec. 3. "That every ship or vessel bound on a voyage from the United States to any port on the continent of Europe, at the time of leaving the last port whence such ship or vessel shall sail, shall have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted provisions, one gallon of vinegar, and one hundred pounds of wholesome ship bread, for each and every passenger on board such ship or vessel, over and above such other provisions, stores and live stock, as may be put on board by such master or passenger for their use, or that of the crew of such ship or vessel; and in like proportion for a shorter or longer voyage; and if the passengers on board of such ship or vessel in which the proportion of provisions herein directed shall not have been provided, shall at any time be put on short allowance, in water, flesh, vinegar, or bread, during any voyage aforesaid, the master and owner of such ship or vessel shall severally pay, to each and every passenger who shall have been put on short allowance as aforesaid, the sum of three dollars for each and every day they may have been on such short allowance; to be recovered in the same manner as seaman's wages are or may be recovered." For the construction of the analogous statute in reference to seaman, see post, Part 2, ch 3.

The other provisions of this Act, containing directions to masters of vessels respecting the numbers of passengers, the list or manifest to be delivered to the collector, &c. &c. will be found in the Appendix.

CHAPTER II.

OF THE AUTHORITY AND OFFICE OF THE MATE.

The mate[1] is an officer participating for some purposes in the functions of the master, while the latter is in the exercise of his office, and succeeding fully to those functions, when the master dies, or is absent. As long, however, as the master is on board, the mate's is essentially a subordinate station;[2] and its general scope consists in carrying into execution the actual or implied commands of the master. His general authority extends to the issuing of lawful commands, of himself—which must be promptly obeyed by the crew, as if emanating from the master, without waiting to question or ascertain the fact—subject to his responsibility to the superior authority of the master for the propriety or reasonableness of the order. His duties are to exercise a general superintendance over every thing that concerns the ship's service, and to advise the master of whatever requires his attention.[3] By the usage generally prevailing, it is also

[1] In Latin, *proreta*, in French, *contremaitre;* the former term being given to him because anciently he commanded from the prow to the mizzen mast.

[2] For the reason assigned with sententious *naivetè* by Valin—"*car deux maitres, independans l'un de l'autre, seroient de trop sur un navire.*" Com. tome i, p. 494.

[3] *Consolato del Mare*, ch. 17, [62,] Pardessus, tome ii, p. 70. *L'Ord. de la Marine*, liv. 2, tit. 5. Valin, Com. tome i, p. 494, *et seq.*

his duty to superintend the receiving and stowing and delivery of the cargo.[1]

His general function, while at sea, is to superintend the sailing of the vessel, in which he is the representative and aid of the master. By the general maritime usage it is also his duty to keep the log-book,[2] in which he should make a faithful and minute journal of the voyage.[3] He should be a person of activity, fidelity, vigilance, prudence and good seamanship. He should have that dignity of character that will keep him from too great familiarity with the crew, and he should especially avoid making them the confidants of any discontents he may entertain towards the master.[4] In fine, it may not be unsuitable to add, in the impressive injunction of the Consulate of the Sea, that "he ought to conduct himself with fidelity towards the merchants, the master, the mariners, the passengers, and generally towards all the world."[5]

Like that of every other seaman, the contract of the mate implies competency for the station which he assumes. By the *Consolato*, the mate who was incompe-

[1] In stating the duties of the mate, it is not my purpose to assign more than the general outline of his office, his particular duties being rather matter of *fact*, than of *law*, depending on the usage.

[2] Jacobsen's Sea Laws, book 2, ch. 2.

[3] The importance of this journal cannot be too highly estimated by a faithful seaman. It is made by the law of some countries of equal authenticity with notarial instruments; and by our law, it is recorded evidence for some important purposes. It is at all times of great consequence upon questions of general average, insurance, salvage, and other controversies, in which the ship or owners may be involved in time of peace, and the predicaments in which the vessel may be found in time of war.

[4] *Thompson* v. *Busch*, 4 Washington's R. 338.

[5] *Consolato*, ut supra.

tent to his duties could be displaced by the master; and he might be compelled to pay any damage that had resulted from his want of skill;[1] and the Danish code inflicts capital punishment, if he is unable to make good such damage.[2] It has been held in some of our own courts, that the mate may forfeit his right to command and wages, by fraudulent, unfaithful and illegal practices, by gross and repeated negligence, or flagrant, wilful and unjustifiable disobedience, by incapacity brought upon him by his own fault, or palpable want of skill in his profession; but the causes of removal should be evident, strong, and legally important.[3] It has also been considered that the ground upon which the contract may thus be rescinded by the master, for incompetency, is an actual or constructive fraud of the seaman in representing himself competent; but if the master took him with a previous personal knowledge of his capabilities, he cannot afterwards displace him for want of professional skill alone.[4] This must be restricted, however, to the case of a party originally shipping in the character of mate, or other particular capacity, and making his contract for the office; for it seems that temporary appointments made by the master during the voyage are held more at his pleasure.[5]

[1] *Consolato del Mare*, ut supra.

[2] Jacobsen's Sea Laws, book 2, ch. 2.

[3] *Thompson* v. *Busch*, 4 Washington's R. 338. *Atkyns* v. *Burrows*, 1 Peters's Adm. R. 244. *Mitchell* v. *The Orozimbo*, 1 Peters's Adm. R. 250. See also *Robinett* v. *The Exeter*, 2 Robinson's Adm. R. 261.

[4] *Mitchell* v. *The Orozimbo*, ut supra.

[5] *Wood et al.* v. *The Nimrod*, Gilpin's R. 83.—There is no positive rule of law, applicable to all cases, so far as I am informed, which requires that the mate should be possessed of the nautical skill and science of a navi-

The general standing of officers, when they are sought to be affected with charges of negligence, disobedience, or other offences, or incapacity, does not differ materially from that of the other seamen, except so far as the greater responsibility of their official stations requires of them

gator. Much must depend upon the nature, objects and extent of the voyage, as to whether the contract of the mate can be considered to imply that he is any thing more than a good seaman. In matters of insurance, it has been considered that the question whether, in order to the seaworthiness of a vessel, the mate ought to be a navigator, capable in that particular, as in all others, of taking the command, on the death or other removal of the master, is a question of *fact* for the jury. Lord Tenterden once instructed a jury, (*Clifford* v. *Hunter*, 3 Carr. and Pa. 16,) that a ship is not seaworthy for a voyage from India to England, with no other person on board capable of commanding but the captain; and the jury so found, under his Lordship's directions. But this doctrine has been strongly questioned by some eminent jurists in this country. A case lately arose in Canada, upon policies of insurance on a voyage from Quebec to Jamaica and back, the vessel being a schooner of one hundred and fifty-six tons. At Jamaica, the master was removed, the mate promoted to his place, and one of the seamen, who could not write and was not what is called a navigator, was promoted to the station of the mate, and acted as such on the return voyage. The vessel was wholly lost on her return voyage in a violent storm, but not from any fault or insufficiency of the person acting as mate, or any want of skill or knowledge in the person acting as master. The payment of the policies was resisted, on the ground that the vessel could not be deemed seaworthy, she not having on board a mate or any other person capable of taking the command in the event of an accident happening to disqualify the master. Before the cause came on for trial in the Queen's Bench at Quebec, the plaintiffs took the opinions of Chancellor Kent, and Professor Greenleaf, of the United States, and the Attorney General of England, Sir J. Campbell. The last two of these eminent persons were of opinion that there is not any fixed rule of law which makes it necessary that the mate should be a navigator capable of keeping the ship's reckoning, in all cases, be the voyage what it may; but that it was a question of fact for the jury upon the circumstances and nature of the particular voyage. Chancellor Kent's opinion was given somewhat more explicitly against the position of Lord Tenterden, and he also denies the existence of any such rule as that referred to. See *Law Reporter*, vol. ii, p. 257, Boston, January, 1840.

a proportionate degree of vigilance. Thus the offence of sleeping upon his watch, in the case of a common seaman, is very serious; in the case of a mate it would be far more serious.[1] It seems, however, that the Courts of Admiralty will require a degree of evidence to inculpate an officer somewhat proportionate to his responsibilities. Lord Stowell has laid it down, that officers come before the court with as strong a title to indulgence and favorable attention as common mariners, inasmuch as an injury done to their characters is of wider extent, and is attended with consequences of a more serious nature. "These considerations," he observes, "are sufficient to place officers also under the particular protection of the Court; at the same time, this must not be so understood in either case, as if the Court would show such a blind indulgence, as should overrule the real justice of the case; it is only such an indulgence as the equitable considerations of public utility require, which can seldom in such cases, any more than in others, be separated from particular justice."[2]

The mate, as the next highest officer on board, succeeds to the rights and authority of the master, in all cases where the latter is dead or absent.[3] The govern-

[1] By the *Consolato*, the mate was forbidden to undress himself, while sleeping, when in health; a provision which, though it cannot now be considered to form a rule in maritime service, marks the high degree of vigilance that has been exacted of these officers. Ch. 17, [62]. See also *L'Ord. de la Marine*, liv. 2, tit. 7, art. 8.

[2] *Robinett* v. *The Exeter*, 2 Robinson's Adm. R. 261.

[3] *Orne* v. *Townsend*, 4 Mason's R. 541. *The George*, 1 Sumner's R. 151. *United States* v. *Taylor*, 2 Sumner's R. 584. The proposition stated in the text is true not only in respect to the government of the crew, &c., but also in respect to the master's duties as agent of the owners. In *Parmeter* v. *Todhunter*, 1 Camp. N. P. R. 541, Lord Ellenborough held that,

ment and management of the crew are devolved upon him, with the same rights and responsibilities as belonged to the master: and if a seaman be wrongfully dismissed by him, on a temporary absence of the master, the owners are liable therefor, as the act of their agent.[1] But while the master is on board, neither the mate, nor any other subordinate officer has authority to inflict punishment on a seaman, for any cause, or at any time, except when it is at the moment absolutely required by the necessities of the ship's service to compel the performance of duty.[2] It has already been seen, that the presumption that all punishment, as such, proceeds from the authority of the master, is carried so far, that he is, when present, presumed to adopt the conduct of his officer, and is held liable as a joint trespasser, if the punishment is excessive, unless he interferes to prevent or restrain it.[3]

in case of capture and recapture, in the absence of the master, the mate had a right to hypothecate the ship for the purpose of paying the salvage to the recaptors. When the mate succeeds to the master, by the death or other removal of the latter, he sues in the Admiralty for his wages, as a mate acting as master. *The George*, 1 Sumner's R. 151. *The Favorite*, 2 Robinson's Adm. R. 232.

[1] *Orne* v. *Townsend*, 4 Mason's R. 541.

[2] *Thomas* v. *Lane*, 2 Sumner's R. 1. *United States* v. *Taylor*, Ibid. 584. *Elwell* v. *Martin*, Ware's R. 53. *Ward* v. *Ames*, 9 Johns. R. 138. *Butler* v. *M'Lellan*, Ware's R. 219. *Rice* v. *The Polly and Kitty*, 2 Peters's Adm. R. 420.

[3] *Ante*, p. 26. The authorities are the same as last cited. In *Butler* v. *M'Lellan*, where the master and mate were jointly sued in the Admiralty by a seaman for an assault and battery, and it appeared that the mate, by order of the master, assisted in some of the acts complained of, it was held that the mate might be justified for assisting in obedience to the master's orders, though the conduct of the master might have been, on the whole, illegal and unjustifiable; and that the libel, in such case, might be dismissed in respect to the mate, and he made a witness for the master. But

In respect to the responsibility of the mate for losses of the cargo, it may be said, that if he is guilty of gross negligence in any point which upon evidence is shewn to be peculiarly his duty, he alone is responsible. But otherwise, it seems that the responsibility is to be borne equally by all the crew, in proportion to their wages.[1] So too, it has been held in England, that if the mate interfere with the responsibility resting upon another person — as a wharfinger who is by the usage responsible for the safe delivery of goods on board the vessel, and the mate, in his absence, undertakes to remove any merchandise, and it is lost, though by accident — the owners will have a right to deduct its value from his wages.[2]

in *Elwell* v. *Martin*, it was held that if there be any evidence to inculpate the mate in the illegal severity of the punishment, or in the unjustifiable assault, the dismissal of the libel as to him cannot be demanded as a matter of right.

[1] *Wilson* v. *The Belvidere*, 1 Peter's Adm. R. 258.

[2] *The New Phœnix*, H. Court of Admiralty, February, 1833, cited from Steele's Ship Master's Assistant, p. 16. (Lond. 1837.)

CHAPTER III.

OF THE SUBSISTENCE AND SICKNESS OF THE MARINERS.

It has already been stated that subsistence, unless the contrary is expressed in the contract, or implied in the usages of a particular trade — as it is in some of the fishing voyages of New England — is to be taken as part of the contract, and as wages paid in another form.[1] From the earliest times, it has been a maritime usage for the owners and master to furnish the subsistence of the mariners, as a part of the compensation for their services, and this usage seems to be universal, with a few local exceptions. The ancient marine ordinances recognised this obligation of the master and owners, and, like the statutory law of modern states, entered into particular regulations of this general duty.[2] The ordinance of Louis XIV. does not contain such regulations, but it enacts severe

[1] Ante p. 27.

[2] *Lois D'Oleron*, art. 17. *Pardessus*, tome i, p. 335. *Lois de Westcapelle*, Jugement 17. Ibid. p. 381. *Droit Mar. de Wisbuy*, art. 32. Ibid. p. 483. *Droit Mar. de la Ligue Anseatique*, ch. 9, *Recès. de* 1591, *Pardessus*, tome ii, p. 510. The Consulate of the Sea has a chapter entitled, "of the subsistence which the master is to give the seamen," which enters into minute regulations respecting the food to be furnished on lay-days, and the changes to be observed on the solemn festivals of the church. *Consolato del Mare*, ch. 100, [145] *Pardessus*, tome ii, p. 136.

penalties, designed to protect the provisions of the ship against waste or loss, and an authority to the master to make use of the private stores of any persons on board when the ship's provisions fail.[1]

The Legislature of this country has so far regulated this general duty of the owners and master, as to provide that every ship or vessel of one hundred and fifty tons burthen, or more, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores and live stock, as shall, by the master or passengers, be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance in water, flesh, or bread, during the voyage, the master or owner of such ship or vessel shall pay, to each of the crew, one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages.[2]

[1] *L'Ord de la Marine*, liv. 2, tit. 1, art. 31, 32, 33, 34; tit. 7, art. 6, 7.

[2] That every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores and live stock, as shall, by the master or passengers, be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel,

The parties within the protection of this law are as well the seamen shipped in a foreign port, as those shipped at the port of departure.[1] The voyages within the operation of the law are all voyages across the Atlantic Ocean; and I understand the words "and in like proportion for shorter or longer voyages," to extend the provisions of the law to all other voyages, in proportion to their duration.[2] The only ground for establishing a claim for extra wages, under the law, is a negligence in the master or owner in not furnishing the ship, before her departure from the last port whence she sails, with the quantity and species of provisions and water required.[3] If the provisions fail during the voyage, from inevitable accident, the master is not responsible. If he is called upon by the laws of humanity to dispose of part of them to a ship in distress at sea, and is thereby compelled to put his own crew on short allowance, there can be no claim for extra wages under the law, unless he receives a compensation for the provisions, in which event, it

which shall not have been so provided, shall be put upon short allowance in water, flesh, or bread, during the voyage, the master or owner of such ship or vessel shall pay, to each of the crew, one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages. Act U. S. 20 July, 1790, ch. 56, sec. 9.

[1] *Gardner* v. *Ship New Jersey*, 1 Peters's Adm. R. 223. See also Story's Notes to Abbot on Shipping, p. 135.

[2] This construction of the law I am led to adopt, partly from the words themselves, and partly upon the use of similar words in the *Act regulating passenger ships and vessels*, (Act U. S. 2d March, 1819, sec. 3,) where a slight variation of phraseology clearly shows the intention of the Legislature to include all voyages, both across the Atlantic and elsewhere.

[3] *Mariners* v. *The Washington*, 1 Peters's Adm. R. 219.

would seem reasonable that it should be shared by those at whose sacrifice it is obtained.[1]

Where the particular species of provisions specified in the statute can be procured at the port of departure, no equivalents can be admitted as substitutes. But it has been considered, in the District Court of the United States for Pennsylvania District, that in ports, where the specific articles cannot be obtained, other good and wholesome esculents may be substituted within the policy of the Act.[2] The contrary opinion, however, seems to have been acted upon in the District Court of the United States for South Carolina District, where it was held that a deficiency of bread was not compensated by a great

[1] "In like manner," say the Laws of the Hanse Towns, "it is forbidden to every master to sell the provisions of the ship, whether at sea or in a foreign country, save when it happens at sea that persons have need of them, to whom he ought to part with them *for the Christian charity of preserving their lives.*" (*Droit Mar. de la Ligue Anseatique*, ch. 9, Recès de 1591, Pardessus, tome ii, p. 510.) The Marine Ordinance of Louis XIV. contained similar prohibitions against a sale of the provisions, with the same exception, which, however, was restricted to allowing a sale only when there should be a sufficiency left for the wants of the ship's company. (*L'Ord. de la Marine*, liv. 2, tit. 1, art. 33. "The charity," says Valin, "which obliges one to assist a neighbor in distress, does not go the length of requiring that one should put oneself in the same predicament." (Valin, Com. tome i, p. 457, 458.) This is merely a paraphrase of the old maxim, "charity begins at home," which has as little appropriate application to the duty of rendering assistance to persons in distress at sea, as it has to all other moral duties of benevolence; if possible, even less. The true question, under which a master would justify his conduct towards his own crew, would be, whether the actual distress of others required him to part with a portion of his stores: and if such were the fact, I have no doubt that he would have a right to put his own crew on short allowance until he should reach a port where the provisions could be replaced, without incurring the penalty of the statute.

[2] *Mariners* v. *The Washington*, 1 Peters's Adm. R. 219.

overplus of beef and water.[1] These two cases were for many years the only decisions in print upon this question arising under the statute;[2] but in a recent case in the District Court of the United States for Maine District, Judge Ware observes that the statute does not in terms admit of any substitutes for the kinds of provisions prescribed; but that courts have thought that when a vessel happens to be in a port where it is not in the power of the master to obtain provisions of the amount and description directed by the law, other articles may be substituted which are of equivalent value; and he refers to the case in Pennsylvania. "This temperament," he adds, "has been introduced in the construction of this statute, upon the reasonable presumption that the law does not intend to require of the master impossibilities. But when the courts by an equitable construction have introduced a qualification, and liberated the owners from the penal operation of the law against its letter, they are bound to see that the substitutes offered are a full equivalent both in quantity and quality for those required by the text of the law; the more so, as the policy of the law addresses itself to the interests of humanity."[3]

In a case of a vessel going to a port voluntarily, where bread, it is known, cannot ordinarily be obtained, would it not be *gross negligence* in the master not

[1] *Coleman* v. *Brig Harriot*, Bee's Adm. R. 80.

[2] The former was decided in 1806, and the latter in 1796. In the last edition of Abbot on Shipping, Mr. Justice Story observes that this question has never been a subject of discussion in the higher appellate courts of the United States, within his knowledge. Edit. 1829, p. 135, note.

[3] *The Mary*, Ware's R. 459.

to take a full supply of bread at the port of departure? Impossibility, in such cases, cannot apply as an excuse, where it ought to have been foreseen and guarded against.

It has been considered that whether the required quantity of provisions is on board or not, it is the duty of the master to oversee and regulate their expenditure. It does not follow that because they are dealt out in fixed and limited quantities, that the men are put on short allowance. It must be shown that the allowance is not in a resonable amount; not enough for the ordinary consumption of a man. What that reasonable quantity is, has not been determined by the statute. But in fixing the rations of the navy, the Legislature have shown what they consider a proper allowance, and the courts have assumed it as the standard by which the allowance in the merchant service ought to be regulated.[1]

As the right to receive subsistence, so also the right of the seaman to be cured at the expense of the ship of sickness and injury occurring to him while in the ship's service, constitutes in the general maritime law a part of the contract for wages, and is a material ingredient in the compensation for his labor and services. This principle may be traced with remarkable uniformity through the marine laws and ordinances of all maritime states;[2] it has

[1] *The Mary*, Ware's R. 460. *Mariners* v. *The Washington*, 1 Peters's Adm. R. 219. *Gardner* v. *Ship New Jersey*, 1 Peters's Adm. R. 233.

[2] *Jugemens D'Oleron*, art. 6, 7, Pardessus, tome i, p. 327. *Lois de Westcapelle*, Jugement 6, 7, Pardessus, tome i, p. 374. *Droit Mar. de Wisbuy*, art. 20, 21, Pardessus, tome i, p. 473, 474. *Droit Mar. de la Ligue*, Anseatique, art. 46, (Recès de, 1591,) Pardessus, tome ii, p. 521. *Droit Mar. de la Suede*, ch. 12, Pardessus, tome iii, p. 141. *Droit Mar. de Hambourg*, art. 30, Pardessus, tome iii, p. 374. *Droit Mar. de la Russie*, tit. 2, art. 510, Pardessus, tome iii, p. 518. *L'Ord. de la Marine*, liv. 3, tit. 4, art. 11.

been recognised as a universal rule by the text writers of France and England,[1] and fully carried into effect by the courts in this country.[2]

The subject is of so much practical importance, that it is material to state the principles of the general maritime law, which define the duties of the owner and master, and the rights of the seamen. In the first place, the sickness or injury, of which the mariner may claim to be cured at the expense of the ship, must occur to him in the service of the ship, and must not be occasioned by his own faults or vices, or while absent upon his own business or pleasure, or without permission. Thus the Laws of Oleron, of Wisbuy and of Westcapelle, provide in terms that the illness must occur in the ship's service.[3] The same limitation is to be inferred from the Laws of the Hanse Towns and the maritime law of Russia;[4] it is also contained in the French Ordinance, and Pothier and Valin, in commenting upon the provision, expressly define it as limiting the right of cure to diseases occurring naturally, while in the service of the ship,

Code de Commerce, art. 262, 263, (liv. 2, tit. 5.) Jacobsen's Sea Laws, book 2, ch. 2. Act 5 and 6 Wm. 4, ch. 19, sec. 18.

[1] Valin, Com. tome i, p. 721, *et seq.* Sautayra, *Sur Code de Com.* p. 171, (Paris, 1836.) Pothier, *Louages Mar.* n. 188, 189, 190, 191. Molloy, book 2, ch. 3, sec. 5. Abbot on Shipping, part 2, ch. 4, sec. 14. 2 Brown Civ. and Adm. Law, 182, 183, 184.

[2] *Harden* v. *Gordon*, 2 Mason's R. 541. *Reed* v. *Canfield*, 1 Sumner's R. 195. *Pierce* v. *The Enterprise*, Gilpin's R. 435. *Walton* v. *The Neptune*, Peters's Adm. R. 142, 152. *The Nimrod*, Ware's R. 9. *The Forest*, Ibid. 420.

[3] *Jugemens D'Oleron*, art. 7. *Droit Mar. de Wisbuy*, art. 21. *Lois de Westcapelle*, Jugement 7, *ut supra*.

[4] *Droit Mar. de la Ligue*, Ans. art. 46, *ut supra*. *Droit Mar. de la Russie*, *ut supra*.

and not by debauchery or crime.[1] In fact, several of the elder ordinances give instances in which the cure is excluded from being a charge on the ship; as where the seamen go on shore without permission, and get intoxicated and thereby injured:[2] and the same exclusion of the case of absence without leave is made in the French law.[3]

[1] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 11. Valin, Com. tome i, p. 721, *et seq.* Pothier, *Louages Mar.* n. 190.

[2] *Jugemens D'Oleron*, art. 6. *Lois de Westcapelle*, art. 6. *Droit Mar. de Wisbuy*, art. 20, *ut supra.*

[3] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 12. *Code de Commerce*, art. 264. The principle by which the cure of injuries, occurring in the service of the ship, is made a charge on the vessel, obviously includes wounds and injuries received in its defence against pirates or an enemy. These are in the first instance a charge upon the vessel; whether they ought not also to be considered as general average upon ship and cargo, does not seem to me to be entirely beyond doubt. Mr. Stevens enumerates these claims for general average among those which are "disputed or doubtful;" and in a note he cites the case of *Taylor et al.* v. *Curtis*, (4 Camp. N. P. R. 337,) in which, among other items claimed as general average — such as damage to the vessel, in an engagement, and expenditure of powder, &c., — one for the cure of seamen wounded in defence of the ship was also rejected; and the American Editor of Stevens and Benecke also states that these claims are not subjects of contribution in general average in Great Britain and the United States. (Stevens and Benecke on Average, by Phillips, p. 86, 87, n.) It may not be the practice, in either country, to treat these claims as general average; and if the learned Editor acquiesces in the principle on which they are rejected, I am not disposed to controvert so respectable authority. But I cannot forbear to call the reader's attention to the provisions of the French law, and the principles on which the French jurists vindicate those provisions. The cure of seamen thus wounded is declared positively to be a subject of general average, both in the Ordinance of Louis XIV. and the Code Napoleon. (*L'Ord. de la Marine*, liv. 3, tit. 4, art. 11. *Code de Commerce*, art. 263.) The commentators assign as the reason for this provision, that the injury is received in exertions for the common safety of both ship and cargo. This fact might not alone be decisive; because the ordinary ship's duty involves the safety of both ship and cargo, and Pothier admits that injuries

The extent of the right of cure is defined by the formulary in which the principle is stated, when it is said to apply to all sickness and injuries occurring while the party is in the ship's service. The rule does not embrace any distinction as to the place where the sickness or injury may occur — whether on the voyage, in a foreign or a home port. The voyage, so far as the seamen are concerned, is deemed to commence, when they are to perform service on board, and to terminate, when they are discharged from farther service. All that the rule requires is, that the sickness or injury should not be occasioned by their own fault.[1] What is comprehended

received in the ordinary service (*manœuvre*) of the ship are not a charge on any thing but the ship itself. The reason is, that all the ordinary service of the ship is due to the cargo, by the contract for the carriage. But that contract does not include an implied stipulation against a great and extraordinary peril, such as an attack by an enemy, any more than against extraordinary perils of the sea. These are both commonly excepted out of it. The services, therefore, are extraordinary, for the common preservation of vessel and cargo from a peril, against which the former does not expressly or by implication warrant the latter. Moreover, Pothier adds the limitation, that unless the injury is received in an actual combat, and of course unless the cargo is actually saved, *by that combat*, from falling into the hands of the assailant, there is no claim for general average. If these two requisites concur, he is of opinion that all injuries, whether received in arms, or in performing the general ship's duty, during an actual engagement, and whether received by the master, officers, crew, or passengers, ought to be general average. (Pothier, *Louages Mar.* n. 142, 191. See also Valin, Com. tome i, p. 721. Sautayra, *Sur le Code de Com.* p. 171, edit. Paris, 1836; and Story J., in *Reed* v. *Canfield*, 1 Sumner's R. p. 203, *arguendo.*) It may here be mentioned, that it was considered in the case just cited, that when the expenses of curing a seaman would be properly a charge on the ship alone, the principle is not altered by the fact that the seaman is interested in the cargo, or rather in the proceeds of the cargo, (as is the case in whaling voyages,) so as to make it a general average upon ship and cargo; for his interest is not that of a partner.

[1] *Reed et al.* v. *Canfield*, 1 Sumner's R. 195. In this case, a seaman's

in the rule, as that which the owners are bound to furnish, is not merely medicine and medical advice, but nursing, diet and lodging, if the seaman, with or without his own consent, be carried on shore.[1] On the other hand, the rule is limited to the cure of the sickness or injury, and does not include any compensation, or allowance for the effects of the injury. So far, and so far only, as expenses are incurred in the cure, whether they are of a medical or other nature, for diet, lodging, nursing or other assistance, they are a charge on the ship. When the cure is completed, so far as the ordinary medical means extend, the owners are free from all other liability.[2]

The right to be cured at the ship's expense extends to the mate,[3] and it has been thought that the master also is included. There is, at least, no authority to the contrary, so far as my researches have extended. "So far as the reason and policy of the law go," says Mr. Justice Story, "I can perceive no difference between the case of the master and the case of any of the other officers, or crew of the ship. The interest of the ship-owner is equally promoted in each case by a speedy recovery and return to duty; and the benefit is even of a higher

feet were frozen while in the ship's boat, under the following circumstances. The ship, on her return voyage, had arrived at the outer harbor of her home port, where she came to anchor. The libellant, who had not been discharged, went in the boat, with others of the crew, to put the mates on shore, and on the return to the ship, his feet were frozen. The court held, that the voyage was not completed, and that the injury occurred in the service of the ship.

[1] *Lois D'Oleron*, art. 7. *Harden* v. *Gordon*, 2 Mason's R. 541.

[2] *Reed* v. *Canfield*, ut supra.

[3] *The Brig George*, 1 Sumner's R. 151.

nature, both for the ship and the voyage. The superintending care and control of the master over all the ship's concerns is of the last importance to the interests of the owner. It must be a sad and narrow policy, utterly at variance with the liberal forecast of the maritime law, to make the master perpetually halt in his duty from the fear of incurring unreasonable personal expenses, and thus endanger the solid interests of the voyage."[1]

In recognition of the general principles of the maritime law, and as a regulation of the general duty of the master and owners, Congress have provided "That every ship or vessel, belonging to a citizen or citizens of the United States, of the burthen of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once, at least, in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner."[2]

[1] *The Brig George*, 1 Sumner's R. 151.

[2] Act U. S. 20 July, 1790, ch. 56, sec. 8. The burthen of proof of the

By a subsequent Act, the provisions of this statute are extended to vessels of seventy-five tons, or upwards, navigated with six persons, or more, in the whole, bound from the United States to any port or ports in the West Indies.[1]

How far this statute provision affects the general right of the mariner to be cured at the ship's expense, has been a question of some difficulty; but the result of the cases which have been litigated has been to give it a clear construction upon some of the points arising.

The Act applies only to advice, medicine and attendance of physicians. If the medicine chest and directions are regarded as a substitute for the regular administration of medical advice, then the Act manifestly contemplates that the sick seaman is on board, or in a situation to command the use of the medicine chest and directions. It cannot therefore be intended to apply to cases where the seaman is removed on shore, and is deprived of these benefits. If he is removed on shore, for the convenience of the ship, whether with his own consent, or without it, if he does not draw his medicines from the chest, or use the medical directions, his expenses for medicines and medical advice remain a charge upon the ship.[2] It has been further held, that, although the seaman may remain on board, yet if there be no person on board by whom the medicines can be administered, or,

sufficiency of the medicine chest is always upon the owner. *The Nimrod*, Ware's R. 9. *The Forest*, Ibid. 420.

[1] Act U. S. 2 March, 1805.

[2] *Harden* v. *Gordon*, 2 Mason's R. 541. *The Brig George*, 1 Sumner's R. 151. *Walton* v. *The Enterprise*, 1 Peters's Adm. R. 152. *Hastings* v. *The Happy Return*, Ibid. 256, note. *The Forest*, Ware's R. 420.

what amounts to the same thing, no person of such intelligence and discretion that it would be safe to intrust him with a duty of so much delicacy and responsibility, the sick seaman is entitled to the attendance of a physician on board, and to have the physician's charges paid by the owners.[1] But in the case of an ordinary sickness, not infectious or dangerous to the crew so as to render a removal from the ship prudent or necessary, and when no such removal is made, and the ship is provided with a proper medicine chest and directions, it has been held by another learned judge that physician's charges for attendance on board are to be paid by the seaman incurring them.[2]

Now the question recurs, whether the mariner is entitled to be put on shore, at his own request, from a vessel properly provided with a medicine chest and directions, and to have his physician's charges paid by the owners, in any and what, circumstances? He had the right, unquestionably, at the maritime law, to be put on shore, in cases of serious and dangerous disease, requiring the comforts and advantages of a lodging on shore and the attendance there to be procured. The ancient marine ordinances formerly cited upon this subject, which are evidence of the maritime law, with marked uniformity, direct the master to place the seaman on shore, in an inn,

[1] *The Forest*, Ware's R. 420. In this case, the master, mate, and four of the seamen were sick with the yellow fever at the same time. The Court considered, that in so malignant a disease, where there would be no safety in sending a common sailor to the medicine chest with the printed directions to serve out the medicines, the benefits of the medicine chest and the directions were really inaccessible to the mariner, and could not therefore be held to answer the purpose of a substitute for regular medical advice, if that is to be regarded as the purpose of the statute.

[2] *Holmes* v. *Hutchinson*, Gilpin's R. 447.

and procure for him a nurse, or give him an attendant from the ship, when he is so ill that he ought not to remain on board.[1] Does the act intend that the medicine chest and directions, under any and all circumstances, shall be acquiesced in by the seaman as a substitute for those benefits which he enjoyed by the maritime law? Does it give the master a right to put him on shore, for the convenience of the ship, and not leave the mariner any right to be put on shore for his own comfort and safety, in a disease that is simply dangerous to himself, without being infectious to the rest of the crew? The rational view of this act seems to be this; that it is a new provision, auxiliary to the maritime law, enlarging the means of recovery, by requiring the owners to provide a medicine chest and directions for the use of the ship during the voyage, so that the seamen taken sick at sea may not be without any means of obtaining suitable remedies. It will be generally conceded that the legislature intended a benefit to the seamen; and it is only in this view that any benefit can follow from the provision; for, in any other view, it narrows their former rights. The medicines and directions may be of great utility at sea: but in port, in serious and dangerous disorders, when brought into comparison with the advantages of regular medical advice, they are of no comparative benefit whatever.[2] So that, admitting the med-

[1] See the marine ordinances cited *ante*.

[2] This was the course of reasoning of the court in the case of *Harden* v. *Gordon*, 2 Mason's R. 541. In a more recent case in the same court, Mr. Justice Story, referring to his former opinion, observes: "I then had, and continue to have, great doubt, whether the act ought to have been allowed to have any operation as an exception out of the maritime law; and whether the provision for a proper medicine chest was not merely directory,

icine chest and directions to be intended by the act as a substitute for the attendance of a physician, they can only be so in cases and under circumstances where they are an equivalent, and can safely and properly be relied on alone. If learned judges have held that the medicines are of no avail, where there is no person on board by whom they can be safely administered;[1] or where, for the convenience of the ship, the mariner is removed beyond their reach;[2] there seems to be no good reason why they should not also fail to be a substitute for regular advice, where the master cannot, or ought not, from the nature and severity of the disease, to assume the responsibility of treating it himself under the directions. Cases requiring *surgical* aid, and many others, may be supposed, in which the directions are of no benefit whatever, and which no master should undertake to manage; at the same time, the health of the crew, or the convenience of the ship, may not require the sufferer to be removed; yet it would be little short of barbarity to retain him on board, or to compel him, where he before had the right of going on shore for cure at the ship's expense, to submit to the imperfect and inadequate remedies on board, or to bear the expenses of better remedies himself. Upon the whole, I concur in the opinion of a learned judge of great experience and learning, that "the regulation of the statute is limited to the ordinary cases of illness on board the ship, a sickness of such a character,

and the omission made penal upon the master personally, without the slightest intention on the part of Congress to interfere with the general duties and responsibilities of the owners, created by the maritime law." *The Brig George*, 1 Sumner's R. 151.

[1] *The Forest*, Ware's R. 420.

[2] *Harden* v. *Gordon*, 2 Mason's R. 541.

that the patient may be and is kept on board, and receives, or may receive, the benefit of the medicine chest and directions, and the advice and assistance of the master of the ship, or some other competent person attached to the ship, in the application of the medical directions accompanying the chest, and such nursing and attendance as the situation of the ship may admit." [1]

The legislature has also made provision for the relief of sick and disabled seamen in our own ports, by the erection and maintenance of temporary and permanent hospitals. The master or owner of every ship or vessel of the United States arriving from a foreign port into any port of the United States, is required, before such ship or vessel is admitted to an entry, to render to the collector a true account of the number of seamen that have been employed on board such vessel since she was last entered at any port in the United States, and to pay to the collector at the rate of twenty cents per month for every seaman so employed; which sum the master or owner is authorized to retain out of the wages of such seamen.[2] The same provision is made in the case of seamen employed in the coasting trade; the master is required to render to the collector, whenever the vessel's enrollment or license is renewed, a true account of the number of seamen, and the time they have severally been employed on board, since the former license was taken out, and to pay the same sum of twenty cents per month for each seaman; and if a false account is rendered, the master subjects himself to a penalty of one hundred dol-

[1] *Per* Davis J., District Court U. S. Mass. District, in *Lamson* v. *Westcott*, (same case as *The Brig George*.) Appendix to 1 Sumner's R. p. 591.

[2] Act U. S. 16 July, 1798, chap. 94, sec. 1.

lars.[1] The moneys thus collected constitute a fund, under the management of the President of the United States and directors appointed by him, for the support of marine hospitals in the several districts, to which all merchant seamen, becoming sick or disabled, have a right to resort for temporary relief and maintenance.[2] But these provisions do not supersede the right of the seamen under the general maritime law to be cured at the expense of the ship to which they belong of all sickness or injury occurring to them while in the service of that ship. They are intended as auxiliary to the maritime law, and to reach cases where that law gives no relief.[3]

[1] Act U. S. sec. 2. By a subsequent act, a similar provision is extended to the persons employed on boats, rafts, or flats, going down the Mississippi river to New Orleans. Act U. S. 3 May, 1802, ch. 51, sec. 3.

[2] The several acts on this subject will be found in the Appendix.

[3] *Reed et al.* v. *Canfield*, 1 Sumner's R. 200. It seems that these acts have been practically construed not to impose upon ships or vessels in the whale and other fisheries the payment of hospital money; and that, therefore, the seamen employed in those fisheries are presumed not to be entitled to the benefit of the hospitals. In the case just cited, Story J. intimated that all seamen, (and whalemen and fishermen are seamen in the sense of the maritime law,) might be within the scope of the acts; and if so no executive instructions could lawfully narrow them. But the point was not decided.

CHAPTER IV.

OF OFFENCES AGAINST THE DISCIPLINE AND ECONOMY OF THE SHIP AND THE PUBLIC LAW.

It has already been seen, in a former chapter, that the relation between the master and crew of a merchant vessel places in the hands of the former the reins of a strict discipline, required by the nature of the service;[1] and it is also to be observed, that the relation of both master and crew to the owners of the ship and of the cargo, being of a highly fiduciary nature, imposes upon them very important duties and responsibilities, peculiar to this relation, the breach of which is attended with peculiar and appropriate penalties, established partly by statutory provisions and partly by the general maritime law. Some of the acts which the master or mariners may commit, in violation of their duty to the owners of the ship or of the cargo, are included in the law of this country and of England under the generic term *barratry;* which signifies any *fraudulent* act of the master or mariners, committed to the prejudice of the owners of the ship or cargo.[2] The term barratry, however, belongs strictly to the law of marine insurance, and not strictly

[1] *Ante*, part 2, ch. 1.

[2] Abbott on Shipping, p. 138. *Earle* v. *Rowcroft*, 8 East's R. 126. See also the elaborate note to Abbot, by Story J. p. 138, note 3, edit. 1829, and the American authorities there cited.

to the relation of the master and mariners simply to the owners, when considered apart from the rights and interests of underwriters. But from the great importance of protecting these latter interests, as well as the general interest of owners, and to preserve, if I may so call it, the public peace of the ocean, many of the offences which fall under the head of barratry have been made punishable by special enactments. There are yet other offences, of serious prejudice to the interests of the voyage, which, as between the owner and the insurer, would not come under the head of barratry; but for which suitable penalties are found in the statutory or the general law, having in view the immediate interests of the owner and of the voyage. Dismissing, therefore, the consideration of barratry, as a subject belonging to the law of insurance, I now proceed to enumerate, with their proper definitions, those offences which violate the discipline and economy of the ship, and the penalties attached to each, by statute or by the general law.

But before proceeding to this enumeration, it is to be remarked, that penalties and punishments are applied to maritime offences, in three modes: *first*, by the public tribunals acting judicially upon the offender; *secondly*, by the general authority of the master to punish or dismiss the delinquent; and *thirdly*, by a principle, peculiar to the maritime law in respect to the range of its application, upon which a total or partial forfeiture of wages may be enforced by the master or owner, according to the nature of the misconduct.

1. The offence of wilfully and corruptly casting away, burning, or otherwise destroying the ship or vessel, to which the party belongs.

The act of Congress of the 26th of March, 1804, provides "that any person, not being an owner, who shall, on the high seas, wilfully and corruptly cast away, burn or otherwise destroy any ship or vessel, unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, shall suffer death."[1] To "destroy a vessel," within the meaning of this statute, has been construed to be to unfit her for service, beyond the hope of recovery by ordinary means. This, as to the extent of the injury, is synoymous with "cast away;" it is the general term. Casting away is, like burning, a species of destruction. Both of them mean such an act as causes the vessel to perish, to be lost, to be irrecoverable by ordinary means.[2]

2. The offences of piratically and feloniously running away with the ship, or vessel, or cargo; of voluntarily yielding up the ship or vessel to a pirate; of hindering and preventing the master from fighting in defence of the ship or cargo, and of making a revolt, upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular State of the United States. These are all capital offences, by the act of Congress 30th of April, 1790, ch. 36, which declares "that if any person shall commit upon the high seas, or any river, haven, basin, or bay, out of the jurisdiction of any particular State,[3] murder, or robbery, or any other offence, which, if committed within the body of a county, would,

[1] Act U. S. 26th March, 1804, sec. 1.

[2] *United States* v. *Johns*, 1 Washington's R. 363.

[3] These words have been construed to mean out of any particular State of the United States. *The United States* v. *Furlong*, 5 Wheaton's R. 184.

by the laws of the United States, be punishable with death; or if any captain, or mariner of any ship, or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship, or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be, a pirate and felon, and being thereof convicted, shall suffer death." [1]

The offences named in this section, which are applicable to the relation of the crew to their own vessel and owners, are those enumerated at the head of the foregoing paragraph. To constitute piracy within the statute, by running away with the vessel, or any goods or merchandise to the value of fifty dollars, personal force and violence are not necessary. It is sufficient if the running away be with an intent to convert the same to the taker's use against the will of the owner, or *animo furandi*. The statute has in view the prevention of atrocious violations of trust, by persons standing in particular relations to the ship.[2] The next offence, that of voluntarily yielding up the vessel to a pirate, has not received any judicial interpretation, so far as I am informed. No great doubts, however, of its meaning, can attach to the clause, which seems to intend cases where the party voluntarily yields to the attack or attempt of a piratical force, without the

[1] Act United States, 30th April, 1790, ch. 36, sec. 8. But the punishment for making a revolt is now changed. See *infra*, p. 128.

[2] *The United States* v. *Tully*, 1 Gallison's R. 247.

resistance which his relation to the ship imposes upon him the duty of making. The next offence, that of laying violent hands upon the master to hinder and prevent his fighting in defence of the ship, or cargo, contemplates the use of personal force and violence against the master, for the purpose described. Whether the offence would be equally committed, by a technical assault, by menacing to shoot with a gun, or wound with a cutlass, without an actual imposition of hands, might unfortunately be questionable, upon the words used in the statute. That such an assault ought to come within the same mischief of the act, as the *laying of violent hands*, and would equally well accomplish the same purpose, is most obvious;[1] and yet the unfortunate expression of the statute seems to be strictly descriptive and exclusive. The last offence, of making a revolt in the ship, has also not received any direct judicial construction, within my knowledge. In a case occurring in the Circuit Court of Pennsylvania, in 1815, Washington J. said that he had always considered that to make a revolt was to throw off all obedience to the master; to take possession by force, of the vessel, by the crew; to navigate her themselves, or to transfer the command to some other person on board; and that a revolution, going to such an extreme, appeared to him to bear a strict analogy to treason against the State; amounting to a falling off from the allegiance due from an inferior to a superior. Still, he would not instruct a jury by a positive definition of a capital offence, not clearly defined in the statute, where the prisoner was indicted for a less offence, the definition of which was clear.[2] But

[1] Holding of fists to strike the captain is so near an act of mutiny, that it will justify the captain in striking the first blow. *The Lima*, 3 Hag. R. 253.

[2] *The United States* v. *Sharp*, 1 Peters's Circ. C. R. 118.

we may safely extract the definition of making a revolt from the cases where the courts have defined the *endeavor* to make a revolt, an offence created by a subsequent section, and presently to be considered. In the one case, the offence is committed by the actual doing and accomplishment, of that which, in the other, is attempted to be committed. It is then, to overthrow the legitimate authority of the master, to remove him from his command, or against his will to take possession of the vessel, by assuming the government and navigation of her, or by transferring obedience from the lawful commander to some other person. But this offence is now further defined by another statute.[1]

3. The offences of confederating, attempting, or endeavoring, to compel any officer or mariner to yield up, or run away with the vessel, or cargo, or to turn pirate, or to go over to, or confederate with a pirate, knowing him to be such; of furnishing such pirate with ammunition, stores or provisions; of consulting, combining, confederating, or corresponding with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; of confining the master, or endeavoring to make a revolt in the ship; — these are all punishable by imprisonment for a term not exceeding three years, and by a fine not exceeding one thousand dollars."[2]

[1] *The United States* v. *Kelly*, 11 Wheaton's R. 417. See also the cases cited *infra*, defining the *endeavor* to make a revolt, and the new act of 1838, *infra*, p. 128.

[2] Act U. S. 30th April 1790, ch. 36, sec. 12. "If any seaman or other person shall commit manslaughter upon the high seas; or confederate, or attempt, or endeavor, to compel any commander, master, officer, or mariner to yield up, or run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to, or confederate with pirates, or in any wise trade with any pirate, knowing him to be such, or shall furnish

The two last of these offences, are of the most frequent occurrence, and have received ample interpretation in the courts.

The offence of confining the master is not limited to mere personal restraint by seizing him and preventing the free movements of his body, nor to imprisonment in any specific place. It is equally a confinement within the Act, to prevent him from free movement about the ship, by force or intimidation, as by limiting him to walking on a particular part of the deck by terror of bodily injury, or by present force. If he is surrounded and prevented from moving where he pleases, according to his rights or duty as master, under threats of force, or if he is restrained from going to any part of the ship, by an avowed determination of the crew, or of any part of them, to resist him, and to employ adequate force to prevent it, these fall within the meaning of confinement.[1] So too, if the master is restrained from performing the duties of his station, by such mutinous conduct of his crew as would reasonably intimidate a firm man, it is a confinement, and if he is compelled to go armed about the ship, from reasonable

such pirate with any ammunition, stores, or provisions of any kind; .... or if any seamen shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship; such person or persons, &c. shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars." The term "seamen," in this act, is not confined merely to those who have signed the articles, but it comprehends also seamen of the United States, put on board a vessel of the United States, by a consul, to be returned to this country. *United States* v. *Sharp et al.* (1 Peters's Circ. C. R. 118.) The mate is a seaman within the Act, (*United States* v. *Hemmer*, 4 Mason's R. 105,) and the cooper, (*United States* v. *Thompson*, 1 Sumner's R. 168.) But the punishment for some offences is now extended to five years' imprisonment and the fine of $1000. See *infra*, p. 128.

[1] *United States* v. *Hemmer et al.*, 4 Mason's R. 105. *Same* v. *Smith et al.*, 3 Washington's R. 78. *Same* v. *Sharp et al.*, 1 Peters's Circ. C. R. 118.

fear for his own safety, although not actually molested, it is a confinement.[1] So too, seizing the person of the master, though but for a minute or two ;[2] and seizing him though only temporarily, and for the purpose of inflicting upon him personal chastisement,[3] are within the meaning of the Act. But the restraint, whether moral or physical, must be an illegal restraint. If the master is about to do an illegal act, and especially to do a felony, a seaman may lawfully confine or restrain him. So a seaman may confine the master in justifiable self defence. If the master assault him without cause, he may restrain the master with so much force, and so long, as is necessary for this purpose. And, if he is suddenly seized by the master, and without any intention of restraining him of his liberty, from the mere impulse of nature, he takes hold of the master, to prevent any injury, for an instant only, and as soon as he may, he withdraws the restraint, so that the act may be fairly deemed involuntary, it might not perhaps, be deemed an offence within the Act, even though the seizing by the master was strictly justifiable: for the will must coöperate with the deed. But if the seizing by the master be justifiable, and he does not exceed the chastisement which he is by law entitled to inflict, then the seaman cannot restrain him, but is bound to submit; and if he does hold the master in personal confinement or restraint, it is an offence within the statute.[4]

The offence of endeavoring to commit a revolt had not been defined in the Act, and a judicial construction alone

[1] *United States* v. *Bladen*, 1 Peters's Circ. C. R. 213.
[2] *United States* v. *Bladen*, ut supra.
[3] *United States* v. *Savage*, 5 Mason's R. 460.
[4] *United States* v. *Thompson*, 1 Sumner's R. 168.

could determine it. The Supreme Court of the United States, in 1826, held that it was competent to the Court to give a definition of it, and that it consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of the commander, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person.[1] It had been supposed that the terms of this definition did not include cases where the seamen merely conspired together not to do duty on board, until the master had complied with their wishes in respect to some particular object, without aiming at an actual removal of him by physical force, from the command of the ship. But in a subsequent case in the Circuit Court of the United States for Massachusetts District, Story J. explained that such was not the understanding of the Court when that definition was laid down. "The language," said he, "does not import that the removal from command must be by physical force. The Court look to the fact, whether there is an overthrow of the master's authority, or a removal of him from his command, intended; and not to the mode by which it is accomplished. The overthrow of authority may be just as complete, the removal from command may be just as effectual, by a universal disobedience to all orders, producing an actual suspension of the master's authority or command, as by actual force, or personal imprisonment, or driving the master on shore."[2]

[1] *United States* v. *Kelly*, 11 Wheaton's R. 417.

[2] *United States* v. *Haines et al.*, 5 Mason's R. 272, *et seq.* See *infra*, p. 128, note.

The same learned Judge has repeatedly defined this offence, to be in effect an endeavor to make a mutiny among the crew of the ship, or to stir up a general disobedience or resistance to the authority of the officers. A mere act of disobedience to a lawful command of the officers is not of itself an endeavor to make a revolt; but to amount to the offence, it must be combined with an attempt to excite others of the crew, either to a general resistance or disobedience of orders, or a general neglect and refusal of duty, or to resist a single lawful order of the master, or to compel him to yield up his authority in a single case.[1] Actual disobedience to some order given is not necessary to constitute the offence. If the crew have combined together to disobey orders and to do no duty, the offence is complete by such combination, although no orders have been subsequently given.[2] But it is not necessary that there should be any previous deliberate combination for mutual aid or encouragement, or any preconcerted plan of operations, to effect the illegal object. However sudden may be the occurrence, or unexpected the occasion, of such disobedience, or resistance, those who take a part in it, whether by words or by deeds, by direct acts of aid or assistance, or by encouragement, or incitement, are in contemplation of law guilty of the offence. Their conduct, under such circumstances, amounts to an endeavor to commit a revolt

[1] *United States* v. *Smith*, 1 Mason's R. 147. *Same* v. *Hemmer*, 4 Mason's R. 105. *Same* v. *Gardner*, 5 Mason's R. 402. *Same* v. *Savage*, Ibid. 460. *Same* v. *Thompson*, 1 Sumner's R. 168. *Same* v. *Cassedy*, 2 Sumner's R. 582.

[2] *United States* v. *Barker*, 5 Mason's R. 404.

by overthrowing, *pro hac vice*, the lawful authority of the commanding officer of the ship.[1]

The offences of mutiny and revolt, of an attempt at mutiny and revolt, and confining the master, have been further defined and punished by a subsequent statute.[2]

[1] *United States* v. *Morrison et al.*, 1 Sumner's R. 448.

[2] Act U. S. 3 March, 1835, ch. 313, sec. 1. That if any one or more of the crew of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall unlawfully, wilfully, and with force, or by fraud, threats or other intimidations, usurp the command of such ship or vessel from the master or other lawful commanding officer thereof, or deprive him of his authority and command on board thereof, or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any other person not lawfully entitled thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt or mutiny and felony; and shall on conviction thereof be punished by a fine not exceeding two thousand dollars; and by imprisonment and confinement to hard labor not exceeding ten years, according to the nature and aggravation of the offence. And the offence of making a revolt in the ship, which now is, under and in virtue of the eighth section of the Act of Congress, passed the thirtieth day of April, in the year of our Lord one thousand seven hundred and ninety, punishable as a capital offence, shall, from and after the passage of this Act, be no longer punishable as a capital offence, but shall be punished in the manner prescribed in the present Act, and not otherwise.

Sec. 2. That if any one or more of the crew of any American ship or vessel on the high seas, or any other waters, within the admiralty and maritime jurisdiction of the United States, shall endeavor to make a revolt or mutiny on board such ship or vessel, or shall combine, conspire or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite or stir up any other or others of the crew to disobey or resist the lawful orders of the master, or other officer of such ship or vessel, or to refuse or neglect their proper duty on board thereof, or shall unlawfully confine the master, or other commanding officer thereof, every such person so offending shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.

To sustain an indictment for an endeavor to commit a revolt under the second section of this new Act, a confederacy or combination must be shewn between two or more of the seamen, to refuse to do further duty on board the ship, or to resist the lawful commands of the officers.

4. DESERTION is an offence of the gravest character, and stands next in the scale to those before enumerated. When a mariner has hired his services to a vessel for a definite voyage, he cannot abandon the vessel until that voyage is finished. The rescission of his contract, at his own pleasure, has always been denied to him, in all countries, for obvious reasons of policy. It has been guarded against by various penalties, in the maritime law of different States, some of the elder of which were of great severity, and all of them concur in the principle that desertion incurs a forfeiture of the wages antecedently earned.[1]

Desertion, in the sense of the maritime law, is a quitting of the ship and her service, not only without leave, and against the duty of the party, but with an intent not again to return to the ship's duty. There is thus a distinction taken between a mere absence without leave, and a final quitting of the ship *animo derelinquendi*.

[1] *Droit Mar. de Wisbuy*, art. 62, Pardessus, tome i, p. 500. *Consolato del Mare*, ch. 112, [157], 113, [158], Pard. tome ii, pp. 141, 142. *L'Ordon. de Charles V.* (1551), art. 6, 7, 9, Pard. tome iv, pp. 46, 47. *Droit Mar. de la Ligue Anseatique*, (*Recès* de 1614), tit. 4, art. 25, Pard. tome ii, p. 542. *L'Ord. de la Marine*, liv. 2, tit. 7, art. 3. Valin, Comm. tome i, p. 534. By the Laws of Wisbuy, deserters were in some cases punished with death; by the Laws of the Hanse Towns, they were punished with branding on the cheek, and by other penalties. *Ut supra.*

The former absence is punishable with greater or less forfeiture of wages, or corporal chastisement; the latter is the offence which incurs the forfeiture of all wages.[1] But in order to have this effect, the desertion must be during the voyage; and although it is the duty of officers and crew to remain by the ship until the cargo is unlivered, yet upon this question of desertion the voyage is ended when the ship has arrived at her last port of destination, and is moored in good safety in the proper and accustomed place. Quitting the ship before such arrival and mooring constitutes a desertion; quitting her after such arrival and mooring, before the unlivery of the cargo, is a mere absence, punishable indeed with the loss of some portion of the wages, in the nature of damages to the owner, but not incurring a forfeiture of the whole, *in modum pœnæ*.[2] Such is the rule, in the absence of all contract upon the point in the articles. There have been cases where the entire wages have been held forfeited for refusing to stay and unlade the cargo; but they proceeded upon clauses in the articles making such refusal a desertion, by the contract, which would have been an absence by the general law.[3]

The nature of this offence is further illustrated by cases in which it has been decided what acts and doings

[1] *Cloutman* v. *Tunison*, 1 Sumner's R. 373. *The Rovena*, Ware's R. 309. *The Bulmer*, 1 Haggard's Adm. R. 163.

[2] *Cloutman* v. *Tunison*, 1 Sumner's R. 373. *The Pearl*, 5 Robinson's Adm. R. 224. *The Baltic Merchant*, Edwards's Adm. R. 86. *Knagg* v. *Goldsmith*, Gilpin's R. 207.

[3] *Webb* v. *Duckingfield*, 13 Johns. R. 390. *Dixon* v. *The Cyrus*, Peters's Adm. R. 407.

amount to a desertion, and what do not. It is desertion wantonly to neglect or refuse to rejoin the ship, after a temporary separation by capture, when the vessel is released ;[1] or after an absence with leave, when ordered to return.[2] So too, although by statute entering on board a king's ship is not to be deemed a forfeiture of wages earned in a merchant vessel, yet where a mariner quitted his vessel in defiance of the master, with opprobrious language, and within twenty-four hours entered on board a king's ship, without having made any declaration of his intention so to do, when he quitted the vessel, it was held to be a desertion.[3] But it is not desertion to leave the ship on account of cruel and oppressive treatment ;[4] or for want of sufficient provisions, in port, when they can be procured by the master ;[5] or when the voyage is altered in the articles without consent.[6]

There is a principle applicable to this, as to most other maritime offences, the punishment of which resides in the hands of the master or owner, by which the forfeiture is cured. When the mariner repents, returns to his duty and is received by the master to the performance of his duty, the forfeiture consequent upon the de-

[1] *Boardman* v. *The Elizabeth*, Peters's Adm. R. 128.

[2] *The Bulmer*, 1 Haggard's Adm. R. 163. *The Jupiter*, 2 Ibid. 221. But it is not desertion, when a mariner, through excess of indulgence, overstays his time of leave, and when he has not refused or neglected to comply with an order to return. *The Ealing Grove*, 2 Haggard's Adm. R. 15.

[3] *The Amphitrite*, 2 Haggard's Adm. R. 403.

[4] *Rice* v. *The Polly and Kitty*, Peters's Adm. R. 420. *Ward* v. *Ames*, 9 Johns. R. 138. *Sherwood* v. *M'Intosh*, Ware's R. 109. *Steele* v. *Thacher*, Ibid. 91.

[5] *The Castilia*, 1 Haggard's Adm. R. 59.

[6] *The Eliza*, 1 Haggard's Adm. R. 182.

sertion is waived.[1] Moreover, it appears that the mariner is entitled to be received on board again, if he tenders his amends at a proper time and manner, and before another person has been employed in his stead, unless his prior conduct has been so flagrantly wrong as to justify his discharge.[2]

In addition to these principles of the maritime law, there are some statute provisions respecting desertion, which are now to be noticed. Desertion is noticed in the Act for the government and regulation of seamen, occurring at two periods after the signing of the contract. The first is a desertion after having executed the contract, by a neglect of the mariner to render himself on board, according to his agreement, or by quitting the vessel, after having rendered himself on board, so that the ship or vessel proceeds to sea without him. This is punished by a forfeiture of a sum equal to what has been paid to the mariner by advance, over and besides the sum so advanced.[3] The mariner may also be apprehended on a

[1] *Whiton* v. *The Commerce*, Peters's Adm. R. 160. But all demands and contributions for losses, occasioned by the absence, are not extinguished. *Ibid.*

[2] *Whiton* v. *The Commerce*, Peters's Adm. R. 160. *Cloutman* v. *Tunison*, 1 Sumner's R. 373. 3 Kent's Comm. 198, ed. 1840. *Lois D'Oleron*, art. 14. Pardessus, tome i, p. 333. *Droit Mar. de Wisbuy*, art. 28. Ibid. p. 481.

[3] Act U. S. 20 July, 1790. "§ 2. That at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall, on the day on which such neglect happened, make an entry in the log-book of

justice's warrant, and constrained to perform his engagement; but in such case the penalty cannot be enforced against him.[1]

such ship or vessel, of the name of such seaman or mariner, and shall, in like manner, note the time that he so neglected to render himself, (after the time appointed), every such seaman or mariner shall forfeit, for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages. *And if any such seaman or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner, or consignee, of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced,* both which sums shall be recoverable in any court, or before any justice or justices of any state, city, town or county, within the United States, which, by the laws thereof, have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage."

For this construction of the statute, making the *second* section apply to absences before the voyage has commenced, and the *fifth* section to absences after the voyage has commenced, see *Cotel* v. *Hilliard*, 4 Mass. R. 664. Abbot on Shipping, Story's Notes, p. 468, edit. 1829.

[1] Act U. S. 20 July, 1790. "That if any seaman, or mariner, who shall have signed a contract to perform a voyage, shall, at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of the peace within the United States, (*upon the complaint of the master*) to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear, by due proof, that he has signed a contract within the intent and meaning of this act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction, or common gaol of the city, town, or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner."

As the statute founds the proceeding "upon the complaint of the master,"

The second period of desertion by the statute, is after the voyage has commenced, and after the vessel has left her home port; and this is provided against by the *fifth* section of the statute, which makes an absence of more than forty-eight hours, if properly entered in the log-book, *ipso facto* a desertion, working an entire forfeiture of wages, and all the mariner's goods and chattels, as well as a liability to pay all damages sustained by the owner in hiring another seaman.[1] Thus the act creates a statute desertion, and

query whether a warrant can be issued on the oath of the owner, accompanied merely by a letter from the master, requesting him to have the seamen apprehended as deserters. *Sims* v. *Sundry Mariners*, 2 Peters's Adm. R. 393.

[1] "§ 5. That if any seaman or mariner, who shall have subscribed such contract as is hereinbefore described, shall absent himself from on board the ship or vessel, in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages: *but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them, all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place;* and such damages shall be recovered with costs, in any court, or before any justice or justices, having jurisdiction of the recovery of debts, to the value of ten dollars or upwards."

Quere — what would be the effect if a seaman, absent without leave, should have intended to return within forty-eight hours, and be prevented by inevitable casualty? By the terms of the act, it would be a desertion, forfeiting the whole wages. Would the case be within the intention of the act? Pothier puts a similar case, in reference to the seaman's obligation to render himself on board, according to his contract, and the provisions of the French ordinance concerning absence, (liv. 2 tit. 7, art. 3,) and thus discusses it:

makes that conclusive evidence of the fact, which would, upon the common principles of the maritime law, be merely presumptive evidence of it. It does not supersede the general doctrine of the maritime law, or repeal it; but merely in a given case applies a particular rule, *in pœnam*, leaving the maritime law in all other cases in full efficiency.[1] If the master prefers, the deserting mariner may be apprehended on a justice's warrant, under the *seventh* section of the act; but then he does not also forfeit his wages under the *fifth* section;[2] and if the vessel becomes unfit to proceed to sea, or is abandoned to underwriters, while the mariner is thus imprisoned, the local authorities must discharge him.[3]

The statute requiring the entry in the log-book is

"It is evident that the seaman is not subject to any penalties, when by an accident of *vis major*, such as sickness, he is prevented from fulfilling his obligation, and from going in the ship for which he has been hired. The master can, in this case, claim nothing more than to be discharged from the hiring of services which the mariner has not been able to render, and the restitution of what has been advanced to him. What if the seaman has not been able to embark, because he has been arrested for a crime of which he is accused, or he has been arrested during the voyage? In this case, if in the result of the process, he is not convicted, the imprisonment would in like manner be deemed an accident of *vis major*, and there would be no room for damages. But if he had been convicted, he would not, in strictness, be liable to the penalties inflicted by the third article, his desertion not having been voluntary; but as it would have been by his act and by his fault, that he was made prisoner, and did not fulfil his obligation, he would be liable to damages — as, for example, if the master had given higher wages to one hired in his place." Pothier, *Louages Mar.* n. 174. Edit. Dupin, tome iv, p. 405. See also Pothier, *Traité de Contrat de Louage*, n. 172.

[1] *Cloutman* v. *Tunison*, 1 Sumner's R. 373.

[2] *Bray* v. *The Atalanta*, Bee's R. 48. *Sherwood* v. *M'Intosh*, Ware's R. 118.

[3] *Sims* v. *Sundry Mariners*, 2 Peters's Adm. R. 393. *Bray* v. *The Atalanta*, Bee's R. 48.

highly penal, and must be strictly construed. The entry must be made on the day when the mariner absents himself; it must state the name of the mariner, and it is not sufficient to state that the crew were absent; it must state that the absence was without leave; and there must be one continued absence of forty-eight hours.[1] The entry in this form, to produce the statute forfeiture, is indispensable, although the absence was permanent, and although it occurred after the vessel arrived at the last port of delivery.[2] But the entry in the log-book, although it complies with these requisitions, is not incontrovertible; and although parol evidence is inadmissible to prove a statute desertion, yet parol evidence is admissible to falsify the entry of desertion.[3]

The statute of 1840, chap. 23, makes it the duty of consuls and commercial agents of the United States "to reclaim deserters and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner."[4] "In all cases where deserters are apprehended, the consul or commercial agent shall inquire into the facts; and, if satisfied that the desertion

[1] *Cloutman* v. *Tunison*, 1 Sumner's R. 373. *The Phœbe* v. *Dignum*, 1 Washington's R. 48. *The Rovena*, Ware's R. 309. *Wood* v. *Nimrod*, Gilpin's R. 86. *Whiton* v. *The Commerce*, 1 Peters's Adm. R. 160. *Malone* v. *The Mary*, Ibid. 169. *Jones* v. *The Phœnix*, Ibid. 201. *Thompson* v. *The Philadelphia*, Ibid. 210. *Herron* v. *The Peggy*, Bee's R. 57.

[2] *Knagg* v. *Goldsmith*, Gilpin's R. 207.

[3] *Orne* v. *Townsend*, 4 Mason's R. 541. *Malone* v. *The Mary*, 1 Peters's Adm. R. 139. *Whiton* v. *The Commerce*, Ibid. 160. *Jones* v. *The Phœnix*, Ibid. 201.

[4] Act U. S. 20th July, 1840, chap. 23, sect. 11.

was caused by unusual or cruel treatment, the mariner shall be discharged, and receive, in addition to his wages to the time of the discharge, three months' pay; and the officer discharging him shall enter upon the crew-list and shipping articles the cause of discharge, and the particulars in which the cruelty or unusual treatment consisted, and subscribe his name thereto officially." [1]

5. ABSENCE. We have already seen, that the maritime law recognises as a substantive offence, the absence of a seaman, without leave, from his vessel; and it may be said to comprehend all absences which do not amount to desertion by the general or the statute law.[2] The penalties attached by the maritime law to such absences as do not amount to desertion are corporal chastisement; or damages by way of set-off against the claim for wages; [3] including the expenses of procuring other service, of demurrage, and other injuries and losses occasioned by the absence of the mariner.[4] These absences give rise to little difficulty in the application of the penalties, when occurring in a foreign port; but where a seaman leaves the vessel on her arrival at the home port, before the discharge of the cargo, a question that may be embarrassing is presented, whether the mariner is

[1] Act U. S. 20th July, 1840, chap. 23, sect. 17.

[2] Ante, p. 28 — 33.

[3] *L'Ord. de la Marine*, liv. 2, tit. 7, art. 3. Valin Comm. tome i, p. 534, *et seq.* *The Ship Mentor*, 4 Mason's R. 84. *The Baltic Merchant*, Edwards's Adm. R. 86.

[4] *Lois D'Oleron*, art. 5. Pardessus, tome i, p. 326. *Consolato del Mare*, ch. 124 [169]. Pard. tome ii, p. 147. *L'Ord. de la Marine*, liv. 2, tit. 7, art. 5. Valin, Comm. tome i, p. 549. *Snell* v. *The Independence*, Gilpin's R. 140. *Brown* v. *The Neptune*, Ibid. 89. *Herron* v. *The Peggy*, Bee's R. 57.

bound to wait the unlivery of the cargo? By the general principles of law he is so bound. In the case of *The Baltic Merchant*, Sir William Scott said, that "by interpretation of law, the voyage is not completed by the mere fact of arrival; the act of mooring is an act to be done by the crew, and their duty extends to the time of the unlivery of the cargo. There is no period at which the cargo is more exposed to hazard, than when it is in the act of being transferred from the ship to the shore, and therefore the law, not only the old law, but particularly the statute by which the West India trade has been in later times regulated, [the case before him being of a West India ship,] has enjoined in the strictest manner that the mariners shall stay by the vessel until the cargo be actually delivered. I take this to have been always a part of the duty of mariners, their contract is legally understood to go this length, and there never can have been a time when the owner was not entitled to some consideration against the mariners, on account of the non-completion of the contract. This is a consideration not *in modum pœnæ*, but it is a civil compensation for injury received existing in all reason and justice antecedently to any statute upon the subject."[1] In a subsequent case, many years afterwards, the same eminent person refers to his former annunciation of the doctrine, and reaffirms the principle that the law of England, in ordinary cases, requires the mariner to stay by the ship till the discharge of the cargo.[2] The same doctrine has been affirmed by Mr. Justice Story, in the case of *Cloutman* v. *Tunison*,

[1] *The Baltic Merchant*, Edwards's Adm. R. 91.

[2] *The Cambridge*, 2 Haggard's Adm. R. 246.

where he distinguished between the forfeiture of the entire wages, for an act of desertion, (before the vessel is moored,) and compensation due to the owner for damages occasioned by absence before or during the unlivery of the cargo.[1]

The general principle, however, may be somewhat controlled by the usage.[2] In most of the ports of this country, it is the custom to discharge the mariners after the vessel is moored, and to employ other persons to unlade the cargo.[3] Such a usage does not, however, take out of the hands of the owner the right to enforce the general principle. It merely amounts to this; that when the usage is pleaded, and established by evidence that shows it to be so uniform, general, and of so long standing, that it may fairly be considered as entering into and making part of the implied terms of the contract, then the assent of the owner or master to the departure of the seamen is to be presumed. But if, on the other hand, the will of the owner or master is signified to the mariner, that he shall await the delivery of the cargo, he is bound, by the general principles of law applicable to his contract, to do so; and is liable in damages if he do not. This I understand to be the result established by the case of *Cloutman* v. *Tunison*, (taken in connection with the other cases,) where damages were decreed in set-off against the wages of a second mate, who left the vessel before the discharge of the cargo, against the known

[1] *Cloutman* v. *Tunison*, 1 Sumner's R. 373.

[2] Pothier, *Louages Mar.* n. 171, 172. *The Mary*, Ware's R. 454.

[3] Dunlap's Adm. Practice, 98, 99. *The Mary*, Ware's R. 454. *Hastings et al.* v. *The Happy Return*, 1 Peters's Adm. R. 253.

will of both the master and owners.[1] The court, in this case, deemed the owner entitled not merely to a compensation for the loss of the service of the second mate during the period of his absence, but for something more, as a just admonition to officers having such high and responsible duties devolved upon them, and designedly departing from them.

In addition to the general law, the act for the regulation of seamen has likewise provided penalties against absence falling short of desertion. By the *second* section, which applies to absences before the vessel has left her home port and after the contract has been executed, an entry of the mariner's name, and of the time that he neglects to render himself on board after the time appointed in the contract, is to be made in the log-book, on the day when such neglect occurs; and if this requisition is complied with, the mariner forfeits one day's pay for every hour of such neglect.[2] Upon this section,

[1] *Cloutman* v. *Tunison*, 1 Sumner's R. 373. See also *The Mary*, Ware's R. 453. *Hastings* v. *The Happy Return*, 1 Peters's Adm. R. 253. *Webb* v. *Duckingfield*, 13 Johns. R. 390. *Brown* v. *Jones*, 2 Gallison's R. 477, 482.

[2] Act U. S, 20 July, 1790, sec. 2. "That at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. *And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall, on the day on which such neglect happened, make an entry in the log-book of such ship or vessel, of the name of such seaman or mariner, and shall, in like manner, note the time that he so neglected to render himself, (after the time appointed), every such seaman or mariner shall forfeit, for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages.* And if any such seaman or mariner shall

it has been held, that the mariner may prove a special indulgence granted by the master to be absent beyond the time specified in the articles, to rebut the proof made by the log-book.[1]

By the *fifth* section, which applies to absences after the voyage has commenced, and the vessel has left her home port, an entry is to be made in the log-book of the name of the mariner and of the day on which he absents himself; and if he returns to his duty within forty-eight hours, he forfeits three days' pay for every day of such absence; if he is absent more than forty-eight hours, it amounts, as we have already seen, to a desertion.[2] The

wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner, or consignee, of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any court, or before any justice or justices of any state, city, town, or county, within the United States, which, by the laws thereof, have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage."

[1] *Thompson* v. *The Philadelphia*, 1 Peters's Adm. R. 210.

[2] Sec. 5. "*That if any seaman or mariner who shall have subscribed such contract as is herein before described, shall absent himself from on board the ship or vessel, in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages:* but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and

same requisitions, as to the entry in the log-book, must be complied with in all these cases of absence.[1]

The *fourth* section enacts a penalty against harboring or secreting any seaman or mariner, belonging to any ship or vessel, knowing them to belong thereto.[2]

6. EMBEZZLEMENT is the unlawful abstraction by a mariner of any portion of the cargo, or of the ship's stores, tackle, apparel or furniture. As the master and owner are responsible to the shipper for the cargo, and as the owner is to be protected from the plundering of his own property by those to whom he entrusts it, where the embezzlement is traced home to a particular mariner, he is responsible for the full value; and in a suit for his wages the Admiralty will make the proper deduction, or even under some circumstances sustain a direct suit for recompense in damages.[3] But where the embezzlement is not fixed upon any individual, though shown to have

moreover shall be liable to pay to him or them, all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place; and such damages shall be recovered with costs, in any court, or before any justice or justices, having jurisdiction of the recovery of debts, to the value of ten dollars, or upwards."

[1] See *ante*, p. 135 — 136.

[2] Sec. 4. "That if any person shall harbor, or secrete, any seaman or mariner, belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof, before any court in the city, town or county, where he, she, or they may reside, shall forfeit and pay ten dollars for every day, which he, she, or they, shall continue so to harbor or secrete such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and no sum exceeding one dollar, shall be recoverable from any seaman or mariner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage, for which such seaman or mariner engaged, shall be ended."

[3] *Sparr* v. *Pearson*, 1 Mason's R. 104.

been committed by the crew, and not by other persons; or where it is shown not to have been in all probability committed by the crew, but by persons not of the crew; there has been some conflict in the authorities as to when and to what extent the seamen are liable. In 1801, it was held in the District Court of Pennsylvania that the seamen are *prima facie* responsible for such losses; that the burthen of proof is upon them to show that the fact was committed by others; and that unless this is shown, they are answerable in a general contribution;[1] and also that where the guilt is only fixed upon some of the crew, that the policy of the law obliges the mariners, (the master and officers as well as the seamen,) engaged for the voyage, to be responsible for each other, so as to sustain the claim for a general contribution by the whole crew.[2] In the District Court of South Carolina District it has also been held that all are chargeable, where none in particular can be criminated;[3] but that the innocence of any one of the crew, if established, exempted him from contribution.[4]

This doctrine of a general contribution was subsequently questioned and denied, in the Court of Common Pleas in England and in the Supreme Court of the State of New York. The case in England proceeded upon the terms of the contract: "that each seaman and mariner, who shall well and truly perform the above mentioned voyage, (provided always that there be no plunderage, embezzlement, or other unlawful acts committed

[1] *Mariners* v. *The Kensington*, 1 Peters's Adm. R. 239.
[2] *Cranmer* v. *The Fair American*, 1 Peters's Adm. R. 243.
[3] *Frederick* v. *The Brig Fanny*, Bee's R. 262.
[4] *Sullivan* v. *Ingraham*, Bee's R. 182.

on the said vessel's cargo or stores,) shall be entitled to their wages or hire that may become due to him pursuant to this agreement." The court held that these words were to be construed respectively to every seaman who should plunder, embezzle, or commit an unlawful act.[1] The case in New York proceeded upon the general doctrine of the maritime law, and it was held that if the circumstances of the case do not fix the presumption of embezzlement upon any of the crew, they ought not to contribute.[2] More recently, the whole subject received the most thorough revision in the Circuit Court of the United States for the First Circuit, which leaves nothing to be done in the way of research into the maritime law, upon this question. The learned judge concludes, "Upon the whole my opinion is, that the rule of contribution contended for, cannot be sustained as a general rule of the maritime law; that it has not that general sanction, or universal use, which entitles it to such a consideration; and that it has not such intrinsic equity, or justice, as that in the absence of direct authority, it ought to be adopted as a limit upon judicial discretion. On the contrary, it seems to me, that the true principles, which are to govern in these cases, are those of the general contract of hire; and that the most that the maritime law has done, is to enforce these principles, by allowing the owner and master to make an immediate deduction from the wages of the offending parties, instead of driving them to the circuity of an action for damages. The result of this opinion is, that where the embezzlement

[1] *Thompson* v. *Collins*, 4 Bos. and Pull. 347.
[2] *Lewis* v. *Davis*, 3 Johns. R. 17.

has arisen from the fault, fraud, connivance or negligence of any of the crew, they are bound to contribute to it in proportion to their wages; that where the embezzlement is fixed on an individual, he is *solely* responsible; that where the embezzlement is clearly shown to have been made by the crew, but the particular offenders are unknown, and from the circumstances of the case, strong presumptions of guilt apply to the whole crew, all must contribute; but that where no fault, fraud, connivance or negligence is proved against the crew, and no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master; that in no case are the innocent part of the crew to contribute for the misdemeanors of the guilty; and further, that in a case of uncertainty, the burthen of the proof of innocence does not rest on the crew; but the guilt of the parties is to be established beyond all reasonable doubt, before the contribution can be demanded."[1]

7. Negligence, in any point peculiarly the duty of the individual mariner, or of the crew, by which a loss happens, is a maritime offence, entitling the owner to compensation for the injury occasioned, which is generally made available by way of set-off to the claim for wages.[2] The same principles should govern, in respect to general contribution or individual liability, as in the case of embezzlement. But there can be no set-off or retainer for contingent damages. If the owner has not

[1] *Spurr et al.* v. *Pearson*, 1 Mason's R. 114, 115. See also Abbot on Shipping, p. 472, 473, and notes. Edit. 1829.

[2] *Wilson* v. *The Belvedere*, 1 Peters's Adm. R. 288. *Thorne* v. *White*, Ibid. 168, 173. *Brown* v. *The Neptune*, Gilpin's R. 89. *The New Phœnix*, 2 Haggard's R. 120.

been compelled to make good losses happening to the cargo, he cannot, in prospect of being called upon to do so, claim contribution from the seamen.[1]

8. DRUNKENNESS, as incapacitating from general maritime employment, may be regarded as a substantive offence. "It is," says Mr. Justice Story, "of such rankness and injurious tendency, both as to discipline and service on shipboard, that it usually calls for the animadversion of the Court, and not unfrequently is followed by punishment in the shape of diminished compensation and wages. Where it is habitual and gross, it may indeed be visited with a total forfeiture of wages; but where it is only occasional, or leaves much meritorious service behind, it is thought quite sufficient to recover, in damages, the amount of the actual or presumed loss, resulting from such a violation of the mariner's contract, and imperfect performance of duty."[2] The British Admiralty courts have made the same distinction between an act and a habit of intoxication; between drunkenness in port, and during the voyage;[3] and Dr. Lushington has recently held, that a refusal to obey orders, while in a state of intoxication, if no more than the single act of drunkenness be proved, ought not to be visited with an entire forfeiture of wages, if occurring in port; but that such an act, whilst the vessel is at sea, would be of a very serious character.[4] Lord Stowell had previously held, that occasional acts of drunkenness, not more than usual

[1] *The Washington*, 1 Peters's Adm. R. 219.

[2] *Orne* v. *Townsend*, 4 Mason's R. 541.

[3] *The Exeter*, 2 Robinson's Adm. R. 216.

[4] *The Blake*, reported in the Monthly Law Mag. vol. iv, p. 90, London, March, 1839. See also *The New Phœnix*, 1 Haggard's Adm. R. 198.

with seamen, and latterly (when more frequent) arising from the undue force given by bodily disease to the moderate use of strong liquors, will not enure to the entire forfeiture of wages.[1]

9. Disobedience of Orders. This is an offence of a very grave character, punishable by corporal chastisement, or by the forfeiture of part or the whole of the mariner's wages. But it is not a single neglect of duty, or a single act of disobedience, which ordinarily carries with it so severe a penalty. There must be a case of high and aggravated neglect or disobedience, importing the most serious mischief, peril, or wrong; a case calling for exemplary punishment and admitting of no reasonable mitigation; a case involving a very gross breach of the contract for hire; or it must be habitual, and produce such a general diminution of duty, as goes to the very essence of the contract.[2] It has also been held, that a refusal to do duty, at a moment of high excitement from punishment, if not followed by obstinate perseverance, is not a forfeiture of all wages.[3]

[1] *The Lady Campbell*, 2 Haggard's R. 5.

[2] *The Mentor*, 4 Mason's R. 84. See also, *The Exeter*, 2 Robinson's Adm. R. 216.

[3] *Orne* v. *Townsend*, 4 Mason's R. 541. See *infra*, part 4, chap. 3, as to the principles regulating a total, or partial forfeiture of wages.

CHAPTER V.

OF THE DISCHARGE OF SEAMEN.

It is a universally recognised principle of the maritime law, and results from the contract between the parties, that the master cannot discharge a seaman before the complete fulfilment of their mutual obligations, without a legally valid reason.[1] What constitutes such valid reason has been ascertained by different standards in the positive law of different maritime nations; but the principle has always been the same, that the contract is not to be rescinded by the master, until the mariner's conduct has been such, that the law of his country deems him unfit to remain on board, or that he has forfeited the rights acquired under his contract. The *Consolato* assigns but three causes for which a mariner may be dismissed: theft, quarrelling, and disobedience of orders; and it adds the restriction, that for these he is not to be discharged on the first offence, but only on its recurrence for the fifth time.[2] The laws of the Hanse Towns declare, that if the seaman misbehaves "in a notorious manner," he may be dismissed.[3] The Marine Ordinance

[1] "*Sans cause valable*," is the language of the French Ordinance.

[2] *Consolato del Mare*, chap. 80 [125]. Pard. tome ii, p. 122.

[3] *Droit Mar. de la Ligue Ans.* (*Recès de* 1591, art. 42;) Pard. tome ii, p. 519.

of Louis XIV. and the *Code de Commerce* make use of the general terms "for valid reasons."[1] Pothier enumerates among such reasons, incompetency, blaspheming, theft, stubbornness, and quarrelling to the extent of producing disorder in the ship.[2] More recent commentators upon the Code enumerate absence without leave, (which is expressly made an offence for which the mariner may be discharged,[3]) incompetency, insubordination, and misconduct generally.[4] Incompetency for the station contracted for is not, however, by the general maritime law, a valid reason for a discharge in a foreign country. The mariner may be degraded, or his compensation may be diminished; but I apprehend, that the French rule (if it be one) is an exception to the more universal rule, and that a merely innocent incompetency is not alone a sufficient ground for dismissing the seaman altogether from the service of the vessel.[5]

Such is the spirit of the foreign law. That of our own and the English tribunals has been, not to assign specific offences, for which a mariner may, under all circumstances, be discharged; but it is laid down generally, that the master may discharge a seaman from the vessel before the termination of the voyage, for a legal cause, but not for slight or venial offences, and certainly not for a single offence, unless of a very aggravated character; thus leaving the master's justification to depend upon the degree and nature of the mariner's misconduct, under

[1] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 10. *Code de Commerce*, art. 270.
[2] Pothier, *Louages Mar.* n. 209.
[3] *Code de Commerce*, art. 264.
[4] Sautayra, *sur le Code de Com.* p. 175.
[5] See *ante*, Part I. chap. 2, p. 29—30.

all the circumstances of the case. Thus, if the charge be negligence, drunkenness, disobedience, or dishonesty, the question would be, whether the misconduct was of that degree as to amount to an habitual inattention to or unfitness for duty, having always in view the particular station of the party and the nature of his duty.[1] If the allegation be, that the seaman is a dangerous person, from a spirit of insubordination, or hostility to the master, it has been held that the master must show that the danger is such as would affect the mind of a man of ordinary firmness.[2]

But even in cases of aggravated offences, or of a continued course of conduct which would justify the discharge of a seaman, if he repents and offers amends, the principle which is always operative in his favor against all kinds of forfeiture, with very rare exceptions, intervenes to restore him to his rights, and he is ordinarily entitled to be received again on board.[3] To deprive a mariner of the benefit of this rule, it should appear that the misconduct amounts to a radical *disqualification*, as dishonesty, and habitual drunkenness in a steward;[4] or that the party is really dangerous to the peace and safety

[1] *Black* v. *The Louisiana*, 2 Peters's Adm. R. 271. *Thorne* v. *White*, 1 Ibid. 168. *Relf* v. *The Maria*, 1 Ibid. 186. *The Mentor*, 4 Mason's R. 84, 102. *Orne* v. *Townsend*, Ibid. 541. *The Exeter*, 2 Robinson's Adm. R. 216. *Hutchinson* v. *Coombs*, Ware's R. 65. *The Nimrod*, Ibid. 9.

[2] *The Nimrod*, *ut supra*.

[3] *Lois D'Oleron*, art. 14. Pard. tome i, p. 333. *Whitton* v. *The Commerce*, 1 Peters's Adm. R. 164. *Thorne* v. *White*, 1 Ibid. 168. *Relf* v. *The Maria*, 1 Ibid. 186. *Atkyns* v. *Burrows*, 1 Ibid. 244. *Black* v. *The Louisiana*, 2 Ibid. 268. *Orne* v. *Townsend*, 4 Mason's R. 541. *The Mentor*, 4 Ibid. 84. *Buck* v. *Lane*, 12 Serg. & R. 266. *Hutchinson* v. *Coombs*, Ware's R. 65.

[4] *Black* v. *The Louisiana*, *ut supra*.

of the ship.[1] These principles receive additional force from the general policy of the laws of the United States, which discountenance the discharge of seamen in foreign ports, as will presently be seen; and it has been held, that the certificate of a consul, that a seaman was discharged with his approbation, will not prevent the Court from inquiring into the cause of the discharge, and awarding damages, if proper.[2]

By a law of the United States, the master of every vessel bound on a foreign voyage is required to deliver to the collector of the customs of the port from which he clears, a list of his ship's company, containing their names, places of birth and residence, and a description of their persons, to which the master is to make oath; a certified copy of this list is then given to the master by the collector: the master is also required to enter into a bond, with sufficient sureties, in the sum of four hundred dollars, that he will exhibit such certified copy of the list to the first boarding officer, at the first port in the United States at which he shall arrive, and then and there produce the persons named in the list to the said boarding officer, whose duty it is to examine the men with the list, and to report the same to the collector; — but such bond is not to be forfeited, on account of the master's not producing to the boarding officer any of the persons contained in the said list, who may be discharged in a foreign country, with the consent of the consul, vice consul, commercial agent, or vice commercial agent, there residing, signified

[1] *The Nimrod*, Ware's R. 9.

[2] *Hutchinson* v. *Coombs*, Ware's R. 65. The consul's certificate is, by the statute of 1803, made a justification as against the penalty of the master's bond to the government, not against the seaman's action for damages.

in writing under his hand and official seal, to be produced to the collector with the other persons composing the crew, nor on account of any person dying or absconding, or being forcibly impressed into other service, of which satisfactory proof shall be there also exhibited to the collector.[1]

By a recent act, the duplicate list of the crew required by the Act of 1803, to be given to the master by the collector, is further required to be "a fair copy, in one uniform hand-writing, without erasure or interlineation."[2] This document, as well as the certified copy of the shipping articles, is to be produced to the consul, or commercial agent of the United States, at any foreign port, "whenever he may deem their contents necessary to enable him to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance."[3] "All interlineations, or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such papers, unless satisfactorily explained in a manner consistent with innocent purposes, and the provisions of law which guard the rights of mariners."[4] When a mariner is shipped in a foreign port, the same act requires that the master "shall forthwith take the list of his crew and the duplicate of the shipping articles to the consul, or person who discharges the duties of the office at that port, who shall make the proper entry thereon, setting forth the contract and describing the person of the mariner; and thereupon the bond originally given for the return of the men, shall embrace each person so shipped."[5]

[1] Act U. S. 28 Feb. 1803, ch. 62, sec. 1. see the Appendix.
[2] Act U. S. 20 July 1840, sec. 1. see the Appendix.
[3] Ibid. sec. 3. [4] Ibid. sec. 4. [5] Ibid.

The third section of the Act of 1803 provides, that "whenever a ship or vessel, belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall with his own consent be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul, vice consul, commercial agent, or vice commercial agent, the list of his ship's company, certified as aforesaid, and to pay to such consul, vice consul, commercial agent, or vice commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman, two thirds thereof to be paid by such consul or commercial agent, to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, and may be in such foreign port; and the several sums retained for such fund, shall be accounted for with the treasury every six months, by the persons receiving the same."[1]

The sale here contemplated applies only to the case of a voluntary discharge by the master, and not to cases where the discharge has resulted from inevitable necessity or superior force, such as a total loss by capture, tempest, or other fortuitous occurrence. It is true that a breaking

[1] Act U. S. 28th Feb., 1803, ch. 62, sec. 3.

up of the voyage by a disaster at sea, will exempt the owners from the payment required by the Act; but the owners will not be exempted, if the vessel can be repaired at a reasonable expense, and in a reasonable time, and the burthen of proof to show that she could not be so repaired, is upon the owners.[1] So too, in a case of capture, the seamen have a right to remain by the ship, and await the result of the prize proceedings; and if the ship be afterwards released, so as to be able to proceed on her voyage, and the crew are then discharged, they will be entitled to the two months' pay.[2] In all cases where the seamen are so entitled to receive the money, if it is not paid over to the consul, the whole may be recovered as wages by a libel in the Admiralty, and the court will order it to be distributed to the United States and the seamen, in the proportion directed by the statute.[3] It has been held that it is no objection to the recovery of the money, that the name of the seaman is omitted as an *American* citizen, in the list of the crew certified from the collector's office, under the Act of 1796, ch. 36, sec. 4, if he is named as an *American* citizen on the list of the crew which the collector, by *this* Act, is required to certify, and give to the master.[4]

The Act of 1840 has greatly enlarged the discretionary power of consuls, or commercial agents, in foreign ports,

[1] *The Dawn*, Ware's R. 485. *The Juniata*, Gilpin's R. 193.

[2] *The Saratoga*, 2 Gallison's R. 164.

[3] *Emerson* v. *Howland*, 1 Mason's R. 45. *Orne* v. *Townsend*, 4 Mason's R. 541. *The Saratoga*, 2 Gallison's R. 181. *The Dawn*, Ware's R. 485. The Supreme Court of the State of New York, have given an entirely different construction to the Act, and held that as the payment is directed to be made to a public functionary, named in the Act, unless the money is paid to him, no action for it can be maintained by the seamen against the owner, and, it would seem from the reasoning of the court, not against the master. See *Ogden* v. *Orr*, 12 Johns. R. 143.

[4] *Orne* v. *Townsend*, ut supra.

to discharge mariners from their vessels. It empowers them, upon application of both the master and the mariner, to discharge the latter, if he thinks it expedient, without requiring the payment of three months' wages, under the provisions of the Act of 1803, or any other sum of money;[1] and he may make such terms with the master as will save the United States from the liability to support the mariner so discharged.[2] The public officer discharging the mariner under this Act is required to make an entry thereof upon the list of the crew and upon the shipping articles.[3] Further powers are also given to discharge mariners in case of a violation of the articles in respect to the voyage, and of unseaworthiness of the vessel, which are stated in the appropriate chapters.[4] And where a mariner has deserted and been reclaimed by the consul, if, on inquiry, he finds that the desertion was caused by unusual or cruel treatment, he may discharge the mariner, who shall in such case be entitled to receive three months' pay in addition to his wages to the time of the discharge.[5]

The fourth section of the Act of 1803, provides, "that it shall be the duty of the consuls, vice consuls, commercial agents, or vice commercial agents of the United States, from time to time, to provide for the mariners and seamen of the United States, who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most rea-

[1] Act U. S. 20th July, 1840, sec. 5. See Appendix. This Act took effect upon vessels which sailed on and after October 1, 1841.

[2] Ibid. sec. 6.

[3] Ibid. sec. 7.

[4] *Ante*, Part I, ch. 2 and 3.

[5] Act U. S. 20th July, 1840, sec. 17.

sonable manner, at the expense of the United States, subject to such instructions as the secretary of state shall give; and that all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are hereby required and enjoined to take such mariners or seamen on board of their ships or vessels, at the request of the said consuls, vice consuls, commercial agents, or vice commercial agents, respectively, and to transport them to the port in the United States to which such ships or vessels may be bound, on such terms, not exceeding ten dollars for each person, as may be agreed between the said master and consul, or commercial agent. And the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels, according to their several abilities: *Provided*, that no master or captain of any ship or vessel shall be obliged to take a greater number than two men to every one hundred tons' burthen of the said ship or vessel, on any one voyage; and if any such captain or master shall refuse the same, on the request or order of the consul, vice consul, commercial agent, or vice commercial agent, such captain or master shall forfeit and pay the sum of one hundred dollars for each mariner or seaman so refused, to be recovered, for the benefit of the United States, in any court of competent jurisdiction. And the certificate of any such consul or commercial agent, given under his hand and official seal, shall be *prima facie* evidence of such refusal, in any court of law having jurisdiction for the recovery of the penalty aforesaid."[1]

The seamen who are thus put on board are liable to be punished for offences committed against any law of

[1] Act U. S. 28th February, 1803, ch. 62, sec. 4.

the United States, in the same manner as the articled seamen of the vessel.[1] The certificate of the consul is *prima facie* evidence of the *refusal* of any master to take a seaman on board, and of all the facts stated in the enacting clause, which are necessary to bring the case within the penalty.[2] If a seaman be entitled to the privileges of an American seaman, and be destitute, the consul is the proper judge as to the ship on board of which he should be placed for his return to the United States; and the fact that the seaman has deserted from his ship, and that she is lying in port at the time when he becomes destitute, does not supersede the authority of the consul to require another American ship to bring him home.[3]

Congress have legislated further upon the unlawful discharge of mariners abroad. The Act of 1825, chapter 276, section 10, provides, "that if any master or commander of any ship or vessel, belonging, in whole, or in part, to any citizen or citizens of the United States, shall, during his being abroad, maliciously and without justifiable cause, force any officer, or mariner, of such ship or vessel, on shore, or leave him behind, in any foreign port or place, or refuse to bring home again all such of the officers and mariners, of such ship or vessel, whom he carried out with him, as are in a condition to return, and

[1] *United States* v. *Sharp*, 1 Peters's Circ. C. R. 118.

[2] *Mathews* v. *Offley*, 3 Sumner's R. 115.

[3] Ibid. Foreigners, while employed as seamen in the merchant ships of the United States, are deemed to be "mariners and seamen of the United States," within the language and policy of this Act. The fact that such a foreigner became destitute by desertion from the ship, does not deprive him of the protection of the Act, unless followed up by engaging in some foreign service. Ibid.

willing to return, when he shall be ready to proceed on his homeward voyage, every master or commander, so offending, shall, on conviction thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment, not exceeding six months, according to the aggravation of the offence."

To constitute the offence here described, the forcing on shore must be done both "maliciously" and without "justifiable cause." "Maliciously," in the sense of the statute, means not merely a wicked, malignant and revengeful act, such as in cases of murder constitutes malice; but if the act be wantonly done, that is, with a wilful disregard of right or duty, it is, in the sense of the statute, malicious. It must be a wilful act, done contrary to a man's own convictions of duty.[1] What would be a "justifiable cause," under the Act, is not, it seems, every cause which would justify a discharge by the general principles of the maritime law. The right to discharge a seaman, under this Act, has been considered by Story J. to result only from what may be deemed a moral necessity, analogous to the cases put in the statute. The right arises only under extraordinary emergencies and in extreme cases, where otherwise the safety of the officers or crew, or the due performance of the voyage, or the regular enforcement of the ship's discipline, would be put in jeopardy.[2]

The measure of damages recoverable by a seaman, in case of a wrongful discharge, will be considered in a future chapter.[3]

[1] *United States* v. *Ruggles*, 5 Mason's R. 192. *United States* v. *Coffin*, 1 Sumner's R. 394.

[2] *United States* v. *Coffin*, ut supra.

[3] *Infra*, part 4, ch. 2.

PART THIRD.

OF THE MASTER'S RELATION TO THE VESSEL, CARGO AND FREIGHT.

CHAPTER I.

OF THE MASTER'S RELATION TO THE VESSEL AND ITS OWNERS.

The Master of a merchant vessel is that officer, to whom is entrusted the entire command of the ship, and between whom and the owner or owners, by the fact of his appointment and by operation of law there arise certain peculiar relations, imposing upon each mutual obligations towards the other, and towards third persons. The master's appointment may take place in several ways. If there be but one owner of the vessel, he alone of course appoints the master. If there are several owners, the control of such a vessel is vested by law in the majority in interest, and such majority have the right to appoint the master. The master himself, too, has power to appoint a substitute in a foreign port, if dangerously ill, or if he is obliged from other controlling reasons to leave the vessel; for although it is a general rule that agencies of this kind cannot be delegated, yet the maritime law has established an exception in favor of commerce, in this particular case.[1] So, too, the consignees of vessel

[1] 1 Bell's Comm. p. 413. Pothier, *Louages Mar.* n. 49. *The Alexander*, 1 Dods. Adm. R. 278.

or cargo, in a foreign port, acting in good faith, have power to appoint a substitute for the master who dies and devolves the whole management upon them.[1] The relations of such new master to the owners and the crew, when rightfully appointed, are the same as those of his predecessor.[2] When appointed, by whom and under what circumstances the master may be removed, is an interesting question, which first meets our attention in considering the relations of the parties.

The possession of a vessel by the master is, in a general sense, that of a mere mandatary, whose authority, upon the general principles of the law of agencies, may be revoked at any time. But it would seem that at least in some cases, a new element of contract mingles with the relation of the parties, and renders it necessary to inquire if this general power of revocation be not subject to important restrictions, as well upon principle, as upon the direct authority of the maritime law.

The Laws of the Hanseatic League contain the earliest positive direction, upon this point, aside from the general law of agencies, with which I have met. They provide, that "if a master conducts himself towards his *co-owners*, in a manner so inconvenient that they deem it proper no longer to retain him, they may dismiss him, provided they purchase from him his share in the vessel, if he has any, according to the valuation that shall be

[1] *The Tartar*, 1 Hag. Adm. R. 1. *The Zodiac*, Ibid. 1. *The Alexander*, 1 Dods. Adm. R. 278. *The Kennersley Castle*, 3 Hag. Adm. R. 1. *The Rubicon*, 3 Ibid. 9.

[2] Ibid. See also *Orne* v. *Townsend*, 4 Mason's R. 541. And ante, Part I, ch. 2.

made of it by experts of known impartiality."[1] This law evidently contemplates the case of the master being a part-owner. It is wholly silent upon the question of damages, or compensation to be made to the master, for the loss of the employment as master; and from the fact that it only imposes upon the other owners the obligation of purchasing his share, *if he has any*, it may be inferred as the sense of the legislators promulgating the law, and of the maritime communities who were governed by it, that in ordinary cases, where the master is not also a part-owner, the owners may dismiss him at any time, for conduct repugnant to their interests or orders. This, however, leaves untouched the case of a dismission of a mere master, without good cause, as from caprice, or to retain one whose services may be had for smaller compensation. But following the historical course of this same provision, we find it incorporated into the Marine Ordinance of Louis XIV. where it stands in these words. "All proprietors of vessels may dismiss the master, reimbursing him, if he requires it, for the part he has in the vessel, on the report of skilful persons."[2] The commentary of M. Valin upon this article is highly instructive and acute. His conclusion upon it is, that the law was intended to secure to the other owners the right of dismissing a master who is also a part-owner, when acting contrary to their interests; in other words, to make effectual the power of the majority in

[1] *Droit Mar. de la Ligue Ans.* (*Recés* de 1614), tit. 2, art. 4; Pardessus, tome ii, p. 532.

[2] "*Pourront toutes proprietaires de navires, congédier le maitre, en le remboursant, s'il le requiert, de la part qu'il aura au vaisseau au dire de gens à ce connoissans.*" *L'Ord. de la Marine*, liv. 2, tit. 8, art. 4.

interest to dispossess a minority, by enforcing this right even against a master in possession, whether there is sufficient cause for depriving him of his command, *as master*, or not. But he asks, significantly, whether it follows that no damages are due to the master, as such, if he is dismissed without a valid reason, because the article is silent upon this point? His own opinion is that the master, under such circumstances, is clearly entitled to damages; and he cites in support of his own reasoning a sentence of the Admiralty of Marseilles, in 1752, placing the master, who is discharged without a valid cause, upon the same rule of damages as a seaman.[1] The *Code de Commerce* promulgates the same general provision in two separate articles. The first declares, with extreme conciseness, that "The owner may dismiss the captain; there is no room for indemnity, if there is no agreement in writing;"[2] which I understand to mean, if the master has not executed articles for a definite voyage, but is merely under a general retainer. The next article reënacts the provisions, "That if the master dismissed is a part-owner of the ship, he may renounce his interest and require the reimbursement of the capital which represents it."[3]

From these evidences of the maritime law, it would seem that the owners have a right to remove the master, who is a part-owner, at their own pleasure, paying him

[1] Valin, *Comm.* tome i, p. 571, *et seq.*

[2] "*Le propriétaire peut congédier le capitaine. Il n'y a pas lieu a indemnité, s'il n'y a convention par écrit.*" *Code de Commerce*, art. 218.

[3] Art. 219. In the Scottish Admiralty it seems to be held that the owners may dismiss the master at any time, without cause assigned. 1 Bell's Com. 506, 508.

for his share of the vessel; but if he is removed without good cause, after an engagement for a particular voyage, I think they are bound to pay him damages for the loss of the employment as master, and for any losses or liabilities he may have incurred by reason of his appointment. I infer this, because the law originally cited seems made only to provide for the indemnity of the master in respect to his interest in the vessel; because it was so incorporated into the French Ordinance; and because the opinion of Valin, in giving it this construction, clearly supplies the principles upon which the question, omitted by the law, ought to be decided, and is clearly in favor of damages. In fact, if it were otherwise, the result would be that an owner may break his contract with a master, and thereby throw undeserved reproach upon his professional character, without compensation, for no sufficient reason; which he cannot do to a common sailor. So too, the master might be left under personal responsibility upon bills of lading, which he may have signed, and for the wages of seamen whom he may have engaged.[1]

But this question is still an open one, and the opinions of jurists are divided upon it.[2]

But upon a general retainer for no particular voyage, as where the master is in possession of a ship which is

[1] See also *Montgomery* v. *Wharton*, 2 Peters's Adm. R. 397. S. C. 1 Dall. 49; Bee's R. 388. *The New Draper*, 4 Robinson's Adm. R. 287. The case of *Montgomery* v. *Wharton* was a libel in the Admiralty, by a master, to compel a specific performance of the contract, by the owners. The Court held that the Admiralty had no jurisdiction to compel such a specific performance; but intimated that the remedy was in damages, to which the common law was most competent.

[2] See 3 Kent's Com. p. 161.

employed in going from port to port, wherever freights can be procured, the owners may at any time remove the master, for any reason that seems good to them; because the nature of his employment is then a mere agency, to be revoked at any time by the principal.[1] This, however, is to be understood with the limitation, that the owners are to indemnify him against liabilities incurred in the course of his connection with the ship.[2] The dispossession of a master may be effected by judicial proceedings in the Admiralty, promoted by the owners who have a majority in interest. In the course of such a proceeding, Sir William Scott observed, "all that the Court requires, in cases where the master is not an owner, is, that the majority of the proprietors should declare their disinclination to continue him in possession.[3] In the case of a master *and part-owner*, something more is required, before the Court will proceed to dispossess a person who is also a proprietor in the vessel, and whose possession the common law is upon general principles inclined to maintain. Some special reason is commonly stated, to induce the Court to interpose."[4]

[1] *Montgomery* v. *Wharton*, 1 Peters's Adm. R. 397. *The New Draper*, 4 Rob. Adm. R. 287; as to the revocation of such an agency, see Story on Agency, ch. 18, sec. 463.

[2] Story on Agency, ch. 18, sec. 466.

[3] This was probably spoken of cases where the master was in possession of a general trading ship; not where he was engaged by contract for a specific voyage. The learned Judge was, however, announcing the practice of the Court upon the matter of *possession*, and not upon the question of *damages*.

[4] *The New Draper*, 4 Rob. Adm. R. 287. See also *The Johan and Siegmund*, Edward's Adm. R. 242. This jurisdiction, however, is not exercised by the British Court of Admiralty between foreigners, without the consent of the parties, or the intervention of the minister of the foreign

It follows, as the correlative of what has been said, that the master who has contracted to go on a particular voyage, can no more withdraw from that contract, without incurring a liability to damages, than the owner. Nor can he quit the vessel in a foreign port, when she is employed as a general trading vessel; for it is always his duty to bring the vessel home, if possible, and even in case of capture by a belligerent, it is his duty to remain until the result of the proceedings and the fate of the ship are made known.[1] It is not to be said, indeed, that a master who finds himself abroad, in a ship that is ordered by the owners from one quarter of the world to another, in a series of voyages which he made no specific contract to perform, can thus be kept in perpetual banishment from home, if they do not permit the ship to return. But even in such a case, he would not be at liberty to quit the vessel without giving them such notice as would enable them to appoint a substitute.[2] If, after such notice, they neglected to make an appointment, he might make it himself.

The master being rightfully appointed, and lawfully in possession of the ship, we are now to inquire what are his powers and duties. The first of these respects the employment of the vessel.

I. The Master is the agent of the owners, to manage

state devolving the jurisdiction of his own country on the Court. But a sentence of the Admiralty Court of the foreign country, where the vessel belongs, will be considered to arm the Court with sufficient authority, and will be supported and possession decreed. *The See Reuter*, 1 Dodson's Adm. R. 22; and *The Johan and Siegmund*, *ante*.

[1] *Willard et ux* v. *Dorr*, 3 Mason's R. 255. *Brown* v. *Lull*, 2 Sumner's R. 443.

[2] Story on Agency, ch. 18, sec. 478.

and employ the vessel for their interest. Whenever he receives their orders, he is bound to obey them as the limitations of his general authority; and when they make a contract respecting the employment of the ship, he cannot make another to annul or supersede it.[1] But in the absence of specific orders, the nature of his agency invests him with certain powers, which the law has accurately defined; and being once master, he will be deemed, as respects third persons, to continue in that character, until displaced by some overt act or declaration of the owner.[2]

1. He may under some circumstances let the ship by charter-party. The first requisite to clothe him with this authority is that it shall be the usual employment of the ship to be so let. The master cannot of himself divert the ship from its usual employment, so as to bind the owners. He cannot let a ship by charter-party which has been employed solely in carrying the goods of the owner, or in carrying passengers; nor can he take her out of the trade in which she has been employed, as in the coasting trade, or fisheries, or in the navigation of rivers, and let her by charter-party for another trade, or in another kind of navigation; nor can he let her by charter-party for a particular business, when she has been employed ordinarily in taking freights as a general ship.[3] In the second place it is requisite to the validity of a charter-party, made by

[1] *Burgon* v. *Sharpe* 2 Camb. N. P. R. 529. *Walter* v. *Brewer* 11 Mass. R. 99. *Ward* v. *Green*, 6 Cowen's R. 173. *Peters* v. *Ballestier*, 3 Pick. R. 495.

[2] *The Schooner Tribune*, 3 Sumner's R. 144.

[3] 1 Bell's Comm. sec. 434. Pothier, *Charte-Partie*, n. 48. 1 Livermore on Agency, p. 155, 156. Abbot on Shipping, part 2, ch. 22, sec. 7—10. *Boucher* v. *Lawson*, Rep. temp. Hardw. 85, 194. *King* v. *Lennox*, 19 Johns. R. 235.

the master, as against the owner, that it should be made in a foreign port; or, if made in the home port, that it should be with the owner's knowledge. So far as the owner is concerned, the master enters into a contract of affreightment only as his agent — by procuration; and as such a power of the agent, to make a contract of this important description is ordinarily suspended by the presence of the principal, it follows that the assent of the principal must appear, when the contract is made by the agent under circumstances in which the principal will ordinarily be deemed to have resumed the superintendence of his own affairs. This assent will be presumed, if it appears that the owner had knowledge, and did not dissent.[1] If these requisites concur, the master has power to let the ship by charter-party, and by such contract to bind the owners.

2. The master may employ the ship as a general ship, and receive goods on board to be carried for freight, and sign bills of lading for the same, which will bind the owners. The ship is also bound, *in specie*, to the performance of the contract. A merchant who ships merchandise in a vessel on freight, has a lien on the vessel for his goods, for any damage they may sustain from the fault or neglect of the master, or the insufficiency of the vessel. He may enforce his lien, by process *in rem*, in the Admiralty. In such a case, the vessel is, by the marine law,

[1] Valin Comm. tome i, p. 618, 630. Pothier, *Louages Mar.* n. 48. Abbot on Shipping, part 2, ch. 2. sec. 5. 1 Bell's Comm. p. 412, 413. *Hurry* v. *The Assignees of Hurry*, 2 Wash. R. 145. *The Schooner Tribune*, 3 Sumner's R. 144. In this last case, the court thought that the fact of the master's having had authority to make charter-parties in the home port, for former voyages, furnished evidence of a superadded agency, (such as the doctrine stated in the text requires, beyond the ordinary powers of the master) for the particular occasion in controversy.

hypothecated to the merchant for his damages, from the time that the misfortune happens, and his claim against it is preferred to the right of the general creditors of the owners. The right of preference may be lost by unreasonable delay. But his lien is not defeated by a *bona fide* sale, before he has had an opportunity for enforcing it, and still less when the purchaser has knowledge of the claim.[1] Here also, as in the case of a letting of the entire ship by charter-party, it is necessary that the usual employment of the ship should be that of a general freighting ship.[2] If the owner freights the ship himself, and the master takes on board goods the freight of which he receives himself as part of his privilege, the owner is not bound to the safe delivery of those goods.[3] So too, if the owner goes out in his own ship to freight her for himself, and the master takes other goods on board, the owner is not bound, unless at the time of sailing he knew the goods to be on board, and that they were taken on freight.[4] But in such case, the owner must shew, in order to relieve himself from the liability, that he was exclusively attending to the shipment of the cargo, and he must show the same thing though he was on board as supercargo.[5] But if the vessel is employed as a general freighting ship, the master may take on board goods to be carried for freight, and the lawfulness or unlawfulness of export-

[1] *The Rebecca*, Ware's R. 188. *The Reeside*, 2 Sumner's R. 567.

[2] Abbot on Shipping, part 2, ch. 2, sec. 4, p. 93. 3 Kent's Comm. Lec. 46. *Boucher* v. *Lawson*, Rep. temp. Hardw. p. 85, 194. *Boson* v. *Sanford*, 3 Mod. R. 321. *Gen. Int. Ins. Co.* v. *Ruggles*, 12 Wheat. 408. *Ellis* v. *Turner*, 8 Term R. 531.

[3] *King* v. *Lennor*, 19 Johns. 235. *Reynolds* v. *Toppan*, 15 Mass. 370.

[4] *Walter* v. *Brewer*, 11 Mass. R. 99.

[5] *Ward* v. *Green*, 6 Cowen's R. 173.

ing such goods from the country whence they are shipped, or the fact that the master receives the freight as his own perquisite, cannot vary the owner's responsibility.[1] So too, the owner is liable, if the ship be a general one, if the master adds to the contract for safe carriage some other condition, as to sail with convoy, though without the owner's knowledge, or authority; for having authority to make the contract to carry the goods, the owners are answerable to strangers for his exceeding his authority, and must seek their remedy against him.[2] The usage of trade may sometimes invest the master with a further extent of authority. Thus, if in the coasting trade it is the usage for the master to act as consignee, and bring back the proceeds of the goods shipped, though the compensation is all paid in the shape of freight, the owners are liable for a safe return of the money by the master.[3]

There does not seem to be the same broad distinction, as to the master's authority, between a contract for the carriage of goods made at the place of the owner's residence, and one made abroad, as in the case of making a contract by charter-party. Abroad, the master is the agent of the owner, to receive goods in a general freighting ship; and at home, the receiving of goods on board

[1] *Boucher* v. *Lawson*, Rep temp. Hardw. p. 85. The fact that the master receives the freight as his own perquisite, was much considered in the case of *Allen* v. *Sewall*, 2 Wend. R. 327, afterwards carried to the Court of Errors in 6 Wend. R. 335. The general principle stated in the text was affirmed. It was also held that the owner's directions to the master not to carry the particular kind of parcels, (as money) did not excuse the owner, unless notice of such instructions were brought home to the shipper. See also 2 Kent's Comm. p. 609.

[2] *Ringuist* v. *Ditchell*, Mich. Ter. 40 Geo. 3, cited Abbot on Shipping, p. 98, Edit. 1829.

[3] *Emery* v. *Hersey*, 4 Greenl. R. 407. *Kemp* v. *Coughtry*, 11 Johns. 107.

and signing bills of lading for them, are so uniformly entrusted to the master of a general trading ship, that an actual interference or prohibition of the owner would seem to be necessary to affect third persons.[1]

3. The hiring as well as the discharge of the other officers and seamen are among the incidental powers of the master, ordinarily entrusted to him, and always to be presumed, unless a prohibition or interference of the owner appears, to affect third persons with notice that the usual powers are withheld.[2]

4. In respect to repairs and the outfit of the vessel.

In the home port, the master's presumed power as agent for the owners will bind them for all proper contracts for fitting out, victualling and repairing the ship, unless it shall be shown that the owners themselves, or a ship's-husband, managed the vessel, and that the party contracting with the master was aware of this.[3] Where an exclusive credit is given to the master, the owner is not liable;[4] but though the master is lessee of the vessel for a term of time, under covenants that he shall have the sole management and repair her at his own cost, yet if the creditor has no notice of this, he will have a right to look to the owner.[5] So too, it was held in England that the owners are bound for necessaries, though the

[1] 1 Bell's Com. sec. 434. Abbot on Shipping, p. 93. 1 Livermore on Agency, p. 157, 158.

[2] *Ante*, Part I, ch. 2, p. 15. Part II, ch. 5. Story on Agency, p. 110.

[3] 1 Bell's Com. 413. Abbot on Shipping, p. 101. *Marquand* v. *Webb*, 16 Johns. R. 89. *Schemerhorn* v. *Loines*, 7 Johns. R. 311. *Muldon* v. *Whitlock*, 1 Cowen's R. 290. *Ex parte Bland*, 2 Rose, 91. *Farmer* v. *Davis*, 1 Ter. R. 108. *Garnham* v. *Bennet*, 2 Stra. 816.

[4] *Thorn* v. *Hicks*, 7 Cowen's R. 697.

[5] *Rich* v. *Coe*, Cowp. 636.

master is appointed by government, the vessel being a mail packet; because the owners receive the benefit of the repairs and the earnings of the vessel.[1] In short, the liability of the owners rests upon two grounds; first, the authority to act for them, of which his character and situation as master furnish presumptive evidence; secondly, the fact that the owners receive the benefit of the contract, and the consequent presumption that arises thereon that it was made at their instance and request.[2]

It has been recently held in England, that the master has authority to pledge the credit of his owner, resident in England, for money advanced to the master in an English port, where the owner has no agent, if such advance of money was necessary for the prosecution of the voyage; and whether it was so or not, is a question for the jury.[3]

The master is the presumed and accredited agent of the owners in fitting out, victualling and repairing the ship abroad; and for his engagements in these respects, or even for money borrowed for the purpose of furnishing *necessaries* for the ship, the owners will be bound, provided the loan appears to be fairly supported by evidence of existing necessities;[4] and he may draw bills of

[1] *Stokes* v. *Carne*, 2 Camp. N. P. R. 339.

[2] *James* v. *Bixby*, 11 Mass. R. 34. But the mere fact that a party receives the benefit, is not alone sufficient to charge him, *as the owner*, unless some ground of contract appears. *Buxton* v. *Snee*, 1 Ves. 154. This subject of the liability of the owner, as such, has been a good deal discussed, and it seems that the ultimate question in every case is, to whom was the credit given? See *Dame* v. *Hadlock*, 4 Pick. R. 458. *Baker* v. *Buckle*, 7 J. B. Moore, 349, and *infra*, Part V, ch. 1, upon the point of liability for seamen's wages.

[3] *Arthur* v. *Barton*, 6 M. and W. 138. See also *Robinson* v. *Lyall*, 7 Price's R. 592.

[4] 1 Bell's Com. 413. *Hussey* v. *Allen*, 6 Mass. R. 163. *James* v. *Bixby*, 11 Mass. R. 34. *Wainwright* v. *Crawford*, 4 Dallas's R. 225. *Millward* v.

exchange on his owners to pay such a loan, which they are bound to accept.[1] The term *necessaries* is not restricted in its meaning to such things as are absolutely necessary, but extends to whatever a prudent owner would order as reasonably fit and proper for the ship, or for the voyage, under the circumstances.[2] But "the money supplied," says Lord Ellenborough, "must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigency of the case, as for the payment of duties and other necessary purposes."[3] It has been held (at *nisi prisus*) to be essential that a specific sum should be advanced for a specific purpose of necessary repairs, and that it should have been in fact so applied, before the owner can be made liable, personally, upon his implied contract. Thus in an action against the owner of a ship for money supplied to the captain at a foreign port, where it appeared that he had taken up seventeen hundred pounds on his owner's account, a part of which only had been applied to the uses of the ship, and then the lender had carried the residue to the private account of the captain; Abbot L. C. J. held that there must be a distinct advance of a specific sum, on account of the ship, which must be specifically applied to the use of the ship, and that it was incumbent on the plaintiff to show the necessity for borrowing the money, and to prove the actual application of it.[4] So too,

Hallet, 2 Caine's R. 77. *Webster* v. *Seekamp*, 4 Barn. and Ald. 352. *Stewart* v. *Hall*, 2 Dow's R. 29. *Rosher* v. *Busher*, 1 Starkie, 27.

[1] *Millward* v. *Hallet*, 2 Caine's R. 77.

[2] *Webster* v. *Seekamp*, 4 Barn. and Ald. 352.

[3] *Rosher* v. *Busher*, 1 Starkie's R. 27.

[4] *Palmer et al.* v. *Gooch*, 2 Starkie's R. 428. See also *Sir Humphrey Jervis's case*, Abbot on Shipping, part 2, ch. 3, p. 104. But it is clearly

the responsibility of the owners is to be restricted to advances for necessary repairs and expenses, to prosecute the voyage originally contemplated, and will not include such extraordinary expenditures as arming the vessel, unless the necessity for so doing was palpable and pressing.[1]

If the master cannot obtain the necessary supplies, or advances for supplies, upon the owner's credit, or his own, in the foreign port, he may then resort to a direct hypothecation of the ship, by giving a bottomry bond.[2] This is one of the most delicate powers entrusted to the master, and capable of dangerous abuses; yet it has been from the earliest periods of commerce one of the acknowledged powers of the master, growing out of the necessity, invincible in a moral sense, that the ship should proceed.[3] But before he can give this species of real security, several previous contingencies must have expressly occurred, which the law has placed as checks upon the master for the protection of the owner; for it is to be observed, that the contract is one which the mas-

otherwise on a bottomry bond, giving a lien on the ship, and relieving the owner from personal responsibility, when the bond is sued in the Admiralty. So much of the money as was needed and applied to the uses of the ship is allowed as a lien on the vessel, and the residue is rejected. And *quære* whether there is any such distinction at law as that taken in *Palmer* v. *Gooch*. Is not the owner liable for so much as is necessary and was actually applied to the necessary uses of the ship, without inquiry as to what particular sum the master took up at the time?

[1] *United Insurance Company* v. *Scott*, 1 Johns. R. 106.

[2] It seems that the master has power to hypothecate the ship, although appointed by the charterers. *Breed* v. *Ship Venus per* Davis J.; cited in Story's notes to Abbot on Shipping, p. 125, Amer. Edit. 1829.

[3] *Lois D'Oleron*, art. 1. Valin's Comm. tome i, p. 411. 1 Bell's Comm. p. 433 — 440.

ter makes for the owner, not by special appointment for the purpose, but only by an authority conferred upon him by law to meet an emergent and unprovided necessity.

First, it must be out of the master's power to obtain a personal credit, either in the name of his owners, or in his own name, at the place where he proposes to hypothecate the ship. That the owner's personal credit should first be insufficient, is by all the authorities, the first principle upon which the validity of such an hypothecation rests.[1] In regard to the master's own credit, it is not likely often to occur, that a master of a vessel will have a personal credit, where his owner has not; but Lord Stowell, on several occasions, in stating the foundation of bottomry bonds, has coupled the owner and master together, and defined the proper occasions on which they may be given, as being those where neither has a personal credit.[2] Upon general principles, it would seem reasonable to hold (but the point has not been directly adjudged) that the master is bound to use his own credit, if he has any, because he is bound to get the repairs done

[1] *The Nelson*, 1 Haggard's Adm. R. 169. *The Zodiac*, 1 Haggard's Adm. R. 320. *The Rhadamanthe*, 1 Dodson's Adm. R. 201. *The Augusta*, 1 Dodson's Adm. R. 283. *The Sydney Cove*, 2 Dodson's Adm. R. 11. *The Virgin*, 8 Peters's S. C. R. 538. *The Aurora*, 1 Wheaton's R. 96. *Murray* v. *Lazarus*, 1 Paine's R. 572. *Ross* v. *Ship Active*, 2 Washington's R. 226. *Tunno* v. *Ship Mary*, Bee's R. 120. *The Fortitude*, 3 Sumner's R. 228. *The Brig Hunter*, Ware's R. 249.

[2] *The Zodiac*, 1 Haggard's Adm. R. 320. *The Sydney Cove*, 2 Dodson's Adm. R. 11. *The Hero*, 2 Dodson's Adm. R. 11. Since this text was written, I have seen a case in England, which sanctions the principle more directly. A bottomry bond was given by the master for advances made on his own credit, and not on that of the owner, for a series of voyages undertaken in defiance of instructions, and it was held void. *The Reliance*, 3 Hag. Adm. R. 66.

at as little sacrifice to the owner as he can; and if, by a loan obtained upon his personal responsibility, he can relieve the owner from the payment of maritime interest, he ought to do so; and for advances thus made, he has a lien on the freight, and perhaps also on the ship.[1] But if his own credit, exclusively, will not procure the necessary advances, there is no objection against his uniting both his own personal credit and a bottomry security, as inducements to the lender of whom he solicits the loan or the supplies. Nor is it material, that the advances are made to the master before the bond of hypothecation is taken, unless they were made trusting to his personal responsibility alone, and without a view to a bottomry bond. Thus, where it was objected that the repairs and supplies were made in the first instance, upon the master's credit, but it did not appear that the material-men trusted to his personal credit exclusively, waiving the lien which the foreign law gave them on the vessel, or the general responsibility of the owners, the Supreme Court of the United States held, that they might well trust to the master's credit, as auxiliary to these sources, and that the fact that the master ordered the supplies and repairs before the bottomry bond was given,

[1] As to the lien on freight, it is less doubted now than formerly, with us. *The Packet*, 3 Mason's R. 255. *Drinkwater et al.* v. *The Freight, &c of the Spartan*, Ware's R. 149. The master's lien on the ship for advances has been disputed in England at common law. *Hussey* v. *Christie*, 9 East's R. 426. Abbot on Shipping, part 2, ch. 3, sec. 9. The Courts of Equity have favored it. *Hussey* v. *Christie*, 13 Ves. Jr. 594. *Ex parte Halsett*, 3 Ves. and Beame, 135. Some of the Courts of Admiralty in this country have affirmed it. *Bulgin* v. *Sloop Rainbow*, Bee's Adm. R. 116. *Gardner* v. *Ship New Jersey*, Peters's Adm. R. 223. See also *The Packet*, 3 Mason's R. 255. See more fully *infra*, Part III, ch. 4.

could have no legal effect to defeat that security, if they were so ordered by the master upon the faith and with the intention that a bottomry bond should be given to secure the payment of them.[1] So too, the master may give the personal security of the owners as auxiliary to that created by the bottomry bond, by drawing bills of exchange on them collateral to the bond, if he cannot obtain the money upon the bills alone.[2] It follows, as a general proposition, from what has been said, that if there is any agent of the owner at the place, the master cannot hypothecate the ship;[3] and *a fortiori* if one or more of the part-owners of the vessel should be present, the master's power ceases.[4]

But the presence of an agent, or correspondent of the owner, is to be taken, in its effect on the master's authority, with the same reference to the question of necessity, as any other state of things. An agent may be present and refuse to act; a consignee may have funds of the owners, and refuse to advance them. In such cases, the master is thrown upon the resources which his official character empowers him to use under other circumstances of distress. Thus it has been held that it is not sufficient that there should be an agent duly empowered to act in supplying the ship's necessities, but he must also be inclined so to act;[5] and that it is wholly

[1] *The Virgin*, 8 Peters's S. C. R. 538. See also *La Ysabel*, 1 Dods. Adm. R. 273, 276.

[2] *The Tartar*, 1 Hag. Adm. R. 3. *The Nelson*, 1 Hag. Adm. R. 179. *The Jane*, 1 Dods. Adm. R. 466. If the bills are honored, they discharge the bond. Ibid.

[3] *Selden* v. *Hendrickson*, 1 Brockenbrough's R. 396. *Boreal* v. *The Golden Rose*, Bee's R. 131.

[4] *Patton* v. *The Randolph*, Gilpin's R. 457.

[5] *The Nelson*, 1 Hag. Adm. 3.

immaterial that a consignee has funds of the owner, if he will not advance them, for the non-existence of funds and the inability to get at them must be deemed precisely equal predicaments of distress.[1] So too, where a ship came to the hands of a foreign merchant, consigned by the master, who died and devolved the whole management upon him, Lord Stowell supported a bottomry bond taken by him of the master whom he himself appointed, the transaction appearing to have been conducted in entire good faith.[2] He held the same, also, in the case of a bond taken by consignees of the cargo, of a master whom, as a measure of necessity, they had appointed in the place of the former master.[3] Upon another occasion he held the following language in respect to bonds given to agents, and upon the principles thus laid down, decided the cause before him. "It is not to be laid down as a universal principle, that an agent of the owner may not, under any circumstances, take the security of a bottomry bond. Cases may possibly arise, in which an agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed, and if he finds it unsafe to extend credit to his employers beyond certain reasonable limits, he may then be at liberty to give up the character of agent, and, as any other merchant, to lend his money upon bond, and secure

[1] *The Virgin*, 8 Peters's S. C. R. 538.

[2] *The Tartar*, 1 Hag. Adm. R. 1. See also *The Zodiac*, Ibid. 320.

[3] *The Alexander*, 1 Dods. Adm. R. 278. In a subsequent case, in England, where the owner had abandoned, and a substituted master (whether appointed by the underwriter's agent, or by the owner's agent, or by both, not appearing,) gave a bottomry bond, to a holder of collateral security, the bond was sustained. *The Kennessly Castle*, 3 Hag. Adm. R. 1. *The Rubicon*, Ibid. 9.

its payment with maritime interest."[1] But it is clear that if the agent has had funds of the owners in his possession, which might have been applied to the demand for which he takes a bottomry bond, he is bound so to apply them; and if he has neglected or refused so to do, it will vitiate the whole transaction.[2]

Secondly. The advances must be for repairs and supplies necessary for effectuating the objects of the voyage, or the safety and security of the ship.[3] Necessities may come in such a variety of forms, that it is impossible to frame any general rules which shall define what are necessaries upon all occasions; rules, however, may well define the occasions upon which necessaries may be taken up.[4] Thus the master cannot hypothecate for an exist-

[1] *The Hero.* 2 Dodson's Adm. R. 139.

[2] *The Aurora*, 1 Wheaton's R. 96. See also *Reed* v. *Com. Ins. Co.* 3 Johns. R. 352.

[3] 1 Bell's Comm. 434. *The Aurora*, 1 Wheaton's R. 96. *The Virgin*, 8 Peters's R. 538. *Hurry* v. *Ship John and Alice*, 1 Wash. R. 293. *Crawford et al.* v. *The William Penn*, 3 Ibid. 484. *The Mary*, 1 Paine, 671. *The Duke of Bedford*, 2 Hag. Adm. R. 294. *Putnam* v. *The Polly*, Bee's R. 157. *Tunno* v. *Ship Mary*, Ibid. 120. *The Fortitude*, 3 Sumner's R. 228.

[4] The latest judicial definition in this country of the necessity which will justify a master in giving a bottomry bond, is a most elaborate and learned judgment of Mr. Justice Story's, in the case of *The Ship Fortitude*, 3 Sumner's R. 228. The necessity is defined to be not merely that which includes such repairs and supplies as are absolutely or indispensably necessary, but that it includes all such as are reasonably fit and proper for the voyage. The lender on bottomry is bound to exercise reasonable diligence, in order to ascertain, whether such supplies and repairs are necessary and proper. He is not bound, however, to show that there was a positive necessity. It is sufficient, if there is an apparent necessity, so far as the lender is able upon due inquiry and due diligence, to ascertain the facts. He will be protected in such a case of apparent necessity for his advances, even though, upon a fuller examination and more thorough investigation of

ing debt, but only for supplies furnished to enable him to complete the voyage, and furnished at the time the necessity existed.[1] But it need not be the original voyage upon which the ship was sent. Mr. Justice Washington has held that the master's power to hypothecate the ship extends to the obtaining of supplies necessary for the safety of the vessel, and to enable him to perform any voyage which he is authorized by law to undertake. In this case, the bottomry bond was given in an enemy's country, after a capture and the breaking up of the original voyage, to enable the ship to return home.[2] The Supreme Court of the United States have also held, that

the facts, at a subsequent period, it should be doubtful whether the supplies and repairs were really necessary. Where there is an apparent necessity for repairs, the lender on bottomry is under no obligation to inquire, as to the best mode of making the repairs, or whether they are made in the most judicious manner, or to ascertain the cause of the injury. It is sufficient, if he acts with good faith, and does not coöperate wilfully in any unnecessary expenditure. Ibid. The doctrine of this case is supported by that of *Soares* v. *Rahn*, before the Judicial Committee of the Privy Council in England, on appeal from the High Court of Admiralty. London Law Magazine, February, 1839, vol. 4, p. 30.

[1] *Hurry* v. *Ship John and Alice*, 1 Wash. R. 293. *The Aurora*, 1 Wheaton's R. 96. In this last case the Supreme Court of the United States said, "It is true that a *bona fide* creditor, who advances money to relieve the ship from an actual arrest, on account of debts contracted for supplies, may stipulate for a bottomry interest, and the necessity of the occasion will justify the master in giving it, if he have no other sufficient funds or credit, to redeem the ship from such arrest. But a mere threat to arrest the ship for a preëxistent debt, would not be a sufficient necessity to justify the master in giving a bottomry interest, since it might be an idle threat, which the creditor might never enforce; and until enforced, the peril would not act upon the ship itself. Nor, because a debt, sought to be enforced by an arrest of the ship, might uphold an hypothecation in favor of a third person, does it follow that a general creditor would be entitled to acquire a like interest."

[2] *Crawford et al.* v. *The William Penn*, 3 Wash. R. 484.

if a bottomry lender, in fraud of the owners, and by connivance with the master for improper purposes, advances his money on a new voyage, his bottomry bond may be set aside as invalid; but that there is no pretence to say that if the master does deviate from his instructions, without any participation or coöperation or fraudulent intent of the bottomry lender, the latter is to lose his security for his advances *bona fide* made for the relief of the ship's necessities.[1]

Thirdly. If the master has money of the owner on board, he cannot resort to bottomry, until he has first applied it as far as it will go, unless it would defeat the purposes of the voyage.[2] Whether he is bound so to apply money of his own, there is no direct authority for asserting, so far as I am informed. The question would seem to depend upon the same general reasons as does that of his obligation to use his own personal credit, already touched upon.[3] Mr. Justice Story has given a strong intimation of his opinion that the master is bound to apply his own funds, upon the principles above expressed.[4] In respect to money belonging to shippers, he holds the case to be different; that there is no absolute rule, but that the general principle is, that the master is bound to act with a reasonable discretion.[5] But this question seems to belong appropriately to the discussion

[1] *The Virgin*, 8 Peters's S. C. R. 538. See also *The Tartar*, 1 Hag. Adm. R. 12, 13.

[2] *The Packet*, 3 Mason's R. 255.

[3] Ante, p. 176.

[4] *The Packet*, 3 Mason's R. 255.

[5] Ibid.

of the master's relation to the cargo, which the money of shippers is deemed to be.[1]

Fourthly. The master can thus hypothecate the ship only in a foreign port; or, as the rule is sometimes expressed, in a port where the owners do not reside.[2] What ports are to be deemed foreign for this purpose is a question of construction. All ports out of the country of the owner are of course within the rule. Then, as to ports in the country of the owner, what are to be deemed foreign as to him, and whether the whole of his country is not to be deemed his residence, is a question that has been mooted. In England, the rule seems to be that the whole of England is to be considered for this purpose as the residence of an Englishman, at least before the commencement of the voyage.[3] But Ireland has been held to be a foreign country, in the case of English ships hypothecated there in the course of the voyage.[4] Sir William Scott afterwards went much farther in the case of a foreign vessel; for where a ship owned in Alicant, in Spain, on a voyage to London, put into Corunna in a different province of the same kingdom, and was there necessitated to take up money upon bottomry, and in the then distracted state of the country, (1811) the master could not have applied to the owners, he held that the rule that a bottomry bond, to be valid, must be executed in a foreign port, does not rest the validity of

[1] Infra, ch. 2.

[2] *L'Ord. de la Marine*, liv. 2, tit. 1, art. 17. *Code de Commerce*, art. 232. *Emerigon*, tome ii, p. 424. *Abbot on Shipping*, part 2, ch. 3, p. 123.

[3] *Abbot on Shipping*, *ante*.

[4] *The Rhadamanthe*, 1 Dodson's Adm. R. 201. See also *Menetone* v. *Gibbons*, 3 Ter. R. K. B. 267.

the bond upon the mere locality of the transaction; but upon the extreme difficulty of communication between the master and his owners.[1]

On the other hand, does the opportunity or facility of communication with the owner take away, in all cases, the master's power to give a bottomry bond? It is true that the rule of necessity knows no territorial or jurisdictional limits; that such necessity may arise from the very fact of the difficulty of communication with the owner, without reference to such limits; and again, that if there is a ready communication with the owner open, the case of necessity *quoad hoc* does not exist, so as to make the master's action indispensable to the preservation of the ship, on whatever side of a territorial line he may happen to be. But has not the maritime law, from an imperative convenience, fixed some boundary, on the passing of which the master's power commences and will continue, even though he should find himself in a port whence there is a ready communication with his owner's residence? Emerigon informs us that in France, the construction put upon the rule as laid down in the ordinance (*le lieu de la demeure des proprietaires*[2]) is to hold each province of the kingdom foreign to the owner, except that in which his actual residence is fixed.[3]

This question is of great consequence in the ports of this country, from the local situation of the States and

[1] *La Ysabel*, 1 Dodson's Adm. R. 273. In this case, the learned judge seems to have considered that the state of the different provinces of the kingdom made them to all intents and purposes foreign countries to each other.

[2] *L'Ord. de la Marine*, liv. 2, tit. 1, art. 17.

[3] *Emerigon*, tome ii, p. 436.

the extent of our coast. It came before Chief Justice Marshall, in the case of a vessel owned in Richmond, on which the master had given a bottomry bond in the city of New York. He adopted the rule which he conceived to be the reasonable principle of the maritime law, and conformable to what had been expressly held in France, that the owner cannot be considered as present in every port belonging to the nation, but that some subdivisional line must be taken, on passing which the master's power commences. He considered it also well adapted to our situation and highly convenient, to hold the master empowered to hypothecate in every port of the United States out of the State in which the owner resides, where he has no agent, limiting the power, as in all other cases, to the necessity in which it originates.[1] This point has never been affirmed by the appellate court; but it is probable that the convenience of the rule, and the great authority of the eminent person who thus settled it, have made it the received law of this country. Indeed, it would be difficult to shake it; for it is entirely in analogy with our rule upon the subject of an implied lien for repairs on American vessels, which are deemed to be subject to such a lien by the general maritime law, in every port out of the State to which the vessel belongs;[2] and the existence of a lien is always a favorable circumstance for the bottomry creditor, in laying the foundation for the validity of his bond.[3]

[1] *Selden et al.* v. *Hendrickson*, 1 Brockenbrough's R. 396.

[2] See Admiralty Digest, title Material-Men.

[3] See a learned and elaborate judgment to this effect in the case of *The Vibelia*, High Court of Admiralty, Dec. 1838; reported Monthly Law Magazine.

The master being unable to procure money on bottomry, or to get the necessary repairs done upon personal credit, or to get them done without a ruinous expense, the question arises whether he has, by virtue of his office, power to sell the ship, and if he has, when and in what manner?

The doctrine on this subject has undergone very considerable changes within two centuries past, in all the great commercial countries. By the general maritime law of Europe, as found in the earlier ordinances, the master had no such power *virtute officii*, under any circumstances. Absolute and unqualified prohibitions against a sale by the master, without a special procuration from the owners, are contained in the laws of Oleron, the laws of Westcapelle, and of Wisbuy;[1] and the same prohibition was incorporated into the marine ordinance of Louis XIV.[2] Valin exhibits the legal estimation of the master's office, at that period, when he remarks upon this prohibition, that the term master is to be understood only with reference to the navigation of the vessel, and not as implying any dominion or property in it.[3] But the greater exigencies of modern commerce have led to an expansion of this rule, and the master's office has become enlarged, to meet such exigencies, into that of an agent clothed with power to act, in certain circumstances, for the benefit of all concerned, when he formerly could only await the directions of the owners. Thus the *Code Na-*

[1] *Jugmens D'Oleron*, art. 1, Pardessus, tome i, p. 323. *Lois de Westcapelle, Jugement* 3, Pardessus, tome i, p. 372. *Droit Mar. de Wisbuy*, art. 17, Pardessus, tome i, p. 472.

[2] *L'Ord. de la Marine*, liv. 2, tit. 1, art. 19.

[3] Valin, Comm. tome i, p. 443, 444.

poleon expressly introduces as an exception to the old rule, the case of innavigability of the vessel, when legally proved by a survey;[1] and this expansion of the doctrine is also found elsewhere upon the continent.[2]

In England, the rule has also been enlarged. Formerly it was doubted whether the master could sell at all; but the more modern cases have settled that the master has an authority, in a case of extreme necessity, acting with good faith and for the general benefit of all concerned, to sell the ship.[3] But then there must be the clearest proof of necessity, it must be shown not only that the vessel was in want of repairs, but likewise that it was impossible to procure money for that purpose.[4]

In this country, the rule is substantially the same, that the master, acting with entire good faith, has, in virtue of his office, authority to sell the ship, in cases of extreme necessity, where the vessel is wrecked or innavigable, and he cannot procure money for the repairs, or means to make them, or the vessel cannot be repaired without an expense of more than half her value when she is repaired.[5] But as between the owner and a purchaser

[1] *Code de Commerce*, art. 237.

[2] Jacobsen's Sea Laws, by Frick, book 4, ch. 2, p. 360.

[3] Bell's Comm. 439. *The Fanny and Elmira*, Edwards's Adm. R. 118. *Idle* v. *Royal Ex. Ins. Co.*, 8 Taunton's R. 755. *Green* v. *Royal Ex. Ins. Co.*, 6 Taunton's R. 68. *Read* v. *Bonham*, 3 Brod. and Bing. R. 147. *Robertson* v. *Clark*, 1 Bingham's R. 445. *Reed* v. *Darby*, 10 East's R. 143. *Hayman* v. *Molton*, 5 Esp. R. 65. *Allen* v. *Sugrue*, 8 B. and C. 561. *Somes* v. *Sugrue*, 4 Carr. and P. 276.

[4] *The Fanny and Elmira*, Edwards's Adm. R. 118. *Reed* v. *Bonham*, 3 Brod. and Bing. R. 147.

[5] *The Tilton*, 5 Mason's R. 465. *The Brig Sarah Ann*, 2 Sumner's R. 206, 215. *Gordon* v. *E. and M. Ins. Co.*, 2 Pick. R. 249. *Winn* v. *Columbian Ins. Co.*, 12 Pick. R. 279. *Fontain* v. *Phenix Ins. Co.*, 11 Johns. R. 293.

at the sale, the title of the former is not devested, unless such necessity exist, notwithstanding the master may have acted with entire good faith and in the exercise of a sound discretion.[1]

Mr. Justice Washington has held that the master has authority to sell only on a foreign shore, and not in the country where the owner lives.[2] On the other hand, Mr. Justice Story has rejected the distinction, and held that if such an urgent necessity exists, as renders every delay highly perilous, or ruinous to the interests of all concerned, the duty of the master is the same, whether the vessel be stranded on the home shore or on a foreign shore, whether the owner's residence be near or at a distance.[3] This opinion has been affirmed by the Supreme Court of the United States, and is now undoubtedly the settled law of this country. The rule has been announced by the court in the following terms. "The true criterion for determining the occurrence of the master's authority to sell is the inquiry, whether the owners or insurers, when they are not distant from the scene of stranding, can, by the earliest use of the ordinary means to convey intelligence, be informed of the situation of the vessel in time to direct the master before she will probably be lost. If there is a probability of loss, and it is made more hazardous by every day's delay, the master may then act promptly, to save something for the benefit of

Center v. *American Ins. Co.*, 7 Cowen's R. 564. *American Ins. Co.* v. *Center*, 4 Wendell's R. 45. *Scull* v. *Briddle*, 2 Wash. R. 150. *Patapsco Ins. Co.* v. *Southgate*, 5 Peters's S. C. R. 604, 620. 3 Kent's Comm. p. 174, 175.

[1] *The Tilton*, 5 Mason's R. 465.

[2] *Scull* v. *Briddle*, 2 Wash. R. 150.

[3] *The Brig Sarah Ann*, 2 Sumner's R. 215.

all concerned, though but little may be saved. There is no way of doing so more effectual than by exposing the vessel to sale; by which the enterprise of such men is brought into competition as are accustomed to encounter such risks, and who know from experience how to estimate the probable profits and losses of such adventures." [1]

I am not aware of the existence of any different rule for the master's conduct, as to what constitutes a case of necessity, between himself and the owner, and between the owner and an underwriter. It has been said that the law of cases of necessity is not likely to be well furnished with precise rules; and the remark points out the danger of attempting to lay down rules for what may come in such an infinite variety of forms. But the kind of necessity that will authorize the master to sell, and the predicaments legally constituting such necessity, have been occasionally adjudicated; and a statement of the doctrine, as laid down in the leading cases upon this question, as between owner and underwriter, will present a view of the master's duty applicable also to his relation to the owner.

In the Circuit Court of the United States for the First Circuit, the principle has been announced in the following terms: "It is not sufficient to a valid sale by the master, that he acted with good faith, and in the exercise of his best discretion. There must be a moral necessity for the sale, so as to make it an urgent duty upon the master to sell for the preservation of the interest of all concerned. If the circumstances were such, that an

[1] *New Eng. Ins. Co.* v. *The Brig Sarah Ann*, 13 Peters's S. C. R. 387.

owner, of reasonable prudence and discretion, acting upon the pressure of the occasion, would have directed the sale, from a firm opinion that the vessel could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, as she lies, then a sale by the master is justifiable, and must be deemed to have been made under a moral necessity. The master thus becomes the agent of all concerned in the voyage, and when an abandonment has been accepted by underwriters, he becomes, by relation, their agent, from the time of the loss to which the abandonment relates, and a sale by him is made as agent of the underwriters." [1]

The Supreme Court of the State of Massachusetts have held the following language. "The master of a vessel insured, which has received damage by the perils of the sea, may, in cases of extreme necessity, sell the vessel, and upon such a sale so occasioned, may be founded a claim against the underwriters for a total loss. This necessity must be of a moral nature." [2] Again, they say, "There must be something more than expediency in the case; the sale should be indispensably requisite. The reasons for it should be cogent. It must be a necessity which leaves no alternative; which prescribes the law for itself, and puts the party in a positive state of compulsion to act." [3] So too, the Court of Errors of

[1] *The Sarah Ann*, 2 Sumner's R. 206. See also *Robinson* v. *Commonwealth Ins. Co.*, 3 Sumner's R. 220, 226. A master may be presumed, in ordering the sale of his ship, to have done his duty properly, if there are no proofs to the contrary.

[2] *Gordon* v. *Mass. Fire and Mar. Ins. Co.*, 2 Pick. R. 249.

[3] *Hall* v. *The Franklin Ins. Co.*, 9 Pick. R. 466.

the State of New York have held that "the master is not authorized to sell, except in a case of absolute necessity, where he is not in a situation to consult with his owner, and where the preservation of the property makes it necessary for him to act as the agent of whom it may concern."[1]

What then constitutes in legal contemplation such a case of necessity? It is either when the vessel cannot be rescued at all, as a vessel, from the peril, being an actual total loss, or when she cannot be repaired except at a cost exceeding her value when repaired, being a technical total loss, or when the means of reparation cannot be obtained.[2] Thus it has been held by the Supreme Court of the State of Massachusetts, that if from the high price of materials and labor, or the difficulty of procuring them, the expense of repairing will be more than the worth of the vessel after she is repaired, the master may sell: he becomes, in such a case, by law, an agent for the insurers as well as the insured.[3] But the expense of making the repairs at the place where the ship is injured is not the criterion for determining whether there is a constructive total loss, provided the vessel can be put into a state to be safely navigated to a port where the

[1] *American Ins. Co.* v. *Center*, 4 Wendell's R. 45.

[2] In England, it seems that the rule of a technical total loss has not been adopted, to warrant a sale by the master. It is there the duty of the master to repair the vessel, unless there is an actual total loss, or he has no means of repairing and cannot procure them by bottomry. See *Idle* v. *Royal Exch. Ins. Co.*, 7 Taunton's R. 755. *Read* v. *Bonham*, 3 Brod. and Bing. R. 147. *Robertson* v. *Clark*, 1 Bing. R. 445. *Cambridge* v. *Anderton*, 4 Dow. and Ryl. R. 203.

[3] *Gordon* v. *Mass. Fire and Mar. Ins. Co.*, 2 Pick. R. 249. See also *Amer. Ins. Co.* v. *Center*, 4 Wendell's R. 45.

repairs can be made for less than fifty per cent. on her value.[1] By reparation, however, is meant the getting off of a stranded vessel and placing her in a situation to receive repairs, as well as the making of the repairs themselves. Indeed, the most common occasions for the justifiable sale of a ship are those where the vessel is stranded in an exposed situation, the master not having the means, or not being able to procure the means, of rescuing her from the peril. The law of cases of this description was recently fully expounded by the Supreme Court of the United States, in the case of *The Sarah Ann*, on appeal from the Circuit Court for the First Circuit. "All will agree," say the court, "that the master must act in good faith, exercise his best discretion for the benefit of all concerned, and that it can only be done upon the compulsion of a necessity, to be determined in each case by the actual and impending peril to which the vessel is exposed; from which it is probable, in the opinion of persons competent to judge, that the vessel cannot be saved. This is an extreme necessity. The master must have the best information which can be got, and must act with the most pure good faith. The necessity for a sale cannot be denied when the peril, in the opinions of those capable of forming a judgment, makes a loss probable; though the vessel may in a short time afterwards be got off and put afloat. It is true, the opinion or judgment of competent persons may be falsified by the event, and that their judgment may be shown to have been erroneous by the better knowledge of other persons, showing it was probable the vessel could have been extricated from her peril

[1] *Hall* v. *Franklin Ins. Co.*, 9 Pick. R. 466.

without great injury or incurring great expense; and the master's incompetency to form a judgment, or to act with a proper discretion in the case, may be shown. But from the mere fact of the vessel having been extricated from her peril, no presumption can be raised of the master's incompetency, or of that of his advisers. . . . . It must also be proved, in a particular case given, that the means in the master's power, or which he may command from those to get his vessel off, had not been applied, and that there would have been a controlling difference between the value of the vessel, as her condition may be when she is old, and the expense to be incurred in getting her off. Nor will any ascertainment of the cost of repairs, subsequent to the extrication of the vessel, raise a presumption against the necessity to sell, whatever may be her condition as to strength, and though she may not be injured in the hull, if the actual and immediate prospective danger menaces a probable total loss."[1]

It was also held in the same case, that the power of the master to sell the hull of his stranded vessel exists also as to her rigging and sails, which he may have stripped from her after unsuccessful efforts to get her afloat; or when his vessel, in his own judgment, and that of others competent to form an opinion and to advise, cannot be delivered from her peril. The presumption is, that they are injured: they can never again be applied to the use of the vessel, and they must ordinarily become from day to day of less value. In fact, they are a part of the vessel when stripped from her, and the mere act

[1] *New England Insurance Company* v. *The Brig Sarah Ann*, 13 Peters's S. C. R. 387.

of separation by the vigilance and effort of the master, by which they are saved from the ocean, does not take them out of his implied power to sell in a case of necessity.[1]

But though the master's power of sale is thus limited, his *possession* of the ship is not that of a mere servant. The law treats him as having for some purposes a special property in it. He may therefore bring an action of trespass for any tort done to the vessel, or institute proceedings therefor in the Admiralty, describing the ship as his own. So too, where the freight has been earned under a contract entered into by himself, he may sue in his own name for the freight due on delivery of the goods.[2] So too the master is not only authorized, but it is his duty, in cases of capture, to remain by the vessel and await the result of the prize proceedings. If the vessel is condemned, and there is opportunity for a successful appeal, he should carry the cause to the appellate court; and in such cases he is to represent and act for the owners, until the directions or wishes of the latter are made known.[3] But though the master is bound to save the

[1] *New England Insurance Company* v. *The Brig Sarah Ann*, 13 Peters's S. C. R. 387.

[2] *Shields* v. *Davis*, 6 Taunton's R. 65. *Williams* v. *Millington*, 1 H. Bl. 81. But it has been held that the master cannot sue in his own name for demurrage, because there is no implied contract, between himself and the party from whom it may be due, as there is with the owner. *Brouncker* v. *Scott*, 4 Taunton's R. 1. Lord Tenterden remarks that it does not appear by the report of this case what were the terms of the contract, and whether there was any written contract, for the carriage of the goods. This might make a material difference.

[3] *Willard* v. *Dorr*, 3 Mason's R. 161. *The Saratoga*, 2 Gallis. R. 178. *Brown* v. *Lull*, 2 Sumner's R. 443. *Francis* v. *Ocean Ins. Co.*, 6 Cowen's R. 404. *Sims* v. *Sundry Mariners*, 2 Peters's Adm. R. 393.

ship and cargo for the owners by all fair means, he is not bound to employ fraud to effect that object, or to violate the good faith even of an enemy.[1] The consideration of the master's relation to the freight is reserved for a subsequent chapter. In respect to the torts committed by the master, the principles regulating the liability of the master and the owners are now to be stated.

The master is bound to his owners, and he and they to every one who may be affected by his acts, for his skill, care and attention in the management of his vessel. It is not sufficient that he exercises his best judgment; he is bound to show that he possessed and exercised the judgment of a good commander, with reasonable skill, care, prudence and fidelity.[2]

The liability of the owners for the presumed trespasses of the master, is most frequently availed of by the injured party in cases of collision. The master being at all times the responsible agent of the owners, it is a general principle of law, that the owner's liability is not varied by the fact of the presence of a pilot, in whose control the actual navigation of the ship is for the time being;[3] provided the master is not by statute compelled under a penalty to take a pilot on board. In such case, the taking the pilot is a voluntary act, and he becomes the servant of the owner. But if the master is by statute

[1] *Hannay* v. *Eve*, 3 Cranch's R. 242.

[2] *Stone* v. *Ketland*, 1 Washington's R. 142. *Purriance* v. *Angus*, 1 Dallas's R. 184. But the owner is not bound for the wilful trespasses and injuries of the master, or crew, which he has not ordered, and which were not done in the course of his duty. Neither is the master liable for such trespasses committed by the crew. *Bowcher* v. *Noidstrom*, 1 Taunton's R. 568.

[3] *Yates* v. *Brown*, 8 Pick. R. 23.

compelled to take a pilot, the owners are not responsible for his acts while the vessel is under his control.[1] The reason of the distinction is this. The owner is responsi-

[1] *Attorney General* v. *Case*, 3 Price's R. 302. *Mackintosh* v. *Slade*, 6 Barn. and Cresw. 657. *Carruthers* v. *Sydebotham*, 4 Maule and Selw. 77. *The Christiana*, 2 Haggard's R. 183. There have been some decisions in England and in this country, which affirm the owner's liability, even when a duly licensed pilot is on board. *The Neptune the Second*, 1 Dodson's Adm. R. 467. *Bussy* v. *Donaldson*, 4 Dallas's R. 206. *Yates* v. *Brown*, 8 Pick. 23. But it is now rendered probable that Lord Stowell decided the case of *The Neptune the Second* in ignorance of the then recent Act of Parliament which required a pilot to be taken on board, and that the question whether the pilot was taken on board by the voluntary act of the master, or by compulsion of law, was not mooted before him. (See the case of *The Protector*, before Dr. Lushington, High Court of Admiralty, July, 1839, reported in Monthly Law Magazine, London, August, 1839, vol. 5, p. 192.) Lord Stowell decided the cause before him upon the general principle of the owner's liability; as did also the Supreme Court of Massachusetts. As to the case of *Bussy* v. *Donaldson*, it does not distinctly appear from the report what were the provisions of the Pilot Act under which the owners claimed exemption; but it may be inferred that the Court meant to affirm the doctrine of the owner's liability although the pilot was not his voluntarily chosen servant. In this, the decision stands opposed to several English cases above cited. In *The Attorney General* v. *Case*, the owner was held liable because the pilot was taken on board under the Liverpool Act, and not under the general Act, and therefore it was optional to take one or not. *Mackintosh* v. *Slade*, turned upon the question whether the master was bound to take a pilot; and the Court being of opinion that he was so bound, held the owner exonerated. In *Carruthers* v. *Sydebotham*, Lord Ellenborough asked, "if the master cannot navigate without a pilot, except under a penalty, is he not under the compulsion of law to take a pilot? And, if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them." See also *Snell* v. *Rich*, 1 Johns. R. 305, and the elaborate judgment of Dr. Lushington, in *The Protector*, before cited. *Bennet* v. *Moita*, 7 Taunt. R. 258. *Ritchie* v. *Bowsfield*, Ibid. 309. *The Girolamo*, 3 Hag. Adm. R. 169. For a collision occasioned by the negligence of the master of a steamboat while towing a ship, the owners of such ship are not liable. *Sprout* v. *Hemenway*, 14 Pick. R. 1.

ble for the acts of the master and crew, because they are his agents, selected and appointed by him, and he is bound to provide persons of adequate skill, diligence, industry and sobriety, for the proper management of the vessel. For the same reason he is responsible for the acts of any person to whom the master voluntarily entrusts the navigation of the ship. But if the owner's authority is superseded by legislative authority, and a person is put on board whose qualifications the owner does not decide upon, but whose qualifications are determined by others, it is only conformable to a principle of natural justice to hold the owner exempted from responsibility for the acts of such person.[1]

In like manner, the owner is responsible for the damages occasioned by a tortious discharge of a mariner by the master.[2] So too, the owner is responsible for every injury to the cargo that might have been prevented by human foresight or care. If the goods are injured by rats, the master and owner must make good the loss, because, according to the injunction of the old law, they should have had

[1] A still further question arises as to the burthen of proof, in cases where a pilot is on board by a statute regulation. Is the presumption that the pilot was in charge of the vessel and therefore occasioned the damage, to prevail? Or is the owner bound to *prove* that the pilot was actually directing the course of the vessel? The cases of *Bennet* v. *Moita*, and *Ritchie* v. *Bowsfield* seem to favor the doctrine that the presence of the pilot is *prima facie* evidence that the damage was occasioned by his negligence or unskilfulness. But Dr. Lushington, in *The Protector*, (ante) holds the contrary, and that as the owner claims exemption from a general liability, under a defence of a special nature, he is bound to show affirmatively that the injury was the fault of the pilot. Whether the personal exemption of the owner, by virtue of such statutes, takes away also the remedy *in rem* against the vessel, which exists by the maritime law of nations — See *The Girolamo*, 3 Hag. Adm. R. 169.

[2] *Orne* v. *Townsend*, 4 Mason's R. 541. *Atkyns* v. *Burrows*, 1 Peters's Adm. R. 245.

a cat on board.[1] If the cargo is injured by a leak in the vessel, which is not occasioned by perils of the seas, unconnected with any negligence on the part of the master or mariners in any matter which belongs to them to perform or provide, or if the goods are lost or injured by being stowed in a part of the vessel where the master is not authorized to stow them, the owner will be responsible for the injury.[2] So too, the master and owners are responsible for goods embezzled by the crew, or stolen by others, although no personal fault or negligence is attributable to the master, because they are bound for the personal fidelity and diligence of all their servants.[3]

The extent of the owner's responsibility for the acts of the master has been various under different systems of law. By the general maritime law of continental

[1] *Si haver será gastat per rates en la nau, è no ha gat en la nau, lo senyor de la nau sera tengut de esmanar. Consolato del Mare*, ch. 22, [67], 23, [68], *Pardessus*, tome ii, p. 75. *Emerigon, Des Assurances*, tome i, p. 377. The Consulate, with that didactic precision for which it is remarkable, gravely follows out the questions arising on the death of the cat during the voyage. In this event, the master is to provide himself with a new cat or cats as soon as he arrives at a port where he can either buy or beg them; and for the damage accruing to the goods during the *interregnum*, between the demise of the old, and the accession of the new cat, the master is not to be responsible, for it is an inevitable accident. Yet I do not observe that "the good customs of the sea," (*les bones costumes del mar*) as this truly great monument of jurisprudence was entitled, have contemplated the case of a single cat only being put on board by the master, and being overpowered by the rats during the voyage.

[2] *Consolato del Mare*, ch. 18, [63], 19, [64], 20, [65], Pardessus, tome ii, p. 71, 72, 73. Emerigon, tome i, p. 373. *Morse* v. *Slue*, 1 Vent. R. 238. *Proprietors of the Trent and Mersey Navigation* v. *Wood*, cited Abb. on Ship. p. 245. *The Rebecca*, Ware's R. 188. *The Reeside*, 2 Sumner's R. 567.

[3] *Schiefflin* v. *Harvey*, 6 Johns. R. 170. *Watkinson* v. *Laughton*, 8 Ibid. 164. *Foot* v. *Wiswall*, 14 Ibid. 304. *Denison* v. *Seymour*, 9 Wendell's R. 8.

Europe, it seems to be quite clear that the owners are responsible for the master's obligations, *ex delicto*, only to the extent of their interest in the vessel and freight, and that by abandoning them they are discharged.[1] But neither the civil law nor the common law of England acknowledges any such limitation. The owner is personally responsible for all the obligations which the master incurs within the scope of his authority as master, to their full extent, whether arising *ex contractu* or *ex delicto*; and it is not known that any other than a special statute limitation, which marks what the general rule is, has ever been introduced into this country, by way of usage or otherwise.[2] But in England several Acts of Parliament have limited the owners' responsibility for the tortious acts of the master, to the value of ship and freight; and the same limitation has been enacted in this country, by several of the State legislatures.[3]

[1] *Consolato del Mare*, ch. 141, [186], 142, [227], 27, [72], Pardessus, tome ii. *Grotius de Jure Belli et Pacis*, liv. 2, cap. 11, sec. 13. Emerigon, *Contrats a la Grosse*, ch. 4, sec. 11. *L'Ord. de la Marine*, liv. 2, tit. 8, art. 2. Valin, Comm. tome i, p. 568. Pothier, *Louages Mar.* n. 51. Whether the same limitation did not also apply to the master's obligations arising *ex contractu*, is a vexed question, which the French jurists have discussed upon different sides. See Pardessus, *Cours de Droit Commercial*, Boulay Paty, *Cours de Droit Maritime*, tome i, p. 263, 298, and Valin and Pothier, *ut supra*. Amer. Jurist, vol. 19, p. 233. See also this subject discussed with much acumen in the cases of *The Rebecca*, and *The Phœbe*, Ware's R. p. 194, *et seq.* 267, *et seq.*

[2] Abbot on Shipping, part 3, ch. 5, p. 263; P. 2, ch. 2, p. 98, 99. 3 Kent's Comm. p. 216, 217, 218. *The Phœbe*, Ware's R. 263. *The Rebecca*, Ibid. 267. *Malpica* v. *M'Kown*, 1 Miller's Louis. R. 259. *Sherwood* v. *Hall*, 3 Sumner's R. 127.

[3] Act 26 Geo. 3, c. 86; 53 Geo. 3, c. 159. Revised Statutes of Mass. ch. 32, sec. 1–4. Laws of Maine, vol. 1, ch. 14, sec. 8. These statute exemptions are supposed to be rare in this country.

There is, also, by the maritime law, a real obligation of the owner, by the implied hypothecation of the ship, as well as a personal liability. Every contract of the master for repairs and supplies, in a foreign port, imports an hypothecation.[1] So too, the master's contract for the carriage of goods subjects the vessel to a lien for their value, in the event of their being lost by any fault or neglect on his part, or through the insufficiency of the vessel.[2] These liens have been incorporated into the law of England and of this country.[3] In cases of collision, also, the master's negligence or wilful trespass subjects the vessel to a lien, by the general maritime law.[4]

We have thus far considered the liability of the owner separately from that of the master, and have now to inquire what personal responsibility the master also incurs to third persons, when acting in his official character. The general principle is, that the master is always personally liable for his contracts and torts. He is liable for his contracts, upon a rule of universal prevalence, which is said to have been introduced in favor of commerce, that the persons with whom he deals may not be compelled to find out the owners and seek their remedy against them, but that they may have a double remedy,

[1] *The Jerusalem*, 2 Gallison's R. 345. *The Nestor*, 1 Sumner's R. 73. *The Fortitude*, 3 Ibid. 228.

[2] *Cleirac, les Us et Coutumes de la mer*, p. 72. *L'Ord. de la Mar.* liv. 3, tit. 1, art. 11. Abbot on Shipping, part 2, ch. 2, p. 93. *The Rebecca*, Ware's R. 194. *The Phœbe*, Ware's R. 267.

[3] Abbot, ut supra. *The Rebecca*, *The Phœbe*, ut supra.

[4] *The Thames*, 5 Rob. Adm. R. 308. *The Neptune*, 1 Dods. Adm. R. 467. *The Woodrop Sims*, 2 Ib. 83. *The Dundee*, 1 Hag. Adm. R. 109. *Gale* v. *Laurie*, 5 B. & Cresw. 156. *The Girolamo*, 3 Hag. Adm. R. 169.

against the owners and against the master;[1] and he is liable upon his torts, because the party actually committing a trespass can never shelter himself under a plea that he did the wrong only in the character of an agent, and because the maritime law, for reasons of its peculiar policy, has expressly made him liable also for his own non-feasances and negligence, as well as for those of all his officers and crew. But there is this distinction between cases of tort and contract; that while it is not competent to the master of a vessel to commit a trespass or be guilty of negligence merely as an agent, and to confine the liability therefor to his principal, it is competent to him to contract with third persons, so as to confine the responsibility to his owners. The master's liability in cases of contract and tort should therefore be considered separately.

The general principle then is, that, without some special contract, the master is personally liable upon all the contracts which he makes respecting the employment, repairs, supplies and navigation of the ship. He is liable on charter-parties and bills of lading signed by himself. The goods taken on board must be delivered, notwithstanding any cause, which does not come within the meaning of an act of providence, or within the exceptions provided for in the bill of lading. If they are lost or injured by any negligence or unskilfulness of the master or crew, or stolen by others, he is personally responsible, as well as the owner, both being regarded by the

[1] Abbot on Ship. part 2, ch. 2, sec. 2, p. 90. Emerigon, *Des Assurances*, tome ii, ch. 45, sec. 10, p. 448. 1 Bell's Comm. sec. 434, p. 413.

law of England and of this country as common carriers.[1] So, too, the master is liable for repairs and supplies ordered by himself, whether at home or abroad, unless it appears by the contract that credit was given only to the owner.[2] And he is liable for the wages of the seamen and for pilotage.[3]

But the contract may be made upon the exclusive credit of the owner. If there is a special promise of the master, the owner is not liable; and *e converso*, where there is a special promise by the owners, the master is discharged from any obligation.[4] The master may also, by virtue of his general authority, order necessary repairs, or make contracts within the ordinary scope of the ship's employment, upon the exclusive liability of the owner, disclosing his name, and stating that he himself is not to be responsible. But this precaution not having been taken, it becomes a question of evidence and of what will amount to evidence of exclusive credit,

[1] *Morse* v. *Slue*, 1 Vent. 190, 238. *Boucher* v. *Lawson*, Rep. temp. Hardw. 183. *Dale* v. *Hall*, 1 Wils. R. 281. *Proprietors of Trent Navigation* v. *Wood*, 3 Esp. R. 127. *Watkinson* v. *Laughton*, 8 Johns. R. 164. *Eliot* v. *Russell*, 10 Ibid. 1. The master and owner are severally liable to indemnify the shipper in the value of the goods at the place where they were to be delivered. *Watkinson* v. *Laughton*, 8 Johns. R. 164. *Amory* v. *M'Gregor*, 15 Ibid. 24. *Oakey* v. *Russell*, 18 Martin's Louis. R. 62.

[2] *Rich* v. *Coe*, Cowper's R. 637. *Garnham* v. *Bennett*, 2 Stra. 816. *James* v. *Bixby*, 11 Mass. R. 34. *Hussey* v. *Christie*, 9 East's R. 426. *Marquand* v. *Webb*, 16 Johns. R. 89.

[3] *Farrel* v. *M'Clea*, 1 Dallas's R. 393. Abbot on Ship. part 4, ch. 4, sec. 1, note 2. Post, Part V, ch. 1.

[4] *Hussey* v. *Allen*, 6 Mass. R. 163. *Chapman* v. *Durant*, 10 Ibid. 47. *James* v. *Bixby*, 11 Ibid. 34. *Wainwright* v. *Crawford*, 3 Yeates's R. 131, 4 Dall. R. 225. *Farrel* v. *M'Clea*, 1 Dallas's R. 396. *Schemerhorn* v. *Loines*, 7 Johns. R. 311. *Marquand* v. *Webb*, 16 Ibid. 89. *Muldon* v. *Whitlock*, 1 Cow. 290. *The Aurora*, 1 Wheaton, 96. *Thorn* v. *Hicks*, 7 Cowen, 697.

on which each case must be determined for itself. Much depends upon the kind and object of the contract and the place where it is made; and still more upon the party by whom it is made.

Repairs and supplies, whether in a foreign port or a home port, ordered by the master, will, in general, be presumed to be a charge against him as well as the owner, because the credit is given to the master in respect of his contract, and to the owner, in respect of his being the principal and the party who derives benefit.[1] But, if ordered by the owner, the master is never liable, because his liability is in respect of his contract.[2] So, too, if it appears that the master merely acted as the servant of the owners to transmit their orders for repairs or supplies, it has been held that he will not be liable.[3] But then the capacity in which he gave such orders ought to be clearly and unequivocally distinguishable from his general official agency, to avail him as a defence.

With regard to the wages of seamen, it seems to be the opinion of some learned jurists, that the mere fact of their being shipped by the owner, in the home port, would scarcely furnish sufficient ground for the presumption that the contract was exclusively on the credit of

[1] *Hoskins* v. *Slayton*, Cas. temp. Hardw. 377. *Hussy* v. *Christie*, 9 East's R. 426. *Rich* v. *Coe*, Cowp. 636. *Leonard* v. *Huntington*, 15 Johns. R. 298. *Marquand* v. *Webb*, 16 Ibid. 89. *James* v. *Bixby*, 11 Mass. R. 34. *Stewart* v. *Hall*, 2 Dow. 29. 1 Bell's Comm. sec. 434, *et seq.* 3 Kent's Comm. 161. Abbot on Shipping, part 1, ch. 357, note 1; part 2, ch. 3, sec. 1, note 1.

[2] *Farmer* v. *Davis*, 1 T. R. 108.

[3] *Hoskins* v. *Slayton*, Cas. temp. Hardw. 377.

the owner.[1] And undoubtedly the maritime law contemplates that the seamen are to have a triple security for their wages, the owner, the master, and the ship itself, as a general right. Still, the master's liability is said to be founded in contract, and if it can be made to appear, by clear and satisfactory proof, that he has made no contract with the seamen express or implied, he will not be liable to them. Thus, if the former master dies, or is removed, the master who succeeds will only be liable to the seamen for the wages earned after his appointment, and not for the wages earned in the preceding part of the voyage.[2] But the original hiring of the seamen by the owner, or by another master, is far from being evidence that no contract arises on the part of the master who is sought to be held liable. If he signs the articles, which the seamen may have previously signed, there is a clear case of contract;[3] and his succession to the office of master during the voyage raises a presumption of contract for the residue of the voyage;[4] and perhaps it might, under some circumstances, raise such a presumption for the whole voyage.[5]

The master is personally liable for his own negligences, non-feasances and mis-feasances.[6] He is also liable for those of his officers and crew, though no personal fault or

[1] Story's Comm. on Agency, sec. 299, p. 302. 2 Emerig. *Des Assurances*, ch. 4, sec. 12, p. 467. 1 Bell's Comm. sec. 435, p. 414; sec. 418, p. 398.

[2] *Wysham* v. *Rossen*, 11 Johns. R. 72.

[3] *Mayo* v. *Harding*, 6 Mass. R. 300.

[4] *Wysham* v. *Rossen*, ante.

[5] See post, Part V, ch. 1.

[6] *Morse* v. *Slue*, 1 Vent. 238; 1 Mod. R. 85. *Schiefflin* v. *Harvey*, 6 Johns. R. 170. *Denison* v. *Seymour*, 9 Wendell's R. 9.

negligence is imputable to him. The rigor of the law in this respect arises from reasons of public policy;[1] and does not admit of any distinction whether the officers and crew are appointed by the master himself, or by the owner.[2] But the master is not liable for the wilful trespasses of his crew, not done in the course of their duty, or by his commands.[3]

[1] *Morse* v. *Slue*, 1 Vent. 238; 1 Mod. R. 85. *Schieffelin* v. *Harvey*, 6 Johns. R. 170, 176. *Watkinson* v. *Laughton*, 8 Ibid. 164. *Foot* v. *Wiswall*, 14 Ibid. 304. *Purviance* v. *Angus*, 1 Dall. 184. Abbot on Ship. part 2, ch. 2, sec. 3; part 3, ch. 3, sec. 3. Valin, Comm. tome i, p. 385; tome ii, p. 161, 162. Story on Agency, sec. 315, 319.

[2] *Foot* v. *Wiswall*, 14 Johns. R. 304. *Denison* v. *Seymour*, 9 Wendell's R. 8.

[3] *Bowcher* v. *Noidstrom*, 1 Taunt. R. 568. Nor are the owners liable for the acts of the master beyond the authority confided in him. *Reynolds* v. *Tappan*, 15 Mass. R. 370. *Dias* v. *The Owners of the Revenge*, 3 Wash. R. 262.

CHAPTER II.

OF THE MASTER'S RELATION TO THE CARGO.

Two relations of the master of a merchant vessel to the cargo under his custody may exist at the same time. *First*, where he is to be viewed simply as master, without any other powers or duties, in ordinary circumstances, than those of safe custody and conveyance: *second*, where he is at the same time both master and consignee, or supercargo, with the powers and duties of the latter capacity superadded to those of the former.

But when the master is also appointed consignee of the cargo, his acts in relation to it are severally to be referred to the different capacities in which he is acting.[1] The general rule is, that during the voyage, his acts are to be referred to his capacity as master; but after the cargo has arrived at its destination, the master, if he be consignee, is to be considered as acting in that relation only.[2] This rule has been clearly illustrated by the Su-

[1] 2 Livermore on Agency, 215. Abbot on Shipping, part 2, ch. 4, sec. 1, n. 1. 1 Bell's Com. p. 413. 3 Kent's Com. Lect. 46. *The Vrow Judith*, 1 Rob. Adm. R. 150. *The St. Nicholas*, 1 Wheaton's R. 417. *Williams* v. *Nichols and Perry*, 13 Wend. R. 58. *Kendrick* v. *Delafield*, 2 Caine's R. 67. *Un. Ins. Co.* v. *Scott*, 1 Johns. R. 106.

[2] 2 Livermore on Agency, 215. *Williams* v. *Nichols and Perry*, 13 Wend. R. 58. *Un. Ins. Co.* v. *Scott*, 1 Johns. R. 106. *Earle* v. *Rowcroft*, 8 East's R. 126.

preme Court of the State of New York. Where, they say, the master of a vessel in which goods are shipped is the *consignee* of the cargo, he stands in the relation of agent to two distinct principals; in the stowage of the cargo, its safe custody and delivery, he is the agent of the ship-owner; but in its sale, and in accounting for its proceeds, he is the agent of the consignor; and in such case, where the owner receives only the *freight*, and the master *commissions* upon the sales, and the master neglects to account for the proceeds, an action will not lie against the owner for such neglect.[1] But the capacity in which the master is to be considered as acting, is not always to be determined by the place where the act is done, but may depend in some degree upon the act itself. Thus, where the master, who was also consignee, having arrived at one port of destination, carried on shore and absconded with a part of the cargo, the same court held that the barratrous act could not be referred to his character of consignee; but that the taking the goods on shore with the fraudulent intent to convert them to his own use, was a criminal breach of his duty as master of the vessel, and properly imputable to him as master.[2]

[1] *Williams* v. *Nichols and Perry*, 13 Wend. R. 58. This case is distinguishable from that of *Kemp* v. *Coughtry*, (11 Johns. R. 107,) where the ship-owner was held liable for the proceeds of cargo sold by the master, in that it was proved to be the usage in the particular trade to consign goods to the master for sale, and the freight which was received by the owners covered the whole compensation paid for the carriage and sale of the goods.

[2] *Cooke* v. *Com. Ins. Co.*, 11 Johns. R. 40. So too, the distinction of the capacity in which the master is acting may be further illustrated by the lien that is sometimes created on the vessel by his acts. Shippers have such a lien for the execution of the contract of a bill of lading; but then it is only those contracts which the master enters into in his quality as master, that

But ordinarily and in his general official capacity, the master is a stranger to the cargo, beyond the purposes of safe custody and conveyance.[1] His rights and duties, therefore, in this simple relation of master are first to be considered, and then the further powers with which he becomes invested by the general policy of the law, in particular emergencies.

The first duty of the master who receives on board goods to be carried for freight, is to see that his vessel is tight, stanch and fitted in all respects for the purpose of carrying those goods to the place to which he undertakes to carry them.[2] There seems to have been some difference of opinion among eminent French writers on the maritime law, whether the master and owner are responsible to shippers for latent defects in the vessel, which were unknown to them at the time of sailing.[3] But the law of England, which holds the master and owner responsible, as common carriers, against all events but acts of Providence or the public enemy, admits of no distinction between such defects as are latent and such as are

specifically bind the ship and affect it with a lien or privilege in favor of the creditor. See *The Paragon*, Ware's R. 322. *The Phœbe*, Ibid. 263.

[1] *The Gratitudine*, 3 Rob. Adm. R. 255. *Ross* v. *Ship Active*, 2 Wash. R. 226. *Searle* v. *Scovell*, 4 Johns. Ch. R. 222. *Douglass* v. *Moody*, 9 Mass. R. 548.

[2] The rule of the French Ordinance was, that if the merchant can prove that when the vessel sailed it was unfit to perform the voyage, the master shall lose his freight and pay the merchant his damages and interest. *L'Ord. de la Marine*, liv. 3, tit. 1, art. 12. See also liv. 2, tit. 1, art. 8.

[3] Valin is of opinion that it makes no difference whether the defects are known or unknown, latent or patent. (Com. tome i, p. 653, 654.) Pothier thinks that if the vessel has been surveyed, (a custom in France,) and the surveyors report no defects, the master and owner are not responsible for defects which were not discovered. *Traité Chart. Part.* n. 30.

known or discoverable. The master and owner are bound to provide equally against them all.

In the language of Lord Ellenborough, "it is a term of the contract on the part of the owner *implied by law*, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so: the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience require that it should be so."[1] The same doctrine has been well settled in our own courts;[2] and it flows directly from the position that the master and owner of a general freighting ship are common carriers.[3] So too it is the

[1] *Lyon* v. *Mells*, 5 East's R. 428.

[2] *Putnam* v. *Wood*, 3 Mass. R. 481. *Bell* v. *Read*, 4 Binn. R. 127. *Kimball* v. *Tucker*, 10 Mass. R. 192. *Goodridge* v. *Lord*, Ibid. 483. *Elliott* v. *Rossell*, 10 Johns. R. 1. *Richards* v. *Gilbert*, 5 Day's R. 415. *Emery* v. *Henry*, 4 Greenl. R. 407. *M'Clure* v. *Hammond*, 1 Bay. R. 99. *Harrington* v. *Lyles*, 2 Nott and M'Cord, R. 88.

[3] The Supreme Court of the State of New York have held that the master and owners of a vessel bringing goods from New Orleans to New York are not common carriers. *Aymar* v. *Astor*, (6 Cowen's R. 266.) This decision stands opposed to the uniform current of decisions in the other States, and to the previous cases of *Elliott* v. *Rossell*, (10 Johns. R. 1), and *Kemp* v. *Coughtry*, (11 Ibid. 107), in the same Court. In truth, the principle of holding the master and owners liable for all losses except such as arise from acts of Providence or the public enemy, is not peculiar to the common law of England. What alone seems to be at all peculiar to that law is the form in which the liability is commonly expressed. There is the same liability by the general maritime law of Continental Europe. *Consolato del Mare*, chap. 13, [58], 70, [115], 20, [65], 21, [66], 22, [67], Pardessus, tome ii. *L'Ord. de la Marine*, liv. 2, tit. 1, art. 9. *Code de Commerce*, art. 230. Emerigon, tome i, p. 377. Valin, Comm. tome i, p. 394. Roccus, N. 40, 50, 56. Jacobsen's Sea Laws, by Frick, B. 2, ch. 1. Indeed the Consolato expresses the exceptions from the usual liability in

duty of the master to keep the vessel in complete repair, by making good at the first convenient port all injuries she may have sustained during the voyage; for the contract is that the goods shall be transported to the place of destination.[1] So imperative is this duty, that the master is allowed by law, if he cannot otherwise procure the means, to hypothecate the cargo, for the purpose of putting the vessel into a condition to perform the contract of transportation.[2]

The master is also bound to see that the crew are sufficient in point of numbers, skill and efficiency, for the contemplated voyage. We have already seen that both the master and the ship-owner are responsible for the conduct of the entire crew.[3] So too, the master is by the general maritime law bound to take a pilot, wherever the usage, or the laws of the country require it.[4] It is always a want of due diligence in a master not to take a pilot, in places where it would have been negligence in the pilot, if taken on board, not to have avoided the difficulties of the navigation.[5] It has been held in New York to be the rule of the master's duty,

nearly the same formula as that of the common law; "*E fon fet percò a quest capitol: car à empediment de Deu ne de mar ne de vent ne de senyoria, negú no pot res dir ni contrastar.*" "Wherefore it is that this chapter has been made; for the restraint of God, the sea, the weather, or foreign princes, no one can gainsay or resist." Chap. 20, [65], Pard. tome ii. p. 73.

[1] And this is true, whether the vessel be let by charter-party, or be a general ship. See the cases cited last page, note 2.

[2] *The Gratitudine*, 3 Rob. Adm. R. 140, 255.

[3] Ante, p. 204.

[4] Abbot on Shipping, part 3, ch. 2, p. 222, and notes. Ibid. part 2, ch. 5, p. 161, and notes.

[5] *The William*, 6 Rob. Adm. R. 316. See also *Law* v. *Hollingworth*, 7 T. R. 156. *Phillips* v. *Headlam*, 2 B. & A. 380.

that in every well appointed port, where pilots are to be had, a vessel arriving upon pilot ground is bound to take a pilot, and the ground is to be approached carefully; and in the night the master is to hold out a light for a pilot, and to wait a reasonable time for one, and to approach one if he can do it with safety.[1]

Following the course of the master's duties in what may be called their historical order, we may suppose the contract by which he, or the owner, engages to carry the goods of another, to have been made. This may be done *first*, by a chartering of the vessel, which, as we have seen, is ordinarily done by the owner himself; *secondly*, by signing bills of lading, which may always be done by the master of a general freighting ship, and commonly is done by him only; *thirdly*, by receiving goods on board without any written contract, in which case the master engages to carry them under all the responsibilities imposed upon him by the general law, without the further exceptions which are usually inserted in charter-parties and bills of lading. The general duties and responsibilities of the master, which are the same in all these cases, are now to be stated, and also how far they are restrained by the peculiar features of each contract.

1. In respect to the reception of the goods into the ship. Whether the ship be let by charter-party, or the contract be by bill of lading, or by the mere undertaking as a common carrier, without any written contract, and whether the lading be performed by the shipper himself

[1] *Bolton et al.* v. *Am. Ins. Co.*, Superior Court of New York, before Ch. J. Jones, November, 1835, cited 3 Kent's Com. 176, note (c), Edition 1840.

or by the master, it is alike in all cases the master's duty to provide all the usual ropes and rigging fit for the lading of the cargo. If by any defect in the usual equipment of ships for this purpose, any damage happens to the goods, the master and owner would be responsible.[1]

2. In respect to the stowage of the goods. It is always the duty of the master to stow the goods under deck, unless by the contract he has expressly reserved a power to carry them on deck, or unless he can show, in the absence of a written contract, a usage in the particular trade to carry goods on deck, so generally known and recognised, that it may be presumed to have been within the contemplation of the parties at the time of the shipment. The authorities of the maritime law are unanimous upon this point.[2] The French Ordinance, and after it, the *Code Napoleon* expressly prohibit the master from lading goods on deck, except in a particular trade, called *navigation au petit cabotage*, which is carried on in a class of vessels usually without decks.[3] This is the only exception in the French law within which the master can bring himself, to avoid his general responsibility. With us, if there be what is commonly called a

[1] *Lois D'Oleron*, art. 10, Pard. i, p. 330. *Droit Mar. de Wisbuy*, art. 25, Ibid. p. 478. Abbot on Ship. part 3, ch. 3, p. 224. *Goff* v. *Clinkard*, cited 1 Wils. 282. *Wilson* v. *The Belvidere*, Pet. Adm. R. 258.

[2] *Consolato del Mare*, ch. 141, [186.] Pard. ii, p. 155. *L'Ord. de la Marine*, liv. 2, tit. 1, art. 12. *Code de Commerce*, art. 229. Valin, Comm. tome i, p. 397. Abbot on Ship. part 3, ch. 8, sec. 13, p. 355. *The Schooner Reeside*, 2 Sumner's R. 567. *The Paragon*, Ware's R. 322. *The Rebecca*, Ibid. 188. *Bartol* v. *Dodge*, 5 Greenl. R. 286. *Gould* v. *Oliver*, 4 Bingh. N. C. 134. *Smith* v. *Wright*, 1 Caine's R. 43. *Lennox* v. *Un. Ins. Co.*, 3 Johns. Cas. 178. *Barber* v. *Bruce*, 3 Conn. R. 9.

[3] *L'Ord. de la Marine*, *Code de Commerce*, and *Valin*, ut supra.

clean bill of lading, that is, one in the common form engaging to deliver the goods in good order and condition, the dangers of the seas only excepted, or a charter-party in the like form, the law presumes that the goods are to be carried under deck; such is the meaning of the contract; and no usage can be permitted to control, vary or contradict that meaning.[1] If the contract be by parol, still the presumption is that the goods were intended by the shipper to be sent under deck, for that is the general law; but it seems that it would be competent to the master to show a local custom to carry goods on deck in the particular trade so generally known and recognised, that a fair presumption arises that the parties, in entering into their engagement, did it with a silent reference to the custom, and tacitly agreed that their rights and responsibilities should be determined by it.[2]

The master is in like manner responsible for the proper stowage of the goods on board, so that no injury may happen to them by the motion or leakage of the ship.[3] Bad stowage may be either from an improper and de-

[1] *The Schooner Reeside*, 2 Sumner's R 567. *The Paragon*, Ware's R. 322. *Vernard* v. *Hudson* 3 Sumner's R. 405. But the presumption may be rebutted by showing a positive agreement that the goods are to be carried on deck; or it may be deduced from other circumstances, such as the goods paying the deck freight only. This proof would be consistent with the rules of law, for it neither contradicts nor varies the bill of lading; but simply rebuts a presumption arising from the ordinary course of business. *Vernard* v. *Hudson*. Where goods were shipped under the common bill of lading, at an under-deck freight, but were carried on deck, and finally delivered safe, held that the ship-owner was only entitled to a deck freight. Ibid.

[2] *The Paragon*, ut supra.

[3] *Droit Mar. de Wisbuy*, art. 25. Pard. 1, p. 478. *Lois D'Oleron*, art. 11. 2 Magens, p. 16, art. 8. Emerigon, ch. 12, sec. 42.

fective arrangement, so that the goods are damaged by contact or by the leakage of the vessel; or from taking on board goods packed or coopered improperly, such as oil or vitriol, whereby other goods are injured, through a leakage of the casks, occasioned by any stress of weather that is not fairly within the meaning of "perils of the seas."[1] These defects the master undertakes by his contract, whether written or verbal, to provide against; and the meaning of the exception, "perils of the seas," which is ordinarily introduced into bills of lading, and which the law implies, in the absence of a written contract, includes only those injuries occasioned by some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.[2]

The question next recurs, whether the master's duties in the stowing of the cargo, are varied by the fact that the ship is taken by charter-party, and the charterer appoints his own stower. Lord Tenterden states it as the general duty of the master, to attend to the stowing, "unless," he says, "by usage or agreement, this business is to be performed by persons hired by the merchant."[3] Since that text was written, it has been held in England, that the master is *prima facie* liable for the safe stowage of the cargo, but he is exonerated by the special appointment of his own stower by the freighter; and if the

[1] *The Schooner Reeside*, 2 Sumner's R. 567.

[2] Ibid. Abbot on Shipping, part 3, ch. 4, sec. 1. 3 Kent's Comm. Lec. 47, p. 216.

[3] Abbot on Shipping, part 3, ch. 3, sec. 3, p. 224. He cites, Welwood, p. 29. 2 Magens, p. 16, art. 8. French Ord. liv. 2, tit. 1, art. 12. Laws of Wisbuy, art. 23. Laws of Oleron, art. 11, and Cleirac thereon.

freighter, by a verbal agreement with the owner, undertakes to appoint his own stower, and he acts as such, the mere silence of a charter-party, subsequently entered into, does not subject the master to his original liability.[1] So too, it seems that if the shipper of goods is warned as to the way in which they will be stowed, the consignee cannot maintain any action for damage occasioned by bad stowage.[2]

3. In respect to setting sail.

There is good authority in the maritime law, for the position that the master is bound not to sail out in tempestuous weather, though the point has not been directly adjudicated in this country, or in England, The laws of Oleron, of Westcapelle, and of Wisbuy expressly make him liable for any damage happening to the cargo in consequence of sailing in bad weather.[3] It is true that they held him justified by the advice of a majority of his crew, which he was obliged to take and to follow. This we have seen is not the law of this country, the master being solely responsible for the government and direction of the ship.[4] But although this justification is by our law

[1] *Swainston* v. *Garrick*, Exchq. Trin. T. 1833. Law Journal, vol. 11, n. s. vol. 2, p. 255. Lord Lyndhurst, C. B. is reported to have said, "The master, as servant of the owner, is bound to superintend the stowage, and if in consequence of improper stowage the owner has been called upon, and has satisfied any claim for damage, the master is liable to him. But where the master is told by the owner that some one will come to superintend and do that which would otherwise be his duty, he is exonerated. If afterwards that intention is changed, the owner should communicate it to the master."

[2] *Major* v. *White*, 7 Car. & P. 41.

[3] *Lois D'Oleron*, art. 2, Pard. 1, p. 324. *Lois De Westcapelle, Jugement* 2. Ibid. p. 371. *Droit Mar. de Wisbuy*, art. 16. Ibid. p. 171.

[4] Ante Part ii, ch. 1, p. 81, 82, 83.

taken away, the force of the responsibility remains, and remains wholly with the master. Lord Tenterden adopts the rule upon the authorities cited;[1] and there is an old case from which he might have drawn a pertinent analogy, to the effect that if a barge-master undertakes to shoot a bridge at a proper time, and is driven by a sudden gust or current against a pier, the loss so happening, would be excusable as a mere casualty; but if he rashly undertook to shoot the bridge when the bent of the weather was tempestuous, he would be chargeable on account of his temerity and imprudence.[2]

4. Care of cargo on the voyage.

A promise to carry the cargo, whether written or verbal, implies a promise to keep it safely on the voyage; and accordingly the master is bound to take the utmost care of the goods, varying his care and watchfulness with the nature and quality of the cargo.[3] He should cause the goods to be properly ventilated if they require it.[4] As we have already seen, he is bound to take the usual precautions against a destruction of the goods by rats, or by a leakage occasioned by rats, by having a cat on board; and if this precaution is neglected, he will be responsible for the loss so occasioned, as it will not then be deemed to have been caused by a peril of the sea, or

[1] Abbot on Shipping, part 3, ch. 3, sec. 5, p. 226.

[2] *Armies* v. *Stevens*, 1 Strange, 128. See also Jones's Bailm. 107.

[3] *Consolato del Mare*, ch. 19, [64], 20, [65], 21, [66], Pard. tome ii, p. 72, 73. Emerigon, tome i, p. 377. 3 Kent's Comm. 213. *Hunter* v. *Potts*, 4 Camp. R. 203. *Dale* v. *Hall*, 1 Wils. 281. *Davidson* v. *Gwynne*, 12 East's R. 381. *Siordet* v. *Hall*, 4 Bingh. R. 607. *Garrigues* v. *Coxe*, 1 Binn. R. 592.

[4] *Davidson* v. *Gwynne*, 12 East's R. 381.

an inevitable casualty.[1] In like manner, the master is bound to prevent thefts and embezzlements by the crew, and by all other persons, and he is personally liable therefor, as well as for all injuries to the cargo arising from the negligence or misfeasance of the crew,[2] whether they are appointed by the owner, or by himself.[3]

In cases of general average, the master has a right to retain the goods of shippers until their proper share of contribution towards the general average is paid or secured.[4] And his lien in such cases exists upon goods shipped by government, as well as by private persons.[5]

5. Construction of the exceptions in the bill of lading.

A bill of lading is a document subscribed by masters of vessels, acknowledging to have received the goods therein specified on board their vessels, and engaging to deliver them in the same condition at the place and to the persons to whom consigned, upon the payment of the freight agreed upon. In America, the common form of the bill of lading contains no other saving clause than

[1] Ante Part III, ch. 1, p. 197, 198, *Consolato del Mare*, ch. 22, [67], 23, [68], Pard. tome ii, p. 75. Emerigon, tome i, p. 377, 378. Marsh. on Ins. book 1, ch. 7, sec. 4. *Dale* v. *Hall*, 1 Wils. 281. *Garrigues* v. *Coxe*, 1 Binn. R. 592.

[2] Abbot on Shipping, part 3, ch. 3, sec. 3, 9. *Morse* v. *Slue*, 1 Vent. 238. *Schieffelin* v. *Harvey*, 6 Johns. R. 170, 176. *Watkison* v. *Laughton*, 8 Ibid. 164. *Foot* v. *Wiswall*, 14 Ibid. 304.

[3] *Denison Seymour*, 9 Wend. R. 8.

[4] Abbot on Shipping, part 3, ch. 8, sec. 17. *Simonds* v. *White*, 2 B. and C. 805. *Scaife* v. *Tobin*, 3 B. and A. 523. *The Hoffnung*, 6 Rob. Adm. R. 383. Stevens on Average, p. 50. *United States* v. *Wilder*, 3 Sumner's R. 308.

[5] *United States* v. *Wilder*, supra.

"the danger of the seas only excepted," and a proviso that the consignees shall pay the freight.[1]

Dangers of the seas, or perils of the seas, have been defined to include those injuries occasioned by some irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence.[2] What are such perils, within the

[1] The following is the common form in use in this port:

Shipped, in good order and condition, by
on board the good called the whereof
is master, for the present voyage, now lying in the
Port of Boston, and bound for *To say:*

being marked and numbered as in the margin, and are to be delivered in like good order and condition, at the aforesaid port of (the danger of the seas only excepted) unto or to assigns, he or they paying freight for the said goods

with primage and average accustomed.

In witness whereof, the master of the said vessel hath affirmed to Bills of Lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated at Boston, this day of 18

In England, the saving clause has for quite a long time been in these words: "*the act of God, the king's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and kind soever excepted, save risk of boats so far as ships are liable thereto.*" In bills of lading for goods shipped on board steam vessels, in England, the saving clause is in these words: "*the act of God, the king's enemies, fire, machinery, boilers, steam and all and every other dangers and accidents of the seas, rivers and steam navigation, of whatever nature and kind soever excepted.*"

[2] *The Reeside*, 2 Sumner's R. 567. Abbot on Shipping, part 3, ch. 4, sec. 1. 3 Kent's Com. Lect. 47.

definition, is often a difficult question, and always rather a question of fact than of law. Losses occasioned by rats, when proper precautions have been taken against them;[1] by collision with other vessels, when no negligence is imputable to the vessel injured;[2] by the dangers of the navigation, when due precautions have been taken by having a pilot;[3] by sunken rocks or shallows not generally known, and where the vessel is forced upon them by adverse winds and tempests;[4] by accidental obstructions not visible, or alterations in the natural features of a place not known, and therefore not to be avoided;[5] by an extraordinary press of sail, in order to keep up with a ship of war that had taken the vessel in tow;[6] by the impressment of the crew;[7] by a jettison, to prevent the vessel from foundering,[8] unless it had been overloaded:[9] these have all been deemed perils of the sea, and it is not important that a stronger vessel might have outlived the exposure, if the vessel lost or injured was reasonably suf-

[1] *Ante*, p. 216, n. 1. But a loss occasioned by the destruction of the ship's bottom by worms has been held not to be by a peril of the sea, upon the ground that it is by ordinary wear and decay. *Park on Ins.* ch. 3. *Rohl* v. *Parr*, 1 Esp. 444. *Martin* v. *Salem Ins. Co.*, 2 Mass. R. 420.

[2] *Buller* v. *Fisher*, 3 Esp. R. 67. *Smith* v. *Scott*, 4 Taunt. R. 126. Abbot on Shipping, part 3, ch. 4, sec. 2, 5.

[3] *The William*, 6 Rob. Adm. R. 316. *Cost* v. *M'Mechan*, 6 Johns. R. 160.

[4] Abbot on Shipping, part 3, ch. 4, sec. 6. *Elliot* v. *Rossel*, 10 Johns. R. 1. *Kemp* v. *Coughtry*, 11 Ibid. 107.

[5] *Hahn* v. *Corbett*, 2 Bing. R. 205. Abbot on Shipping, part 3, ch. 4, sec. 1, 5, 6, 9.

[6] *Hagedorn* v. *Whitmore*, 1 Stark. 157.

[7] *Hodgson* v. *Malcom*, 5 Bos. and Pul. 336.

[8] *Bird* v. *Astcock*, 2 Bulst. 280. 1 Caine's R. 43. 3 Conn. R. 9.

[9] 2 Ld. Raymond, 909, 911.

ficient for the voyage.[1] Losses by pirates, who are deemed enemies of the human race, have also been included within the exception of perils of the sea.[2] So too, a loss by lightning is a peril of the sea;[3] but a loss by fire, proceeding from any other cause, is not.[4]

The burthen of proof is always upon the master, to bring himself within some one of the foregoing grounds of exception to his liability;[5] and where the case does not preclude the idea of negligence, as affecting the question, (such as a loss by lightning,) if it should appear that he had not used the proper diligence incumbent on him, namely, the highest degree of diligence,[6] he would be liable. Thus, if his defence were that he had been robbed of the goods by pirates, it would fail in case it appeared that the ship fell into the hands of the pirates by any fault or negligence of his own, or, what is the same, of the crew.[7] But whether the master, when he has shown that the loss happened within some one of the recognised *casûs fortuiti*, or perils of the sea, is bound also to show affirmatively that no negligence of his own accompanied or blended with the accident, perhaps, admits of some doubt. By the civil and maritime law, it

[1] *Armies* v. *Stevens*, 1 Stra. 128. Abbot on Shipping, part 3, ch. 4, sec. 7.

[2] Abbot on Shipping, part 3, ch. 4, sec. 2, 3. *United States* v. *Smith*, 5 Wheat. R. 153.

[3] Abbot on Shipping, part 3, ch. 4, sec. 8.

[4] *Forward* v. *Pittard*, 1 T. R. 27.

[5] Ibid. 27, 33. *Bell* v. *Read*, 4 Binn. R. 127. *Cost* v. *M'Mechan*, 6 Johns. R. 160.

[6] Valin, Com. tome i, p. 394. Pothier, *Traité de la Charte-Partie*, n. 31, 50.

[7] Emerigon, tome i, p. 532.

seems quite clear that the only burthen upon the master is to show that the loss occurred by some *vis major*. Valin says, that "it is for him to prove the *casus fortuitus*;"[1] and he cites Peckius, Vinnius and Casaregis, who add, that if the adverse party allege that the accident happened by his fault, it is for them to prove it, because it is an exception which renders them demandants, [actors,] in this matter.[2] Pothier, also, lays it down, that the master must show the loss to have been caused by a *vis major*; but he does not intimate that he is obliged to show affirmatively that there was no negligence. His language rather implies that after a *prima facie* case of a loss by a peril of the sea, it is for the other party to show that the negligence of the master caused or contributed to the loss.[3]

The common law authorities are not so clear upon this point, but I apprehend that the principles on which they proceed will not lead to a different result. The master (being a common carrier) is treated as an insurer of the safety of the goods against all but two classes of

[1] Valin, tome i, p. 394.

[2] Ibid.

[3] Pothier, *Traité de Charte-Partie*, n. 35, 38, 39. The passage, which is particularly cited here, is as follows: "Not only is the master bound to exhibit all the goods with which he is charged by the bill of lading, but also to exhibit [deliver] them in the same condition in which he received them, unless they have since been damaged by accidents of *vis major*, (*force majeure*,) for which he is not responsible. But if it was by the act or negligence of the master, or his people, he is obliged to indemnify the freighter. . . . . When the dispute about the condition of the goods, which he to whom they were consigned alleges to have been damaged by the fault of the master, cannot be decided promptly, the master may require to be paid his freight provisionally, either on giving security, or without security, according as the dispute shall appear to be well or ill founded," n. 38, 39.

events — the acts of God and the public enemy.[1] The law presumes against him in all cases but these; so that the first question to be settled is, not whether there has been negligence, but whether the loss falls within either of the cases excepted by the general principles of law, or the particular contract of the parties.[2] If it is shown that the loss falls within either of the excepted cases, does the law still presume against him? On the contrary, as it seems to me, he is here entitled to the benefit of the principle by which every man is presumed to have performed the duty incumbent upon him. The first presumption against him is in all but certain excepted cases, and is founded on public policy. The excepted case having occurred, that presumption is, so to speak, discharged of its office; and then the presumption of innocence, which public policy had suspended in all other cases, seems necessarily to apply. This view of the subject is sanctioned by what fell from Lord Mansfield in the case of *Forward* v. *Pittard:* "To prevent litigation, collusion, and the necessity of going into circumstances impossible to be unravelled, the law presumes against the carrier, *unless he shows* it was done by the king's enemies, or by such act as could not happen by the intervention of man, as storms, lightning and tempests."[3] The fair deduction

[1] *Riley* v. *Horne*, 5 Bing. R. 217.

[2] Abbot on Ship. part 3, ch. 4, sec. 1.

[3] 1 Term R. 38. See also the case of *Cost* v. *Mechan*, 6 Johns. R. 160. In this case, where the vessel was beating up a river, and on making a tack near the shore, the wind suddenly changed, and the vessel was carried upon the bank, and the cargo injured, it was found by the jury that the change of wind was the proximate cause of the loss, and the court held it to be an act of God. Upon argument before the whole court, it was contended that there was negligence on the part of the master in running so

from this language is, that when he has shewn that the loss proceeded *prima facie* from one of the excepted causes, the law no longer presumes against him, and it is for the other party to prove negligence.

But in all cases where the master cannot bring himself within one of the cases excepted by the contract, or, in the absence of a contract, by the general principles of law, he must pay the loss, whether there has or has not been any negligence on his part. We have seen what cases are deemed to be "perils, or dangers of the sea," the phrase commonly used in the bill of lading. Where there is no bill of lading, the only cases which excuse the master are the act of God,[1] and of the public enemy ;[2] and unless the loss can be brought within one of these, it matters not whether there has been any negligence or not.

We have now to develop further the master's relation

near the bank. The court said that even if there were grounds of negligence, *that point had been open to the plaintiff at the trial ;* and, as the verdict did not find any negligence, they could not set aside a verdict, when the plaintiff was seeking to hold the defendant under a rigid rule of law, *in order to give the plaintiff another opportunity to urge that objection.*

[1] The meaning of this expression includes natural accidents, such as lightning, earthquake and tempest, and not arising from the agency of man. *Trent and Mersey Navigation Company* v. *Wood*, 3 Esp. R. 127. *Forward* v. *Pittard*, 1 T. R. 27. So that the carrier is liable for a loss by an accidental fire, wholly without negligence on his part, (*Forward* v. *Pittard*, ante,) and by an accident arising from an unseen nuisance in the course of his navigation. (*Prop. Trent. and Mersey Nav.* v. *Wood*, ante.)

[2] The public enemy includes that people with whom the nation is at open war, and pirates, with whom all makind are deemed to be in a state of war. The master is liable for thefts, robberies and embezzlements by all other persons, although he may have used all diligence. Abbot on Ship. part 3, ch. 3, sec. 3. *Schieffelin* v. *Harvey*, 6 Johns. R. 170. *Watkinson* v. *Laughton*, 8 Johns. R. 213. *Morse* v. *Slue*, 1 Vent. 190, 238.

to the cargo, by noticing the additional powers with which he becomes invested by the policy of the law, in particular emergencies.

6. Power of hypothecation and sale. Ordinarily, as has been stated, the master is a stranger to the cargo, beyond the purposes of safe custody and conveyance; but there comes often to be applied to his situation a new principle, by which the necessities of sudden and unprovided emergencies are recognised as the legitimate sources of a new authority, and he is made the agent of the proprietors of the cargo, as well as of the ship. The germ of this principle is to be found in a remote antiquity, and thence it has been incorporated, by application to analogous cases, into most of the maritime codes of Europe.[1]

[1] It is first to be traced in the Roman law. In the primitive forms in which commercial intercourse was then carried on, the merchant went with his goods and carried his own provisions for the voyage, those of the ship's company alone being provided by the master. In a case of necessity, the master could compel the merchant to bring his stores into the common stock. Dig. liv. 14, tit. 2, sec. 2, fr. 2. Experience and the enlarging interests of commerce gradually extended the same principle to all analogous cases. Thus, in the laws of Oleron, a power to sell a part of the cargo is expressly given to the master, in case of necessity, to make repairs of the ship in a foreign port. (*Jugemens D'Oleron*, art. 23.) The *Consolato* says that freighters, when on board, ought to loan their money to the master in a like case of necessity; and if they have no money on board, it empowers the master to sell their goods in sufficient quantity to make the necessary repairs. *Consolato del Mare*, ch. 61, [106,] 62, [107.] Pard. tome ii, p. 109, 110. The same power is given by the laws of Wisbuy, (art. 43, 44,) and is incorporated into the French ordinance, (liv. 2, tit. 1, art. 19.) The reason assigned in all these codes is, that the master is bound to carry the cargo on to the place of its destination, and is responsible in damages to the freighters if, by his own neglect or default, he does not. Thus arose the doctrines of hypothecation and sale applied to the cargo by the expansive character of the modern maritime law, tracing the authority up to the fountains of those usages and customs of the sea which have been recognised and acted upon for so many ages.

Its full application and the limits of such application remained for Sir William Scott; and, in his celebrated judgment in the case of the *Gratitudine*, he has announced the doctrine in so complete and, at the same time, precise terms, that little doubt or uncertainty can now remain respecting some of the exact powers of the master, over the cargo, in cases of distress in a foreign port.[1] After stating the general principle that, in the ordinary state of things, the master is a stranger to the cargo, beyond the purposes of safe custody and conveyance, he proceeds to point out the exceptions, under which he may be clothed with an entirely new character; as in cases of instant and unforeseen and unprovided necessity, where the character of agent and supercargo is forced upon him by the general policy of the law, as well at sea as in intermediate ports; and he holds that where the master cannot obtain funds on a pledge of the ship, he has power to bind the whole cargo for the repairs necessary to effect the prosecution of the voyage, by a bottomry bond, or to sell a part of the cargo for the same purpose.[2] If the repairs of the ship produce no

[1] 3 Robinson's Adm. R. 240. It is the peculiarity of this masterly judgment, that, while it settles the point immediately before the court, it has, at the same time, announced the whole doctrines of the master's relation to the cargo so fully, and with such clearness and cautious examination of authorities, that it has been received with implicit confidence upon all the points which it touches. I do not remember an instance in which its soundness has been called in question, by text writers or tribunals; and many of our own courts have relied upon and adopted its authority. The subject is made *res ajudicata*. See also *Freeman* v. *E. I. Company*, 5 B. and Ald. 617. *Morris* v. *Robinson*, 3 B. and Cresw. 196. *Curran* v. *Meaburn*, 1 Bing. 243.

[2] There is this distinction, he says, between a sale of the cargo and an hypothecation of it. Only a part can be sold, because the express purpose

benefit or prospect of benefit to the cargo, the master can neither sell nor hypothecate; but though the prospect of benefit may be more direct and more immediate to the ship, it may still be for the preservation and conveyance of the cargo; and when it is so, it is justly to be considered as done for the common benefit of both ship and cargo.[1]

The question, whether the master is bound to select any particular part of the cargo, and apply it to the expenses of necessary repairs, rather than to hypothecate the whole, when he cannot procure funds on the ship, came before the Circuit Court of the United States for the First Circuit. Coin, belonging to shippers, being on board, when the necessity for the repairs occurred, it was contended that it was the duty of the master to have made use of it, in preference to borrowing

of the sale is to enable the remainder to go forward. But the whole may be hypothecated. Ibid. As to when the whole cargo may be sold, see *infra*, p. 229, 230.

[1] Ibid. This doctrine has been amply recognised in this country. *The Packet*, 3 Mason's R. 255. *The Zephyr*, Ibid. 341. *United Ins. Co.* v. *Scott* 1, Johns. R. 106. *Fontaine* v. *Col. Ins. Co.*, 9 Johns. R. 29. *Searle* v. *Scovell*, 4 Johns. Ch. R. 222. *American Ins. Co.* v. *Coster*, 3 Paige's R. 323. *Ross* v. *Ship Active*, 2 Wash. R. 226. In this last case, Mr. Justice Washington thus announced the doctrine: "If the owner of the ship be also owner, or part owner of the cargo, the master may, in his discretion, sell a part of the cargo, in preference to borrowing upon an extraordinary rate of interest; and, in his choice of means, his judgment, fairly exercised, must govern him. If in none of these ways, (by drawing bills on his owner, by hypothecating the ship, or by applying such funds or other property as the owner has on board,) he can supply his wants, he may then go beyond the general scope of his authority as master, and may sell a part of the cargo, or hypothecate the whole. But the necessity must be such as to connect the act with the success of the voyage, and not for the exclusive interest of the ship-owner."

upon bottomry of the whole cargo. Mr. Justice Story held that there was no such absolute rule; that the general principle is, that the master is bound to act with a reasonable discretion. He is to get the necessary repairs done at as little sacrifice as is practicable; and according as the use of the money on board would or would not be the least sacrifice, so he is to resort to it in the first instance. On these points, he has a large discretion, and though it should afterwards be found that he had committed an error in judgment, the parties will be bound by his acts, if done *bona fide* and with reasonable care.[1]

7. *Jettison.* The same principle of necessity authorizes the master to throw overboard a part of the cargo, in case of imminent danger, in order to save the residue, and even to throw the whole overboard, in a case of extreme danger, when the lives of the crew cannot otherwise be saved, leaving to the ship to contribute its average proportion.[2] The ancient marine ordinances required that the master should take the opinion of the crew, upon the necessity for the jettison; and some of them specify the goods to be first selected.[3] This is the law

[1] *The Packet*, 3 Mason's R. 255. But money of the ship-owner he absolutely bound to apply first; perhaps also money of his own. Ibid ante, ch. 1, p. 182.

[2] *The Gratitudine*, 3 Rob. Adm. R. 240. "It is said," observed Sir Wm Scott, in this case, "that this power of throwing over the whole cannot be but in cases of extreme danger, which sweeps all ordinary rules before it; and so it is. So likewise with respect to any proportion, the master can be justified only by that necessity; nothing short of that will do, — the mere convenience of better sailing, or more commodious stowage, will not justify him to throw overboard the smallest part. It must be a necessity of the same species, though perhaps differing in the degree."

[3] *Droit Mar. des Rhodiens*, chap. 9, 38. Pard. tome i, pp. 243, 254. *Lois*

of France, at this day.[1] But it is not understood to be the modern law in England or in this country. The master alone is authorized to make a jettison, and he is not bound to consult the crew;[2] and he may select what articles he pleases, and determine their quantity.[3] But it seems that the ancient regulation that the master should draw up an account of the jettison, and verify it by his own oath and that of some of his crew, as soon afterwards as may be, is still recognised.[4]

8. *Ransom.* This contract, by which a sum of money is given to an enemy, a pirate, or other captor, for the redelivery of the vessel or cargo taken, or one part of the cargo is given for the release of the remainder, or the whole is bound for the payment of the stipulated sum, is by the maritime law entirely within the scope of the master's authority, enlarged as it is by the necessities of the case.[5] By it, he may bind the whole cargo, as well as the ship.[6]

9. *Transhipment.* When the vessel is driven into an

D'Oleron, art. 8, 9. Ibid. pp. 328, 329. *Lois de Wisbuy*, art. 29. *Consolato del Mare*, chap. 54, [99]. Pard. tome ii, p. 104.

[1] *L'Ord de la Marine*, liv. 3, tit. 2, art. 1. *Code de Commerce*, art. 410.

[2] *The Nimrod*, Ware's R. 1. *Sims* v. *Gurney*, 4 Binn. R. 513.

[3] *The Gratitudine*, 3 Rob. Adm. R. 240. See Abbot on Shipping, part 3, ch. 8, sec. 3, for some judicious remarks upon the *observance of forms* in making a jettison.

[4] Abbot on Shipping, *ut supra*. *Ordonanza de Bilboa*, 24 – 43 – 47.

[5] *Consolato del Mare*, ch. 185, [230], 186, [231]. Pard. tome ii, pp. 208, 209, 210. Jacobsen's Sea Laws, by Frick, part 2, ch. 4, p. 562. *The Gratitudine*, 3 Rob. Adm. R. 240. *Maisonnaire et al.* v. *Keating*, 2 Gallis. R. 336.

[6] *The Gratitudine*, *ut supra*. By a modern regulation, ransom is put an end to in the British practice. Ibid. But it is not prohibited by our law. *Girard* v. *Ware*, 1 Peters's Circ. C. R. 142. *The Saratoga*, 2 Gallis. R. 164. *Maisonnaire* v. *Keating*, Ibid. 336. *Brooks* v. *Dorr*, 2 Mass. R. 39. *Spafford* v. *Dodge*, 14 Mass. R. 66.

intermediate port, in a state requiring repairs, the question arises whether the master has power to tranship the cargo into another vessel, and send it on, and whether he is ever, and in what cases, bound to do so.

It is clear from all the authorities, ancient and modern, that if the ship cannot be repaired at all, or not without very great loss of time, the master is *at liberty* to tranship, and so to earn the whole freight.[1] In such case, the freighter is bound to pay the *extra* freight for the renewed voyage, which the master pays for the hire of the vessel which he procures.[2] If, however, the vessel can be repaired in a reasonable time, and the cargo is not perishable, the master is not bound to tranship, but he may detain the cargo until the repairs are completed.[3] If the cargo is of a perishable nature, and there is not time or opportunity to consult the proprietor, he may sell a part of it, or hypothecate the whole, if necessary, to effect the repairs of the ship, and to enable him to carry the residue forward, *or* he may tranship it, according as in the best exercise of his judgment, would be for the interest of the whole cargo.[4] But he cannot sell the whole

[1] *Lois D'Oleron*, art. 4. *L'Ord. de la Marine*, liv. 3, tit. 3, art. 11. Valin, Comm. tome i, p. 651. Emerigon, tome i, p. 420–433. Pothier, *Charte-Partie*, n. 68. *The Gratitudine*, 3 Rob. Adm. R. 240. *Luke* v. *Lyde*, 2 Burr. 889. *Schieffiin* v. *New York Exch. Ins. Co.*, 9 Johns. R. 21.

[2] Ibid. and *Searle* v. *Scovell*, 4 Johns. Ch. R. 218. That is to say, the owner of the goods is not responsible for the old and the new freight united, but for the excess of the whole freight over what the old freight would have been, if the first ship had been able to carry on the goods. Ibid. See also *Shipton* v. *Thornton*, 9 Adol. and Ellis, 314.

[3] *Clark* v. *Mass. Fire and Mar. Ins. Co.*, 2 Pick. R. 104. See also *Palmer* v. *Lorillard*, 16 Johns. R. 348.

[4] *The Gratitudine*, 3 Rob. Adm. R. 240. Abbot on Shipping, part 2, ch. 3, sec. 8. *The Packet*, 3 Mason's R. 255.

cargo, and thus put an end to the adventure, either for the purpose of repairing his ship, to let it proceed empty, or where his ship is totally disabled, unless it is wholly out of his power to procure another suitable vessel in the same, or a contiguous port.[1] Whether he can sell the whole, in this last case, would depend much on the nature of the cargo and its exposure to destruction. If it were perishable, it would seem to be prudent to sell; if not perishable, it is his duty to store it and inform the proprietor, as soon as possible.[2] In all cases, the owner of the cargo should be consulted if possible.[3] These propositions, understood to be well settled, clearly enough indicate the master's duty, in a large variety of cases. But cases may arise, where some more precise statement of the degree of *obligation* to tranship resting upon the master, may be useful; as where the vessel cannot be repaired at all, and the cargo is not immediately perishable.

It does not appear from the very early maritime law that the master was bound to procure another vessel, if his own became innavigable by perils of the sea. He

[1] *The Gratitudine*, ut supra. *Searle* v. *Scovell*, 4 Johns. Ch. R. 218. *Hunter* v. *Prinsep*, 10 East's R. 393. *Saltus* v. *Ocean Ins. Co.*, 12 Johns. R. 107.

[2] *Saltus* v. *Ocean Ins. Co.*, ut supra. *Treadwell* v. *Union Ins. Co.*, 6 Cowen's R. 270. *Liddard* v. *Lopes et al.*, 10 East's R. 526.

[3] *Wilson* v. *Millar et al.*, 2 Starkie, 1. *Amer. Ins. Co.* v. *Center*, 4 Wendell's R. 52. *Freeman* v. *E. India Co.*, 5 B. & A. 617. Abbot on Shipping, pp. 240, 241, 243, and notes. The master cannot sell the cargo merely on the ground that a sale will be the best thing for all concerned in the voyage, and that a prudent owner, if present, would sell under the same circumstances; but he will be justified in selling only by a legal necessity. *Bryant* v. *Com. Ins. Co.*, 13 Pick. R. 543. *Hall* v. *Franklin Ins. Co.*, 9 Ibid. 478.

was discharged, by such an occurrence, from his contract to carry the goods, if he elected to be so discharged.[1] The first mention of any obligation to procure another vessel, occurs in the French Ordinance; and certainly the language is peremptory.[2] But Valin and Pothier construe the passage as meaning only to place the master under this obligation, in case he wishes to earn the whole freight.[3] On the other hand, Emerigon, Boulay Paty and Pardessus, construe it otherwise, and hold that it is the positive duty of the master to procure another vessel.[4] The Code Napoleon has adopted the language of the Ordinance,[5] and one of its recent commentators remarks that the passage is not permissive, *(facultative,)* and that the master is not discharged from it, except by being unable to find another ship.[6]

It being clear that the master *may* procure another vessel, and thus entitle himself to the whole freight,[7] the courts, both in England and America, have affirmed it to be his *duty* to do so; upon the principle that he becomes,

[1] By the *Rhodian Law*, Dig. 14, 2, 10, 1. *Jugemens D'Oleron*, art. 4. *Droit Mar. de Wisbuy*, art. 18, [16.] By these authorities the master was *at liberty* to procure another ship, and by so doing to entitle himself to the whole freight.

[2] "If the master is constrained to repair his vessel during the voyage, the freighter shall wait, or pay him the whole freight; and in case the vessel cannot be refitted, the master shall immediately hire another, (*sera oblige d'en louer incessamment un autre*), and if he cannot find one, he shall be paid his freight in proportion to the part of the voyage already accomplished." *L'Ord. de la Marine*, liv. 3, tit. 3, art. 11.

[3] Valin, Com. tome i, p. 651. Pothier, *Charte-Partie*, n. 68.

[4] Emerigon, tome i, p. 428, 429. Boulay Paty, *Cours de Droit Com.*, tome ii, p. 400, *et seq.* Pardessus, *Cours de Droit Com.*, tome iii, n. 644.

[5] *Code de Commerce*, art. 299.

[6] Santayra, *Code de Com.*, p. 189, (Paris, 1836.)

[7] *Hunter* v. *Prinsep*, 10 East, 394.

by the disaster, the agent of the owner of the cargo, or of the underwriter on the cargo, and that what *may* be done, *ought* to be done, when the rights of third persons are essentially concerned in the act.[1] Thus it has been held to be the master's duty to procure another ship, if his own becomes disabled, and forward the cargo; and he must carry his efforts so far as to go to a contiguous port to procure it, if one cannot be had at the port where his vessel lies.[2] But he is not obliged to go further than to "a port immediately contiguous," to seek another vessel.[3]

Much depends, also, upon the nature and condition of the cargo, whether the master's duty to tranship is to be considered imperative. The Supreme Court of the State of New York intimated in the case last cited, that the master was not obliged to lade the cargo in a number of vessels, when the freight, from the greatly deteriorated condition of the cargo, would have been enormously disproportionate to its value; but the case was decided upon another point, respecting the contiguity of the port where vessels could be procured.[4] But in a more recent case they held that, independent of the opportunity for procuring a vessel, there might be further serious impediments to a transhipment, which must be regarded as

[1] *Shipton* v. *Thornton*, 9 Adol. and Ellis, 314.

[2] *Wilson* v. *The Royal Ex. Assur. Co.*, 2 Camp. N. P. R. 623. *Schieffelin* v. *N. York Ins. Co.*, 9 Johns. R. 21. *Searle* v. *Scovell*, 4 Johns. Ch. R. 218. *Mumford* v. *Com. Ins. Co.*, 5 Johns. R. 262.

[3] *Saltus* v. *Ocean Ins. Co.*, 12 Johns. R. 112. In this case, the master was with his vessel at *Kinsale*, in Ireland: the court held that he was not bound to go to the port of *Cork*, a distance of sixteen miles, to get another vessel. The same court have reaffirmed this rule in *Treadwell* v. *Union Ins. Co.*, 6 Cowen's R. 276.

[4] *Saltus* v. *Ocean Ins. Co.*, ut supra.

limitations of the rule: as where the cargo (being wheat, apparently shipped in bulk) would first have had to be carted across a beach, and then to have been transported in boats a distance of several miles, to be put on board the new vessel, it being impracticable to approach the shore.[1]

The Circuit Court of the United States for Massachusetts District have very recently held that where the cargo is so much injured, (although capable of being carried to the port of destination and there landed,) that it will endanger the safety of the ship and cargo, or it will become utterly worthless, it is the duty of the master to

[1] *Treadwell* v. *Union Ins. Co.*, ut supra. See also *Herbert* v. *Hallet*, 3 Johns. Cases, 93. In the case of *Shipton* v. *Thornton*, (9 Adol. and Ellis, 314,) the Court of Queen's Bench said, "It may well be that the master's *right* to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighter; and that, where the freight cannot be procured at that rate, another but familiar principle will be introduced, that of agency for the merchant. For it must never be forgotten that the master acts in a double capacity, as agent of the owner as to the ship and freight, and agent of the merchant as to the goods; these interests may sometimes conflict with each other, and from that circumstance may have arisen the difficulty of defining the master's duty under all circumstances in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and therefore the ship-owner's *right* to tranship is at an end; but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an increased rate of freight; and, if so, it will be the duty of the master as his agent to do so. *In such a case*, the freighter will be bound by the act of his agent, and of course be liable for the increased freight. The rule will be the same whether the transhipment be made by the ship-owner or the master; and in applying it, circumstances make it necessary, on the one hand, to repose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched."

land and sell the cargo at the place where the necessity arises.[1]

Since the foregoing text was written, I have seen a recent case in the Court of Queen's Bench upon this subject of transhipment, which presented a novel question. Goods were shipped under a bill of lading in a general ship, which was prevented from completing the voyage in consequence of damage occasioned by a tempest. The master forwarded the goods to the place of destination, by a conveyance, for which he paid a less freight than he would have been entitled to, for that portion of the voyage, if he had carried them in his own vessel. He had been paid freight at the rate originally agreed on for so much of the voyage as had been performed when the goods were transhipped, and for the remainder of the voyage at the rate which he paid for the carriage of the goods by the substituted vessel. The action was brought to recover the difference between what he paid and what he would have been entitled to receive, if he had brought the goods himself. The court reviewed some of the foreign authorities which I have cited above, noticing the conflict in regard to the *obligation* to tranship, and observed, "All authorities, however, are in unison, to this extent, that 'the master is *at liberty* to procure another ship to transport the cargo to the place of destination;' and in these words Lord Tenterden cautiously lays down the rule of our law: p. 240, part 3, ch. 3, sec. 8. It may therefore be safely taken to be either the duty, or the right, of the ship-owner to tranship in the case of his

[1] *Jordan et al.* v. *Warren Ins. Co.*, Oct. T. 1840, *Law Reporter*, Boston, May, 1841, and 4 Sumner's R.

being prevented from doing so in his own ship by some event which he has not occasioned, and over which he has no control: if it be the former, (his duty,) it must be so in virtue of his original contract, and it should seem to result from a performance by him of that contract, that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending its fulfilment: on the other hand, if it be the latter, (his right,) a right to the full freight seems to be implied; the master is at liberty to tranship; but for what purpose, except for that of earning his full freight, at the rate agreed on? In the case supposed, we may introduce another circumstance: let the owner of the goods arrive, and insist, as he undoubtedly may, that the goods shall not proceed, but be delivered to him at the intermediate port; there is then no question that the whole freight at the original rate must be paid; and that, because the freighter prevents the master, who is able and willing, and has the right to insist on it, from fulfilling the contract on his part, and because the carrying the goods to their destination in another vessel is deemed a fulfilment of the contract. If, therefore, the owner of the goods be not present, and personally exercises no option, still the ship-owner, in forwarding the goods, must have the same rights, and, in so doing, must be taken to exercise them with the same object in view. We come to the conclusion, therefore, that the plaintiff is entitled to recover the difference sued for."[1]

10. *Deviation.* Closely connected with the last topic, is that of the power of the master to deviate from the

[1] *Shipton* v. *Thornton*, 9 Adol. and Ellis, 314.

voyage described in the charter-party, or bill of lading, or otherwise agreed upon between his owner, or himself, and the freighter.

The general principle is, that the master must pursue the voyage, whether the ship be a general ship or be taken by charter-party, in the most expeditious and usual course, and that nothing but certain excepted causes will excuse a deviation from that course.[1] The master, as such, has no authority to change the voyage agreed upon by his owners and the freighters, and substitute another.[2]

One of the legitimate causes of deviation is to render assistance to vessels in distress, when such aid is necessary to preserve the lives of those on board.[3] Though it may formerly have admitted of some doubt, it is now settled, that stopping for the purpose of saving the lives of persons shipwrecked is not a deviation; but that any stoppage solely to save property, or where a part of the crew of the saving ship is put on board to navigate the distressed ship, and thereby the crew of the saving ship is materially diminished, is a deviation, which renders the master and owners responsible for the consequences.[4]

[1] *L'Ord. de la Marine*, liv. 3, tit. 3, art. 10. Valin, Com. tome i, p. 650. *Davis* v. *Garrett*, 6 Bing R. 716.

[2] *Burgon* v. *Sharpe*, 2 Camp. N. P. R. 529. See also *ante*, Part III, ch. 1, p. 168.

[3] Mr. Jacobsen recommends the abolition of any distinction between aid rendered to *property* merely, and aid rendered to *life*, upon the question of deviation. Jacobsen's Sea Laws, by Frick, book 4, ch. 4, p. 551.

[4] *The Boston and Cargo*, 1 Sumner's R. 328. *The Henry Eubank*, Ibid. 400. *Mason* v. *Ship. Blaireau*, 2 Cranch's R. 240. *Bond* v. *Brig Cora*, 2 Washington's R. 80. These were cases of salvage, where the question arose whether the insurance was avoided by the deviation. They do not settle the point as between ship-owner and freighter. But the same prin-

Other justifiable causes of deviation are to repair the ship from the effects of accident or tempest, to avoid enemies or pirates, and to procure supplies of provisions or water at places usually resorted to in long voyages for that purpose.[1] But if the master deviates unnecessarily from the voyage, and the cargo is injured by tempests during the deviation, the deviation is a sufficiently proximate cause of the loss to entitle the freighter to recover.[2]

11. *Duty in case of capture.* The master's duty towards the cargo, in case of capture by a belligerent, is the same as that towards the vessel.[3] He should remain and await the result of the prize proceedings, and exhibit the papers and documents with which he has been furnished for the protection of the cargo: and generally, he is to represent and act for the owners of the cargo, as well as the ship, until their wishes are made known.[4] His duties do not entirely cease even with condemnation: he is to act for the benefit of all concerned, and if he should deem an appeal expedient, he is bound to enter it, and may, in his discretion, remain until the means of rendering the appeal effectual are concluded. In such case, he is entitled to compensation for his services in effecting the appeal and procuring the necessary papers, which

ciples are applicable to cases of affreightment as to policies of insurance. See Abbot on Shipping, Notes by Story, p. 239, n. 1. Phillips on Insurance, ch. 12, *passim*.

[1] Abbot on Shipping, part 3, ch. 3, sec. 7. Jacobsen's Sea Laws, by Frick, book 2, ch. 1, p. 103.

[2] *Davis* v. *Garrett*, 6 Bing. R. 716.

[3] *Ante*, Part III, ch. 1.

[4] *Willard* v. *Dorr*, 3 Mason's R. 161. *The Saratoga*, 2 Gallison's R. 178. *Brown* v. *Lull*, 2 Sumner's R. 443. *Francis* v. *Ocean Ins. Co.*, 6 Cowen's R. *Sims* v. *Sundry Mariners*, 2 Peters's Adm. R. *Cheviot* v. *Brooks*, 1 Johns. R. 364.

should be contributed to by the owner of the cargo.[1] If by any negligence in the performance of this duty, the proprietor of the goods sustain damages, the master is responsible to the extent of such damage.[2] But where the owners of the goods had neglected to furnish the master with the proper and customary documents to show their neutral character, and he had to depend on the accuracy of his memory to support the claim which he had interposed in the Admiralty Court of the captors, and answered the interrogatories in good faith and to the best of his recollection, it was held that no negligence could be imputed to him, even if it appeared that the prize court condemned the property on the disclosures made in his answer.[3] What is required of the master, then, is that he should use due diligence, by all the fair means within his reach, to substantiate the neutral character of the property. But he is not bound to violate good faith, even in respect to an enemy, to protect the property from condemnation, or to employ fraud in order to effect that object.[4]

12. *Delivery of the cargo.* The ship having arrived at the destination of the cargo, and being first properly moored,[5] the master is to deliver the goods to the consignee. It seems to be well settled in England and America, that a delivery at any usual landing place, when there are no special directions to the contrary, is all that is required of the master,[6] provided he gives notice to the

[1] *Willard* v. *Dorr*, 3 Mason's R. 161. *Leman* v. *Walker*, 9 Mass. R. 404. *Smith* v. *Gilbert*, 4 Day's Cases, 105.

[2] Jones's Bailm. 121. *Cheriot* v. *Brooks*, 1 Johns. R. 364.

[3] *Cheviot* v. *Brooks*, 1 Johns. R. 364.

[4] *Hannay* v. *Eve*, 3 Cranch's R. 243.

[5] *Ord. of Wisbuy*, art. 36.

[6] *Hyde* v. *Trent. and Mers. Nav. Co.*, 5 T. R. 389. *Chickering* v. *Fowler*, 4 Pick. 371.

consignee, that he may come and take them.[1] But if the consignee is unable or unwilling to receive them, the master cannot discharge himself from responsibility by leaving the goods on the wharf, but it is his duty to take care of them for the owner,[2] unless the consignee is under an obligation to receive them, in which case they will be at his risk.[3]

It has been held, in England, that if the consignee requires the master to deliver the goods to himself, on board the ship, and not to land them on the wharf, that the master must obey the request; for the wharfinger cannot insist that the goods shall be landed on his wharf, though the vessel be moored against it.[4]

Until some such delivery as above indicated, the master remains responsible for the goods. If they are lost in the ship's boat, being on the way from the ship to the shore, he is responsible, unless such risk is expressly guarded against in the bill of lading. But if the owner receives them in a lighter from the ship, or in any way takes the custody of them before they are landed, the master's responsibility ceases.[5]

[1] *Strong* v. *Natally*, 4 Bos. and Pul. 16. *Garnett* v. *Wilson*, 5 B. and Ald. 58. *Ostrander* v. *Brown*, 15 Johns. R. 39.

[2] *Ostrander* v. *Brown*, 15 Johns. R. 39. *Chickering* v. *Fowler*, 4 Pick. 371. *Mayell* v. *Potter*, 2 Johns. Cas. 371.

[3] *Chickering* v. *Mackay*, ut supra.

[4] *Syeds* v. *Hay*, 4 T. R. 260.

[5] *Strong* v. *Natally*, 4 Bos. and Pul. 16. *Johnson* v. *Benson*, 1 B. and Bing. 454. The full consideration of this subject — the determination of the carrier's risk — cannot find space in this work. The reader is referred to Story on Bailm. sec. 532, *et seq.* Abbot on Ship. part 3, ch. 3, sec. 11. 3 Kent's Comm. p. 214.

CHAPTER III.

OF THE MASTER'S RELATION TO THE FREIGHT.

Freight, in the general legal sense of the term, means all rewards, hire or compensation, paid for the use of ships.[1] In this sense, it includes as well the compensation paid, or agreed to be paid, for the transportation of passengers, as of merchandise. It is of some moment, at the present day, both to masters and mariners, that this definition should not be restrained in its scope to the merely common acceptation in which it signifies only the compensation for the carriage of goods; since great numbers of persons are now employed upon ships, whose freight, in this latter sense, bears a small proportion to the money received or contracted for from passengers, and in some cases might be insufficient for the payment of the wages due. There is no authority, that I am aware of, for the limited definition which would exclude those interested in the *freight*, from the same rights connected with passage money, as they would have in money received or earned in the transportation of goods. There

[1] Pothier, *Traite de Charte-Partie*, n. 1, defines freight as "the reward which one agrees to pay for the hire of a vessel." Valin defines it as "the price due for the hire of a ship, or for the transportation of merchandise." It is called freight, (*fret*) in the Atlantic—*nolis*, in the Mediterranean. Comm. tome i, p. 639.

is, however, authority for the broad definition above given, in respect to the rights of seamen;[1] and it has also been held that passage money and freight are governed by the same rules, as between the passenger or freighter, and the ship-owner and master.[2] So too, it was held that the master may detain the luggage of a passenger, for the passage money which is to be considered as payable in respect of the person and his baggage, in like manner as he may detain the goods of a shipper for freight due.[3]

Freight, then, being the earnings of the ship, the master, as the general agent and representative of the owner, has certain powers in regard to it, which are ample for its security and due collection; and as the special employer of the ship, in which character he is, to some extent, treated by the law,[4] he has certain other powers, which spring from this latter capacity, as well as from the agency with which he is clothed; and finally, as the servant of the owner, having performed labor in his behalf for hire, he has certain other relations to the money of his employer, which the law has established for the protection of his compensation.

1. As the general agent and representative of the

[1] *Giles* v. *The Cynthia*, 1 Peters's Adm. R. 206. *Howland* v. *The Lavinia*, Ibid. 126. So also, the *Consolato*, in defining a passenger: "*Tot hom es appelat pelegri qui do* NOLIT *de la sua persona e de roba qui no sia mercaderia, é tot hom qui port de deu quintars en avall, dou donar* NOLIT *de la sua persona.*" "Every man is called a passenger, who gives FREIGHT for his person and for his effects which are not merchandise; and every man who carries less than ten quintals, ought to pay FREIGHT for his person." Ch. 68, [113], Pardessus, tome ii, p. 115.

[2] *Mullov* v. *Backer*, 5 East's R. 316. *Moffat* v. *E. I. Company*, 10 East's R. 468. *Watson* v. *Duykinck*, 3 Johns. R. 335.

[3] *Wolf* v. *Summers*, 2 Camph. N. P. R. 631.

[4] Story's Comm. on Agency, sec. 116, 117.

owner, the master may at all times receive the freight due, whether the contract was made by the owner or by himself; and a payment to him will discharge the goods and those who may be liable for the freight, unless notice should be given by the owner, or unless there be some stipulation to the contrary, in the contract. This authority results from the nature of his agency, by the appointment to which the owner has conferred upon him all the powers incident to the conducting of the usual business of the ship.[1]

But when the master enters into the contract in his own name, as where he signs the bill of lading or charter-party, he is then in a still more intimate relation to the freight. Pothier remarks that, in this case, an action for the freight resides in the person of the master.[2] This agrees with several decisions in England, in which it has been held that the master has such a special property in the ship, that he may bring an action for the freight, describing the ship as his own, and that he is not a mere servant entrusted with the charge of it.[3]

2. As the agent of the ship-owner and to secure the payment of the freight, the master may exercise that right which the ship-owner enjoys of retaining the goods until the freight is paid, and may enforce this lien as far as the law permits it to go, after the goods have actually left his possession.

The general right of the ship-owner to retain the

[1] Pothier, *Charte-Partie*, n. 88, *ante*, Part III, ch. i, p. 167, *et seq.*

[2] Pothier, *Charte-Partie*, n. 88.

[3] *Shields* v. *Davis*, 6 Taunt. R. 65. See also *Blanck* v. *Solly*, 8 Taunt. R. 89. *Williams* v. *Millington*, 1 H. Bl. 81, 84. See also Story on Agency, sec. 116, 117.

goods for freight, has always been recognised both by the maritime and the common law,[1] and the lien applies equally, whether the goods were shipped under a charter-party, or by bill of lading.[2] But the lien may be waived or displaced. It is waived, when the delivery of the goods is by the charter-party to precede the payment, or security of payment of freight; but, on the other hand, where such payment, or security of payment of freight, is to be simultaneous or concurrent with the delivery, there the lien exists in its full force.[3] So too, if the charter-party is silent upon the point, and it does not appear that the delivery of the cargo is to precede the payment of freight, the lien will not be presumed to be waived.[4] The lien will be displaced, if, instead of the letting the use of the ship to freight, the vessel itself be

[1] Valin, Comm. tome i, p. 659, 655, 666. Pothier, *Charte-Partie*, n. 88, 89, 90. 3 Kent's Comm. p. 220, 221. Abbot on Ship. part 3, ch. 7. *The Volunteer and Cargo*, 1 Sumner's R. 551. *Certain Logs of Mahogany*, 2 Sumner's R. 589.

[2] *Drinkwater* v. *The Freight and Cargo of the Spartan*, Ware's R. 155. *Christie* v. *Lewis*, 2 B. and B. 410.

[3] *The Volunteer and Cargo*, 1 Sumner's R. 569. *Yates* v. *Railston*, 8 Taunt. R. 293. *Christie* v. *Lewis*, 2 B. and B. 410. *Tate* v. *Meek*, 8 Taunt. R. 280. *Saville* v. *Campion*, 2 B. and Ald. 503. *Faith* v. *E. I. Co.*, 4 B. and Ald. 630. *Gracie* v. *Palmer*, 8 Wheaton's R. 605.

[4] Abbot on Ship. part 3, ch. 1, sec. 7, p. 177, and cases cited. See also *The Volunteer and Cargo*, 1 Sumner's R. 551, 557, and *Certain Logs of Mahogany*, 2 Sumner's R. 589. Both these elaborate judgments proceeded in part upon the ground stated in the text. In the former, it was held that a stipulation in the charter-party for the payment of freight *ten days after the return of the vessel*, is not inconsistent with a lien; among other reasons, because *non constat* that *the cargo was to be delivered within ten days after the arrival*. In the latter case, upon a clause in the charter-party that the freight should be paid "in five days after the brig's return to and *discharge* in Boston," it was held that the word *discharge* merely referred to the unlading, and not to the delivery of the cargo.

let to hire, and the exclusive possession and control is given up to the charterer; because the charterer then becomes owner of the ship for the voyage, and the true ship-owner's lien passes from him into the hands of the charterer.[1] But, on the other hand, if the vessel is navigated at the expense of the general owner, and by his master and crew, and he retains the possession and management of her during the voyage, then the lien for freight is not displaced, because the general owner is deemed owner for the voyage, notwithstanding a charter-party.[2] Especially is this the case where the general owner retains a part of the ship for his own use;[3] and, indeed, if the intention of the parties, with regard to the point, who is to be deemed owner for the voyage, seems to be doubtful on the face of the charter-party, the lien will not be presumed to have been relinquished.[4]

The exercise of this right, thus to retain the goods for the payment of freight, has also been uniformly admitted to reside in the hands of the master, as the owner's agent, by virtue of his office, whether he or the owner made the contract by which the goods are conveyed.[5] But, in

[1] *Drinkwater* v. *The Freight and Cargo of the Spartan*, Ware's R. 166. *Christie* v. *Lewis*, 2 B. and B. 410. *The Volunteer and Cargo*, 1 Sumner's R. 551. *Certain Logs of Mahogany*, 2 Sumner's R. 589.

[2] *The Volunteer and Cargo*, 1 Sumner's R. 551. *Certain Logs of Mahogany*, 2 Sumner's R. 589. *Macadier* v. *Chesapeake Ins. Co.*, 8 Cranch's R. 49. *McIntyre* v. *Browne*, 1 Johns. R. 229. *Gracie* v. *Palmer*, 8 Wheaton's R. 632.

[3] *The Volunteer and Cargo*, 1 Sumner's R. 551.

[4] *Certain Logs of Mahogany*, 2 Sumner's R. 589. *Chandler* v. *Belden*, 18 Johns. R. 157. *Clarkson* v. *Edes*, 4 Cowen's R. 470. *Pickman* v. *Wood*, 6 Pick. R. 248. *Drinkwater* v. *The Freight, etc., of the Spartan*, Ware's R. 155.

[5] Valin, Comm. tome i, p. 659, 665, 666. *L'Ord. de la Marine*, liv. 3,

order to its exercise, it is necessary not only that the goods should have arrived at the place of their destination, but they must be taken out of the vessel, and the master must be ready to deliver them on payment or tender of the freight.[1] It is quite clear, upon authority, that the unlivery of the cargo is, by the maritime law, a condition precedent to the perfect right to freight and the right to detain for nonpayment; and the reason is that the merchant may have an opportunity to examine the goods, before he makes himself liable at all events for the freight.[2]

The general rule, then, to entitle the master, or owner, to demand the full freight is, that the goods must have

tit. 3, art. 17, 23, 24. Pothier, *Charte-Partie*, n. 88, 89, 90. Abbot on Ship. part 3, ch. 7, sec. 4. *Tapley* v. *Martins*, 8 T. R. 451. *Christy* v. *Row*, 1 Taunton, 300. *Barker* v. *Haven*, 17 Johns. R. 234. *Poland et al.* v. *The Freight, &c., of the Spartan*, Ware's R. 149. When the regulations of the revenue require the goods to be landed and deposited in a public warehouse, the master may enter them in his own name and preserve the lien. 3 Kent's Comm. Lect. 47, p. 220.

[1] Abbot on Ship. part 3, ch. 7, sec. 1, and p. 273, note 2, by Story. 3 Kent's Comm. Lect. 47, p. 219. *Lane* v. *Penniman*, 4 Mass. R. 91. *Bradstreet* v. *Baldwin*, 11 Mass. R. 229. *Certain Logs of Mahogany*, 2 Sumner's R. 589.

[2] *L'Ord. de la Marine*, liv. 3, tit. 3, art. 23. Valin Comm. tome i, p. 665. *Code Commerce*, art. 306. *Santayra*, (*sur le Code, etc.*) p. 191. Abbot on Ship. part 3, ch. 3, p. 247, 248. See also the case of *Certain Logs of Mahogany*, 2 Sumner's R. 589. The master may detain any part of the merchandise for the freight of all that is consigned to the same person; so that, if he make a delivery of part of the goods to the consignee, he may detain the residue even against a purchaser, until payment of the freight of the whole. But if the goods are sold to different persons by the consignee, and part is delivered, the master has not a lien on the residue so as to compel one purchaser to pay freight for what has been delivered to another purchaser, but only for what has been purchased by himself. Abbot on Ship. part 3, ch. 3, p. 247, and notes by Story.

been carried to their place of destination, and be ready for delivery.[1] To this rule there are ordinarily two exceptions; *first*, where the delivery is prevented by the neglect or default of the owner of the goods, as if they are attached or seized for his default;[2] *second*, where the government of the place refuse permission to land the goods.[3] Mr. Justice Story has recently said, however, that in his opinion, "the whole of the cases in which the full freight is, upon the ordinary principles of the commercial law, due, notwithstanding the non-arrival of the goods at the port of destination, may be reduced to the single statement, that the non-arrival has been occasioned by no default or inability of the carrier-ship, but has been occasioned by the default or waiver of the merchant shipper. In the former case, the merchant shipper cannot avail himself of his own default to escape the payment of freight; in the latter case, he dispenses with the entire fulfilment of the original contract, for his own interest and purposes. Thus, for example, if the goods be seized or detained at an intermediate port for the illegal conduct, or wrongful act of the shipper, or if, at such intermediate port, he voluntarily insists upon receiving and does receive his goods, the carrier-ship being ready and able to carry them to their destination, there can be no doubt that full freight is due for the whole voyage."[4]

[1] *The Ship Nathaniel Hooper*, 3 Sumner's R. 512. Abbot on Ship. part 3, ch. 7, sec. 1. 3 Kent's Comm. Lect. 47, p. 219. *Case* v. *Baltimore Ins. Co.*, 7 Cranch's R. 358, 362.

[2] *Bradstreet* v. *Baldwin*, 11 Mass. R. 229. *Palmer* v. *Lorillard*, 16 Johns. R. 348. *The Ship Nathaniel Hooper*, 3 Sumner's R. 542.

[3] *L'Ord. de la Marine*, liv. 3, tit. 3, art. 15. *Code de Commerce*, art. 299. *Morgan* v. *Ins. Co. of North America*, 4 Dal. R. 455.

[4] *The Ship Nathaniel Hooper*, 3 Sumner's R. 542. There is another class

There are two other cases, in which the master, being temporarily restrained from performing his contract, may detain the goods until such temporary restraint is removed, and then demand the full freight, on delivery of the goods. Thus where the vessel is detained by an embargo at the port of *departure*, or in the course of the voyage, the master may wait till the embargo is removed, and then carry the cargo on to its place of destination; and if the owner of the cargo insists on receiving it short of the port of destination, he must pay the full freight.[1] So too, in the case of a blockade, or hostile investment of the port of *departure*, after the voyage has actually commenced, the contract of affreightment is not dissolved. The master may retain the goods until he can prosecute the voyage with safety; and he is not bound to surrender them to the proprietor, unless he is tendered his full freight.[2] The reason in both these cases is, that the impediment is temporary, and does not break up the voyage by rendering the performance of the contract impossible. If, however, the cargo be of such a perishable nature, that it will not endure the delay of the embargo or blockade at the port of departure, Sir William Scott

of cases where the whole freight is held to be due — cases of capture by an enemy — upon the peculiar principles of prize law, acting on the maxim that *capture is delivery*. See *The Race-Horse*, 3 Rob. Adm. R. 101. *The Martha*, 3 Ibid. 106. *The Hoffnung*, 6 Ibid. 231. See also an analysis of these cases and their bearing on the ordinary cases of claim for full freight, in *The Nathaniel Hooper*, ubi supra.

[1] *Hadley* v. *Clarke*, 8 T. R. 259. *M'Bride* v. *Mar. Ins. Co.*, 5 Johns. R. 308. *Baylies* v. *Fettyplace*, 7 Mass. R. 325.

[2] *Palmer* v. *Lorillard*, 16 Johns. R. 348. *L'Ord. de la Marine*, liv. 3, tit. 3, art. 15, and Valin, Comm. tome i, 656, 657. Pothier, *Charte-Partie*, n. 69, 100, 101.

has held that no freight is due, as it is then impossible to fulfil the contract.[1] The French writers on maritime law lay down the same principle.[2] But if the voyage be broken up, after its commencement, by war, or interdiction of commerce with the place of *destination*, the contract is dissolved, and no freight is earned.[3]

Such are the principles which govern the right to demand a full freight. What, then, are the cases in which a *pro rata*, or proportional freight may be demanded? The general principle of the maritime law is, that the contract for the conveyance of merchandise on a voyage, is in its nature an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, no freight is due; for a partial conveyance is not within the terms or the intent of the contract.[4] Thus, we have already seen, that where the ship becomes innavigable, the master is bound to repair it, or to procure another vessel, the freighter being bound

[1] *The Isabella*, 4 Rob. Adm. R. 77.

[2] *Valin*, *Comm.* tome. i, p. 628. Pothier *Charte-Partie*, n. 102.

[3] *Scott* v. *Libby*, 2 Johns. R. 336. *The Hiram*, 3 Rob. Adm. R. 180. *Liddard* v. *Lopes*, 10 East's R. 526. The French rule is different. By the Ordinance, liv. 3, tit. 3, art. 15, it is provided that where, after the voyage is commenced, commerce is prohibited by war or otherwise, with the country to which the vessel is destined, and the ship is obliged to return with the cargo, the outward freight is still due. But if the execution of the contract is only retarded, the parties by the same law were to wait until the obstacle is removed. As, if the port to which the vessel is destined be only closed, by an order of the prince, or by a blockade, or the vessel be arrested by a *vis major*, both parties are bound to wait for the removal of the impediment, without damage on either side. *L'Ord de la Marine*, liv. 3, tit. 1, art. 8. Valin, Comm. tome i, 617. Pothier, *Charte-Partie*, n. 101.

[4] *The Ship Nathaniel Hooper*, 3 Sumner's R. *Post et al.* v. *Robertson*, 1 Johns. R. 24. *Case* v. *Baltimore Ins. Co.*, 7 Cranch's R. 358. *Cook* v. *Jennings*, 7 T. R. 381. Abbot on Shipping, part 3, ch. 7, sec. 1, p. 273. 3 Kent's Comm. Lect. 47, p. 228.

to wait a reasonable time for this purpose:[1] and this is necessary to entitle the master to any freight.[2] But if the ship is forced into an intermediate port, and is unable to prosecute the voyage, and the owner of the goods voluntarily accepts them, or insists on their being delivered up to him, the law implies a new contract, viz. — to pay freight in the proportion of the voyage performed.[3]

The master may hypothecate the freight by a bottomry bond, under the same circumstances of necessity in which he is allowed to give that security on the ship itself.[4] Together with the ship, it is to be hypothecated before the cargo: for the master is not authorized to touch the cargo, unless he cannot obtain the necessary supplies, upon the credit of the ship and freight. And it seems that if the freight happened to be omitted in the literal terms of the bond, it would still be liable, when the bond comes to be enforced, to the extent of its amount, al-

[1] *Ante*, Part III, ch. 2.

[2] *Luke* v. *Lyde*, 2 Burr. 889. *Schieffelin* v. *N. York Exchg. Ins. Co.*, 9 Johns. R. 21. *Searle* v. *Scovell*, 4 Johns. Ch. R. 218. *Clark* v. *Mass. F. & Mar. Ins. Co.*, 2 Pick. R. 104. *Hunter* v. *Prinsep*, 10 East's R. 394. *Mumford* v. *Com. Ins. Co.*, 5 Johns. R. 262. *Saltus* v. *Ocean Ins. Co.*, 12 Johns. R. 112. *Treadwell* v. *Union Ins. Co.*, 6 Cowen's R. 270. *The Ship Nathaniel Hooper*, 3 Sumner's R. 542.

[3] *Laws of Oleron*, art. 4, Pardessus 1, 325. *L'Ord de la Marine*, liv. 3, tit. 3, art. 21, 22. *Luke* v. *Lyde*, 2 Burr. 883. *Cooke* v. *Jennings*, 7 T. R. 381. *Hunter* v. *Prinsep*, 10 East's R. 378. *Liddard* v. *Lopes*, 10 Ibid. 526. *Robinson* v. *Mar. Ins. Co.*, 2 Johns. R. 323. *Caze* v. *Baltimore Ins. Co.*, 7 Cranch's R. 358. *The Ship Nathaniel Hooper*, 3 Sumner's R. 542. *Coffin* v. *Storer*, 5 Mass. R. 252. *Dorr* v. *New Eng. Mar. Ins. Co.*, 4 Mass. R. 221. *Portland* v. *Stubbs*, 6 Mass. R. 420. *Griggs* v. *Austin*, 3 Pick. R. 20.

[4] *The Packet*, 3 Mason's R. 255. *The Zephyr*, Ibid. 341. *Murray* v. *Lazarus*, 1 Paine's R. 572. *The Gratitudine*, 3 Rob. Adm. R. 240. *The Nelson*, 1 Hagg. Adm. R. 169. *The Augusta*, 1 Dods. Adm. R. 283. *The Jacob*, 4 Rob. Adm. R. 91. As to the ship, see *ante* p. 176, *et seq.*

though the cargo alone had been made immediately answerable to the foreign lender, who has nothing to do with averages of any kind.[1]

Where freight is pledged in a bottomry bond, it means the freight of the whole voyage, and not the freight of that part of the voyage unperformed at the time of giving the bottomry bond.[2] So too, it seems that freight made in a subsequent voyage may be pursued, if the owner has appropriated the freight of the first voyage, before the bottomry bond holder could reach it; the court of Admiralty exercising its equity jurisdiction for this purpose.[3] And where the freight to be made on a voyage is pledged in a bottomry bond, the freight earned from sub-shippers of goods, by permission of the charterers of the whole ship, is liable as against them, in payment of the bond given at the port of the charterers, for advances made subsequently to the charter-party.[4]

The master's lien on the freight for his wages, advances and expenses will be considered in the next chapter.

[1] *The Gratitudine*, 3 Rob. Adm. R. 240.
[2] *The Zephyr*, 3 Mason's R. 341.
[3] *The Jacob*, 4 Rob. Adm. R. 245.
[4] *The Eliza*, 3 Hagg. Adm. R. 87.

CHAPTER IV.

OF THE MASTER'S WAGES, DISBURSEMENTS AND ADVANCES.

As the law has distinguished the case of the master from that of all the other mariners, in respect to his wages, and as in the course of his agency the ship-owner often becomes indebted to him for advances made or liabilities incurred on account of the ship, it is proper to treat of these topics separately from the general case of the mariner. And first

As to his wages. The master is ordinarily hired by signing the shipping articles, which contain his contract in respect to wages and the voyage, as well as that of the other seamen. The hiring may however be by any other writing, or by parol.[1] But when a rate of wages is specified in the articles against the name of the master, they are *prima facie* evidence of his contract, and are as much to be resorted to in any controversy between him and his owner, as between the owner and the seamen generally.[2]

[1] *Moore* v. *Jones*, 15 Mass. R. 424.

[2] *Willard* v. *Dorr*, 3 Mason's R. 168. The articles may be controverted by offering evidence of fraud, mistake, or interpolation. But in the absence of such evidence, they are presumed to be as well known to the owner as the master. *Ibid.*

By the law of England, and of this country, the master has no lien on the ship for his wages. The reason laid down in the books of the common law is, that although mariners are supposed to contract on the credit of the ship, the master's contract is altogether of a personal nature, on the credit of his owner.[1] But this, as was observed by one of our learned Admiralty judges, is little more than another form of stating the same fact.[2] If there is any reason for the distinction thus made between the master and the other mariners, all of whom render the same kind of service, it must be founded purely in considerations of policy. The reason that the master's contract is made by personal treaty with the owner, while that of the seamen is made with the master, on the credit of the ship, does not satisfy all cases. The sailor's contract may be made personally with the owner, and yet his lien, given him by the policy of the law, could not be questioned. So on the other hand, a party may become master, in a remote part of the world, and perform all the duties of the office and be entitled to a *quantum meruit* for his services, by nothing more than an implied contract with the owner, and still have no lien for his services as master.[3]

There is no reason, in principle, why the master should not have a lien on the ship for his wages, apart from considerations of policy. His contract is for a maritime service; it is of the same general nature, to a certain extent, as that of the other mariners, though it embraces other

[1] 12 Mod. R. 405. See also *Read* v. *Chapman*, 2 Sh. 937. *Ragg* v. *King*, Ibid. 858. *Clay* v. *Sudgrave*, Salk. 33. 1 Ld. Raym. 576. Carth. 518.

[2] Ware's R. p. 161.

[3] *The Favorite*, 2 Rob. Adm. R. 192. *The George*, 1 Sumner's R. 151.

and further duties. Moreover, his case is not universally made an exception by the general maritime law.[1] But it has been uniformly held in England that he has no lien on the ship for his wages,[2] and the rule has always been followed and acquiesced in, in this country.[3] Mr. Chancellor Kent says, that the rule has its foundation in policy, and the benefit of navigation; and that it would be a great inconvenience, if, on the change of a captain for misbehaviour, or any other reason, he would be entitled to keep possession of the ship until he was paid, or to enfore the lien while abroad, and compel a sacrifice of the ship.[4]

The next question that arises is, whether the master has any lien on the *freight*, for his wages. The English authorities, before cited, which deny his lien on the ship, also deny it upon the freight.[5] In this country, this direct question has been adjudicated in two cases only, that I am aware of. Most of the cases in which the master's lien on freight, for advances made or liabilities incurred by him in the course of the voyage, is considered, do not include his wages, expressly.[6] But in *Ingersoll* v.

[1] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 8, 21. *Code de Commerce*, art. 259, 272.

[2] See the earlier cases cited *ante*, p. 252, n. 1. Also *Wilkins* v. *Carmichael*, Dougl. R. 101. *Hussey* v. *Christie*, 9 East's R. 426. *Smith* v. *Plummer*, 1 B. and A. 575. *Atkinson* v. *Coteswortb*, 5 D. and R. 552. *The Favorite*, 2 Rob. Adm. R. 192.

[3] *The Ship Packet*, 3 Mason's R. 255. *Willard* v. *Dorr*, 3 Ibid. 91, 161. *The Steamboat Orleans*, 11 Peters's S. C. R. 175. *The Ship Grand Turk*, 1 Paine's R. 73. *Fisher* v. *Willing*, 8 Serg. and R. 118. *Drinkwater* v. *The Spartan*, Ware's R. 149.

[4] 3 Kent's Com. p. 166, edit. 1840.

[5] Ante, p. 252, note 1, and note 2 of this page.

[6] *The Ship Packet*, 3 Mason's R. 255. *Lane* v. *Penniman*, 4 Mass. R. 92. *Lewis* v. *Hancocck*, 11 Ibid. 72. *Cowing* v. *Snow*, 11 Ibid. 415.

Van Bokkelin, the Supreme Court of New York included the wages of the master among the items for which he was held to have a lien on the freight.[1] But this, as to the wages, was overruled in the Court of Errors.[2] Judge Ware, in the District Court for Maine, has supported the lien on freight, for wages. He puts it on the ground of analogy with his lien on the freight for advances, which the prior cases had settled. "Why does not," he asks, "his prior right for his wages rest on as good ground as for his liabilities or disbursements? The money is as much due to him in one case as the other, and the credit has in each grown out of the same service, a service which has contributed to create the fund against which his claim is made. His wages are as much a charge on the earnings of the ship as those of the seamen, or as the advances which he makes for incidental expenses."[3]

This reasoning seems to be just. But the question may be considered as one that remains to be definitely settled in this country.

The master's remedy for his wages against the owner

Shaw v. *Gooking*, 7 New Hamp. R. 19. *Milward* v. *Hallet*, 2 Caine's R. 77.

[1] *Ingersoll* v. *Van Bokkelin*, 7 Cowen's R. 670.

[2] 5 Wendell's R. 314.

[3] *Drinkwater* v. *The Spartan*, Ware's R. 163. In this case, the charterers, who were owners for the voyage, and hired the master, had failed before the termination of the voyage, and transferred all their property to assignees to pay their creditors, including the cargo belonging to themselves on board the ship, and it appeared that the freight due on the merchandise taken on freight was exhausted by prior claims, the seamen having enforced their lien upon it by a previous libel. This brought up the question, whether the master's lien for his wages extended to the merchandise of the owners, which he had brought home. The court put the decision on the peculiar facts of the case, which clearly gave an equitable lien; and sitting in a court bound to decide *ex æquo et bono*, the learned judge decreed in favor of the lien.

personally is the same as that of the other mariners; and the question of who is to be considered as owner, and the other general principles of personal remedy for the mariner, will be treated of in a subsequent part of this work.

The Circuit Court for Massachusetts District have held that the master is entitled to his wages in case of capture, up to the time of condemnation, if he remains by the ship, to attend to the interests of all concerned in her, and that such wages are ultimately to be borne as general average, by all the parties in interest; that his duties do not entirely cease even with condemnation; if he deems an appeal expedient, he is bound to enter it, and may remain for that purpose, and is entitled to compensation for his services.[1]

As to his advances made and liabilities incurred for the ship, during the voyage, the English authorities at common law, with considerable uniformity, deny the master any lien upon either the ship, freight, or cargo.[2] At the same time the leaning of the Courts of Equity seems to be in favor of the lien, at least upon the freight.[3]

The Supreme Court of Massachusetts have affirmed the master's lien on the freight, for the purpose of covering all necessary disbursements made by him, or respon-

[1] *Willard* v. *Dorr*, 3 Mason's R. 161. See also *Moore* v. *Jones*, 15 Mass. R. 424.

[2] *Wilkins* v. *Carmichael*, Dougl. R. 101. *Hussey* v. *Christie*, 9 East's R. 426. *Smith* v. *Plummer*, 1 B. and A. 575. *Atkinson* v. *Cotesworth*, 5 D. and R. 552.

[3] *Hussey* v. *Christie*, 13 Ves. jr. 594. *Ex parte Halkett*, 3 Ves. and Beames, 134. *Pierson* v. *Robinson*, 3 Swanst. R. 139, note.

sibilities incurred, on account of the ship.[1] "He may be understood," they say, "as against the owner himself, to have the same right in the freight money, which a factor or consignee has in the goods of the principal or consignor, for whom money has been advanced, or any liabilities have been incurred, in consequence of the employment or consignment. The master of a vessel in a foreign port, and at home after a voyage performed, has many liabilities from which he may have cause to protect himself, by insisting on his right to collect the freight money; and he is to be considered as having an implied promise from the freighters to pay it to him."[2]

The Supreme Court of New York sanctioned the same principle, in a case where the consignee had paid over the freight to the ship-owner, and the master recovered in an action of trover the amount of his advances, or liabilities, against the party with whom he (the master) had deposited the goods to be kept for him, but who had delivered them over to the consignee by direction of the ship-owner.[3]

In the Admiralty Courts, Judge Peters, in the District Court for Pennsylvania, held that the master's disbursements abroad were a lien on the proceeds of the ship in court.[4] The Circuit Court of the United States for Massachusetts District, held in the case of *The*

[1] *Lane* v. *Penniman*, 4 Mass. R. 92. *Lewis* v. *Hancock*, 11 Ibid. 72. *Cowing* v. *Snow*, 11 Ibid. 415. *Goodrich* v. *Lord*, 10 Ibid. 487.

[2] *Lewis* v. *Hancock*, supra.

[3] *Ingersoll* v. *Van Bokkelin*, 7 Cow. R. 670. S. C. 5 Wendell's R. 314. See also *Shaw* v. *Gooking*, 7 New Hamp. R. 19.

[4] *Gardner* v. *Ship New Jersey*, 1 Peters's Adm. R. 227. See also *Bulgin* v. *Sloop Rainbow*, Bee's R. 116.

Ship Packet, that the master had a lien on the freight for all advances made by him on account of the ship, and that he might intercept it, when earned, to reimburse himself. The court noticed the doctrine of the maritime law of foreign countries, giving a lien on the ship for such advances, and said there was much reason for upholding it.[1] Judge Ware proceeded upon the same doctrine, as to the freight, in *Drinkwater* v. *The Spartan*.[2]

Whatever uncertainty there may be respecting the master's right to intercept the freight, as against his owner, there is no doubt of his right to retain it, when once received by him, to reimburse himself as a general creditor of the owner, either against the owner himself, or his assignee, where the assignment has not been made until after the freight is earned and received by him and due notice of his claim has been given.[3] Indeed, the case of *Drinkwater* v. *The Spartan* goes much further than this, inasmuch as the freight had not been earned, but the vessel was at sea, when the assignment was made.

The rights of the master, as against his owner, in respect to the topics above considered, remain for further elucidation than they have yet received. We have seen, in a former chapter, the tendency to the doctrine that if the master has funds of his own, or can procure them on his own credit, he is bound to apply them to the ship's necessities, before he can resort to hypothecation of the

[1] 3 Mason's R. 255.

[2] Ware's R. 163. See also *The Ship Grand Turk*, 1 Paine's R. 76.

[3] *Hodgson* v. *Butts*, 3 Cranch's R. 140.

ship itself.[1] If this doctrine is to be considered as finally established in the maritime law — and it is certainly asserted with an imposing weight of authority — it should seem to rest on the ground that the master has a lien on the ship and freight for this application of his own money or credit to the ship's necessities. Upon what principle, drawn from his contract merely, can it be made his duty to apply his own money, or goods, or credit, to the wants of the owner, if this security is denied to him? A very accurate foreign writer states the substance of the agreement between the master and owner to be to this effect: that the latter will faithfully discharge every duty incumbent on him, and render a satisfactory account of all his transactions; that he shall receive a stipulated sum as wages; and shall be secured in all his advances, that do not exceed the value of the vessel, or are authorized by the owner.[2] It is true, that the maritime law throws upon the master a peculiar agency; that it constantly requires his best exertions for the interests of the owner; that his duties are not limited to the mere navigation of the vessel from port to port, but he may in some cases be required to act in the same manner and extent, as the prudent owner himself would do, if present. In all this, however, he is dealing with and for the benefit of the property of another. If he benefits and saves that property, by application of his own funds; if he contributes by his own property to give value to and to bring safely home, a vessel, which otherwise would not return to the owner's hands, there arises in equity a clear lien, in his

[1] *Ante*, Part III, ch. 1, pp. 176, 182.

[2] Jacobsen's Sea Laws, by Frick, B. 2, ch. 1, p. 87.

favor, upon the vessel, or its earnings, which he has thus secured; and there does not seem to be any good reason why this lien should not be recognised, at law, as the correlative and consideration of his asserted duty so to apply his own property.[1]

[1] See *The Ship Packet*, 3 Mason's R. 255, where the master's duty was put upon this ground.

PART FOURTH.

OF THE EARNING AND PAYMENT OF WAGES.

CHAPTER I.

OF THE TIME WITHIN WHICH PAYMENT OF WAGES MAY BE DEMANDED AND ENFORCED.

It is the general rule of the maritime law, that the wages for the whole voyage are not due and payable, until the voyage is terminated and the cargo is unlivered. We have already seen that it is, in general, the duty of the officers and crew to remain by the ship until the cargo is discharged;[1] and the reason why the wages are not payable until the discharge of the cargo is complete, is both because it is part of the contract that the mariner shall assist in the unlading, and in order that the merchant may have opportunity to demand the freight, the fund out of which the wages are ordinarily to be paid, and to see whether any deductions are to be made from the wages on account of embezzlement or other injury to the cargo. But in most countries there are positive regulations upon the subject; and in this country, by Act of Congress, it is provided that, as soon as the voyage is ended, and the cargo or ballast fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract, and if not paid within ten days after such discharge, the sea-

[1] *Ante*, Part II, ch. 4, p. 137 — 140.

man or mariner is entitled to Admiralty process against the vessel.[1]

[1] Act U. S. 20th July, 1790, ch. 29, sec. 6. "That every seaman or mariner shall be entitled to demand and receive, from the master or commander of the ship or vessel to which they belong, one third part of the wages which shall be due to him, at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract: and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract: and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then, for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackle, furniture, and apparel, according to the course of admiralty courts, to answer for the said wages: and if the master shall neglect to appear, or appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used; and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise, the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law, for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast."

The statute is obscure,[1] and the necessity of a judicial construction was obvious from the first. Soon after the passage of the Act, Judge Peters, of the District Court of Pennsylvania, gave it the following construction. It appeared to him unwarrantable to contend that the ten days should run from the time of the discharge of the cargo; that the discharge of the cargo or ballast was coupled with the end of the voyage in the law, not as part of the contract, or to fix the time from whence the ten days are to be computed, but because it is a necessary step to enable the merchant to demand his freight; and that it is not to be supposed that the Act means to fix two periods from which one term of ten days is to run. A reasonable construction is therefore to be given to it, and he allowed at the least ten days from the end of the voyage, and at the most fifteen working days to unlade.[2]

In the District Court of Massachusetts, Judge Davis, more recently, adopted a similar construction. He held that the ten days ordinarily began to run from the period when the cargo actually was or might be discharged; and that the voyage was then properly ended. But in cases where the crew were discharged upon arrival in port, and were not retained for the purpose of discharging the cargo, (as is the common practice,) he thought the ten

[1] In England, by Act of Parliament, two days, in coasting voyages, from the termination of the agreement, or from the time when the mariner receives his discharge, *whichever shall first happen*, and in other voyages, three days after the cargo shall have been delivered, and ten days after the mariner receives his discharge, *whichever shall first happen*, are the times when the wages are demandable. Act 5 and 6 Wm. IV. ch. 19, sec. 11 and 12.

[2] *Edwards* v. *The Susan*, 1 Peters's Adm. R. 165. *Thompson* v. *The Philadelphia*, Ibid. 210. *Hastings* v. *The Happy Return*, 2 Ibid. 253.

days began to run from the time of the discharge of the crew; and that the day of the discharge should not be included in the ten days.[1]

Still more recently, the subject was fully examined by Judge Ware, of the District Court of Maine. He held that the ten days begin to run from the day when the wages are completely earned. If by the terms of the contract, or the usage of the place, the seamen are bound to remain in the vessel, and assist in unlading the cargo, then on common principles they will not be entitled to their wages until the cargo is discharged. It is the general rule of the maritime law that the seamen are bound to wait the unlivery of the cargo, in the absence of any usage or particular contract. But if by the terms of the contract or the usage of the port, the term of service and with it the wages terminate when the vessel is safely moored, and before the unlading; or if they are discharged and other persons employed to unlade, then the ten days are to be computed from the arrival of the ship, or from the discharge of the mariner.[2]

Ordinarily, therefore, the mariner is entitled to his wages as soon as he is voluntarily discharged from the vessel; and if they are not paid within ten days after his discharge, he may have process from a Court of Admiralty against the vessel. But if he be not discharged, and if the owner or master require that he should assist in unlading, a period of fifteen days has been adopted by the courts, as a reasonable time for the unlading, and the

[1] *Holmes* v. *Bradshaw*, cited in Story's Notes to Abbot on Shipping, p. 456.

[2] *The Mary*, Ware's R. 454.

ten days are to be computed from the expiration of that time.[1]

The statute does not prevent the filing of a libel in the Court of Admiralty, previous to the expiration of the ten days, but the issuing of process against the vessel; so that the question, when raised, depends on the date and issuing of the warrant of arrest, and not of the filing of the libel.[2] There is also an express exception, by which immediate process may be issued against the vessel, wherever she may be found, in case she shall have left the port of delivery where the voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo, or ballast.

By the general maritime law, wages are earned at every port of delivery during the voyage;[3] but it has been the policy of most nations to restrict the payment of the full wages, until the ship returns home, unless she be lost, or detained, in order to prevent desertions.[4] By our law, one third only of the wages earned can be demanded by the mariner at any port of delivery, during the voyage, unless it has been otherwise expressly stipulated in the contract.[5] If the ship be lost, or captured, whatever wages were

[1] *Holmes* v. *Bradshaw*, per Davis J. cited in Story's Notes to Abbot, p. 456. *Edwards* v. *The Susan*, 1 Peters's Adm. R. 165. *Thompson* v. *The Philadelphia*, Ibid. 210. *Hastings* v. *The Happy Return*, 2 Ibid. 253.

[2] *The Mary*, Ware's R. 454.

[3] *The Juliana*, 2 Dods. Adm. R. 504; and the port of destination is for this purpose a port of delivery, where the ship goes in ballast for a cargo. *Giles* v. *The Cynthia*, 1 Peters' Adm. R. 207. *The Two Catharines*, 2 Mason's R. 319. *Blanchard* v. *Bucknam*, 3 Greenl. R. 1.

[4] *Laws of Oleron*, art. 19. Pothier, *Louages Mar.* n. 211, 212, 213. Abbot on Ship. p. 453, part 4, ch. 2.

[5] Act U. S. 20 July, 1790, ch. 29, sec. 6.

earned up to the last port of delivery are recoverable by the mariner on his return home;[1] and the clause in the act "unless the contrary be expressly stipulated in the contract," is intended to provide only for a stipulation in the contract as to the *time* and *place* of payment, and not to put at hazard, by any stipulation, the wages actually earned at a port of delivery, by making the payment contingent upon the arrival of the ship at the home port.[2] The entire clause in the act applies, also, to cases where the voyage is continued. If the ship is sold abroad, or the seamen are discharged by their own consent, the whole wages due at the time may be demanded, and three months' wages in addition are to be paid by the master, to the consul, two thirds to be paid by him to the seamen, and one third retained to the use of the United States.[3]

We have now to inquire, how long, after wages become due, they may be sued for, by a mariner. In the courts of common law, the rules of the common law apply to the contracts of seamen, as to all other contracts, and wages are not recoverable, if they have been due more than six years, unless the party entitled to sue were under the disability provided for in the statute of limitations, by which the court is governed. And in England, the statute of limitations of 4 Anne, ch. 16, sec. 17, applies to suits in the Admiralty. But in our Admiralty Courts, there are no other limitations than

[1] *Giles* v. *The Cynthia*, 1 Peters's Adm. R. 209. *Johnson* v. *The Walterstorf*, Ibid. 215. *Blanchard* v. *Bucknam*, 3 Greenl. R. 1.

[2] *Johnson* v. *The Walterstorf*, 1 Peters's Adm. R. 215.

[3] Act U. S. 28 Feb. 1803, ch. 62, sec. 3.—As to the right of seamen to sue in foreign courts, see *post*.

those which Courts of Equity prescribe to themselves in the maintenance of suits. This question was examined with much care by Mr. Justice Story, many years ago, and it was held by him that neither the statute of 21 Jac. 1, ch. 16, nor the Massachusetts statute of limitations, which is substantially a copy of the former, applied to suits in the Admiralty, and that the act of 4 Anne included only the High Court of Admiralty in England, and was never adopted in any of the colonies; though if it had been, it could not now govern the Admiralty Courts of the United States, which possess general admiralty and maritime jurisdiction, under the constitution. The act of the United States regulating suits for mariners' wages contains no limitations as to the time within which such suits shall be brought. In the exercise of their jurisdiction, therefore, our Courts of Admiralty are governed by the general principles of such tribunals.[1] Those principles are to refuse aid in favor of stale and dormant claims, where the party has not been vigilant in asserting them; to follow the analogy of the rules prescribed to courts of common law, unless under special circumstances, constituting a just exception, which free the case from the imputation of staleness.[2]

It would indeed be unfortunate, if the Admiralty jurisdiction were ever to be trammeled with any limitations to the claims of seamen, other than those which Courts of Equity prescribe to themselves. Wages are dependent on the earning of freight, and the payment is

[1] *Brown* v. *Jones*, 2 Gallison's R. 481. *Willard* v. *Dorr*, 3 Mason's R. 91, 161.

[2] Ibid. *The Sarah Ann*, 2 Sumner's R. 206. *Pitman* v. *Hooper*, 3 Ibid. 286. See also *The Mentor*, 1 Rob. Adm. R. 180. *The Rebecca*, 5 Ibid. 102.

sometimes suspended, to await an indemnity from a foreign government; and at other times, in cases of insolvency, the only reliance for the mariner is upon the ship which may have passed into other hands, and may remain beyond his reach, long after a particular term of time has closed upon his just demand.

CHAPTER II.

OF WAGES AS AFFECTED BY VARIOUS INTERRUPTIONS OF THE VOYAGE.

The voyage being ended, the title of the mariner to the fruits of his toil becomes complete. But there is a maxim, which has had great currency in English and American jurisprudence, that "Freight is the mother of wages;" a formula that should be carefully scrutinized in its application. It is true in the inclusive, though not in the exclusive sense; for although it is true, that where freight is made wages are due, yet it does not always follow that if there be actually no freight, there can be no wages.[1] In the application of this rule, a distinction is to be made between those accidents by which the voyage is interrupted and the freight lost, without the fault of the owner, or master, and other causes arising

[1] Thus it is said, that if a vessel be sent out on a seeking voyage, and obtains nothing, the mariner is yet entitled to his wages, if she arrives home in safety, for by his contract he has a lien on the vessel. *The Lady Durham*, 3 Hagg. Adm. R. 202. So too, where the loss of freight is occasioned by a seizure for illegal trading, of which the crew are innocent, the wages are not only not forfeited with the vessel, but the mariners are not barred of their action against the owners. *The Malta*, 2 Hagg. Adm. R. 158. These and the like cases show the necessity of dealing cautiously with such a maxim as that quoted in the text.

from the acts of the owner or master.[1] This distinction therefore establishes several clear exceptions from the rule. If the voyage or freight be lost by the negligence, fraud, or misconduct of the owner or master, or voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies differing from the general rules of the maritime law; or if he have chartered his ship to take a freight at a foreign port, and none is to be earned on the outward voyage, in all these cases, the mariner is entitled to wages, notwithstanding no freight has accrued.[2] The doctrine of the connection between freight and wages has lately been thoroughly reviewed by Mr. Justice Story in an elaborate judgment, in which he states a far more accurate general formula than the usual one; that where freight is, or *might be* earned, wages are due for the full period of employment in the ship's service, whether the freight is actually received by the owner or not; and that no private contract between the owner and the shipper, with regard to freight, can affect the right to wages.[3]

[1] *The Malta*, 2 Hagg. Adm. R. 162. *L'Ord. de la Marine*, liv. 3, tit. 4, art. 3, 4. Valin, Comm. tome i, p. 686. Pothier, *Louages Mar.* n. 199, 200, 201. Abbot on Shipping, part 4, ch. 2, sec. 4, 5, 6.

[2] *The Saratoga*, 2 Gallis. R. 175. *Wolf* v. *The Oder*, 2 Peters's Adm. R. 261. *Hoyt* v. *Wildfire*, 3 Johns. R. 518. *Emerson* v. *Howland*, 1 Mason's R. 45. *The Malta*, 2 Hagg. Adm. R. 162. *Giles* v. *The Cynthia*, 1 Peters's Adm. R. 207. *The Two Catharines*, 2 Mason's R. 319. *Blanchard* v. *Bucknam*, 3 Greenl. R. 1. *The Juliana*, 2 Dods. Adm. R. 501. *Van Beuren* v. *Wilson*, 9 Cowen's R. 158. So too in cases of shipwreck, where parts of the vessel are saved by the crew, they have a lien for their wages on what is saved. But this is sometimes deemed to be a claim in the nature of salvage.

[3] *Pitman* v. *Hooper*, 3 Sumner's R. 50, 286. So too, *The Consolato*, after various provisions directing the wages to be paid out of freight,

These principles are now to be applied to the different cases of a loss of the vessel at different periods of the round voyage; as *first*, on the outward voyage; *secondly*, on the homeward voyage; *thirdly*, where the loss takes place between intermediate ports.

1. *Where the vessel is lost on the outward voyage.* The contract of the mariner is, as we have seen, an entire contract for the voyage, and, unlike most contracts for the hire of services, the wages are made dependent on the successful issue of the enterprise, for reasons of policy, in order that the mariner's reward may be bound up in the safety of the vessel and cargo, so that motive to exertion may be drawn in part from his own interest.[1] The owner of the vessel is therefore absolved from the payment of wages by the total loss of the ship, however long the mariners may have been in his employment previous to such loss; and this rule of the entirety of the contract is only so far modified by the equitable intervention of another principle, as to give the mariner wages when and as long as the vessel has or might have earned freight.[2] If therefore the vessel and cargo are lost on the outward voyage, before any freight is earned, and no part of either are saved by the crew, the wages of the seamen are also lost and the original contract therefor

whether a large or small amount has been received, declares, "this chapter has been made, in order that every master should attend carefully how he freights his ship, to whom and with what merchandise; because whether he receives the freight, or does not receive it, the mariners ought to be paid their wages." Chap. 94, [139]. Pardessus, tome ii, p. 131.

[1] Pothier, *Louages Mar.* n. 184.

[2] Ante, p. 272.

is annulled.[1] But the advance wages are not in such cases to be returned.[2]

The same rule of policy which makes the wages dependent on the safety of the vessel and cargo and the earning of freight, or the usual opportunity to earn it, necessarily excludes the mariner from the benefit of insurance, obtained by the owner, or on his own account, directly or indirectly. If a loss takes place, a recovery therefor by the owner from underwriters does not give the seaman a right to recover wages.[3] So too, the mariner cannot procure his wages to be insured, as that would entirely abrogate the rule and policy of the law.[4]

[1] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 8. Valin, Comm. tome i, p. 701. Abbot on Shipping, part 4, ch. 3, sec. 1. 3 Kent's Comm. 187. *The Neptune*, 1 Hagg. Adm. R. 239. *Adams* v. *The Sophia*, Gilpin's R. 77.

[2] Valin, Comm. tome i, p. 702. Pothier, *Louages Mar.* n. 184, 185. *The Neptune*, 1 Hagg. Adm. R. 239. In the case of *The Mentor*, 4 Mason's R. 102, 103, the Court defined advance wages to be, in effect, a sum that is given in part consideration of the contract to go on the voyage, and is not affected by any subsequent occurrences, the owner consenting to lose it, if the wages subsequently earned do not indemnify him.

[3] *McQuirk* v. *The Penelope*, 2 Peters's Adm. R. 276. *Percival* v. *Hickey*, 18 Johns. R. 257. *Icard* v. *Gould*, 11 Ibid. 279. *The Lady Durham*, 3 Hagg. Adm. R. 196.

[4] *The Neptune*, 1 Hagg. Adm. R. 239. Underwriters become liable for wages after an abandonment, not as insurers towards the seamen, but on a personal liability as owners, which relation they sustain after the abandonment is accepted by them. In a late case in the Circuit Court of the United States for Massachusetts, a *quære* is thrown out by the court, whether an insurance by seamen of their shares on a fishing voyage, where the shares would be in the nature of wages, though given in lieu thereof, would be valid. *Hancox* v. *Fishing Ins. Co.* (3 Sumner's R. 132, 141.) I do not see why an insurance *by the seaman himself*, of his share, or lay, would not be within the prohibition of the policy which is understood to be the foundation of the rule in regard to monthly wages. But these shares are assignable, before the vessel sails. The assignee has an insurable interest; he may procure insurance that shall be unknown to the sea-

2. *Where the vessel is lost on the homeward voyage.* The mariner's contract for wages is in most respects an entire contract for the round voyage. But if a loss of the ship takes place after she has been at one of the outward ports of destination, the rule that the earning of freight for the owner is also the earning of wages for the mariner, gives him an election to divide this entire voyage into two periods, which the maritime law treats distinctly, as the outward and the homeward voyages, in order to give effect to the equitable rule which it has established in his favor. When, therefore, the vessel is totally lost on the homeward voyage, the inquiry is to be made, whether freight was or might have been earned on the outward voyage. The requisitions of the law, in favor of the mariner, will be satisfied if the freight was, or upon the principles of the maritime law, might have been earned, on the outward voyage. Thus wages are due at the port of delivery of the outward cargo;[1] and the port of destination is in general to be deemed a port of delivery for the purpose of wages, though the vessel may have gone there in ballast.[2] So too, if there is a special

man, and in that case one reason of the public policy would be removed, which is commonly assigned as an ingredient, that the exertions of the mariner are lessened by the knowledge that his wages are insured. Mr. Chancellor Kent says that the goods which seamen purchase abroad with their wages, do not fall within the prohibition, and that wages already earned and due, do not. 3 Comm. p. 269, edit. 1840.

[1] *Anon.* 1 Lord Raym. 639. *The Juliana*, 2 Dods. Adm. R. 504. *The Neptune*, 1 Hagg. Adm. R. 232.

[2] Abbot on Ship. part 4, ch. 2, sec. 4. 3 Kent's Comm. 190. *Giles* v. *The Cynthia*, 1 Peters's Adm. R. 207. *The Two Catharines*, 2 Mason's R. 319. *Blanchard* v. *Bucknam*, 3 Green. R. 1. *Thompson* v. *Faussat*, 1 Peters's Circ. C. R. 182. *Putman* v. *Hooper*, 3 Sumner's R. 290.

contract between the owner and the freighter, varying the right to freight from the general law, freight will still be deemed to have been earned for the purposes of wages.[1]

If, therefore, the vessel is lost on the homeward voyage, and freight has been, or might have been, by the general principles of law, earned to an outward port, the wages for the outward voyage to that port are deemed to have been earned; and the rule is now firmly established in this country, that the outward voyage is to be considered as including generally, for the purpose of wages, one half of the time spent at such outward port.[2] Nor is

[1] 3 Kent's Comm. 190, 191. *Pitman* v. *Hooper*, 3 Sumner's R. 50, 286. Case in 3 Hagg.

[2] *Pitman* v. *Hooper*, 3 Sumner's R. 286. *Hooper* v. *Perley*, 11 Mass. R. 545. *Locke* v. *Swan*, 13 Ibid. 76. *Swift* v. *Clarke*, 15 Ibid. 173. *Moore* v. *Jones*, 15 Ibid. 424. *Galloway* v. *Morris*, 3 Yeates's R. 445. *Giles* v. *The Cynthia*, 1 Peters's Adm. R. 204. *The Elizabeth*, Peters's Circ. C. R. 130. *The Walterstorff*, 1 Peters's Adm. R. 215. *Cranmer* v. *Gernon*, 2 Ibid. 391. *Thompson* v. *Faussatt*, 1 Peters's Circ. C. R. 182. *Jones* v. *Smith*, 4 Hall's Am. Law Jour. 276. The only case in which this rule has been questioned, in this country, is that of *Bronde* v. *Haven*, (Gilpin's R. 592); and this must be considered as outweighed by the numerous decisions in which it has been supported. See an examination of the authorities in *Pitman* v. *Hooper*, supra. Upon the theory of the rule, the court in this last case said: "It is difficult to lay down any universal rule, applicable to all cases, as to when the outward voyage ends, and the homeward voyage begins, in respect to seamen's wages. In a just and legal sense, the outward voyage may well be deemed generally to continue as to seamen's wages, as long as the seamen are engaged in purposes connected with the outward voyage, whether the cargo is discharged or not; and the homeward voyage to begin, when any acts are done or preparations made, having reference exclusively to the homeward voyage. And if there be any intermediate time which is not properly referrible to either, that may well be treated like an intermediate voyage in ballast, to be for the benefit and purposes of the owner, and for which he ought, therefore, to pay the seamen for their services. In ordinary voyages, it is not very

there any abatement to be made from the wages, in case of the freight being partially lost or diminished by maritime accidents or perils. If freight is earned, whether it be large or small, the whole wages, which are deemed to have been earned, are to be paid without deduction.[1]

The wages for the homeward voyage, calculated from the expiration of half the time that the ship lay at the outward port, are lost by a total loss of the ship and freight on the homeward voyage,[2] and the right to wages, thus lost, is, (as we shall see in the course of this chapter,) restored only by a restitution of freight to the owner, under an indemnity in cases of capture, or by a salvage

easy to find any such intermediate time, or to measure it with exactness; and in many cases acts are done, and proceedings had simultaneously with reference both to the outward and the homeward voyage; so that it is impracticable to divide the time with perfect accuracy. It was with a view to this practical difficulty, that the rule has been established that one half of the time during which the vessel is lying in the port, shall be deemed a part of the outward voyage, and the other half part of the homeward voyage. For the sake of uniformity and certainty, half the time passed in port is attributed to each voyage, and it is an apportionment commended by the double motive of suppressing litigation upon slight distinctions, and of accomplishing the ends of maritime policy, by which the right to wages is made in a good degree dependent on the safety and success of the voyage." Ibid.

[1] *Pitman* v. *Hooper*, 3 Sumner's R. 50. In addition to the authorities cited in the learned opinion, in this case, a passage in the *Consolato* may be quoted, which seems to have escaped the attention of the court, but which is precisely in point. "If, in any event, the merchants have been faithless, or if the merchandise, not being worth the freight due upon it, is abandoned for the freight, whether such merchandise is worth the freight or not, the seamen ought to have their wages even though it should be necessary to sell the ship for a sum less than would be sufficient to pay them." *Consolato del Mare*, ch. 94, [139]. Pard. tome ii, p. 130.

[2] *Pitman* v. *Hooper*, 3 Sumner's R. 286.

of some part of the ship, or cargo, by the crew, in cases of wreck; unless the loss took place by the fraud or fault of the master or owner.[1]

3. *Where the vessel is lost between intermediate ports.* The same general rules apply to this case as to those where the voyage consists of two distinct periods only. The wages are to be calculated up to the last port of the delivery or receipt of cargo, and for half the time that the ship lies there.[2] The most valuable case illustrating this doctrine is an elaborate judgment of Lord Stowell's, in which he held that in a divided voyage, in which cargoes successively taken in and delivered at different ports earn freight for the owners at each port of delivery, wages are earned by the mariners by the general maritime law; and he declared emphatically that no contract in the shipping articles by which the mariners are not to be entitled to their wages unless the ship returns to the last port of discharge, would be upheld by the Court of Admiralty.[3]

The effect of various interruptions of the voyage is now to be considered.

1. *Capture by a belligerent.* It was formerly supposed that the capture of a neutral ship completely dissolved the mariner's contract and defeated all rights and interests under it.[4] But it is now well settled, that the

[1] *The Malta*, 2 Hagg. Adm. R. 158.

[2] *Johnson* v. *The Walterstorff*, 1 Peters's Adm. R. 215. *Galloway* v. *Morris*, 3 Yeates's R. 445. *Thompson* v. *Faussatt*, 1 Peters's Circ. C. R. 182. *Lindsey* v. *The South Carolina*, Bee's R. 173. And the cases cited supra.

[3] *The Juliana*, 2 Dods. Adm. R. 504.

[4] So held by the Supreme Court of Massachusetts, in *Lemon* v. *Walker*, 9 Mass. R. 404, and in *Alfridson* v. *Ladd*, 12 Ibid. 173; but questioned and

capture of a neutral ship does not of itself operate as a dissolution of the contract for mariner's wages, but at most only as a suspension of it. It is ordinarily the right and duty of the mariners to remain by the ship, while there is any hope of recovery of the property, which is generally to be considered as at an end when a condemnation and sale of the ship takes place. If the ship is restored and performs her voyage, the contract is revived and the mariner becomes entitled to his wages; that is, to his full wages for the voyage, if he has remained on board and done his duty, or if, being taken out, he has been unable, without any fault of his own to rejoin the ship.[1] If the ship is condemned by a sentence of condemnation, then the contract is dissolved, and the seamen discharged from any further duty on board; and

much shaken in *Spafford* v. *Dodge*, 14 Ibid. 72. See also *Brooks* v. *Dorr*, 2 Ibid. 39. Sir William Scott held the same in *The Friends*, 4 Rob. Adm. R. 143.

[1] Where a mariner is taken out of the captured ship, and is unable without any fault of his own to rejoin her, he is entitled to his full wages for the voyage, if the vessel is afterwards released, recaptured or ransomed, he paying his proportion of salvage and ransom money in the two last cases, and deducting also any wages he may have earned in the intermediate period. *Howland* v. *The Lavinia*, 1 Peters's Adm. R. 123. *Hart* v. *The Little John*, 1 Ibid. 132. *Girard* v. *Ware*, 1 Ibid. 142. *Singstrom* v. *The Hazard*, 2 Ibid. 384. *Brooks* v. *Dorr*, 2 Mass. R. 39. *Wetmore* v. *Henshaw*, 12 Johns. R. 324. *Spafford* v. *Dodge*, 14 Mass. R. 66. *The Saratoga*, 2 Gallis. R. 164. *Beale* v. *Thompson*, 4 East's R. 546. Sir William Scott held otherwise in the case of *The Friends*, (4 Rob. Adm. R. 143,) as to a mariner *taken out* of the vessel, which had been captured and recaptured. But our law is clearly in favor of the mariner, and the principle is ancient. The Consulate declares that if a mariner is taken from the vessel by pirates, or a hostile force, he ought to have his wages the same as if he had performed the voyage. *Consolato del Mare*, chap. 137, [182]. Pardessus, tome ii, p. 152. It seems that it is otherwise where the seaman is impressed, and the vessel permitted to proceed. *Watson* v. *The Rose*, 1 Peters's Adm. R. 132.

they lose their wages, unless there is a subsequent restitution of the property, or of its equivalent value, upon an appeal, or by treaty, with an allowance of freight, in which event their claim for wages revives. In the case of a restitution in value, the proceeds represent the ship and freight, and are a substitute therefor. If freight is decreed or allowed for the whole voyage, then the mariners are entitled to the full wages for the whole voyage; for the decree for freight, in such a case, includes an allowance of the full wages, and consequently creates a trust or lien to that extent thereon, for the benefit of the mariners. If the freight decreed or allowed is for a part of the voyage only, the seamen are ordinarily entitled only to wages up to the time for which the freight is given, unless under special circumstances, as where they have remained by the ship at the special request of the master, to preserve and protect the property for the benefit of all concerned.[1]

Two valuable cases, arising under the provisions of indemnity made by treaty, which have been already cited, have been adjudicated recently in the Circuit Court of the United States for the First Circuit. A, shipped as mariner on board a brig, on a voyage from Beverly, in Massachusetts, to Naples, and back again, at the rate of wages of eighteen dollars per month. The brig arrived

[1] This statement of the doctrine is taken from the opinion of the court in *Brown* v. *Lull*, 2 Sumner's R. 447. See also *The Saratoga*, 2 Gallis. R. 164. *Emerson* v. *Howland*, 1 Mason's R. 45. *Willard* v. *Dorr*, 3 Ibid. 161. *Sheppard* v. *Taylor*, 5 Peters's S. C. R. 675. *Lindsay* v. *The South Carolina*, Bee's R. 173. *Pitman* v. *Hooper*, 3 Sumner's R. 50, 286. *Beale* v. *Thompson*, 4 East's R. 546. 3 Kent's Comm. 191, 192, 193. Abbot on Ship. part 4, ch. 3, sec. 2, and notes.

at Naples, and was there seized, confiscated and sold. A continued on board until he was discharged by the master, with his own consent, when he returned home. By a convention with the King of the Two Sicilies, a provision was made for the indemnity of this and other American claims; and three instalments were received, amounting in all to more than the claim of A for wages; a proportion of the indemnity went to the underwriters, who, at the time of the loss, had insured the vessel. The suit was by libel in the Admiralty, *in personam*, against the executors of the owner of the brig. The court held that the libellant should recover full wages from the time of his shipment, up to the time of his arrival in the United States, as indemnity had been made by treaty, and received by the owner, sufficient to pay the claim for wages; and that the owner's having paid over to the underwriters a part of the fund did not release him *pro tanto*, or at all, from his original liability under his contract, which had revived by the receipt of the indemnity.[1]

In the other case, an American ship, having delivered her outward cargo at St. Petersburg, was captured on the homeward voyage by the Danes, carried into Denmark, and condemned. Compensation was afterwards made by treaty, for the ship and cargo, which belonged to the same owner. The libel was *in personam* against the owner's administrator. The owner had not received a full indemnity, but taking his share in proportion with the other claimants to the fund paid under the treaty, he

[1] *Brown* v. *Lull*, 2 Sumner's R. 443. See also *Brooks* v. *Dorr*, 2 Mass. R. 39.

received about one third of his loss. The commissioners under the treaty made no express allowance on account of freight. The court held that the seamen were entitled to recover full wages; that the indemnity made must be presumed to have included freight; and that whether this was great or small, whether received in whole, or only in part, by the owner, the right of the seamen to wages accrued to the full extent of the freight earned.[1]

In cases of rescue, recapture and ransom, the wages of the mariners are subject to the general average; but they are not liable to contribution in any other cases of general average.[2]

The ship's crew may entitle themselves to salvage by recapturing the vessel from a seizure made by an usurped authority of a foreign government, or from a regular capture.[3]

2. *Interdiction of commerce.* If a vessel be on a voyage to a foreign country, and a declaration of war takes place between such foreign country and that of its owner, the farther prosecution of the voyage becomes illegal.[4] The effect of this upon the mariner's contract was considered in the case of *The Saratoga*. It was held that the original contract was completely dissolved, and that the vessel earning no freight, the mariners were consequently entitled to no wages. But it appearing that the

[1] *Pitman* v. *Hooper*, 3 Sumner's R. 50, 286.

[2] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 20. Jacobsen's Sea Laws, book 2, ch. 2, p. 155. Valin, Comm. p. 752. *Pitman* v. *Hooper*, 3 Sumner's R. 50, 59 — 61. *The Friends*, 4 Rob. Adm. R. 143. Abbot on Ship. part 4, ch. 3, sec. 2, p. 458.

[3] *Williams* v. *Suffolk Ins. Co.*, 3 Sumner's R. 270. 1 Peters's Adm. R. 306.

[4] See article *Trade with the Enemy*, Adm. Digest, p. 495.

crew had been subsequently retained by the master to refit and preserve the ship in the port where she lay, they were held to be entitled to a reasonable compensation in the nature of wages, upon the ground of a new contract.[1]

The case of an embargo, or detention of the vessel by order of the sovereign, is different from a declaration of war. An embargo[2] is a temporary restraint, meaning in commerce a stop put to trade for the time. It may be applied to foreign or domestic vessels; to the ships of one nation in the ports of another, or to its own ships in its own ports. In either case, it is not deemed a dissolution of the voyage, or of the contracts concerning it.[3] If the vessel is released and performs her voyage, or if a new voyage is substituted, the seamen are entitled to wages during the detention.[4]

[1] *The Saratoga*, 2 Gallison's R. 164. If one or more freights to intermediate ports had been earned by the vessel, before the interdiction of commerce took place, or if by a voluntary acceptance of the cargo at an intermediate port, a *pro rata* freight had been earned, then undoubtedly wages for that portion of the voyage would be due. See also Pothier, *Louages Mar.* n. 180, and Valin, Comm. tome i, p. 688, on the 4th art. of book 3, tit. 4, of the French Ordinance.

[2] From the Spanish *embargar*, to detain.

[3] Valin, Comm. tome i, p. 690. Pothier, *Louages Mar.* n. 181. *Beale* v. *Thompson*, 4 East's R. 558. *Hadley* v. *Clark*, 8 T. R. 259. *M'Bride* v. *Mar. Ins. Co.*, 5 Johns. R. 308. *Baylies* v. *Fettyplace*, 7 Mass. R. 325. An embargo is sometimes equivocal. If the result is that the vessel is allowed to depart, then the detention retains its original character of a temporary seizure. If the embargo precedes a war, and is merged in a war, then the character of hostility is impressed on the original seizure, *ab initio*. *The Boedes Lust*, 5 Rob. Adm. R. 219. Jacobsen's Sea Laws, book 4. ch. 3, p. 382.

[4] *Marshall* v. *Montgomery*, 2 Dallas's R. 170. Abbot on Ship. part 4, ch. 2, p. 443, n. 1, by Story; and the cases cited in the last note. The French ordinance gave the seamen, hired by the month, half wages during such a detention. *L'Ord. de la Mar.* liv. 3, tit. 4, art. 5.

3. *Shipwreck.* All the authorities of the maritime law agree that, in cases of wreck, where parts of the ship are saved by the exertions of the seamen, they have a lien on what is thus saved for some kind and extent of compensation. The doubt in these cases has been, whether it was to be a compensation in the nature of salvage for their exertions in saving the property, and to be confined to that, or whether the case of shipwreck constituted a special exception to the rule that freight must have been earned, to entitle to wages, and thus preserved the lien for the whole wages antecedently earned, with perhaps an additional compensation in the nature of salvage. The authorities bearing upon this question are not very clear.

The laws of Oleron are not explicit enough to throw much light upon the subject. They recognise, however, the lien, for some compensation.[1] The laws of Wisbuy are more express and speak of wages, in terms. "If they [the seamen] aid the master in the salvage, he will owe them their wages. If they do not aid him, he will owe them nothing, and they shall lose their wages, the same as if the ship had perished."[2] The Hanseatic ordinances are not clear upon the point. That of 1591 declares that "if the seamen refuse to assist the master, and the ship perishes, they shall have neither wages, nor any other reward;[3] the ordinance of 1614 speaks of a salvage reward, to be paid out of the property saved, by

[1] *Jugemens D'Oleron*, art. 3, Pard. tome i, p. 324.

[2] *Droit Mar. de Wisbuy*, art. 17. Pard. tome i, p. 471.

[3] *Droit Mar. de la Ligue*, ans. (*Reces de* 1591,) art. 45. Pard. tome ii, p. 520.

arbitration.[1] But the French ordinance is express. "If any part of the vessel is saved, the seamen hired for the voyage, or by the month, shall be paid their wages already earned, from the materials which they have saved;"[2] and the payment of wages, *eo nomine*, and to the full extent, if the materials saved are sufficient, is recognised by the commentators.[3] All these ordinances declare the duty of the mariner to remain by and assist in preserving the wreck.

In England, the question had never been directly adjudicated, in the common law courts, when Lord Tenterden wrote his treatise.[4] In this country, in the District Court for Pennsylvania, Judge Peters was long in the practice of decreeing a compensation equivalent to wages, holding that the mariner's contract is not dissolved by shipwreck.[5] The present judge of that court has decreed wages out of portions of vessel, or cargo, saved, and seems to put it on the ground of salvage, for he holds that a new lien arises thereon, the original contract being annulled, where the wreck occasions a total loss of the freight.[6] The Supreme Court of Massachusetts and that of New York, have inclined to treat the lien as aris-

[1] Ibid. p. 543, art. 29.

[2] *L'Ord. de la Mar.* liv. 3, tit. 4, art. 9.

[3] Valin, Comm. tome i, p. 703. Pothier, *Louages Mar.* n. 185. Sautayra, *Code de Commerce, expliqué*, p. 170, (Paris, 1836.)

[4] Abbot on Ship. part 4, ch. 2, p. 452.

[5] *Taylor* v. *The Cato*, 1 Peters's Adm. R. 48. *Giles* v. *The Cynthia*, 2 Ibid. 203. *Clayton* v. *The Harmony*, Ibid. 70, 79. *Weeks* v. *The Catharina Maria*, Ibid. 424. In these cases, it is intimated that there may be a claim for compensation beyond wages, if the property saved warrants it.

[6] *Adams* v. *The Sophia*, Gilpin's R. 77. *Brackett* v. *The Hercules*, Ibid. 184.

ing by way of salvage.[1] In the District Court for Maine, Judge Ware has recognised the doctrine that the wreck is pledged by the maritime law for the payment of wages; but he holds that the seamen are not entitled, if the materials are saved by other persons; that the original contract by which the seaman is bound to the vessel, is not dissolved by the shipwreck, as long as the seamen remain by it, but that it is dissolved, if they abandon it.[2] In the Circuit Court for the District of Massachusetts, the allowance was put upon the ground of salvage, adopting the wages earned as a measure, in ordinary cases, leaving an additional recompense to be made for cases of extraordinary merit.[3] The court intimated, however, that it might be more consistent with the principle of the rule, that the earning of wages shall depend on the earning of freight, to hold that the case of shipwreck constituted an exception from the rule, and that the claim to wages was fully supported by the maritime policy on which the rule itself rests.[4] This doctrine was subsequently asserted by Lord Stowell, in an elaborate judgment, in which he held that the original contract was not dissolved by the shipwreck; that the duty is imperative to remain by the wreck, and that the lien for wages attaches upon a part, as well as the whole of the

[1] *Frothingham* v. *Prince*, 3 Mass. R. 568. *Coffin* v. *Storer*, 5 Ibid. 252; 2 Dane's Abridg. 462. *Dunnett* v. *Tomhagen*, 3 Johns. R. 154.

[2] *Lewis* v. *The Elizabeth and Jane*, Ware's R. 41.

[3] *The Two Catharines*, 2 Mason's R. 319. See also *The Saratoga*, 2 Gallis. R. 161, 183.

[4] *The Two Catharines*, 2 Mason's R. 331. In a note to his edition of Abbot, Mr. Justice Story has said that he put the allowance of wages in case of shipwreck upon the grounds of a qualified salvage, because the exception to the rule had not at the time been clearly established. (Abbot on Ship. p. 451, n. 1, Amer. edit. 1829.)

ship, and that the rule of wages has the advantage on grounds of policy.[1] These cases, therefore, seem to establish the case of shipwreck, and a saving of any part of the ship, as an exception to the rule that freight must be earned before wages are due; that ordinarily the claim must be limited to the wages; although the learned judges did not deny that very extraordinary circumstances might give a title to further compensation in the way of salvage.[2]

This interesting question, whether a mariner can entitle himself as a salvor of any part of his own ship, or her cargo, must perhaps always remain to be determined, under certain general principles, from the circumstances of every case. From what has been said of the claim for wages, in cases of wreck and a saving of the materials, it may seem that the distinction between a claim for salvage compensation and a claim for wages is but shadowy. The principle, however, deducible from the authorities is, that shipwreck does not dissolve the mariner's contract, at least so long as the ship's company are kept together by the master, or mate, or whoever suc-

[1] *The Neptune*, 1 Hagg. Adm. R. 227.

[2] Ibid. p. 237. *The Two Catharines*, ante, and *Pitman* v. *Hooper*, 3 Sumner's R. 60. Mr. Chancellor Kent says, "The equitable claim which seamen may have upon the remains of the wreck is rather a claim for salvage, and seems to be incorrectly denominated in the books a title to wages. Wages, in such case, would be contrary to the great principle in marine law, that freight is the mother of wages, and the safety of the ship the mother of freight." 3 Kent's Comm. 196, edit. 1840. It is not for me to controvert so great an authority. But my researches have led to the conclusion that the tendency of the doctrine is to make the case of shipwreck, with a total loss of freight, as stated in the text, a clear exception to the general rule; and that there is sufficient authority in the maritime law to establish it as such.

ceeds in authority, and that it continues to be their duty as long as there is any thing to be done, to labor in the preservation of the vessel and cargo, out of which, if saved, they will be entitled to their wages.[1] Proceeding from this principle, as a guide, the cases in which the question of a further reward than wages may be considered, divide themselves into two classes. *First*, where the mariner's relation to the vessel has been dissolved, *de facto*, or by operation of law, as if the master, or his successor in authority, in case he may have perished, had abandoned the vessel and authorized the crew to leave her. *Second.* Where the relation is not dissolved, but all parties continue to labor in their legal duty, but where the services in saving the property are highly meritorious, the hazard very great, and the mariner may seem to have so far exceeded the demands of his ordinary duty, that a claim seems in equity to arise for a further compensation than the pittance of wages that may be due.

In the first of these cases, there is little room for doubt that the seamen may become salvors of their own ship. In the case of *The Blaireau*, a single seaman was accidentally left on board of a valuable ship in distress, the master and the rest of the crew having abandoned her. He lightened the ship, put her before the wind and hoisted a signal of distress, and the next day she was boarded by another ship's company, whom he assisted in bringing her into port. The Supreme Court of the United States held that, by deserting the ship with his entire crew, the master had absolved this man from his contract, and he

[1] The goods are liable to wages as well as the materials of the ship, in cases of wreck; though it seems that the parts of the ship should be first exhausted. *Clayton* v. *The Harmony*, 1 Peters's Adm. R. 58.

was admitted as a salvor on an equal footing with the stranger crew.[1] Lord Stowell, after defining the general character of a salvor and alluding, probably, to such a case of the dissolution of the contract by extraordinary circumstances, said, "I will not say that, in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves, that might induce the court to open itself to their [seamen's] claim of a *persona standi in judicio.* But they must be very extraordinary circumstances indeed; for the general rule is very strong and inflexible, that they are not permitted to assume that character."[2] The Supreme Court of the United States have again recognised the same doctrine, that extraordinary events may occur, by which a mariner's connection with the ship may be dissolved.[3] The analogies, too, are in favor of it. By a rescue of their ship from an enemy, mariners are, by the law of nations, treated as salvors, upon the ground that it is no part of their general duty as seamen to attempt a rescue.[4] The capture so far suspends their contract, that they have a right to wait inactively the doings of the captors and the result of the prize proceedings.[5] So too, in the analogous cases of pilots, who sustain, when on board, some legal relation to the vessel, it seems to be well settled, that for services beyond the line of their appropriate duty, or under cir-

[1] *Mason* v. *The Ship Blaireau*, 2 Cranch's R. 240, 270.

[2] *The Neptune*, 1 Hagg. Adm. R. 236, 237.

[3] *Hobart* v. *Drogan*, 10 Peters's S. C. R. 108.

[4] *The Two Friends*, 1 Rob. Adm. R. 271. *Clayton* v. *The Harmony*, 1 Peters's Adm. R. 70, 79.

[5] Ante.

cumstances to which those duties do not justly attach, they may claim as salvors.[1]

With regard to the other class of cases, there is more difficulty. Mr. Justice Story, delivering the opinion of the court in *Hobart* v. *Drogan*, said of the cases in which seamen may become salvors, "Extraordinary events may occur in which their connection with the ship may be dissolved *de facto*, or by operation of law, *or they may exceed their proper duty*, in which cases they may be permitted to claim as salvors."[2] When mariners may be said to have exceeded their proper duty, the legal relation being still undissolved, is certainly not capable of definition apart from circumstances. There is much intrinsic difficulty in the question. But there are cases in which a salvage compensation has been given, besides the dicta which tend to support the doctrine.[3]

4. *Sickness and death of the mariner.* The ample provisions of the maritime law to secure a proper treatment of seamen in cases of sickness have been stated in a former part of this treatise. It is now to be added to these, that sickness, or disability, occurring in the service

[1] *Hobart* v. *Drogan*, 10 Peters's S. C. R. 108. *Dulaney* v. *The Pelagio*, Bee's R. 212. *Hand* v. *The Elvira*, Gilpin's R. 60. *The Joseph Harvey*, 1 Rob. Adm. R. 306. *The General Palmer*, 2 Hagg. Adm. R. 176. *The City of Edinburgh*, 2 Ibid. 333. See also the case of an agent becoming a salvor. *The Happy Return*, 2 Hagg. Adm. R. 198.

[2] 10 Peters's S. C. R. 122.

[3] *Taylor* v. *The Cato*, 1 Peters's Adm. R. 48. *Clayton* v. *The Harmony*, Ibid. 70, 79. *Weeks* v. *The Catharina Maria*, Ibid. 424. *The Two Catharines*, 2 Mason's R. 319. Abbot on Ship. part 4, ch. 2, sec. 6, and the cases cited *ante*. This question is of course wholly aside from those cases where a higher reward is claimed on the ground of a new contract. See *ante*, pp. 28, 46, 47.

of the ship, do not interrupt the mariner's wages, whether he remains on board, or is left at a foreign port.[1] The foreign writers lay down the same limitation as that which I have stated to apply to the right of being cured at the ship's expense; that the sickness or injury should occur in the ship's service and not through any fault or vice of the party himself: otherwise, he will not be entitled to receive wages.[2]

When recovered, it is the mariner's duty to rejoin the ship, if opportunity offers; and if he neglects to do it, he cannot recover wages beyond the time when he could have rejoined it.[3] It has been held that if the disability of a seaman takes place before the voyage begins, no wages are due, if he does not proceed on the voyage; but it seems that he would in equity be entitled to some compensation for the services actually rendered before the ship sailed.[4]

The extent to which wages may be claimed by the representatives of a mariner, who dies during the voyage, is a vexed question. There is no room for doubt that by the general maritime law wages are universally allowed up to the time of the decease. Whether they are also to be continued up to the prosperous termination of the

[1] *Jugemens D'Oleron*, art. 6, 7, Pardessus tome i, p. 327. *L'Ord. de la Marine*, liv. 3, tit. 4, art. 11; and the other foreign ordinances, cited *ante*, Part II, ch. 3, p. 106, 107. *Chandler* v. *Grieves*, 2 H. Bl. R. 606. *Naterstrom* v. *The Hazard*, Bee's R. 441. *Ex parte Giddings*, 2 Gallison's R. 56. *Hart* v. *The Little John*, 1 Peters's Adm. R. 117. *Williams* v. *The Hope*, Ibid. 138.

[2] Pothier, *Louages Mar.* n. 190. *Ante*, Part II, ch. 3, p. 107.

[3] *Williams* v. *The Hope*, 1 Peters's Adm. R. 138.

[4] *Ex parte Giddings*, 2 Gallison's R. 56.

voyage, as if the mariner had lived and performed his duty, admits of controversy.

By the Rhodian law, under which it seems to have been customary to hire mariners by the year, the wages for the entire year were due to the heirs of the seaman who died during the year.[1] The Laws of Oleron are less clear. The text which I have most used, in the article directing a sick mariner to be put on shore, has a passage which may be rendered thus: "If the ship is ready to sail, it ought not to wait for him, but may go away; and if he gets well, he ought to have his pay *all the while;* and if he dies, his wife or his heirs ought to have it for him."[2] It is not very easy to extract from this ordinance any other meaning than that the mariner's wages are to run during his sickness, in case he dies, as they do when he recovers: there is nothing in the text which positively warrants the construction that they are to be continued after his decease.[3] So too, the Laws of

[1] "*Si scapha, funibus quibus navis ligata erat ruptis, cum navigantibus in ea nautis eversa fuerit, et nautæ perierint aut obierint, merces annua, usquedum annus integer exactus fuerit, nautarum heredibus solvatur.*" Droit Mar. Des Rhodiens, xlvi, Pardessus, tome i, p. 257.

[2] "*Et si la neef est preste a s'en aler, elle ne doit pas demourer pour li, ainz se doit aller; et s'il guarit, il doit avoir son louyer tout a long; et s'il moerge, sa femme ou ses privés le doibvent avoir pour li.*" Pardessus, tome i, p. 328, art. 7, *Jugemens D'Oleron.* In the text of Cleirac, the passage reads "*et sil guarit, il doit avoir son loyer tout comptant, en rabattant les frais, si le maistre luy en a fait; et sil meurt, sa femme et ses prochains le doivent avoir pour luy.*" Cleirac (Les Us et Cout. de la Mer.) on the 7th article of the Laws of Oleron.

[3] More than thirty years since, the venerable Judge Davis, of the District Court for Massachusetts District, had occasion to examine this question. His judgment, almost the only one of his in print, with the exception of a few published recently, from time to time, in a periodical work, may well occasion regret that more of his learned and wise opinions, are

Westcapelle, of Wisbuy and of the Hanse Towns, which are all reproductions of the same code, provide nothing more than that the mariner who is sick or dies is to have his *full wages;* which, literally, means all his wages earned; and the context will support nothing more.[1] The *Consolato del Mare* is explicit. It provides that where the mariner is hired by the month, and dies, his heirs shall be paid for all the time that he has served: if hired by the voyage, and he dies before the ship sails, they are to receive a fourth of his stipulated hire; and if he dies after the ship has sailed and before her arrival at the place of destination, they are to receive a half.[2] The French Ordinance and the *Code de Commerce* give to the heirs of seamen hired by the month the wages to the time of the decease: where they are hired by the voyage, one half of the stipulated hire, if the party dies on the outward voyage, and the whole, if he dies on the return

not accessible to the profession. He discussed with great acumen the passage above cited from Cleirac, and from analogous provisions in the ancient ordinances, formed the conclusion that nothing more was intended than that there should be no diminution of wages on account of and during sickness, whether the party died or recovered. *Naterstrom* v. *Ship Hazard*, printed in the Appendix to Bee's Adm. R. p. 441.

[1] *Lois de Westcapelle, Jugement* 7, Pardessus, tome i, p. 374. *Droit Mar. de Wisbuy*, art. 21, Ibid. p. 474. *Droit Mar. de la Ligue Ans.* 46. Ibid. tome ii, p. 521. In the original texts the phrases are "Alle ere Hure," and "Aller Seiner Heure;" which carry no other meaning, *ex vi termini*, than what is above stated. M. Pardessus renders them by the corresponding phrases "*son loyer en totalité*," and "*l'integralité de leurs loyers.*" He gives no other effect to his translation than the idea, that the integrity of the wages is not to be broken by and during the sickness. If he had understood the original to import the entire wages for the residue of the voyage, his notes would have made known so remarkable an effect of the law.

[2] *Consolato del Mare*, ch. 84, [129], 85, [130], Pardessus, tome ii, p. 124, 125.

voyage; and where they are hired on the freight or profits of the voyage, the whole stipulated share, provided the vessel has sailed.[1] This distinction is made in favor of those hired by the voyage or on profits, on account of the greater risks assumed by them in the contract.[2]

In England, there has been no direct decision of this question. The only case bearing upon it is that of *Cutter* v. *Powell*,[3] which is, in truth, of slight authority, since the question turned upon the terms of a note given by the master to a seaman hired by the run from Jamaica to Liverpool. The case of *Armstrong* v. *Smith* does not settle any thing more than that some wages are due.[4]

In this country, there have been contradictory decisions, as to the right to wages up to the termination of the voyage, though all the cases admit the right to recover to the time of the mariner's decease. Judge Peters, in the District Court for Pennsylvania, held in several cases that the wages were due to the end of the voyage, as if the mariner had lived and performed his duty.[5] One of these decisions was affirmed by Mr. Justice Washington, on appeal.[6] Both these learned judges relied much on the *seventh* article of the Laws of Oleron, which they understood to import full wages for the entire voyage.

[1] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 13, 14. *Code de Commerce*, art. 263.

[2] Valin, Comm. tome i, p. 746. Pothier, *Louages Mar.* n. 189. Sautayra, *Code de Commerce Expliqué*, p. 172.

[3] 6 T. R. 320. See this case and some observations upon it *ante*, Part I, ch. 2, p. 67.

[4] 1 Bos. and Pull. N. R. 299.

[5] *Walton* v. *The Neptune*, 1 Peters's Adm. R. 142. *Scott* v. *Greenwich*, Ibid. 155. *Jackson* v. *Sims*, Ibid. 157.

[6] *Sims* v. *Jackson*, 1 Wash. R. 414.

In the District Court for South Carolina, Judge Bee afterwards held that wages were due only to the time of the death, and that such had always been the received practice of that District.[1] Judge Davis followed, in the decision already cited, and on a full and critical examination of the ancient ordinances, and particularly of the article in the Laws of Oleron, held that the wages could not be recovered beyond the death, and that the usage in Massachusetts had always been so.[2]

In the whale fishery, by the terms of the usual articles, the legal representatives of a mariner, dying during the voyage, are entitled to such part of the whole amount of his stipulated share as the time of his services on board shall be of the whole term of the voyage.[3]

5. *Voluntary abandonment or change of the voyage, by the owner or master.*

It has been shewn in a former chapter that the mariner, when engaging his services, may claim to have a fair, definite and intelligible description of the voyage, as part of the written contract.[4] But whether the contract be in writing, or by parol, after having engaged to go on a voyage, the mariner has an interest to earn whatever may be earned under his contract, and a breach of it by the ship-owner, or master, for or by reason of any other cause than a *vis major*, has always been admitted by the general law to be a case for damages. This

[1] *Carey* v. *The Kitty*, Bee's R. 255.

[2] *Naterstrom* v. *Ship Hazard*, reported in Bee's Adm. R. 441. See also a *dictum* in *Luscomb* v. *Prince*, 12 Mass. R. 576, and the case of *Jones* v. *Smith*, 4 Hall's Am. Law Jour. 276.

[3] See the articles in the Appendix.

[4] Ante, Part I, chap. 3.

would be so by the general principles of a contract for hire;[1] and in regard to the mariner's contract, it has been the policy of some maritime states to regulate specifically the damages that may be demanded in different cases. Thus the French Ordinance, in case the voyage is broken up by the act of the owner, master, or freighter, before the ship has sailed, gives to the mariners hired by the voyage, the days'-works employed by them in equipping the vessel, and a quarter part of their stipulated pay; if the voyage is broken up after the ship has sailed, they are to receive the entire pay; and those hired by the month receive their wages for the time they have served, with the necessary means of returning to the port of departure.[2] The *Code de Commerce* has adopted a more favorable measure of damages, for those hired by the month. In addition to what was given by the Ordinance, in cases where the voyage is abandoned after it has commenced, it gives wages for half of the presumed duration of the residue of the voyage.[3]

In this country, there is no settled rule, that I am aware of, to govern the case of a voluntary abandonment of the voyage, before the ship sails. It is a case not precisely analogous to that of a wrongful discharge of the mariner abroad, in which we have a settled rule.[4] At least, some foreign authorities make a broad distinction, in giving damages, between these two cases.[5] This case seems more nearly to resemble that where the

[1] Pothier, *Traité du contrat de louage*, n. 142.

[2] *L'Ord. de la Marine*, liv. 3, tit 4, art. 3.

[3] *Code de Commerce*, art. 252.

[4] Infra.

[5] *Code de Commerce*, art. 257, 270.

voyage is lost by the fraud of the owner, or master; in which the Supreme Court of the State of New York gave, as damages, wages from the time of the shipment until the seaman's return to the port of shipment, deducting such wages as he had earned and received during his absence.[1] So too, in a case where the voyage was broken up by a seizure for the debts of the owner, wages to the time of the seizure, and one month's additional pay, were given by Judge Peters.[2] In a subsequent case, he stated that his practice had been, where the voyage was broken up for the interest, profit, or convenience of the owner, to give from one to three months additional wages, according to the circumstances; giving to the owner an alternative; if the seaman had been accommodated with a passage home at the owner's expense, to allow the cost of such passage to be substituted for the additional wages.[3]

One case of a voluntary abandonment of the voyage in a foreign port is provided for by our statute law. When the ship is sold abroad, the Act of 1803, chap. 62, requires the master to pay the mariners the wages then due, and to pay to the American consul three month's wages in addition, two thirds of which are for the benefit

[1] *Hoyt* v. *Wildfire*, 3 Johns. R. 510. The Supreme Court of Massachusetts once held that a mariner of a vessel which was seized and condemned for a violation of the revenue laws of a foreign country, on her return voyage, was not entitled to any wages after the seizure, and perhaps not to any after the outward voyage was finished. *Ossard* v. *Dean*, (10 Mass. R. 143.) It does not appear whether the mariner was cognizant of the offence against the foreign revenue laws. If he was not, the case is not law, as I humbly conceive. See *The Malta*, 2 Hagg. Adm. R. 158.

[2] *Wolf* v. *The Brig Oder*, 2 Peters's Adm. R. 261.

[3] *Hindman* v. *Shaw*, Ibid. p. 264.

of the mariners.[1] The rule here adopted, though applied in terms to a sale of the vessel, would ordinarily be applied to other cases of a voluntary abandonment of the voyage. But these cases of a breach of the mariner's contract by the owner or master, open a question purely of damages, to be determined, in the absence of any fixed rule, by the circumstances of the case. A Court of Admiralty awards such damages in the shape of wages; and a Court of Common Law in a special action on the case.[2]

In regard to a change of the voyage, it has been stated, that a spontaneous deviation of importance entitles a mariner to his discharge; and if he does not see fit to leave the vessel, he is entitled to additional compensation.[3] In the case of a French seaman, who had shipped at Nantz for a voyage to New Orleans, thence to Martinique, and from thence to return to France, and after repeated deviations, the ship came into Philadelphia; Judge Peters applied the rule of the French Ordinance, permitting the mariner in such cases to quit the vessel, and gave wages from the time of the shipment to the date of the libel.[4] In another case of a British seaman who insisted on his discharge in a foreign port, in consequence of a wide deviation contemplated by the master, Sir Christopher Robinson gave full wages to the time of the discharge.[5]

[1] Sec. 3.

[2] See the case of *Emerson* v. *Howland*, 1 Mason's R. 52, 53.

[3] Ante, part i, ch. 2.

[4] *Moran* v. *Baudin*, 2 Peters's Adm. R. 415.

[5] *The Cambridge*, 2 Hagg. Adm. R. 243.

6. *Wrongful discharge of the mariner.*

In a former chapter, I have stated the principles which govern the discharge of a mariner from the service of the ship; and have defined what under the general and statute law is an illegal discharge.

In regard to the measure of damages, when a seaman is wrongfully discharged, the maritime law of continental Europe makes a distinction between such discharges abroad, and when made before the vessel sails. If discharged in a foreign country, the entire wages, with the expenses of return, are given; if discharged before the vessel sails, only a third of the wages that might have been earned are awarded, for the reason that the mariner can readily find other employment.[1] The master was not allowed to carry the damages thus paid into his general account against the owners.[2] It does not appear that this proportion of one-third has been adopted in our law, in cases of wrongful discharge before the vessel sails. Damages would undoubtedly be recoverable, in an action of the case at common law, or by a libel in the Admiralty, for the breach of the contract, to be regulated by the circumstances of the case; and it has recently been held that wages for the voyage, *eo nomine*, are recoverable in the Admiralty in England.[3] For a wrong-

[1] *Droit Mar. de Wisbuy*, art. 3, 47. Pard. tome i, p. 465, 494. *Droit Mar. de la Ligue Ans.* (*Recés* de 1591,) art. 42, 43. Pard. tome ii, p. 519, 520, and note. *L'Ord. de la Marine*, liv. 3, tit. 4, art. 10. Pothier, *Louages Mar.* n. 206, 207. Jacobsen's Sea Laws, book 2, ch. 2, p. 148.

[2] Ut supra.

[3] The mariner, James Sparks, was hired on the 7th of March, 1838, by the master of *The City of London*, in the port of London, as cook, for a voyage to Sydney, in New South Wales, thence to the East Indies, and back to England, at 2*l.* 15*s.* per month. He came on board, and on the

ful discharge abroad, the rule as held in England and in this country, is ordinarily to allow full wages up to the prosperous termination of the voyage, with the expenses of return; deducting what the mariner may have earned in the mean time in another vessel.[1] But the rule is not

12th of March signed the mariner's contract. On the 14th, without (as alleged) any cause or pretence, the master discharged and compelled him to quit the vessel. Sparks obtained employment in other vessels, but did not earn as much as he would have done had he gone the voyage with *The City of London*, which lasted sixteen months and twenty days, and he sought to recover the whole of his wages for that time, *minus* the money he had earned in other ships. For the owners, an objection was taken to the jurisdiction of the court, founded on the fact that the voyage had not commenced, and therefore the court could not entertain it as a case of *mariner's wages*, but must leave the party to his remedy by an action at common law upon the agreement. Dr. Lushington overruled the objection, inasmuch as it was admitted in England that a seaman hired for a voyage, and the voyage has actually commenced before he is discharged, may sue in the Admiralty for his wages for the whole voyage; and that there is no essential difference between a discharge just before, and one just after the voyage has commenced; the means of measuring the damage are the same where the voyage proceeds, so that the court would not have *to perform the function of a jury*, as it would where the voyage does not proceed, in estimating the damages. He therefore admitted the Summary Petition, praying for the whole wages, *less* the money earned in the mean time. (*The* "*City of London*," High Court of Admiralty, November 5, 1839, Monthly Law Magazine, vol. vi, p. 159.) With us, I apprehend there could be no difficulty in suing in the Admiralty for damages in the nature of a breach of contract, where the ship did not proceed at all on the voyage; and in the case cited the learned judge states that in England this question has never been *agitated and decided*. In truth, our Admiralty Courts constantly exercise *the functions of juries*, if the contract be maritime. The case is important, as showing the disposition of the English Court to adopt no less a measure of damages than the whole wages of the voyage, in the case of a wrongful discharge before the voyage begins.

[1] *Robinett* v. *The Exeter*, 2 Robinson's Adm. R. 261. *The Beaver*, 3 Ibid. 92. *Mahoon* v. *The Gloucester*, 2 Peters's Adm. R. 403. *Rice* v. *The Polly and Kitty*, Ibid. 420. *Wisberg* v. *The St. Oloff*, Ibid. 428. *Keane* v.

an inflexible one. Sometimes wages have been allowed up to the prosperous termination of the voyage; and in other cases, up to the time of the seaman's return to the country where he was originally shipped, without reference to the termination of the voyage.[1] The principle upon which they proceed is, to give a complete indemnity for the illegal discharge; and this is conveniently measured by the loss of time and the expenses incurred by the party.[2] The wages which he has earned in the mean time, may be deducted from these expenses, but not from the wages due from the vessel from which he was wrongfully discharged.[3]

There is one case, in which the rule concerning damages will be applied within narrower limits. Sir William Scott has held that in a case of *semi naufragium*, when a vessel is so injured that it is doubtful if she can be repaired, or the repairs cannot be made for a long time, during which it would entail great expense on the owners to support the mariners in a foreign country, the master may discharge them upon proper conditions; viz. the payment of their passage home, and wages up to the time when they reach their native country; that where the seaman is *wrongfully* discharged, as from tyranny,

The Gloucester, 2 Dall. R. 36. *Ex parte Giddings*, 2 Gallison's R. 56. *Ward* v. *Ames*, 9 Johns. 138. *Hoyt* v. *Wildfire*, 3 Ibid. 518.

[1] *Emerson* v. *Howland*, 1 Mason's R. 53. *The Beaver*, 3 Robinson's Adm. R. 92. *The Exeter*, 2 Ibid. 261. *Hoyt* v. *Wildfire*, 3 Johns. R. 518. *Brooks* v. *Dorr*, 2 Mass. R. 39. *Ward* v. *Ames*, 9 Johns. R. 138. *Sullivan* v. *Morgan*, 11 Ibid. 66, and cases in Peters's Adm. R. cited supra.

[2] *Emerson* v. *Howland*, ut supra.

[3] Ibid. and *Hutchinson* v. *Cooms*, Ware's R. 65. If the master detains the clothes of the seaman, they may be recovered for in the Admiralty in the same libel. Ibid.

passion, or injustice, he has a right, by the law of most countries, to demand wages till the return of the ship; but in a case of mere misfortune, approaching almost to a necessity, he can demand them only up to his own return in as direct a mode as may offer.[1]

[1] *The Elizabeth*, 2 Dodson's Adm. R. 403.

CHAPTER III.

OF THE PRINCIPLES OF FORFEITURE APPLICABLE TO WAGES.

It has been accurately observed, that the principles of law applicable to a total or partial forfeiture of wages, may be deduced from the mariner's contract.[1] That contract is to give his whole time and utmost exertions to the service for which he engages; not to violate the discipline or economy of the ship; and to obey all lawful commands. Whatever amounts to a breach of the mariner's duty under his contract, as expressed in the written articles, or implied by law, has always been held to affect his claim for wages. The practice of thus enforcing his obligations is one of the oldest in the maritime law. Thus the total forfeiture of wages for desertion is found in all the older maritime constitutions.[2] So too, the principle requiring the mariner to indemnify the master, or owner, for expenses incurred in procuring other labor, when he is wrongfully absent, and for losses and injuries occasioned by his default, is constantly

[1] *The Lima*, 3 Hagg. Adm. R. 359.

[2] *Droit Mar. de Wisbuy*, art. 62. Pardessus, tome i, p. 500. *Consolato del Mare*, ch. 112, [157], 113, [158]. Ibid. tome ii, pp. 141, 142. *Droit Mar. de la Ligue Ans.* (*Recès* de 1614), tit. 4, art. 25. Ibid. tome ii, p. 542. *L'Ord. de la Marine*, liv. 2, tit. 7, art. 3.

recognised.[1] In the practice of modern times, these principles are variously applied, by statute, and under the general maritime law.[2]

In a former chapter, the several offences which amount to a breach of the mariner's contract, as well as the statute offences, have been stated and defined, and the effect of each upon his compensation is there pointed out.[3] It remains only to state the general principles applicable to the civil forfeitures and penalties thus incurred.

In the first place, the forfeiture of wages to the master, or owner, is a civil compensation for injury received, antecedent to any statute regulations. Public policy, in a variety of instances, comes in aid of this compensation, and defines the offence and fixes the amount of damages, by enactment;[4] but the forfeiture is founded in the contract of the parties. Pothier states the whole groundwork of the contract, showing that payment depends on the performance by the mariner of his stipulated duty. "There is no doubt," he observes, "that the master owes his entire wages to a seaman who has rendered, during the whole time of the voyage, the services which by his contract he was bound to render. On the contrary, where the seaman, by his own fault, has failed to fulfil his obligations, there is no doubt that the master

[1] *Jugemens D'Oleron*, art. 5, Pardessus, tome i, p. 326. *Consolato del Mare*, ch. 124, [169]. Ibid. tome ii, p. 147. *L'Ord. de la Marine*, liv. 2, tit. 7, art. 5.

[2] Act U. S. 20 July, 1790. Act 5 and 6 Wm. IV. ch. 19. *Code de Commerce*, art. 264. *The Pearl*, 5 Rob. Adm. R. 199. *The Mentor*, 4 Mason's R. 84. *Cloutman* v. *Tunison*, 1 Sumner's R. 373.

[3] Ante, Part II, ch. 4.

[4] Ante, ut supra.

does not owe him the pay for services which he has not rendered." [1]

Hence, if there be a statute forfeiture created, and the misconduct or default of the party does not fall within the description of the statute, it does not follow that the master or owner is without remedy. He may fall back upon the original principles of the contract, and demand compensation for the injury received; and the damages which he thus seeks to set off against the claim for wages may be influenced by the considerations of policy, which the Court may see fit, by way of example, to apply to the offence.[2] But such damages must have been actually suffered, or must be legally ascertainable, before compensation can be demanded;[3] and they must be the direct and immediate, not remote and contingent result of the acts and omissions of the party complained of.[4]

Another principle, deducible also from the mariner's contract, is that a total forfeiture of wages is ordinarily inflicted by the maritime law, only where the misconduct is of an aggravated character, constituting an entire breach of the contract.[5] It is not a single neglect of

[1] Pothier, *Louages Mar.* n. 178.

[2] *Cloutman* v. *Tunison*, 1 Sumner's R. 373. *Knagg* v. *Goldsmith*, Gilpin's R. 207. *Snell* v. *The Independence*, Ibid. 140. *Brown* v. *The Neptune*, Ibid. 89. *Magee* v. *Ship Moss*, Ibid. 219. *The Baltic Merchant*, Edwards's Adm. R. 219.

[3] *Mariners* v. *The Washington*, 1 Peters's Adm. 86.

[4] *Macomber* v. *Thompson*, 1 Sumner's R. 384.

[5] In the case of *The Exeter*, (2 Rob. Adm. R. 261,) Sir William Scott had said that any cause which will justify a master in discharging a seaman, during the voyage, will also deprive him of his wages; and Lord Tenterden quotes the doctrine in his Treatise on Shipping, (part 4, ch. 3, sec. 4.) Upon this Dr. Lushington has recently observed, that "it appears but a very infirm test, and one which cannot be uniformly adopted and

duty, or a single act of disobedience, which ordinarily carries with it so severe a penalty.[1] Desertion, being an utter abandonment and breach of the contract, is punished uniformly with the loss of all wages.[2] Absence, for a longer or shorter period, incurs a forfeiture in proportion to the damage actually sustained and the circumstances attending it.[3] Embezzlement, unless of a serious character, is generally visited with contribution only to the extent of the injury sustained.[4] Negligence, unless amounting to that habitual inattention to ordinary duties, which would expose the ship to danger, incurs a forfeiture of less than the whole wages;[5] and so with drunkenness, unless it has reached a habit which incapacitates the party from the ordinary performance of duty.[6] Dis-

acted upon with safety in transactions with seamen; for in case of disobedience of orders (presuming that the orders were proper) whether a master is justified in discharging a seaman or not during the voyage, must depend upon circumstances continually varying, and to a great degree not connected with the conduct of the mariner himself; for instance, the place where the disobedience occurred, whether at sea or in a British or a foreign port, taking into consideration also the provisions of Sir James Graham's Act. [5 and 6 Wm. IV. ch. 19.] The discharge of a seaman for an offence, therefore, can hardly be a test, unless the offence be so atrocious as to make the discharge of the offender absolutely necessary to the safety of the ship. The only rule which I can get to guide me is this, that the wages may be forfeited, not in cases of discharge for mere disobedience of orders, but where the disobedience is to such an extent as to render the discharge of the seaman imperatively necessary to the safety of the ship, and the due preservation of discipline." *The Blake*, High Court of Admiralty, July, 1839. Reported Monthly Law Magazine, December, 1840, vol. ix, p. 202.

[1] *The Mentor*, 4 Mason's R. 90.

[2] Ante, Part II, ch. 4, p. 129.

[3] *The Baltic Merchant*, Edwards's Adm. R. 86. *Snell* v. *The Independence*, Gilpin's R. 207. *Cloutman* v. *Tunison*, 1 Sumner's R. 373.

[4] Ante, Part II, ch. 4, p. 142–145.

[5] *Robinet* v. *Ship Exeter*, 2 Rob. Adm. R. 261.

[6] Ante, Part II, ch. 4, p. 145.

obedience of orders must, in a single case, be of a high and aggravating character, involving a very gross breach of the contract, or, if habitual, must produce a general diminution of duty, to carry with it a forfeiture of all wages.[1]

A third principle is that forfeitures, in cases of serious offences, are retrospective in their operation, involving only the wages antecedently earned. Thus, in the case of *The Mentor*, where the seamen had been guilty of an endeavor to commit a revolt, on the homeward voyage, and after the occurrence, the master put into St. Helena, for the purpose of procuring another crew, but some of the original crew remained on board, and performed their duty faithfully until the ship arrived home; in answer to the seamen's action for wages, an attempt was made to carry forward the forfeiture to the time of the ship's arrival at St. Helena; but the court refused to attach the forfeiture to any wages except those earned antecedently to the affray.[2]

In this case, the court settled some principles in relation to forfeited wages, of a good deal of practical importance. The entire wages up to a certain period being declared forfeited, the question arose upon what portion

[1] Ante, Part II, ch. 4, p. 117. *The Ship Mentor*, 4 Mason's R. 93. In this case, Mr. Justice Story said, "I should be sorry to lay it down as a settled rule, that even the commission of the offence of endeavoring to make a revolt, punishable as it is, by fine and imprisonment under our laws, is, in all cases, to be visited with a total forfeiture of wages. Cases may easily be conceived, where the seamen have, in a legal sense, committed the offence, and yet under such circumstances of gross provocation and misconduct on the part of the master, as to form a very strong excuse, addressing itself to the conscience and mercy of the Court."

[2] 4 Mason's R. 95. See also *Dixon* v. *The Cyrus*, 2 Peters's Adm. R. 412.

of the time the advance wages, other advances for necessaries made during the voyage, and hospital money, were to be charged. *First*, as to the advance wages, it was held that they were absolutely due to the seamen, as part of the consideration of their contract to go on the voyage, and were not affected by any subsequent occurrences. *Second*, that the money advanced for clothes and other necessaries during the voyage, and the premium demanded on it, were a charge which a Court of Admiralty would watch with solicitude, and allow in its discretion, according as it appeared to be just and reasonable; and as it was so, in this instance, it was allowed as a charge against the seamen, to be deducted from the unforfeited wages pronounced due from the owner. *Third*, that the hospital money required by the act of July 16, 1798, ch. 94, of twenty cents per month, which the master was authorized to retain out of the wages of the seamen, was to be considered as a monthly deduction, to be apportioned upon the wages of the whole voyage, and not to be borne as a charge upon the unforfeited wages exclusively.[1]

Finally, the principle of condonation, by which the mariner is reinstated in all his rights, will cure a total or partial forfeiture of wages, in case of a subsequent faithful performance of duty. The master, as the agent of the ship-owner, has the necessary power to grant such pardon as will operate to restore the right to wages; and it is in general the right of the seaman to be reinstated, if he tender his amends in season, and before another person has been employed in his stead. The laws of

[1] *The Mentor*, 4 Mason's R. 102, 103, 104.

Oleron and those of Wisbuy gave the mariner a right to offer satisfaction, in the presence of the crew, and if not then received again by the master, to follow the ship home and demand his wages.[1] In our law, the same general right seems to be recognised, subject only to the exception that if the mariner's conduct has been so flagrantly wrong as to justify his discharge, and if another person has been, in his absence, hired in his place, then the master will not be bound to receive him.[2] The fact of his being received again, or retained on board, in the ordinary performance of his duty, will in general be presumptive evidence of a full pardon.[3] But this presumption may be rebutted. If the seamen are retained because their places cannot be supplied, then the act of retaining them may not possess such significancy as would belong to it under other circumstances.[4]

In some cases, where the offence is not of an aggravated character, and punishment has been administered at the time, no forfeiture of wages will be superadded.[5]

[1] *Jugemens D'Oleron*, art. 14. Pardessus, tome i, p. 333. *Droit Mar. de Wisbuy*, art. 28. Ibid. p. 481.

[2] *Cloutman* v. *Tunison*, 1 Sumner's R. 373. *Whiton* v. *The Commerce*, 1 Peters's Adm. R. 160.

[3] *Cloutman* v. *Tunison*, supra. *The Test*, 3 Hagg. Adm. R. 307, 315. *Thorne* v. *White*, 1 Peters's Adm. R. 168. *Black* v. *The Louisiana*, Ibid. 268. *Relf* v. *The Maria*, Ibid. 186. *Dixon* v. *The Cyrus*, Ibid. 407. *Buck* v. *Lane*, 12 Serg. and R. 266. *Miller* v. *Brant*, 2 Campb. R. 590. *Beale* v. *Thompson*, 4 East's R. 546, 565. See *ante*, Part I, ch. 3, p. 53, note 2, for some observations respecting a clause in the Boston shipping articles, restricting the effect of a pardon.

[4] *The Mentor*, 4 Mason's R. 96.

[5] *The Ealing Grove*, 2 Hagg. Adm. R. 15. *Bray* v. *The Atalanta*, Bee's R. 48. *Luscomb* v. *Prince*, 12 Mass. R. 576.

PART FIFTH.

OF THE REMEDY OF MARINERS FOR BREACHES OF THEIR CONTRACT.

CHAPTER I.

OF THE REMEDY OF MARINERS FOR THEIR WAGES.

We have seen, in a former part of this Treatise, the form and manner of hiring seamen, and the parties between whom the contract takes place. It has been stated, that the parties to the contract are three; the master, the owner and the seamen; and that the hiring is ordinarily transacted by the master, as the owner's agent.[1] It is now to be ascertained, what remedies exist for the mariner, for his wages.

First in order, then, as the most effectual security, is that, upon the faith of which, by the universal maritime law, the contract is always presumed to be made — the lien upon the vessel itself. The *Consolato* affirms the existence of this lien with great emphasis. It directs the master to sell the vessel, if he has not means to pay the seamen; "for the seamen ought to be paid," it declares, "before every one else, *even though there remains but a single nail for the payment*;" and it adds that they are hired upon the faith and security of this hypothecation.[2] It elsewhere gives a precedence to the claims of seamen over all the other debts of the ship.[3]

[1] Ante, Part I, ch. 2, p. 15 — 19.

[2] *Consolato del Mare*, art. 93, [138]. Pardessus, tome ii, p. 129.

[3] Ibid. art. 13, 18, 91, 113, 118, 182, [58, 63, 139, 158, 193, 227.] Ibid. tome ii, p. 66, 71, 129, 142, 161, 205.

The French Ordinance of 1681 specially affects the vessel with the same lien, and gives the same privilege;[1] both of which are reënacted in the *Code de Commerce* with slight variations.[2] Indeed, the universal maritime law of Europe, Continental and British, gives this real security upon the ship itself, to the mariner, for his wages,[3] and it is equally recognised and enforced in this country.[4] The grounds upon which the security and precedence rest are, that the mariner, in contracting with the master, is presumed to engage on the credit of the ship; that he is constantly in danger of losing his wages by shipwreck; that it stimulates his exertions to save as much as possible in the hour of danger, to give him a preferred right of payment out of it; and that finally, by his exertions in bringing the remnants of the vessel, or the vessel itself into port, he has enabled others to be paid, who have claims on it like his own.[5]

[1] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 19. Liv. 1, tit. 14, art. 16.

[2] *Code de Commerce*, art. 271, 191. In the French law the master's wages are also a lien on the ship. Ibid.

[3] Cleirac, p. 8. Targa, p. 308. Valin, Comm. tome i, pp. 362, 751. Emerigon, tome i, p. 493; tome ii, pp. 229, 569. Jacobsen's Sea Laws, by Frick, book 2, ch. 2, p. 151. Abbot on Shipping, part 4, ch. 4, sec. 8. *The Favorite*, 2 Dods. Adm. R. 222. *The Sidney Cove*, 2 Ibid. 1.

[4] *Farrel* v. *M'Clea*, 1 Dall. R. 392. *Brown* v. *Lull*, 2 Sumner's R. 443. *The Mary*, 1 Paine's R. 180. *Sheppard* v. *Taylor*, 5 Peters's S. C. R. 675, and numerous cases in the notes, infra. The lien is also recognised by our Statute, Act U. S. 20 July, 1790, ch. 56, sec. 6; and is given to fishermen in the bank and cod fisheries; Act U. S. 19 June, 1813, ch. 2. On some of the western waters, there is a lien given by state legislation to the officers and crews of steamboats, and a proceeding *in rem*.

[5] Jacobsen's Sea Laws, by Frick, book 2, ch. 2, p. 151. Valin, Comm. tome i, pp. 362, 363. 1 Sider. 179. 11 Johns. R. 280. *The Neptune*, 1 Hagg. Adm. R. 227.

But the voyage must be legal, to give a lien on the vessel for wages. If it be illegal, and such illegality is known to the mariner, he cannot assert a claim upon the vessel.[1] But where the mariners are innocent of all knowledge of, or participation in the illegality of the voyage, their claim will be preferred to the claim of forfeiture on the part of the government.[2]

The nature of this lien, or claim upon the vessel *in rem* is totally distinct from those rights which are more appropriately called *liens*, at the common law. Strictly speaking, a lien is a right to detain a thing put into a party's possession, until some demand of that party is satisfied.[3] The word itself, however, has been used indiscriminately, in our law books, to signify as well the strict possessory lien of the common law, as those other claims with which a particular thing may be affected, by a privileged debt, which require and involve no possession, but attach to the thing wherever it is found. To define clearly, therefore, the nature of the mariner's claim upon the vessel, it would seem to be necessary to discard this term from use; though it has been so extensively employed in juridical discussions, that it cannot be wholly dispensed with.[4]

Domat, treating of the privileges of creditors, divides them into three classes, in one of which he places "those

[1] *The St. Jago de Cuba*, 9 Wheaton's R. 409. *The Langdan Cheeves*, 2 Mason's R. 58. *The Vanguard*, 6 Rob. Adm. R. 207. *The Leander*, Edw. Adm. R. 35. *The Benjamin Franklin*, 6 Rob. Adm. R. 350.

[2] *The St. Jago de Cuba*, and *The Vanguard*, supra. See also *Sheppard* v. *Taylor*, 5 Peters's S. C. R. 675, 709.

[3] Story on Agency, sec. 352, and the authorities cited.

[4] See a discussion of the nature of maritime liens, in the opinion of the Court in the case of *The Nestor*, 1 Sumner's R. 73.

whose debt has some privilege which distinguishes their condition from that of others, and gives them a preference over those whose debt may be prior in point of time."[1] "Privileges," he says, "are of two kinds: one, those which give a preference upon all goods, without special affectation of any one thing; as, for example, the privilege of expenses of justice, and of funeral charges: the other, those which have only *a special affectation of certain things*, and not of other things."[2] "The privilege of a creditor is the distinguishing right which the quality of his debt gives him, which causes it to be preferred to other creditors, and even to express hypothecations, though anterior."[3]

The kind of claim here spoken of is precisely what the maritime law intends, in the claim of seamen upon the vessel, as in the case of other maritime liens.[4] It embraces two elements: *first*, it is a special charge on the ship itself; a right to be paid out of the thing: *second*, it is a privileged charge, entitled to be paid, by priority, before any other special charge upon the same thing. These characteristics are fully recognised in the

[1] Domat, liv. 3, tit. 1, sec. 5. Œuvres Complete, tome ii, p. 35, Paris, 1829.

[2] Ibid. It is difficult to render, by any corresponding English terms, better than *special affectation*, the *affectation particuliére sur une chose*, of a writer whose native tongue is so exact, and so eminently adapted to scientific precision. The phrase, in English, sounds like special affectation, in good sooth. The use, however, of the verb "to affect," in the sense of to taint, or touch with, to convict of, is by license conceded to the profession. "A merely juridical phrase," says Dr. Johnson, of the *eighth* and last meaning which he assigns to the word.

[3] Ibid.

[4] "Every privilege," says Emerigon, "carries with it a tacit hypothecation." *Contracts a la Grosse*, ch. 12, sec. 2.

decisions in our own and the English law. Thus, from the principle that the claim is a charge on the thing itself, and not merely a right to detain the thing, flows the necessary consequence, that it does not include or require possession of the thing, in order to be enforced or kept alive; but it is a right to proceed against the thing, wherever it is found.[1] So too, it is equally a consequence of the same principle, that the lien, attaching originally to the vessel, attaches to whatever is substituted for it. If the ship is sold, the lien still attaches to it, or to its proceeds, in the hands of the owner, or of his assignee, or when deposited in court; and the seaman may proceed against such proceeds, or against the ship itself, according as either is under the process of the court.[2] If the ship is seized and condemned in a foreign country, and restitution is made in money, the lien reattaches upon the fund, as representing the ship, whether received in the whole or in part of the value, or of the sum awarded, because it attaches equally upon a part of the ship, as well as the whole.[3]

[1] *Sheppard* v. *Taylor*, 5 Peters's S. C. R. 675. *Brown* v. *Lull*, 2 Sumner's R. 443. *The Nestor*, 1 Ibid. 73. *The Mary*, 1 Paine's R. 180. *The Batavia*, 2 Dods. Adm. R. 500. *The Lord Hobart*, 2 Ibid. 100. *The Madonna D'Idra*, 1 Ibid. 37. *The Sidney Cove*, 2 Ibid. 11. *The Neptune*, 1 Hagg. Adm. R. 227. *Goodridge* v. *Lord*, 10 Mass. R. 483.

[2] *Sheppard* v. *Taylor*, 5 Peters's S. C. R. 675. *Brown* v. *Lull*, 2 Sumner's R. 443. *The Dunvegan Castle*, 3 Hagg. Adm. R. 329. *The Prince George*, 3 Hagg. Adm. R. 376. And the lien exists in all cases as much against the government, becoming proprietors by way of purchase, or forfeiture, or otherwise, as it does against the vessel in the possession of a private person. So too, of bottomry bonds. *United States* v. *Wilder*, 3 Sumner's R. 308, 314. *The St. Jago de Cuba*, 9 Wheaton's R. 409. *The Vanguard*, 6 Rob. Adm. R. 207.

[3] Ibid. *The Neptune*, 1 Hagg. Adm. R. 227. *Pitman* v. *Hooper*, 3 Sumner's R. 50, 286.

The mariner's lien is a privileged claim. Hence it has precedence of all the other debts of the vessel, and is even entitled to be paid before the debts for which an express hypothecation of the ship may have been given, whether the vessel itself be proceeded against, or a fund which represents it.[1]

The modes in which the seamen's lien may be lost or extinguished, may be examined under three principal heads. First, by the destruction of the thing. Second, by payment, or what is equivalent thereto. Third, by prescription, or laches, or a renunciation of his rights by the mariner.[2]

First, the lien is of course lost by the destruction of the vessel. But it must be a total loss and destruction of every part of it. It has been seen, in a previous discussion of the case of shipwreck, that the seamen are entitled to be paid out of any fragments of the wreck which they may save; and although there has been some doubt whether a new lien, in the nature of a lien for salvage, did not arise, in such cases, the weight of authority is in favor of the doctrine, that the contract is not dissolved, and hence that the original lien for wages adheres as well to parts of the ship as to the whole.[3] So too, in the cases of restitution of the value of the ship, after a seizure and condemnation, the whole wages due attach

[1] *The Madonna D'Idra*, 1 Dods. Adm. R. 37. *The Sydney Cove*, 2 Ibid. 1. *The Kammerheve Rosenkrantz*, 1 Hagg. Adm. R. 62. *The Ship Virgin*, 8 Peters's S. C. R. 538. *The Paragon*, Ware's R. 322, 330. 3 Kent's Com. 196, 197.

[2] See Pothier, *Traité de L'Hypothèque*, ch. 3, as to the manner in which an hypothecary interest may be extinguished.

[3] Ante, Part IV, ch. 2, p. 284, *et seq.*

as well to the first instalment of the indemnity received by the owner, as if the whole had been received.[1]

In the second place, the lien is lost by payment of the claim, or what is equivalent thereto. But it must be a payment in full, to extinguish the lien: payment in part can only extinguish the lien *pro tanto*, which remains good for the residue over the whole of the thing to which the lien originally attached.[2] What will be considered as equivalent to payment must depend on particular facts. It is a general principle of law, that the taking of a negotiable security extinguishes a simple contract debt; and in a case where a seaman, discharged at Calcutta, and having had his wages offered to him in money, preferred to take a bill of exchange on the owners, as an accommodation to himself, Lord Stowell held that he could not sue against the ship, the owners having become insolvent, but that having made his election, he must stand by the risk.[3] This is a rather rigorous application of legal principles to a right which the maritime law is disposed to favor. In another case, where there was no offer of money, but when the men called on the master for their pay, he drew an order on the owner, not negotiable, the learned Judge of the District Court for Maine held that the taking of the order was not to be considered as a waiver of their lien on the vessel, or of their right to proceed against the master.[4]

[1] *Brown* v. *Lull*, 2 Sumner's R. 443. *Pitman* v. *Hooper*, 3 Ibid. 50, 286. The same is true of portions of the freight received. Ibid.

[2] Pothier, *Traité de L'Hypothèque*, ch. 3, sec. 4.

[3] *The William Money*, 2 Hagg. Adm. R. 136.

[4] *The Eastern Star*, Ware's R. 185. As to the extinguishment of the original debt, by taking a negotiable security, see *Chitty on Contracts*, fourth Amer. edit. (1839,) p. 594, and notes. The modern doctrine, in respect to

In a more recent case in England, the seamen had proceeded in the Admiralty against the freight in the hands of the ship's agent, the ship itself having gone to sea. The agent admitted that he had received the freight, but had paid it away; and in order to avoid further costs, and in the expectation that the ship would soon return, consigned to him, he gave his bill at three months' date for fifty-five pounds, debt and costs; whereupon the matter was alleged to be under treaty.[1] The ship arrived in England, consigned to other parties, and not to the former agent. The consignees admitted the claim of the seamen against the ship, but refused to pay the costs. Upon this, an action was entered against the ship; and, on the part of the owners, thirty-eight pounds and fourteen shillings — the amount of wages and allowances claimed — were paid into the registry, with an undertaking to pay such costs as might be decreed against them. The facts were then set forth on behalf of the seamen, in an act on petition: and in reply, it was admitted that the amount of the demand, for which the former action was brought against the freight, and for which the second action had been entered against the ship, was paid into the registry, as the ship was liable for the same, although she did not continue the property of the persons to whom she belonged when the debt to the said seamen was contracted, or when the freight was

liens, is, that an express contract for a specific sum is not of itself a waiver of the lien, but that to produce that effect, the contract must contain some stipulations inconsistent with the continuance of such lien, or from which a waiver may fairly be inferred. *Peyroux et al.* v. *Howard*, 7 Peters's S. C. R. 324.

[1] That is, so alleged in the proceedings, for delay.

earned, or the former action pending; but it was denied that the ship was liable for the costs of such action, inasmuch as it should have been proceeded with, or the former agent sued upon his bill. An affidavit, with a letter, dated before the action was entered against the ship, from the former agent to the Sardinian Consul, [who intervened for the seamen, they being Italians,] was brought in, giving notice to the consul of the ship having arrived in England, and that having accepted the bill, merely as guarantee, he was only liable in the event of the men not recovering against the ship. There was no proof of the change of ownership. *Sir John Nicholl.* "It is said that the agent admits that he had possession of the freight, but it was out of his possession before the commencement of this suit; and he only undertook to pay the demand in case the ship were consigned to him. It is also said that this is a new suit; but I do not so consider it; it is only a continuance of proceedings for the same object—the recovery of wages. The ship is liable for wages and costs. The costs are as much due as the *sors principalis.* If the ship has changed her owners, this payment may be hard upon those who are the present owners, but they must seek their remedy against the former owners."[1]

In the third place, the lien may be lost by prescription, or laches, or a renunciation of his rights by the mariner.

In France, the rule is that the wages of the seamen for the last voyage are a charge on the ship, and after a voluntary sale and a voyage in the name and at the risk of the new owner, their lien is lost.[2] No such prescrip-

[1] *The Margaret*, 3 Hagg. Adm. R. 238.

[2] *L'Ord. de la Marine*, liv. 1, tit. 14, art. 16.

tion has been adopted in this country, or in England. Seamen may pursue their lien after the vessel has passed into other hands, and after she may have made one or more voyages.[1] Nor does any particular lapse of time defeat it, provided that neither the vessel, nor a fund that may be substituted for it, is within their reach; as in cases of seizure by a foreign government, where the lien, as we have seen, reattaches, upon restitution.[2] The limitation followed by our admiralty courts is that involved in the maxim "*vigilantibus, non dormientibus, subveniunt leges.*" If a mariner, being on the spot, should suffer a vessel to be sold to a person ignorant of his claim, without asserting it, or giving notice of it, when he might have done so;[3] *a fortiori*, if, being on the spot, he suffers a judicial sale to take place, under a decree of a court of Admiralty, at the suit of others of the crew, and gives no notice and does not apply to be admitted against the proceeds;[4] in these and the like cases he would lose his lien.

Still, there is no fixed rule, other than what in equity ought to be drawn from the circumstances of each case. Thus, where mariners shipped with a cargo on a voyage from New York to New Orleans and back, and the vessel remained at the latter port more than a year waiting for freight, and not obtaining any, the master discharged the seamen, whom he persuaded to return with him in

[1] *The Mary*, 1 Paine's R. 180. *The Batavia*, 2 Dods. Adm. R. 500. *The Margaret*, 3 Hagg. Adm. R. 238. *The Eastern Star*, Ware's R. 185. 3 Kent's Com. 197.

[2] *Ante*, p. 278, 279, 280.

[3] *The Rising Sun*, Ware's R. 85.

[4] *Trump* v. *Ship Thomas*, Bee's R. 86.

another vessel to New York, to get their wages; and afterwards, while the vessel was at New Orleans, she was sold and went a voyage to Liverpool and thence to New York, where the former crew libelled her; the Circuit Court for the District of New York held that their forbearance to libel her at New Orleans did not amount to a waiver of their lien against a subsequent *bona fide* purchaser. They were discharged and persuaded to return to New York, before the vessel was sold; as strangers, they might have found difficulty in getting bail for the proceedings, at New Orleans; and they might have had other motives of liberality, in not libelling the vessel there, as this might have had the effect to break up the residue of her voyage, or expose her to be sold at a great sacrifice.[1]

We have seen that in admiralty proceedings there is no express limitation of time, within which seamen must pursue their claims.[2]

Another security for the payment of wages is a direct hypothecary interest in the freight earned by the vessel, for the amount of the wages due. The general maritime law clearly recognises such a lien. The *Consolato* declares that the master is bound to pay the seamen with the freight which he receives, and if this is not sufficient, that he ought to borrow; that he should pay them at the place where he receives the freight, and with the same kind of money which he receives from the merchants; and that when the merchandise is abandoned to the master for the freight, whether it is worth the freight, or not,

[1] *The Mary*, 1 Paine's R. 180, 187.

[2] *Ante*, Part IV, ch. 1, p. 268, 269.

the seamen ought to be paid their wages, though it should be necessary to sell the ship.[1] The French ordinance of 1681, and the new code, specially affect the freight as well as the vessel, with the wages;[2] and although the seaman's privilege against the vessel is, in the French law, placed in the sixth rank in the arrangement of the privileges of different creditors, it is not so with regard to the freight, against which his privilege is first, because he has created the freight for the owner by his labor.[3] The laws of Spain and Portugal also make the freight specially answerable for wages.[4] Foreign text writers affirm the same privilege.[5] By our courts, the lien on the ship and that on the freight are treated as of the same nature and ordinarily of the same extent;[6] and it seems that they would be so regarded in England.[7]

The lien on the freight can be enforced by seizing it in the hands of the master, or in the hands of the merchant before it is paid over to the master.[8] If this precaution is omitted, and the merchant has paid over the freight to the master, the French writers are of opinion

[1] *Consolato del Mare*, ch. 93, [138,] 94, [139,] 86, [131.] Pardessus, tome ii, p. 129, 130, 125.

[2] *L'Ord. de la Marine*, liv. 3, tit. 4, art. 19. *Code de Commerce*, art. 271.

[3] Sautayra, *Code de Commerce, expliqué*, p. 176, Paris, 1836.

[4] Jacobsen's Sea Laws, book 2, ch. 2, p. 150.

[5] Valin, Comm. tome i, p. 751. Emerigon, tome ii, ch. 17, sec. 11. Boulay Paty, *Cours de Droit Commerce*, tome ii, p. 223.

[6] *Sheppard* v. *Taylor*, 5 Peters's S. C. R. 675. *Brown* v. *Lull*, 2 Sumner's R. 443. *Pitman* v. *Hooper*, 3 Ibid. 50. *Poland et al.* v. *The Freight, &c., of The Spartan*, Ware's R. 134. 1 Peters's Adm. R. 194, note.

[7] *The Lady Durham*, 3 Hagg. Adm. R. 200.

[8] Sautayra, *Code de Commerce, expliqué*, p. 176. *Poland et al.* v. *The Freight, &c., of The Spartan*, Ware's R. 134. *The Lady Durham*, 3 Hagg. Adm. R. 200.

that the mariners cannot recover of the merchant.[1] But in this they must intend the case of payment to the master without notice from the seamen of their claim.[2]

If the merchant refuses or neglects to pay the freight, the mariners may proceed against the merchandise for so much of the freight as is due upon it.[3] Where the ship and cargo belong to the same person, it has been held in one case that the mariners may proceed against such cargo, for a reasonable freight, although it had passed to assignees, on the insolvency of the owner, before the ship arrived.[4] If, the owner of the ship being also owner of the cargo, both have been seized and condemned by a foreign government, and afterwards restitution in value is made, and freight is awarded as a distinct item, the mariners may proceed against it for wages, in the hands of the assignees of the insolvent owner.[5] And if the owner receives any freight, whether in full or in part of what was earned, the whole wages due attach upon it; for as the wages are nailed to the last plank of the ship, so also they are to the last fragment of the freight.[6]

[1] Valin, Comm. tome i, p. 751. Sautayra, *ut supra.* Boucher, *Droit Mar.* part 3, sec. 7.

[2] See *ante*, Part III, ch. 4, and the case of *Ingersoll* v. *Van Bokkelin*, there cited.

[3] *Poland et al.* v. *The Freight, &c., of The Spartan*, Ware's R. 134. *The Lady Durham*, 3 Hagg. Adm. R. 200.

[4] *Poland et al.* v. *The Spartan*, supra. In *The Lady Durham*, Sir John Nicholl said, "A mariner has no lien on the cargo, as cargo; his lien is upon the ship and on the freight as appurtenant to the ship; and so far as the cargo is subject to freight, he may attach it as security for the freight that may be due."

[5] *Shepherd* v. *Taylor*, 5 Peters's S. C. R. 675.

[6] *Brown* v. *Lull*, 2 Sumner's R. 443. *Pitman* v. *Hooper*, 3 Ibid. 50, 186.

Of the personal remedies for the mariner, we have now to treat of the liability of the master and the owner of the ship.

The manner in which seamen are ordinarily hired, by the master acting as the agent of the ship-owner, has been stated in a former chapter; and it has been seen that he is ordinarily clothed with authority to make this contract, subject to very few restrictions.[1] Whenever he hires a mariner, the master subjects himself to a personal liability to such mariner, for the wages, founded in the contract of hiring, which he has himself made.[2] This liability is usually expressly stated in the shipping articles, which ordinarily recite that the master agrees with and hires the several other parties. There can be no question, therefore, of the master's personal liability to the mariners whom he has himself hired. And where he has not hired them himself, but they have been hired by the owner, and the master afterwards signs the contract, it has been held that the master is liable to the action of the seamen for wages, for that is a case of contract.[3] So too, it is said, upon great authority, that the mere fact of the contract being made by the owner, would not raise the presumption that exclusive credit was given to the owner, by the crew, as it might in other contracts respecting the vessel; because the shipping

And if any freight is earned, whether received or not, the mariners are entitled to wages. Ibid. and *ante*, Part IV, ch. 2.

[1] *Ante*, Part I, ch. 2, p. 15, *et seq.*

[2] Pothier, *Louages Mar.* n. 226, edit. Dupin, tome iv, p. 429. Abbot on Ship. part 4, ch. 4, sec. 10, p. 485, Amer. edit. 1839. *Farrel* v. *M'Clea*, 1 Dall. R. 392. *The Margaret*, 3 Hagg. Adm. R. 238. *Ante*, Part III, ch. 1, and cases cited.

[3] *Mayo* v. *Harding*, 6 Mass. R. 300.

articles and the maritime law contemplate a personal responsibility of the master.[1]

But where the master has neither originally hired the mariners, nor subsequently signed the shipping articles, does he in any, and what case, become personally liable to the seamen who may have performed the voyage under him? The Supreme Court of New York have decided that a master who was sent out by the owners to take the place of the original master and bring the vessel home, which had been captured, was liable to the crew only for that portion of the wages accruing after he took the command. They put it upon the ground of contract; and as there was no contract between the new master and the crew, with respect to the outward voyage, and he did not assume the contract of the old master, it was held that the voyage home was, under the circumstances, altogether a new contract with the crew, and the only contract into which the new master had entered.[2]

In this case, the court said, "The only case in which it can be supposed that a new or substituted master assumes the contract, is, when he takes upon himself the original voyage."[3] We may suppose the case, then, of a substituted master, who completes the original voyage, the vessel earning freight, which the new master receives, or might have received.

I have stated, in the chapter on the master's relation to the vessel, that his liability to the seamen is founded

[1] Story's Comm. on Agency, sec. 299, p. 302; he cites 2 Emerig. *Des Assurances*, ch. 4, sec. 12, p. 467. 1 Bell's Comm. sec. 435, p. 414, sec. 418, p. 398.

[2] *Wysham* v. *Rossen*, 11 Johns. R. 72.

[3] Ibid. p. 73.

in contract, express or implied.[1] If, then, a substituted master had earned freight, and had actually received it, or might have received it, to be applied to the claims of the seamen, would he not be deemed to have assumed the whole of the original contract, so as to be personally liable for the wages earned before, as well as those earned after his accession to the office? It is certain that the maritime law contemplates freight as the trust fund for the payment of wages, and some of the older authorities direct the master positively in regard to the payment of their claims out of it.[2] If he had actually received the freight, and neglected their claims, he would at least be liable as the holder of a fund out of which they are entitled to be paid by priority.[3] Whether the opportunity to have received it would raise an implied contract with the seamen for the whole voyage, is a question deserving of consideration.

The remaining personal remedy for the mariner is against the owner or owners of the vessel.

It has been shown in a former chapter that the master is uniformly empowered by the maritime law to contract with the seamen for their services; that he hires them as the agent of the ship-owner, as well as on his own account; and that through such agency the owner becomes personally liable to the seamen for their wages.[4] It is not necessary that the owner should be known to the mariner, thus hired, or that his name should appear as owner in the shipping articles. If he be the owner of

[1] *Ante*, Part III, ch. 1.
[2] *Ante*, p. 323, 324, and notes.
[3] Valin, tome 1, p. 751.
[4] Ante, Part I, ch. 2, p. 15, 19.

the vessel, he virtually contracts with the mariner, through the agency of the master, and is answerable for the performance of his engagement.[1] So too, although the statute regulating the fisheries, requires the shipping articles to be endorsed or countersigned by the owner,[2] it has been held that the articles do not determine conclusively who are the owners, nor with whom the contract is made; but that a seaman may have his remedy for his share of the fish taken, against all the owners, and he may show those whom he sues, to be such, by other evidence than the papers of the vessel.[3]

There is no difficulty, therefore, in the maintenance of the general proposition that the owner is answerable for the wages of the seamen. But the question, who is to be deemed owner, under all circumstances, with reference to this contract, may present real embarrassments, in some cases.

One test, to be applied to the solution of this question, would be, who appointed the master and gave him, express or implied, authority to hire the seamen? If the actual owner of the ship did this, he remains personally liable for the wages of seamen hired for the voyage, and cannot divest himself of that liability by a sale of the ship abroad. Thus, where a ship, which had been captured on the voyage homeward, was abandoned to the underwriters, on receipt of the news of capture, and afterwards, being released, performed the voyage and de-

[1] Abbot on Shipping, part 4, ch. 4, sec. 10, p. 485, Amer. edit. 1829. *Bronde* v. *Haven*, Gilpin's R. 592. *Wait* v. *Gibbs*, 4 Pick. R. 298. *Farrel* v. *M'Clea*, 1 Dall. R. 393. *The St. Johan*, 1 Hagg. Adm. R. 331.

[2] Act U. S. 19th June, 1813, ch. 2, sec. 1.

[3] *Wait* v. *Gibbs*, 4 Pick. R. 298.

livered her cargo, a seaman who had been taken out by the captors, but who had returned home as soon as he was set at liberty, was held entitled to wages to the time of his return; from the original owners and not from the underwriters.[1] So too, it has been held that the sale of the vessel, by the owner, subsequent to the making of the shipping articles, does not discharge his liability for the wages of a seaman, though the voyage was not terminated, nor the wages demanded, previous to the sale.[2] But where there was a contract by the master of a ship in a foreign country, for the sale of the ship, and a delivery in pursuance of such contract, which was afterwards fully ratified by the owner, and the master left the vessel in charge of a new master appointed by the purchasers, who agreed to victual and man the vessel for the voyage, it was held that a mariner who shipped at the foreign port, under the new master, could not look to the former owner for his wages.[3]

But the actual privity of contract does not always determine who, as owners, are liable for the wages of mariners. A party may neither have appointed the master, nor hired the seamen, yet if he acquires the interest of an owner in the vessel and receives the freight, he may be liable for the wages earned after he acquired such an

[1] *Brooks* v. *Dorr*, 2 Mass. R. 39.

[2] *Bronde* v. *Haven*, Gilpin's R. 592. See also *The Batavia*, 2 Dods. Adm. R. 500.

[3] *Aspinwall* v. *Bartlett*, 8 Mass. R. 483. So too, in relation to repairs and supplies, where a contract for the sale of the ship has been made, and possession delivered to the vendee, the fact that the legal title remains in the vendor, does not make him liable for the contracts or conduct of the master. *Wendover* v. *Hogeboom*, 7 Johns. R. 308. *Leonard* v. *Huntington*, 15 Ibid. 298. *Thorn* v. *Hicks*, 7 Cowen's R. 697.

interest. Thus, underwriters, after an abandonment is accepted, become owners of the ship, are entitled to the freight earned subsequently to the abandonment, and are liable to the payment of the wages of the master and mariners for the residue of the voyage after they become owners.[1] With regard to the mortgagee of a vessel, in the analogous cases of repairs and supplies, it is the settled doctrine in this country, that the mortgagee in possession, receiving the freight and employing the vessel, is to be treated as owner; but where he is not in possession and does not receive the freight, he is not to be so treated.[2] But the cases proceed upon the importance of the question, to whom was the credit given? Where the dealing has been with the mortgagor, as owner, and he retains possession of the ship, the mortgagee is not held liable. Where there has been no dealing with the mortgagor in the character of owner, but the credit has been given to the person who may be owner, it is said to be a point still remaining open for discussion, whether the liability will attach to the beneficial, or to the legal owner.[3]

Now with respect to the mariners, the fact of appointing the master and hiring the crew is of itself a badge of

[1] *Hammond* v. *Essex Fire and Mar. Ins. Co.*, 4 Mason's R. 196. *Thompson* v. *Rowcroft*, 4 East's R. 31. *Sharp* v. *Gledstone*, 7 East's R. 24. *Case* v. *Davidson*, 5 M. and S. 79. *M'Bride* v. *Mar. Ins. Co.*, 7 Johns. R. 431. *Coolidge* v. *Gloucester Mar. Ins. Co.*, 15 Mass. R. 341.

[2] *M'Intyre* v. *Scott*, 8 Johns. R. 123. *Champlin*, v. *Butler*, 18 Ibid. 169. *Thorn* v. *Hicks*, 7 Cowen's R. 697. *Ring* v. *Franklin*, 2 Hall's N. Y. R. 1. *Tucker* v. *Buffington*, 15 Mass. R. 477. *Dame* v. *Hadlock*, 4 Pick. R. 458. *Brooks* v. *Bonsey*, 17 Ibid. 441. *Colson* v. *Bonsey*, 6 Greenleaf's R. 474.

[3] See 3 Kent's Comm. p. 135, 136, edit. 1840.

ownership; it is the exercise of an act of ownership, always relied on in other cases, and in the case of a charter-party it often determines who is owner for the voyage. It would of itself, therefore, furnish some presumption, that the mortgagee, who did not hire them, was not liable to pay them. But if the mortgagee has taken the control of the vessel and receives the freight, although the master and crew had been hired by the mortgagor, would he not then be liable at least for the wages earned after such possession, upon the same ground as the underwriter is, who has accepted an abandonment? Would he not also be liable for the whole wages of the voyage, if he had received sufficient freight?

In an action in the Supreme Court of New York, brought by the master of a vessel for his wages and those of his apprentice, it appeared that the defendant held a bill of sale of the ship, absolute in its terms, was named as owner in the register, and wrote the usual letter of instructions to the master, when about to sail on the voyage. The master was hired for the voyage by the vendors of the ship.

For the defendant, it was proved that the bill of sale, though absolute on its face, was given as collateral security, by way of mortgage; that he merely lent his name to cover the voyage, but was not interested in it, and did not receive the freight, and that the plaintiff had full knowledge of these facts. The court held, that whether the defendant were to be considered as an absolute purchaser, or as a mortgagee in possession, would be immaterial, provided there was an actual contract of hiring between him and the plaintiff; and that, in either case, the relation of master and owner would exist, so far as to support the claim for wages, *if the voyage was per-*

formed for the use of the defendant. But as the defendant was not interested in the voyage, and the master knew this, he must look to the actual employers with whom he made his contract.[1]

In a case before Lord Stowell, it appeared that a firm of bankers had taken a conveyance of a vessel as security for a balance of account, to be sold and disposed of, in trust, to pay themselves, and to account; they appointed an agent, who entered into copartnership with one S. and this latter firm employed the vessel as agents for the bankers; the vessel was continued by them in the Norwegian trade, in which she had been employed by the former owners, under the name of one Gersse, the master, as owner, who was represented as such, in order to evade the laws of Norway. The mariner suing was hired in the Shetland Isles, to go upon one of these Norwegian voyages. It appeared in the cause, that the bankers, in an answer filed in the Court of Chancery to a bill by the former owners, had sworn that they were the owners of the vessel, at a time when the mariner's services were rendered. A protest was entered against the mariner's suit, upon the ground that the question of ownership was unsettled in the Court of Chancery. But Lord Stowell overruled it, partly upon the ground of the positive admissions contained in the answer, and partly because from the other facts it appeared that the bankers had employed the vessel for their own benefit and received its earnings; and they were accordingly held liable for the mariners' wages.[2]

[1] *Champlin* v. *Butler*, 18 Johns. R. 169.

[2] *The St. Johan*, 1 Hagg. Adm. R. 334.

From these and the analogous cases of repairs and supplies, it would seem that the naked legal title, or the possession, being in the mortgagee, is not sufficient to charge him with the wages of mariners, unless he receives the freight, or, what is the same thing, unless the voyage is performed for his benefit. But if the legal title, or the possession, be accompanied with an interest in the voyage for his own benefit, he may be charged with the wages of the mariners.[1]

In the cases of charter-parties, the fact of hiring the master and crew is also of great consequence, in determining whether the general owner, or the hirer, is to be deemed owner of the ship for the voyage; the general doctrine being that where the general owner retains the possession, control and navigation of the ship, that is to say, where he supplies the necessaries for the voyage, and appoints the master and crew, the charter-party is a mere affreightment sounding in covenant, and the general owner remains owner for the voyage; but that where the freighter hires the possession, control and navigation of the ship, agreeing to pay the master and crew, he becomes owner for the voyage, and the general owner has not the privileges and responsibilities of ownership, in respect to third persons, for that voyage.[2] But

[1] Registered ownership is *prima facie* evidence of liability for the repairs of a ship; but it may be rebutted by showing that the credit was given to another. *Cox* v. *Reid*, 1 Ryan and Moody's R. 199.

[2] *Christie* v. *Lewis*, 2 B. and Bingh. 410. *Marcadier* v. *Chesapeake Ins. Co.*, 8 Cranch's R. 39. *Gracie* v. *Palmer*, 8 Wheaton's R. 605. *Hallet* v. *Col. Ins. Co.*, 8 Johns. R. 209. *Clarkson* v. *Edes*, 4 Cowen's R. 470. *M'Intyre* v. *Bowne*, 1 Johns. R. 229. *The Volunteer and Cargo*, 1 Sumner's R. 551. *Certain Logs of Mahogany*, 2 Ibid. 589. *The Schooner Tribune*, 3 Ibid. 144. *Taggard* v. *Loring*, 16 Mass. R. 336. *Emery* v.

the question who is to pay the crew, which has so much influence in determining the question of ownership for the voyage, is here the question to be determined. It may be supposed to arise, then, in the case of a letting of the ship to the master, or any other person, upon such terms as amount to a charter-party, with an agreement as between themselves, that the hirer shall victual and man her. The hirer, or the master appointed by him, engages the crew, who have no knowledge of the charter-party. Can they in such case look to the general owner of the ship for their wages?

This question has never been directly decided. But in all the analogous cases, it has been held, as above stated, that the general owner, under such circumstances, is not entitled to the privileges, and is not under the responsibilities of ownership, for the particular voyage when the ship is so chartered. Thus it has been held that where the master has so hired the ship of the general owner, as to be owner for the voyage, he cannot commit barratry, and that the general owner cannot recover of an underwriter for what would have been barratry, if the relation of owner and master had existed.[1]

Hersey, 4 Greenl. R. 407. The Revised Statutes of Massachusetts have enacted the same doctrine, in part. Ch. 32, sec. 3. Whether the fact that the general owner is to pay the master and crew, and furnish the supplies, is conclusive upon the question of ownership for the voyage, see the opinion of the court in the case of *Certain Logs of Mahogany*, supra. The American doctrine seems to be, that it is very strong *prima facie* evidence that the general owner is to be deemed owner for the voyage. Ibid. and the cases ante.

[1] *Taggard* v. *Loring*, 16 Mass. R. 336. *Hallet* v. *Columbian Ins. Co.*, 8 Johns. R. 209. And the same is true if the master be the general owner of the ship. *Marcadier* v. *Chesapeake Ins. Co.*, 8 Cranch's R. 39.

On the contrary, if the general owner is, by the charter-party, to victual and man the ship, he remains owner for the voyage, and may recover of insurers for an act of barratry committed by the master at the instance of the charterer.[1] If by the terms of the charter-party the general owner is not owner for the voyage, he has no lien on the cargo for the freight; but he has such a lien, if the letting of the ship amounts only to a covenant to carry the cargo.[2] So too, if the general owner has divested himself of all control and possession of the ship for the time being in favor of another, he is not liable for stores furnished by order of the master during such time;[3] but if the vessel is navigated by a master appointed by the general owner, and is supplied and furnished by him, the liability, with respect to all third persons, for the master's doings, remains with the general owner.[4]

Upon principle, therefore, it would seem that the hirer of the ship, in the case supposed, is personally liable to the mariners, and that they cannot look to the general owner.

[1] *M'Intyre* v. *Bowne*, 1 Johns. R. 229.

[2] *The Volunteer and Cargo*, 1 Sumner's R. 551. *Certain Logs of Mahogany*, 2 Ibid. 589. *Gracie* v. *Palmer*, 8 Wheaton's R. 605. *Drinkwater* v. *The Spartan*, Ware's R. 149. *The Phebe*, Ibid. 266.

[3] *Frazier* v. *Marsh*, 13 East's R. 239. *Emery* v. *Hersey*, 4 Greenl. R. 407.

[4] *Fletcher* v. *Braddick*, 5 Bos. and Pul. 182.

CHAPTER II.

OF THE CIVIL REMEDIES OF MARINERS FOR PERSONAL TORTS.

For the various personal injuries which the master of a vessel may inflict on a mariner, or which one mariner may inflict on another, the law has provided ample remedy. We have seen that the master is sometimes held responsible for wrongs done by those whom he ought to have restrained, or when they are done by his express or presumed command.[1] How far liability as joint trespassers will extend to different parties, will appear in considering the various cases of torts and injuries common in the merchant service.

1. *Assaults and batteries and imprisonments.*

For these injuries, the mariner has a remedy against the actual and presumed trespasser, by an action of trespass at common law,[2] or by a libel in the Admiralty, in what is technically called a cause of damage.[3] Where

[1] *Ante*, Part I, ch. 2, p. 26, 27.

[2] *Watson* v. *Christie*, 3 Bos. and Pul. 224. *Sampson* v. *Smith*, 15 Mass. R. 355. *Brown* v. *Howard*, 15 Johns. R. 119. *Ward* v. *Ames*, 9 Ibid. 138.

[3] *Thomas* v. *Lane*, 2 Sumner's R. 1. *Thorne* v. *White*, 1 Peters's Adm. R. 172, 174. *Hutchinson* v. *Coombs*, Ware's R. 65. *Elwell* v. *Martin*, Ibid. 53. *Jenks* v. *Lewis*, Ibid. 51. *Bangs* v. *Little*, Ibid. 506. *Butler* v. *M'Lellan*, Ibid. 219. *Steele* v. *Thacher*, Ibid. 91. *Hutson* v. *Jordan*, Ibid. 385. *Polydore* v. *Prince*, Ibid. 402. *Pratt* v. *Thomas*, Ibid. 427, 496. *The*

the injury complained of is actually committed by the mate, or any other seaman, at the master's order, by way of punishment, the master is liable, if the punishment is excessive.[1] If the assault were not committed by the master's order, but was yet done in his presence, and he might have interfered to prevent it, but did not, he will then also be liable, being presumed to adopt the conduct of the trespasser.[2] Whether the party inflicting the assault, by the master's order, in the way of punishment, is jointly liable with the master, depends on the degree of the injury and the circumstances of justification. The mate, or other person, ordered to inflict punishment, is bound to obey, unless the master clearly passes the bounds of his lawful authority; to justify himself for refusing to do so, it would be necessary to show that the master was proceeding with cruelty and passion to inflict a gross injury. It has therefore been held, that the mate, or other person, punishing a seaman in obedience to the master's order, is not liable as a joint trespasser, unless the punishment is obviously and grossly excessive and unjust.[3] But if the justification fails wholly, or in part, as if it appears that an officer, in executing the command of the master, proceeded with unnecessary harshness and severity, and a serious injury is inflicted,

Agincourt, 1 Hagg Adm. R. 271. *The Lowther Castle*, Ibid. 384. *The Centurion*, Ibid. 161. *The Enchantress*, Ibid. 395.

[1] *Thomas* v. *Lane*, 2 Sumner's R. 1. *Plummer* v. *Webb*, Ware's R. 75. *Elwell* v. *Martin*, Ibid. 83. *Butler* v. *M'Lellan*, Ibid. 219. *Hutson* v. *Jordan*, Ibid. 385. *Brown* v. *Howard*, 14 Johns. R. 119. *Watson* v. *Christie*, 3 Bos. and Pul. 224.

[2] *Thomas* v. *Lane*, *Elwell* v. *Martin*, *Butler* v. *M'Lellan*, ut supra. *Ward* v. *Ames*, 9 Johns. R. 138.

[3] *Butler* v. *M'Lellan*, ut supra.

or if it appears that the master's order was of itself wholly unjustifiable and illegal, the party doing the actual injury will then be liable as a joint trespasser.[1]

Whether the ship-owner would in any case be liable for the consequential injuries occasioned by excessive punishment of a mariner, by the master, is a point which I have never known to be raised judicially. It is laid down generally that the owners are liable for the torts of the master in acts relative to the service of the ship, and within the scope of his employment in the ship.[2] The cases in which this liability is most familiarly known are those of collision, and torts committed by the masters of privateers in making captures.[3] The punishing of a seaman is in one sense an act relative to the service of the ship, as much as the shipping of a seaman; and it has recently been held by an eminent judge, that the owners are responsible in damages for the tortious abduction of a minor by their agent, the master, in shipping him, although constructive notice only was brought home to them.[4] But the case of excessive punishment is distinguishable from this, by being a trespass, of the kind for which the principal is not liable, when committed by the agent. The master punishes a seaman by the exercise of an authority conferred upon him by law; and whoever exceeds such an authority becomes a trespasser *ab initio*.

[1] *Elwell* v. *Martin*, Ware's R. 83. *Brown* v. *Howard*, 15 Johns. R. 119. In the former case, it was held that if some punishment was merited, the officer is liable for the actual pecuniary damage sustained, but not for vindictive damages.

[2] Abbot on Ship. part 2, ch. 2, sec. 9, 11, p. 98, 99, edit. 1829.

[3] Ibid. note to p. 99.

[4] *Sherwood* v. *Hall*, 3 Sumner's R. 127.

For such trespasses of the agent the principal is not liable.[1]

2. *Tortious discharge of a mariner.*

The measure of damages in these cases has been stated in a former chapter.[2] They are ordinarily recovered as wages, and are recoverable against the owner, as well as the master, in the same manner as in other cases of wages. The remedy against the master and against the owner might be sought upon two grounds. First, it would be by a special action for the tort committed by the master, in the illegal discharge, and for this, upon the principles before alluded to, the owner, it seems, would be responsible. Secondly, and what is the more common form, it would be by an action for the wages upon the original contract of hiring, the tortious discharge being a void act, and the contract remaining in full force. If non-performance of his contract be pleaded, the mariner then shows that he was prevented from performing by the act of the master, and recovers such damages in the shape of wages as the rules of law have established in these cases.[3]

3. *Tortious abduction of a minor.*

This is a marine tort, the remedy for which, as recently made familiar in admiralty proceedings, resides in the hands of the parent, or other person entitled to the custody and earnings of an infant. The incapacity of a mi-

[1] Story on Agency, ch. 12, sec. 308, 309, 310, 319.

[2] Ante, Part IV, ch. 2, p. 299.

[3] *Hall* v. *Heightman*, 2 East's R. 145. *Sigard* v. *Roberts*, 3 Esp. R. 71. *Limland* v. *Stevens*, Ibid. 269. *Sullivan* v. *Morgan*, 11 Johns. R. 66. *Wilcocks* v. *Palmer*, 3 Wash. R. 248. *Emerson* v. *Howland*, 1 Mason's R. 45. *Orne* v. *Townsend*, 4 Ibid. 541, and the cases cited ante, p. 299, 230.

nor to enter into the mariner's contract, without the concurrence of the parent or guardian, is stated in a former chapter.[1] The gist of this tort consists in the loss of service;[2] but it has also been held, in one case, that it may consist in withdrawing the child from the supervision and control of the parent, even if he is not an inmate of his father's family, and though he may have been principally left to support himself by his own exertions, unless it appears that the father has abandoned all care of his child.[3]

The suit in these cases lies ordinarily against the master, actually committing the tort; but in a recent case, it has been held that the ship-owner may be charged with the damages, the court considering it one of those cases in which he is responsible for the torts of the master in acts relative to the service of the ship, and within the scope of his employment in the ship.[4]

[1] Ante, Part I, ch. 2, p. 14.

[2] *Plummer* v. *Webb*, 4 Mason's R. 380. S. C. Ware's R. 75. *Sherwood* v. *Hall*, 3 Sumner's R. 127.

[3] *Steele* v. *Thacher*, Ware's R. 91, 102. As to when a minor becomes, in a qualified sense, emancipated by the parent's neglect, see 1 Blackstone's Comm. ch. 16. *Jenny* v. *Alden*, 12 Mass. R. 375. *Nightingale* v. *Withington*, 15 Ibid. 272.

[4] *Sherwood* v. *Hall*, 3 Sumner's R. 127.

CHAPTER III.

OF THE ADMIRALTY AND COMMON LAW JURISDICTIONS IN MARINERS' CASES.

A VIEW of the forms and systems in which the jurisprudence of a country administers the principles governing rights and duties, is an important branch of the subject of remedy. But it is not my purpose, nor could it be within the limits of this work, to examine the general foundations of the admiralty and common law jurisdictions, still less to enter into that *vexata quæstio*, the general limits of each of them; but to state the principles and outlines of the remedies afforded by each, in taking cognizance of contracts and torts in mariners' cases.

I. *Of the Admiralty Jurisdiction.*

It seems quite certain, that in all the maritime powers of Europe, from the earliest periods of their commerce, peculiar, though not always exclusive cognizance over maritime affairs, was committed to a branch of the judicial power specially designated for this purpose.[1] In the English constitution, this jurisdiction, exercised by a great officer of state, called the Lord High Admiral, became

[1] Valin, Comm. tome i, p. 120. *De Lovio*, v. *Boit*, 2 Gallison's R. 400, and the authorities there cited. 2 Brown's Civ. and Adm. Law, ch. 1, *passim*.

known as the admiralty jurisdiction.[1] At what period in the history of that constitution it began to be exercised over the various subjects which are now settled to be within its cognizance, or when its limits were most fully extended over various other matters, and most clearly defined, are questions involved in the same obscurity which rests upon almost all institutions of a similar character and upon the history of the common law itself. But there can be no doubt that there was, practically, the same substantial division of the judicial power in England, as in France, and that the jurisdiction claimed by the admiralty lawyers as the proper theory and ancient practice of their court, was substantially the same as that known to the French constitution, which in modern times was defined and recorded in the great Ordinance of Louis XIV.[2] But in the progress of time, doubts, conflicts and controversies upon the extent of jurisdiction necessarily arose, springing partly from the constitutional position in which the divided judicial power was placed, and partly from the diverse spirit and system of the law which each branch of the judicature was accustomed to administer.[3] The personal ambition and predilections of judges and advocates mingled with these causes of controversy; and at length, in the confusion of this conflict of jurisdictions, the ancient outlines and theory of each were lost in the contradictory decisions made under such disturbing influences. The jurisdiction of the admiralty,

[1] 2 Brown's Civ. and Adm. Law, ch. 1, p. 21, *et seq.*

[2] Liv. 1, tit. 2, *de la Competence.*

[3] Valin shows that the same controversy was carried on in France, tome i, p. 120. Indeed, it seems to me to have been the unavoidable result from the very position of things.

being that exercised originally by a grant from the king to a subject, could be restrained by that superior jurisdiction, in which the king had reserved all that he had not granted away.[1] The power and dignity and learning of the common law, as long as the commerce of England remained comparatively small, grew far out of proportion with those of the civil and maritime law, as known and practised within the realm.[2] The contest was an unequal one; and the result to the jurisprudence of the country was, to deprive the admiralty of some part of a jurisdiction, which anciently belonged to it upon principle, and to leave it wholly uncertain whether other powers, reputed to have been exercised by it, did or did not, upon the principles of the constitution, rightfully belong to it.

But the commerce of England has grown to an immense importance. Its maritime interests seem to have demanded anew the peculiar convenience and fitness of a jurisdiction well adapted to the ends of despatch and equity, two great wants in a commercial jurisprudence. The present reign has witnessed a large restoration of powers in the Court of Admiralty, which had been long withheld from it, though claimed as its ancient right.[3] A comparison of its present jurisdiction with that exercised in this country, would show that our institutions, springing from the same common origin, have wisely preserved and confirmed a jurisdiction and mode of procedure, the fitness of which a great commercial country has so signally recognised.

[1] Blackstone's Comm. book 3, ch. 7, p. 112.

[2] Ibid. vol. i, p. 63—92.

[3] 3 and 4 Vict. ch. 65, 7th Aug. 1840.

Upon the state of things existing at the time of its establishment, the Constitution of the United States granted to the judicial power, to be vested in such tribunals as Congress should establish, cognizance, among other things, of "all cases of admiralty and maritime jurisdiction."[1] It is not material here to discuss what subjects are within this clause; nor, if it were, could I hope to throw any new light upon this interesting question. The present purpose only requires me to point out, that the contract for marine service, though made upon land, but to be rendered substantially upon tide waters, is clearly a case of admiralty jurisdiction, and must be taken to have been within the contemplation of the constitution, from the nature of the subject matter.

The state of things previous to the adoption of the constitution is important.

In England, mariners' wages had been treated as an exception from that construction of the statutes of Richard II, for which the common law courts contended. Long anterior to the famous resolutions of the judges in the reign of Charles I., the jurisdiction over mariners' wages had been more than once affirmed.[2] Though occasionally

[1] Art. 3, sec. 2.

[2] Mr. Justice Story, in *De Lovio* v. *Boit*, (2 Gallison's R. 453,) cites *Anon. Winch.* 8, in the 19th James I, as the earliest case in the reports in which the jurisdiction was affirmed. He did not mean, probably, to give that as the first affirmation of the jurisdiction, but as the first admission of it by the courts of common law. There is a far more solemn affirmation of it than a judgment at Westminster upon a writ of prohibition; which shows that it was exercised by the admiral, as a settled jurisdiction, at and after the very time when the restraining statutes of Richard II. were enacted. One of these statutes dates in the thirteenth and the other in the fifteenth year of that reign. Sir Leoline Jenkins, in his Argument before the House of Lords, *upon a bill to settle the admiralty jurisdiction*, cites a

denied, and again acquiesced in from time to time, by the common law courts, professedly as a matter of favor to the suitors, on account of the speed with which justice was administered and of the convenience of joining several parties in one suit, the contest was finally given up;[1] and the resolutions subscribed by the judges before the king in council, in 1632, and the Ordinance of the Commonwealth of 1648, expressly confirm the jurisdiction over "mariners' wages," *totidem verbis*.[2] At the restoration, the ordinance, which had been made perpetual in 1663, fell with the other acts of the commonwealth; but the merchants petitioned for a reëstablishment of rules similar to those settled in 1632, and upon this occasion, Sir Leoline Jenkins discussed before the House of Lords the principles upon which the jurisdiction rested.[3]

Parliamentary Roll of 14 Richard II. (Rot. Parl. 11, 37,) in which, he says, "the owners of ships trading out of England into France, complain to Parliament, that mariners, by a combination, did exact twice as much salary and freight as they had used to do in King Edward III's time, and would not serve in English bottoms, to the detriment of the owners and navy of England; for redress whereof they pray, that the mayor and bailiffs of towns, where such mariners lived, might have power to punish them, at the suit of every man that complained. To this the king consents. But how? Not to the prejudice, or in derogation of the admiral's lawful and ancient jurisdiction: but answers, that he will charge his admirals to ordain, that the mariners should have that which was reasonable for their service, and to punish them if they did otherwise. Mariners were then hired at Wapping and the bank side, as now they are, and the *querela* did arise upon the land; yet the admirals were ever allowed to have the cognizance of it." *Jenkins's Argument in the House of Lords*, *Works by Sergt. Wynne*, fol. Lond. 1724, vol. 1.

[1] It would be cumbrous to cite here the cases showing the history of this controversy. They are collected in *De Lovio* v. *Boit*, 2 Gallison's R. 453 to 461.

[2] 2 Brown's Civ. and Adm. Law, 77, 78, contains both these documents.

[3] See his argument, cited *supra*.

This course of history is not without importance at the present day, and in this country; for if it appears that mariner's wages were first treated as a case of admiralty jurisdiction, not merely *ex gratia*, and because the cause could be decided "between tide and tide," but, upon principle, because it was a case of maritime service, over which this branch of the judicial power exercised a general superintendence, there is then no difficulty, in principle, in admitting all classes of persons to sue in the admiralty, who perform any service for hire on board a vessel upon tide waters. Especially would this be so, under our constitution, if it appears that the admiralty jurisdiction, as it had been exercised in this country just before the revolution, was so understood and practised, as to be grounded on the nature of the service, and was a general jurisdiction resting upon principle.

Now it seems that, in England, if we may trust the citation made by Jenkins of the Parliamentary roll of 14 Richard II, that, at the time when the restraining statutes of that reign were enacted, a contemporaneous construction was given to them, which shows that they were certainly not designed and not understood to touch the admiralty jurisdiction over mariner's wages and the affairs of mariners generally. It appears that a general complaint being made that mariners extorted too high wages, the king answered that he would give his admirals charge to ordain that they should have what was reasonable for their service, and to punish them if they did otherwise; an answer which shows that the admiralty had, in that age, a general jurisdiction over the contracts of this class of subjects, grounded on their professional employment.[1]

[1] Ante, p. 345, note 2,

It is equally certain, that this jurisdiction has, at times, been admitted by the courts of common law, to be an ancient concurrent jurisdiction, as old as the constitution itself, and that they have sometimes recognised its foundation to be, not in the place where the contract was made, but in the subject matter of the contract for maritime service.[1] Such, it seems to me, is the ground of the jurisdiction of the High Court of Admiralty as ordinarily exercised in modern times, covering as well the services of the mariners, strictly so called, as those of various other persons rendering service on board.[2]

But the state of things in this country is more important. If we come back, then, to the colonies, we know that the commissions of the governors, as vice-admirals, authorized them to take cognizance of "all causes civil and maritime;"[3] and upon investigating the actual juris-

[1] *Coke* v. *Cretchet*, 3 Lev. 60. *Howe* v. *Napier*, 4 Burr. 1944. *Brown v. Benn*, 2 Lord Raym. 1247. *The Queen* v. *London*, 6 Mod. 205. See also *The Courtney*, Edwds. Adm. R.

[2] Winch. S. *Alleson* v. *Marsh*, 2 Vent. 181. Anon. 3 Mod. 370. *Bens* v. *Parr*, 2 Lord Raym. 1206. *King* v. *Ragg*, 2 Stra. 858. *Bayley* v. *Grant*, 1 Lord Raym. 632. *Read* v. *Chapman*, 2 Stra. 37. *Mills* v. *Long*, Sayer's R. 136. *Wheeler* v. *Thompson*, 1 Stra. 136. *The Lord Hobart*, 2 Dods. Adm. R. *note*. *The Prince George*, 3 Hagg. Adm. R. 376; which was that of a purser. Pilots, too, are within the jurisdiction, upon the same principle. *The Nelson*, 6 Rob. Adm. R. 227. *The Benjamin Frankin*, Ibid. 350. *The Anne*, 1 Mason's R. 508. *Hobart* v. *Drogan*, 10 Peters's S. C. R. 108.

[3] See an extract from the commission of the governor of New Hampshire (6 Geo. III,) in 2 Gallis. R. 470, note. The commission of Governor Shirley, of Massachusetts, as vice-admiral, in the 15 Geo. II, authorizes him "throughout all and every the sea shores, publick streames, ports, fresh waters, rivers, creeks and arms, as well of the sea as of the rivers and coasts whatsoever, of our said province of Massachusetts Bay and territories dependent thereon and maritime parts whatsoever, of the same and thereto adjacent, as well within liberties and franchises as without, to take

diction exercised by the vice-admiralty court for the Province of Massachusetts Bay, I find that over the subject of mariners, it exercised a general jurisdiction, *in rem*, *in personam*, for specific performance and for rescission of the contract, without reference to the place of the hiring. This jurisdiction, under the commissions, must have rested upon the nature of the cause, as "civil and maritime," and on the ancient theory of the court, that over the matter of maritime service it had a rightful cognizance.[1]

There is, therefore, as it seems to me, every reason to hold, that mariner's wages are within the clause of the constitution as "a cause of admiralty and maritime jurisdiction," and that they are so because of the nature of the service and contract.[2] If this be true, it follows that

cognizance of and proceed in all causes, civil and maritime, and in complaints, contracts, offences or suspected offences, crimes, pleas, debts, exchanges, accompts, charter-parties, agreements, suits, trespasses, injuries, extortions and demands and businesses, civil and maritime whatsoever commenced or to be commenced between merchants or between owners and proprietors of ships or other vessels, and merchants and others whomsoever had, made, begun or contracted for, any matter, thing, cause, or business whatsoever, done or to be done within our maritime jurisdiction aforesaid, together with all and singular their incidents," &c. *MSS. Records in the public archives of Massachusetts.*

[1] I am able to rescue from oblivion a portion of the records of the vice-admiralty court for this province, for the year 1740, during the time of the Honorable Robert Auchmuty, as judge of the court. Several of the cases, illustrating the jurisdiction exercised, I have extracted into the Appendix. They show, in part, more clearly than any documents yet published, what was the admiralty jurisdiction, as known and practised in this country, before the constitution of the United States.

[2] Mr. Chancellor Kent apprehends that "it may fairly be doubted, whether the constitution of the United States meant, by admiralty and maritime jurisdiction, any thing more than that jurisdiction which was settled and in practice in this country under the English jurisprudence, when the con-

the precise station or employment of the party is immaterial, provided his service, for the consideration of which he sues in the admiralty, be a maritime service. It will be seen, to what extent the admiralty jurisdiction is exercised in this country, upon this principle.

1. *Of personal standing in the Court of Admiralty.*

Upon principle, if the foregoing doctrine is correct, all parties performing service in and about the business of a vessel engaged in maritime trade and navigation, have a *persona standi in judicio* in the Court of Admiralty, to enforce such remedy as the law has given them.[1] From this general rule, the master alone seems to be excepted in the English practice. Although the surgeon, the purser and the carpenter are permitted to sue in the admiralty,[2] the master is not; and the reason assigned by the courts of common law, and referred to by Sir

stitution was made; and whether it had any retrospective or historical reference to the usages and practice of the admiralty, as it once existed, in the middle ages, before its territories had been invaded and partly subdued by the bold and free spirit of the courts of common law, armed with the protecting genius and masculine vigor of trial by jury." (1 Comm. p. 377, edit. 1840.) With the latter branch of the doctrine here referred to, I have nothing to do. There are great authorities on both sides of the question. I doubt, however, whether it will not be found, the more the vice-admiralty jurisdiction in this country is investigated, that it was more extensive than is commonly supposed by the profession. But my design has been, to show that the contract for maritime service was a case of admiralty jurisdiction as understood and practised in both countries, before the constitution was made, not merely as matter of indulgence, but upon principle; not confined to the sailors merely, but including all parties. Hence, if this doctrine be correct, the exception made in the English practice against the master, which is not made in ours, is made against principle.

[1] The father may sue in the admiralty for the wages of his minor son. (*Plummer* v. *Webb*, 4 Mason's R. 380,) and the master for those of his apprentice or slave. (*Emerson* v. *Howland*, 1 Ibid. 45.)

[2] Sayer's R. p. 136. *Wheeler* v. *Thompson*, 1 Stra. *The Prince George*, 3 Hagg. Adm. R. 376. *The Test*, Ibid. 307.

William Scott himself, as that upon which the prohibition is grounded, is because he is supposed to stand on the security of his personal contract with his owner, not relating to the bottom of the ship.[1] This reason contains only an objection to his proceeding *in rem;* it furnishes no objection whatever to his suit *in personam.* It was assigned at times — and as part of the same doctrine — when it was held, that the reason why mariners were permitted to sue in the admiralty was because that court could enforce their lien on the ship; and it seems that the occasions when it was advanced, were when masters were seeking a remedy *in rem*, which has always been denied to them by the law of England.[2] It was on such an application, that Sir William Scott yielded to the force of the objection and to the manifest prospect of a prohibition. In fact, as Lord Tenterden observes, "it is difficult to distinguish the case of the master from that of the persons employed under his command; the nature and place of the service, and the place of the hiring, are in both cases the same."[3]

Accordingly, our admiralty courts have not hesitated to entertain the master's suit *in personam*,[4] and also *in rem*, where he has been held to have a lien on any fund in the possession of the court.[5]

[1] *The Favorite*, 2 Rob. Adm. R. 232.

[2] *Ragg* v. *King*, 2 Stra. 858. *Clay* v. *Sudgrave*, 1 Salk. 33. 1 Lord Raym. 576. *Read* v. *Chapman*, 2 Stra. 937. *Wilkins* v. *Carmichael*, Doug. 101.

[3] Abbot on Ship. part 4, ch. 4, p. 475, edit. 1829.

[4] *Willard* v. *Dorr*, 3 Mason's R. 91. *The George*, 1 Sumner's R. 151. *Hammond* v. *Essex F. and M. Ins. Co.*, 4 Mason's R. 196. *The Ship Grand Turk*, 1 Paine's R. 78.

[5] *Drinkwater* v. *The Freight, &c., of the Spartan*, Ware's R. 149. As to the master's admission to sue against remnants, &c., see *infra*.

The test of the right to sue in the admiralty is now considered, with us, to embrace two elements: first, that the voyage should be substantially on tide waters, and secondly, that the services should be maritime, concerning the business of commerce and navigation. The cases establishing the first of these requisites proceed upon the acknowledged limits of the jurisdiction, as confined to that which is done, or to be done, upon tide waters; and it is said by the Supreme Court of the United States that if the service was to be performed substantially upon tide waters, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide, the jurisdiction exists.[1] On the other hand, if the voyage be substantially on other waters, though one terminus of it may be on tide waters, the jurisdiction does not exist.[2] In respect to the nature of the service rendered, one learned judge has given as a definition, that it should be such as contributes to the preservation of the vessel, or of those employed in navigating her.[3] This is a convenient description of those who have been admitted to sue in the admiralty. But perhaps a more suitable description would be, that all persons on board a vessel engaged in

[1] *The Thomas Jefferson*, 10 Wheaton's R. 428.

[2] Ibid. *The Steamboat Orleans* v. *Phœbus*, 11 Peters's S. C. R. 175. *Peyroux* v. *Howard*, 7 Ibid. 324. *Thackery* v. *The Farmer*, Gilpin's R. 526. *Smith* v. *The Pekin*, Ibid. 203. *Trainer* v. *The Superior*, Ibid. 516.

[3] *Trainer* v. *The Superior*, ut supra. Musicians hired and employed in the service of a boat used for exhibiting a museum of curiosities, though on tide waters, are not within the admiralty jurisdiction. Ibid. But the pilot, deck hands, engineers and firemen on board of a steamboat, navigating the high seas, are entitled to sue in the admiralty. *Wilson* v. *The Ohio*, Gilpin's R. 505.

maritime commerce and navigation, whose service is in the business and employment of the vessel, are within the jurisdiction.[1] It should be remembered, that the right to sue in the admiralty is wholly independent of the question of a lien. The proceeding *in rem* is to enforce a peculiar privilege against the thing itself, which is not always essential to the jurisdiction, in favor of the party, but which always gives jurisdiction, where it is a maritime lien arising upon a maritime right or contract.[2]

The form of the contract, whether under seal or otherwise, and whatever be the form in which the wages, or compensation are to be earned, does not affect the jurisdiction, in this country. In England, the Court of Admiralty does not exercise jurisdiction, when the claim is founded on special and extraordinary contracts, as for shares in the proceeds of a whaling voyage.[3] But with us, if the suit seeks compensation, in the nature of wages, for services of a maritime character, it is sustainable *in personam*, as well as, (where there is a lien) it is *in rem*.[4]

[1] Take, for example, the passenger ships that navigate the Atlantic, whether propelled by wind or steam. There can be no doubt that such ships fall within the test of trade and commerce. The business is that of earning freight by the carriage of persons, instead of goods. The various servants attached to the ship, employed for the accommodation of passengers, are employed in the business of the ship, and would seem, upon principle, to be as well within the admiralty jurisdiction, as the purser, the surgeon, or the cook and steward.

[2] *Sheppard* v. *Taylor*, 5 Peters's S. C. R. 657. *The General Smith*, 4 Wheaton's R. 438. *The Bolina and Cargo*, 1 Gallison's R. 75. *The Boston and Cargo*, 1 Sumner's R. 341. *The Draco*, 2 Ibid. 157.

[3] *The Sydney Cove*, 2 Dods. Adm. R. 14. Abbot on Shipping, part 4, chap. 4, secs. 3, 4, 5, 6, 7.

[4] *Macomber* v. *Thompson*, 1 Sumner's R. 384. *The Crusader*, Ware's

But then a contract of a special nature is not cognizable in the admiralty, merely because the consideration, on one part, is maritime service. The compensation must be sought in the nature of wages, *in pecuniâ numerata*; and therefore a suit for damages, upon breach of a contract "for good, careful, kind, tender and parental usage," in consideration of marine services, upon a special retainer without wages, is not cognizable in the admiralty.[1]

Contracts under seal are excluded from the admiralty jurisdiction, in England.[2] I am not aware that the question has ever been raised in this country, upon a mariner's contract. It is probable that a seal would not be held to exclude the contract from the admiralty jurisdiction, by our courts, inasmuch as the doctrine with us is that where the admiralty has jurisdiction over the subject matter, it is not defeated by the peculiar form which the parties have chosen to give to their contract;[3] and they entertain jurisdiction over charter parties, upon this principle, although the contract is under seal.[4]

R. 437. That the mariners hired on shares of freight, or proceeds, are not partners with the ship-owner, see ante, pp. 74 – 76.

[1] *Plummer* v. *Webb*, 4 Mason's R. 380. It is in this form, as part of the compensation, that subsistence, expenses of cure of sickness, and the three months' pay allowed by our statute, may be sued for in the admiralty. As to subsistence, see *The Madonna D'Idra*, 1 Dods. Adm. R. 40; ante, p. 101, *et seq.*; as to expenses of cure, *Harden* v. *Gordon*, 2 Mason's R. 541. Ante, p. 106, *et. seq.*; and as to the three months' wages, *Emerson* v. *Howland* 1 Mason's R. 45. *Orne* v. *Townsend*, 4 Ibid. 541.

[2] Abbot on Shipping, part 4, ch. 4, secs. 3, 4, 5, 6, 7.

[3] *De Lovio* v. *Boit*, 2 Gallison's R. 398, 457.

[4] *Drinkwater* v. *The Freight, &c. of the Spartan*, Ware's R. 149, 153. *The Volunteer and Cargo*, 1 Sumner's R. 551. See the case of *De Lovio* v. *Boit*, 2 Gallison's R. 457, et seq. for an examination of the English authorities at common law, respecting mariner's contracts under seal.

It is further to be observed, that it is not essential, to give a standing in a Court of Admiralty, that the whole or any part of the service should have been performed, for which the party seeks compensation, where it has not been rendered through the fault of the owner or master.

In England, it would seem that the admiralty can take jurisdiction of a suit for damages in the nature of a breach of contract. Lord Tenterden, it is true, observes of the statutes of Richard, that "it is evident, if the seaman's claim to wages be in reality founded on the performance of his service in the navigation of a ship on the high sea, the Court of Admiralty must have cognizance of the claim; and on the other hand that, if the claim be in reality founded on the contract made for performance of such service, and such contract be, as it usually is, made on shore, or in a port, or river, within the body of a county, the Court of Admiralty can have no cognizance of it."[1] But it had been decided, as he afterwards notices, that the seamen may sue in the admiralty for wages earned in rigging and fitting out the ship, if the owners do not think fit afterwards to send the ship on the intended voyage;[2] and in Ireland it had been held that they may sue there for the wages contracted to be paid, where the voyage is abandoned.[3] There has been a very recent case in England, in which the mariner, wrongfully discharged before the vessel

[1] Abbot on Shipping, part 4, ch. 4, sec. 1, p. 475, edit. 1829.

[2] *Wells* v. *Osman*, 2 Ld. Raym. 1044. 6 Mod. 238. Abbot, ut supra, sec. 2, p. 476.

[3] *Parry* v. *The Peggy*, 2 Brown's Civ. and Adm. Law, 533, on the authority of *Wells* v. *Osman*.

sailed, was held entitled to sue in the admiralty for wages for the whole voyage.[1]

However this may be in England, in our Admiralty Courts, there can be no difficulty in maintaining a suit for damages in the nature of a breach of contract, since the jurisdiction with us is founded on the nature of the contract. Our courts constantly take cognizance of suits, in cases of a wrongful discharge abroad, decreeing damages in the shape of wages according to the contract;[2] and in the District Court of the United States for Massachusetts, a suit has been maintained for a fraudulent shipment of seamen for a fictitious voyage, the Court considering the defendant estopped to deny the reality of the voyage, and awarding damages in the shape of wages.[3]

It belongs to the subject now under consideration, to state the doctrine and practice of courts of admiralty, in respect to suits between foreigners. "The jurisdiction of the admiralty, in matters of contract," it is said, "depends not on the character of the parties, but on the character of the contract, whether maritime or not. When once its jurisdiction, therefore, attaches rightfully on the subject matter, it will exercise it conformably with the law of nations, or the *lex loci contractûs*, as the case may

[1] *The City of London*, cited at length, ante, p. 299. Dr. Lushington is reported to have said, that, whether the mariner, when the voyage is abandoned, is entitled to come into the admiralty and sue, has never been agitated and decided. The cases above referred to show how nearly it has been decided. — I have relied for these recent cases in the High Court of Admiralty upon the reports made in the Monthly Law Magazine. It seems that they are sufficiently accurate to be cited for some purposes in that court itself. See vol. x, No. 38, p. 139, (March, 1841.)

[2] Ante, pp. 296, 297, 299, 300, 301.

[3] *Stewart's Case*, cited in Dunlap's Adm. Practice, p. 53.

require."[1] This general description of its functions—intended only for a general description—obviously requires some further explanation; for it cannot be intended that the admiralty will always take cognizance of a contract, though maritime, where the merely municipal regulations of the place where the contract was made are to be enforced, without first founding the jurisdiction upon principles of the general law. A writer on the admiralty jurisdiction has pointed out this distinction as to suits between foreigners. "It must depend," he says, "on the nature of the question. If it arises from the particular institutions of any country, to be applied and construed and explained, by the particular rules of that country, it will not be entertained. Such is a question arising upon the contracts of mariners, who will be remitted to their own forum."[2] This general language needs qualification. Questions arising upon the contracts of mariners are not always such questions as those which the writer describes, and accordingly are not always remitted to their domestic forum. Wages of mariners are due by the general maritime law, however modified by the particular regulations of different countries.[3] When, therefore, the wages become due in the foreign country and all that is sought to be enforced is the payment of what is due by their contract, the courts of such foreign country may admit mariners to sue and enforce their claims; and will then proceed to ascertain by the *lex loci* what is due by the contract.

Thus, in England, the first case of the kind reported, was that of certain American seamen discharged there,

[1] *The Jerusalem*, 2 Gallison's R. 191, 200.

[2] 2 Brown's Civ. and Adm. Law, 119.

[3] *The Courtney*, Edwards's Adm. R. 241.

and who sued against the master for their wages due according to the contract, and also for the three months' wages required to be paid in such cases by the Act of Congress. The court admitted the libel for the wages under the contract, with the consent of the representative of the United States, but as the statute requiring the three months' additional pay was only printed on the back of the articles and not referred to therein, it could not be taken to be a part of the contract, and being a merely municipal regulation, the court had no jurisdiction to enforce it.[1] The next case was that of certain Greek seamen, whose vessel had been arrested at the suit of a bottomry bond holder; wages and subsistence in England, until they could return home, were decreed against the proceeds of the ship, upon the ground that such subsistence was to be deemed part of their contract.[2] The next case was that of a foreign mate of an enemy ship, but which came to England under a British license: wages were decreed against the ship.[3] The next two cases were similar in

[1] *The Courtney*, Edwards's Adm. R. 241.

[2] *The Madonna D'Idra*, 1 Dods. Adm. R. 37, 41. The court sought to distinguish this case from that of the American seamen. In the case of the Greek seamen, the court received and relied upon evidence that subsistence was required by the laws of their own country, and so was to be deemed part of the contract. Of the other case, the court say, "the American seamen did not attempt to establish their right, as due to them by the universal usage and custom of their country, or as forming part of the contract under which they sailed, but upon the ground of a statute lately introduced." (Ib. p. 41.) The learned judge, in distinguishing the cases, did not do justice to the real distinctions. The libel of the American seamen prayed the court to decree the three months' wages to be paid to the American consul, and this would have been merely an enforcement of a municipal regulation.

[3] *The Vrow Mina*, 1 Dods. Adm. R. 234.

features and result.[1] Then followed a case of certain Dutch seamen, whose vessel in England had been assigned over by the master to British creditors. The court considered the contract at an end, and that under such circumstances the seamen might proceed, on the general law, to establish their claims against the ship itself.[2] A similar case of breach of contract was more recently made the foundation of proceedings against the ship.[3]

From all these cases, it appears to be the practice in England not to proceed to entertain jurisdiction, without the consent of the representative of the foreign government to which the parties belong.

In this country, our admiralty courts have ordinarily exercised jurisdiction upon the same principles. Where the voyage is terminated, either by its completion or abandonment, or there is a dissolution of the contract by the wrongful act of the owner or master, the suits are entertained, and the court will notice the *lex loci* to ascertain the contract; but where the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of their own tribunals, they are remitted to their own forum.[4]

[1] *The Frederick*, 1 Dods. Adm. R. 266. *The Maria Theresa*, Ibid. 303.

[2] *The Wilhelm Frederick*, 1 Hagg. Adm. R. 138.

[3] *The Margaret*, 3 Hagg. Adm. R. 238.

[4] *Ellison* v. *The Bellona*, Bee's Adm. R. 106, 112. *Aertsen* v. *The Aurora*, Ibid. 161. *Thompson* v. *The Nancy*, Ibid. 217. *Wellendson* v. *The Forsoket*, 1 Peters's Adm. R. 197. *Moran* v. *Baudin*, 2 Ibid. 415. *Weiburg* v. *The St. Oloff*, Ibid. 428. *The Jerusalem*, 2 Gallison's R. 198. The courts of common law have proceeded upon the same principles, 2 East's R. 175. *Johnson* v. *Dalton*, 1 Cowen's R. 543. As to the admiralty jurisdiction in other cases, between foreigners, see *Mason* v. *The Blaireau*, 2 Cranch's R. 240. *Hudson* v. *Guestier*, 4 Ibid. 293. *The Antelope*, 9 Wheat. R. 66. *The*

Passengers, for some purposes, have a personal standing in the admiralty. By the statute of the United States regulating passenger ships and vessels, the master, who has not furnished his vessel as required by law, and is in consequence obliged to put the passengers on short allowance, is made liable to pay to each of them "the sum of three dollars for each and every day they may have been put on such short allowance; to be recovered in the same manner as seamen's wages are or may be recovered."[1] This clause of the statute does not in terms include the admiralty jurisdiction, but the meaning of it is presumed to be, that the per diem allowance is recoverable there by a libel for damages in the nature of a breach of contract, setting forth the statute provisions. So too, in cases of torts to the person of a passenger, including consequential damages for immodest, harsh, or oppressive deportment towards them, the admiralty has jurisdiction.[2]

2. *Jurisdiction in personam.*

The jurisdiction of the admiralty in personal suits embraces those founded in contract and in tort. I have laid down the general doctrine that all the persons employed in the business of a vessel engaged in maritime trade and navigation are entitled to come into this jurisdiction and seek their remedy for breach of contract. The master, or owner, is cited personally to answer to

Calypso, 2 Hagg. Adm. R. 209. *The Salacia*, Ibid. 262. *The See Reuter*, 1 Dods. Adm. R. 22. *The Two Friends*, 1 Rob. Adm. R. 271. *The Prince Frederick*, 2 Dods. 541. *Schooner Exchange* v. *M'Faddon*, 2 Cranch's R. 115. *The Experiment*, 2 Dods. 38. *The Jerusalem*, 2 Gallison's R. 191.

[1] Act U. S. 2d March, 1819, ch. 170, sec. 3.

[2] *Chamberlain* v. *Chandler*, 3 Mason's R. 242. *The Ruckers*, 4 Rob. Adm. R. 73.

the party complaining, in a suit called in the technical language of the admiralty, "a cause of subtraction of wages," or "a cause of pilotage," as the case may be. The right thus to proceed is wholly independent of the question of a lien. No lien is sought to be enforced, but the party is cited under a personal liability.[1] This mode of proceeding is said to have been the original and ancient form of exercising the jurisdiction in all cases;[2] it is familiarly and constantly used in the modern practice,[3] and was equally well known in the admiralty jurisdiction, as held and practised in this country before the Constitution of the United States was established.[4]

In cases of tort, the proceeding is also *in personam* for damages, very frequently used, and known from time immemorial. The competency of the Court of Admiralty to award damages for personal wrongs done upon the high seas, has always been admitted in England,[5] is constantly practised there[6], and is equally familiar in this country.[7] But in these cases, the subject matter of course is not the criterion of the jurisdiction, but the place where the act is done. The jurisdiction includes the high seas,

[1] 2 Brown's Civ. and Adm. Law, 432.

[2] *The Boston and Cargo*, 1 Sumner's R. 341.

[3] *Oliver* v. *Alexander*, 6 Peters's S. C. R. 143. *Macomber* v. *Thompson*, 1 Sumner's R. 384. *Hammond* v. *Essex Fire and Mar. Ins. Co.*, 4 Mason's R. 196. *Bronde* v. *Haven*, Gilpin's R. 592.

[4] See Appendix I.

[5] 2 Brown's Civ. and Adm. Law, 108. 3 Blackstone's Comm. 106. Sir L. Jenkins's works, vol. ii, p. 774. *Le Caux* v. *Eden*, Doug. R. 108.

[6] *The Agincourt*, 1 Hagg. Adm. R. 271. *The Lowther Castle*, Ibid. 384. *The Centurion*, Ibid. 161. *The Enchantress*, Ibid. 395.

[7] *Chamberlain* v. *Chandler*, 3 Mason, 242. *Thomas* v. *Lane*, 2 Sumner's R. 1. *Thorne* v. *White*, 1 Peters's Adm. R. 172, 174. *Hutchinson* v. *Coombs*, Ware's R. 65, and other cases cited, ante, p. 337, 338.

or open sea without the body of a county, both in England and in this country.[1] Waters within the ebb and flow of the tide, which lie within a port, or body of a county, of the realm, are not in England within the admiralty jurisdiction.[2] But in this country, all tide waters, though within the body of a county, are within the admiralty jurisdiction, and torts committed upon such waters are cognizable there.[3]

It seems, also, that torts committed on tide waters within foreign ports, are within the admiralty jurisdiction.[4]

It is said by the learned Dr. Browne, that "there can be no variety in the subject matter of torts. They cannot, like contracts, relate some to terrene and some to marine affairs. Nor have a double aspect like them, which, though made on land, may relate entirely to the sea."[5] But a tort may have its inception upon the land and be consummated on the sea. Cases of this kind are excluded from the admiralty jurisdiction in England; but they are not with us, it being held, that where the tort is one continued act, though commencing on the

[1] 2 Brown's Civ. and Adm. Law, 108, 109, 110. 4 Inst. 134. *Lindo* v. *Rodney*, Doug. 613. 3 Swanst. R. 605, 606.

[2] 2 Brown's Civ. and Adm. Law, 111. *Velthason* v. *Ormsby*, 2 Term R. 315. *The Nicolaas Witzen*, 3 Hagg. Adm. R. 369.

[3] Judic. Act U. S. 1789, sec. 9. *United States* v. *The Schooner Sally*, 2 Cranch's R. 406. *United States* v. *The Schooner Betsey*, 4 Ibid. 443. *The Samuel*, 1 Wheaton's R. 9. *The Octavia*, 1 Ibid. 20. *The Sarah*, 8 Wheat. 391. *Peyroux* v. *Howard*, 7 Peters's S. C. R. 324. *Smith* v. *The Pekin*, Gilpin's R. 203. *Wilson* v. *The Ohio*, Ibid. 505. *De Lovio* v. *Boit*, 2 Gallison's R. 398. *The Jerusalem*, 2 Ibid. 347. *Sancry's Case*, U. S. Dist. Court, Mass., March T. 1832, cited Dunlap's Adm. Prac. 51.

[4] *Thomas* v. *Lane*, 2 Sumner's R. 1. *The Apollon*, 9 Wheaton's R. 363.

[5] 2 Brown's Civ. and Adm. Law, p. 110.

land, the admiralty has jurisdiction over the whole matter.[1]

3. *Jurisdiction in rem.*

Proceedings *in rem* take place at the suit of the party having an hypothecary interest in the thing proceeded against, ordinarily styled a lien.[2] The admiralty jurisdiction in these cases and in this form of proceeding where the lien is of a maritime nature, has rarely been questioned, and the fact that it is the only court which can enforce a maritime hypothecation, by proceeding directly against the thing itself, has often been assigned as the ground for permission to sue at all. But we have seen that a personal standing may be acquired on other grounds; although, where there exists a maritime lien, in favor of the party, he may always come into the admiralty to enforce it.[3] Hence all the persons to whom the maritime law gives a lien for their services on shipboard, may have the aid of this jurisdiction.[4] We have seen that the master has, for reasons of policy, no lien on the vessel for his wages, and that it is from this exercise of the jurisdiction that he is excluded.[5]

The distinction taken in the cases where a mate has succeeded to the office of master during the voyage, by treating him as a mate acting as master, has been taken with reference to the question of a lien and the right to proceed *in rem*. It is not necessary to resort to this dis-

[1] *Steele* v. *Thacher*, Ware's R. 91. *Plummer* v. *Webb*, 4 Mason's R. 380. *Sherwood* v. *Hall*, 3 Sumner's R. 127.

[2] Ante, p. 315, *et seq.*

[3] *The Draco*, 2 Sumner's R. 157.

[4] As to the lien in mariners cases, see ante. As to the lien for pilotage, *The Anne*, 1 Mason's R. 508. *Hobart* v. *Drogan*, 10 Peters's S C. R. 108.

[5] Ante, p. 350, 351.

tinction to give a right to sue *in personam;* but where the distinction actually exists, the right to proceed against the ship for the wages due in the capacity of mate still remains, leaving the residue of his compensation, as master, to be recovered at common law.[1]

There is also a qualified proceeding *in rem*, which courts of admiralty allow to the master, by petition against remnants and surplus remaining in the registry, after sale of the ship at the suit of other parties, when there are no adverse interests opposing it.[2]

The lien and proceeding *in rem* for wages, according to the course of courts of admiralty, are expressly recognised and given by the statute for the regulation of seamen in the merchant service;[3] and for shares of fish taken in the bank and other cod fisheries, by the statute for the regulation of persons in those fisheries.[4] In the whale fishery, the jurisdiction remains grounded on the lien by the general law, and the general jurisdiction of the court. Treated as in all respects in the nature of wages, the shares in these cases doubtless give a lien on the vessel and the proceeds of the fish taken.[5]

The lien for wages, it has been seen, attaches to the ship, to what is substituted for it, and to its proceeds, when sold. The same is true of the freight. The admiralty jurisdiction is exerted over such proceeds, or sub-

[1] *The Favorite*, 2 Rob. Adm. R. 232. *The George*, 1 Sumner's R. 151, 157.

[2] *The Favorite*, 2 Rob. Adm. R. 232. *Gardner* v. *Ship New Jersey*, 1 Peters's Adm. R. 223.

[3] Act. U. S. 20th July, 1790, sec. 6.

[4] Act U. S. 19th June, 1813, sec. 2. The lien in the cod fisheries exists for six months against the vessel, after the fish have been sold. Ibid.

[5] Ante, p. 75.

stituted fund, by first founding the jurisdiction in the lien, and then by personal monition calling on the parties holding the proceeds to pay them into court.[1]

Such is the general outline of the admiralty jurisdiction in mariners' cases.[2] It remains to add a peculiarity of this jurisdiction, of ancient practice, confirmed by statute, and applicable to all its forms of proceeding, that the seamen may unite in one suit the claims founded on their several distinct contracts. It is a privilege granted to mariners only, and is confined strictly to demands for wages.[3]

II. *Of the Common Law Jurisdiction.*

The courts of common law have always exercised a concurrent jurisdiction over mariners' contracts,[4] and although these causes are well settled in this country to be, rightfully, causes of admiralty and maritime jurisdiction, yet this latter jurisdiction is not exclusive, the Judiciary Act of the United States, as well as the statutes regulating seamen in the merchant service and the fisheries, having saved the right of a common law remedy, where the common law is competent to give it.[5]

Courts of common law are not competent to give a remedy *in rem*, or to enforce directly the mariner's lien

[1] *Sheppard* v. *Taylor*, 5 Peters's S. C. R. 675. See also ante, p. 317.

[2] It would lead to too minute and extended inquiries, to go into the Admiralty Practice, in this work. The excellent work of the late Mr. Dunlap, Hall's Admiralty Practice, the Reports of Judge Ware, and other sources, familiar to the reader, supply the requisite materials for practical inquiries.

[3] *Oliver* v. *Alexander*, 6 Peters's S. C. R. 143, (where the practice, &c., are explained). Acts U. S. 20th July, 1790, sec. 6; 19th June, 1813, sec. 2.

[4] *De Lovio* v. *Boit*, 2 Gallison's R. 398—476, *passim*.

[5] Acts U. S. 24th Sept., 1789, ch. 20, sec. 9; 20th July, 1790, ch. 56, sec. 6; 19th June, 1813, ch. 2, sec. 2.

upon the vessel, and accordingly the remedy in this jurisdiction is confined to a personal suit against the master, or owner, upon the contract. The form of action depends upon the nature of the contract. If it be in the usual form of hiring, and not under seal, the remedy is by an action of debt, or assumpsit. If the instrument be under seal, then an action of debt or covenant must be brought upon it. But it has been held that *delivery*, as a deed, is necessary, to require the technical remedy appropriate to an instrument under seal, and that where a mariner's contract had a seal affixed to his name, and it did not appear that the instrument had been or was intended to be delivered as a deed, an action upon the case would lie.[1] So too, if the instrument be not sealed by the master, and is only sealed by the mariners, assumpsit lies upon it for their wages against the master.[2]

It seems to be the doctrine of common law courts in this country, that a mariner may maintain general indebitatus assumpsit to recover his *pro rata* wages, or the whole wages for the voyage, when tortiously dismissed by the master before the voyage is ended, or when it is broken up by the act of the owner, or master, although there is a stipulation in the contract that the wages are not to be paid till the end of the voyage: and that a special action on the case is not necessary.[3]

[1] *Clement* v. *Gunhouse*, 5 Esp. 83.

[2] *Sutherland* v. *Lishnan*, 3 Ibid. 42.

[3] *Hoyt* v. *Wildfire*, 3 Johns. R. 518. *Ward* v. *Ames*, 9 Johns. R. 138. *Sullivan* v. *Morgan*, 11 Ibid. 66. *Brooks* v. *Dorr*, 2 Mass. R. 39. *Luscomb* v. *Prince*, 12 Ibid. 576. *Sigard* v. *Roberts*, 3 Esp. R. 71. *Sed vide Hulle* v. *Heightman*, 2 East's R. 145.

In cases of tort, committed upon the high seas, however it might have been formerly, the common law has concurrent jurisdiction. The form of the remedy is by an action of trespass, or a special action on the case.[1]

[1] 1 Chitty's Plead. 152, 191. *Watson* v. *Christie*, 3 Bos. and Pul. 224. *Sampson* v. *Smith*, 15 Mass. R. 355. *Brown* v. *Howard*, 15 Johns. R. 119. *Ward* v. *Ames*, 9 Ibid. 138.

APPENDIX.

APPENDIX.

I.

EXTRACTS FROM THE RECORDS OF THE VICE ADMIRALTY COURT FOR THE PROVINCE OF MASSACHUSETTS BAY.

[The volume of records, from which these cases are extracted, is deposited in the archives of the District Court of the United States for Massachusetts District. It is the only volume of the records of the Provincial Vice Admiralty Court known to be in existence here. There is a tradition that the residue of its records were carried to Halifax, by the officers of the crown, when the British evacuated Boston. If in the possession of the British government, their restoration to this country would be of great service to a question which is agitated in our jurisprudence — what was the admiralty jurisdiction, on the instance side, settled and in practice here, before the revolution.]

At a Court of Admiralty holden at Boston before the Hono'ble. }
Robt. Auchmuty Esq. Judge of said Court. April 15, 1740. }

1740. *April* 11. Francis de Quitteville Mariner exhibited a libel agt. Andrew Woodbury Mariner for an assault upon the body of the Plff. at the bay of Honduras upon the open sea on board ye Ship King George as p Libel on file more fully sets forth; the case was heard on the 14th currt. and on the 15th currt. aforesd. his Honor the Judge gave the following decree, viz.

I have duly considered this case together wth. the proofs and am of opinion the mutinous behavior of abt. fourteen of the crew ought severely to be punished, yet not in the method and manner used by the Deft. but it appears clear to me from the whole of the evidence that the Propt. shared no part in that mutiny and that the Deft. imaging he was an actor with them beat him with uncommon severity wh. by no means is justifiable, the Deft. mistaking his man is easily accounted for because the disturbance happened in the night, there was a number of these refractory men & the Propt. was by violence

shoved on the Deft. these things in my opinion tho they will not amount to an entire justification, greatly ought to mitigate in damage, therefore upon the whole I decree the Deft. to pay unto ye propt. five Pounds in bills of Public Credit and the costs of this Court.

Robt. Auchmuty *Judge Ady.*

Exmn'd p. John Payne *D. Rgr.*

1740. *Apl.* 9. Francis Pulcifer exhibitd. a Libel agt. Francis Cogswell late owner of ye Schooner Speedwell for Wages &c. wh. was agreed.

Att. John Payne *D. Rr.*

1740. *May* 30. Thomas Darcy Bowling mariner Exhibited a Libel against William Clark, Late Master of the Ship Seaflowr. & agt. sd. ship for wages and liberation as p Libel on file more fully sets forth; the case was agreed.

Att. John Payne *D. Regr.*

At a Court of Admiralty Holden at Boston before the Honoble. Robt. Auchmuty Esq. Judge of said Court. Sept. 10, 1740.

1740. *Sept.* 6. Timothy Wyer of the Island of Nantucket mariner, exhibited a libel agt. William Henry Master of the Ship Polly for Piloting sd. Ship from Nantucket to Boston as p. Libel on file more fully sets forth, the case was heard on ye 9th currt. and on the 10th currt. aforesd. the Judge gave the following Decree viz.

I have considered this Libel and am of opinion to do justice therein the only evidence to be relied on are the Testimonies of Capt. Coffin & Capt. Brock who saw ye situation of the Ship when the signal of distress was given and both gentlemn. of experience & knowledge in respect to the difficulty & hazard as well as the skill in Piloting such a Vessel over Nantucket Shoals to Boston they also especially Mr. Brock are of opinion that the sum of six pounds for the Whale Boat & crew in carrying the Pilot on Board considering ye distance & hazard was not excessive wh. reduces the bare Pilotage to seventeen pounds and upon the whole taking the case with all its circumstances the Ships being Leaky full loaden drawing better than twelve feet water, the difficulty of getting hands and reaching the vessell in the night I cant apprehend ye agreemt. en-

tered into by the parties to be extorted — It must not be a small matter more than the service is worth that ought to set such agreement aside but where the agreement is pretty near the value of the Labour it ought to be preserved and I would not be understood to establish in this Court any excessive sum for Piloting neither would I by so great a reduction discourage persons skilled from giving their ready assistance. I believe this case will not settle any rule being in fact or circumstances different from the Common Cases and therefore not to be measured by the prices sworn to by the Merchts. in ye ordinary cases and inasmuch as the Propt. declined taking ye charge of the Ship from the Light House to Boston so that a Pilot was necessarily employed for that purpose I order the sum of four Pounds to be deducted out of the sum demanded to pay that Pilot. The remaining sum of nineteen Pounds I decree the Propt. together with his costs of this court.

ROBT. AUCHMUTY *Judge Ady.*

Exmnd. p. JOHN PAYNE *D. Rgr.*

1740. *Sept.* 15. James Moore of Londonderry Weaver exhibited a Libel on behalf of his son John Moore a minor for wages against William Henry Master of the Ship Polly wh. was agreed.

Atts. JOHN PAYNE *D. Regr.*

At a Court of Admiralty holden at Boston before the Honble. Robt. Auchmuty Esq. Judge of sd Court. 18 Nov. 1740.

1740. *Nov.* 15. Thomas Camell Mariner exhibited a Libel against Ship Eliza, Lewis Turner Master & agt. said Turner for wages and liberation he being incapacitated to proceed the voyage by reason of sickness &c. as p. Libel on file more fully sets forth, the case was fully heard on the 18th currt. aforesd. at which time his Honor the Judge gave the following Decree viz.

I have considered this Libel and evidences produced and am of opinion the Propt. is not in Health suitable to prosecute the voyage without endangering his life and therefore I discharge him from the same and as to the demand of wages when I consider that hands present themselves where the Deft. Shipped the Propt. to come hither gratis provided they can be secured from being pressed it must be a loss to the deft. in having the Plf. liberated after the charge

the Deft. was at in securing the Propt. as aforsd. and when I consider the distemper that now is the cause of liberation was contracted by the Propt's sin & folly and that truly by his own act he has disabled himself from performing his contract. I can't in justice give the Propt. the full of his wages and therefore as the case stands circumstanced I decree the Propt. only one months wages further, than the months wages advanced — and ye remaining wages declare to be detained by ye deft. to make good the damage he may sustain by reason of ye Propts. disabling himself from performing ye contract, ye Deft. thereout to pay ye costs of this Court.

Robt. Auchmuty *Judge Ady.*

Exmnd. p. John Payne *D. Regr.*

At a Court of Admiralty holden at Boston before the Hon. Robt. Auchmuty Esq. Judge of sd Court. Sept. 10, 1740.

1740. *Sepr. 3d.* Thomas Cavendish Merchant & Richard Girdler Mariner both of Marblehead exhibited a Libel against William Hilligoe of Marblehead Merchant $\frac{1}{4}$ part owner of ye Schooner Richard & Hannah for refusing to fit out his part &c. as p Libel on file more fully sets forth; the case was heard on the 5th currt. at 8 O'clock A. M. and afterwards adjourned to the 10th currt. aforsd. at which time the Proponts. & Deft. having agreed upon the sale of the vessell & nothing but the costs coming under consideration the Judge decreed the costs to be paid by the Deft.

Atts. John Payne *D. Regr.*

At a Court of Admiralty holden at Boston before the Hon'ble. Robt. Auchmuty Esq. Judge of Admiralty. Dec. 2, 1740.

1740. *Nov.* 25. Robert Taylor Mariner exhibited a Libel against Thomas Perkins Master of the Ship Prince of Orange for wages & liberation as p. Libel on file more fully sets forth, the case was fully heard on the second Dcr. aforsd. at which time the Judge gave the following decree viz.

The Propt. not proving the Libel I dismiss the same, and order him to proceed the voyage and decree the Deft. to pay the costs of Court out of the wages due to the Propnt.

Robt. Auchmuty *Judge Ady.*

At a Court of Admiralty holden at Boston before the Hono'ble. }
Robt. Auchmuty Esq. Judge of said Court Decr. y 16, 1740. }

1740. *Dec.* 13. John Searl Mariner exhibited a petition to his Honor the Judge setting forth that he belongs to the Schooner Charlestown William Hinckley Master who has kept him in Gaol 35 Days under pretence of his deserting sd vessell that the Deft. is int. upon sailing without taking ye Propt. or paying his wages &c. as p. Libel on file more fully sets forth the case was fully heard on the 16 currt. aforesd. at which time the Judge decreed the Petitr. to proceed the voyage to Winyau at the terms he was shipped at viz. £12 So. Carolina Currency P. mo the shiping [articles] being clandestinely taken out of the Captains chests and decreed the Capt. to pay the prison fees & the Costs of Court & deduct it out of the wages due to the Plt.

Atts. John Payne *D. Regr.*

At a Court of Admiralty holden at Boston before the Hon. }
Robt. Auchmuty Esq. Judge of sd. Court. Dec. 26, 1740. }

1740. *Dec.* 23. Michel Turpin of Boston Mariner late Mate of the Ship Brittania exhibited a Libel against Nicholas Luce late Master of said Ship for wages amounting to 13 £ Sterling as p. libel on file more fully sets forth; the case was fully heard on 26th currt. afors'd. when his Honor the Judge decreed the Plf. his wages as sued for & costs of Court.

Atts. John Payne *D. Regr.*

At a Court of Admiralty holden at Boston before the Hono'ble. }
Robt. Auchmuty Esq. Judge of said Court. Jany. 3, 1740. }

1740. *Dec.* 27. John Keeping Mariner and Mate of the Snow Diamond John Hore Master, Exhibited a Libel against sd. Hore for wages & Liberation he being by sickness renderred not capable of proceeding the voyage &c, as p Libel on file more fully sets forth. the case was fully heard on the 30th of Decr. and on the 3d day of Jany. aforesaid his Honor the Judge gave the following decree viz.

Having considered this Libel and the Defts. Plea as also the evidence produced on both sides together with the report of Dr. Cutler apointed by the Court to enquire into the state of health of the

Propont. and whether notwithstanding his lameness he can with safety prosecute the voyage to South Carolina, I am of opinion that the propont. ought not to be liberated but order him to go on board and as far as he is able prosecute said voyage to South Carolina where he may be liberated if by sicknes he is rendered incapable of prosecuting the voyage home and in order to it I decree the Deft. to pay the Propt. one months wages to enable him to discharge his expences to his Landlady and to buy proper things for his health and as to the costs it appears to me the Deft. did not take that natural care of the propt. that he in duty ought, neither did the propt. act towards the Deft. as his duty required him but that both were in respect to their conduct blameworthy therefore order both parties to pay ye costs of this Court between them the Propts Moiety to be paid by the Deft. out of his wages in which costs I allow the Physician twenty shillings that made the report.

Robt. Auchmuty *Judge Ady.*

Examned. p. John Payne *D. Regr.*

At a Court of Admiralty holden at Boston before the Hono'ble. Robt. Auchmuty Esq. Judge of said Court. Feb. 21, 1740.

1740. *January* 24. Josiah Bennett Mariner & Mate of the Snow William exhibited a Libel against William Ball Master thereof. For Wages & Liberation &c. inasmuch as the Deft. had shipped another Mate in his room or that he might be reinstated as mate again &c. as p. Libel on file more fully sets forth; the case was fully heard on the 20th currt. and on the 21st current aforesd. his Honor the Judge gave the following decree viz.

I have considered this Libel and the special plea of the Deft. and the evidence produced in the case, and am of opinion the Deft. had reasonable cause to Ship another Mate in the room of the propt. wherefore I decline ordering ye Propt. to receive the Wages here, but decree the Deft. to pay the same viz. from ye 20 day of September last to ye 15th of January following at 3 Pounds Stl. p. Mo. one Months advance wages deducted by a sett of bills of excha. upon the Defts. owners: and forasmuch as it appears that the propt. received ye hurt as mentiond. in the Libel, in the Service of the Vessell, and is obliged to pay twentythree shillings to the Doct. & three pounds ten shillings for his nursing & diet: wh. the Deft. refuses to

pay but by a deduction out of the Propts. Wages therein I am of opinion the Defts. refusal is wrong or contrary to Law. wherefore I decree the Deft. to pay ye Propt. the aforesaid sums together with the costs of this Court.

ROBT. AUCHMUTY *Judge Ady.*

exmnd. p. JOHN PAYNE *D. Regr.*

[The following libel was exhibited by mariners, after their vessel had come into the custody of the court at the suit of salvors.]

At a Court of Admiralty holden at Boston before the Hon. George Cradock Esq. Deputy Judge of said Court Aug. ye 5, 1742.

1742. *July* 17. Simeon Clark late mate of the ship Adventure and Stephen Brown Jeoffry Poor & John Webster late mariners of the said ship exhibited a libel against Josiah Cocks late commander of the sd. Ship for wages and salvage as p. Libel on file more fully sets forth. The case was fully heard on the second of August and on the 5th of Augt. aforsd. the Judge gave ye following decree viz.

I have considered this case with all its circumstances and find that the propts. were severally shipped as set forth in the Libel and accordingly decree the Deft. to pay them their wages from the time of their shipping to their arrival in this port which was on the 7th of July last; and as to the propt. Poor who was shipped on the run, I allow him fifty five shillings Sterl. p. Month from the time of his shipping which was on the 19th of April last to the said seventh of July which is to be in full of the propts. wages & Salvage — the wages due to each of the propts. being as follows viz. — to the Propt. Clark £19 in Province Bills of the Old tenor he having received £10 advance wages; to ye Propt. Brown £15. in like bills he having received £17.; to the Propt. Webster £9. 8. 10 Sterling and to the Propt. [Poor] 83s. Sterling he having received 63s Sterl. and I order the defendant to pay to the owners what money the Propts. have received more than their wages amounted to at the time the ship was stranded and that the wages since that time be paid out of the goods and effects saved. I also decree the Deft. to pay the Costs of this Court.

GEORGE CRADOCK *Dep. Judge.*

exmnd. p. JOHN PAYNE *D. Regr.*

1740. *April* 25. Boney Norcut Mariner exhibited a libel against Henry Caswell of Boston Merchant owner of the Schooner Dolphin for wages as p. libel on file more fully sets forth the case was agreed.

Atts. JOHN PAYNE *D. Regr.*

At a Court of Admiralty holden at Boston before the Honoble. George Cradock Esq. Depy. Judge of said Court Feb. ye 5, 1742.

1742. *Oct.* 20. Thomas Oliver late Master of the Ship Dragon exhibited a petition setting forth, that on the ninth of August last, he sailed from Port Royal on the Island of Jamacia in the Ship Dragon whereof he was then Master, bound for this Port and that on the 7th Day of this Inst. Octo. ye said vessell through the violence of the winds & seas was unfortunately cast away on Scituate Beach where ye hull of the Sd. Ship now lies Bilged &c. praying that the said vessell might be surveyed & that she with her appurces. wh. ye Ptr. has savd & brot. to this port may be appraised by persons to be appointed by your Honr. for that purpose, and that they may make report to ye Court of the condition & circumstances of said vessell and that the same may be condemned if your Honr. sees just upon sd. report, and that the vessell and appurces. be sold by decree of this Court &c. The Judge ordered that a warrant issue out directed to Messers. James Stutson, Jonathan Meritt, James Merrett, Joshua Otis, & Charles Turner, or any three of them to appraise the said vessell upon oath in order to have the same sold (if it appears for the owners interest) and, that the appurces. belonging to said vessell be appraised upon oath by Mesrs. Stephen Boutineau, John Steel, & Alexandr. Chamberlain — accordingly a warrant was issued out directed to ye sd. James Stutson &c. for the purpose aforesd. who made the following return viz.

Pursuant to the within warrant we the subscribers have viewed and examined the Ship Dragon as she now lyes on Scituate Beach (and in our judgment it would be most for the owners or insurers interest to have the vessell sold) and accordingly we value the Hull of the said vessell as she now lays at the sum of one hundred and twenty five pounds old tenor.

JAMES STUTSON
JONATHAN MERITT
JAMES MERRETT.

Plymo. ss. *Scituate, Oct.* 27, 1742.

The subscribers made oath to the truth of the above return before me David Little Justice of Peace, and on the 21st Nov. 1742, the Judge gave the following interlocutory decree viz.

It appearing unto me by the report of the persons appointed to survey & appraise the Ship Dragon that it would be most for the interest of the owners or insurers to have her sold, I therefore decree that said Ship with all the appurces. & materials saved from her be sold by publick vendue by the Marshall of Court at the Royal Exchange Tavern on the 30th Currt. at 5 Oclock, P. M. the Regr. to advertise the sale in the Publick prints and that the moneys arising from the sale rest in the Register's hands until further order of Court.

George Cradock, *D. Judge.*

[Then follow the Inventory, Appraisement, order of sale, &c.]

And on the first of Jany. 1742, John Levey & Samuel Batturs, Marriners & Samuel Gore, Merchant owner of a negro man called Joseph Asken exhibited a libel against Thomas Oliver, late Commander of the Ship Dragon & against the Materials & effects of said vessell setting forth that each of the Propts. were shipped at London at the following Sterling wages viz. ye sd. John Levey as Boatswain on the 11 of May 1740, at 60s. sterling p. Mo. Batturs on ye 7th May aforsd. as Steward at 40s. p. Mo. & ye sd. George [Joseph] as Cook on ye 9th day of May aforsd. at 35s. P. Mo. that ye Propts. proceeded in said vessell and continued on board her till ye 7th of Octo. last when ye said Ship was unfortunately cast &c. praying that his Honr. the Judge would decree them their wages due to them out of the materials saved from ye sd. vessell and Salvage there being now due to ye Propt. Levey 88. 16s. Sterl. (exclusive of 5. 2s. 6d. Ster. already reed.) to ye Propt. Batturs 60. 8s. Ster. (exclusive of 3 Pounds sterling already reed.) & ye Propt. Samuel Gore for ye sd. George's [Joseph's] Services £51. 15s. (Exclusive of 3. 10s. Sterl. advand. wages) the case was heard on ye sd. Currt. and on ye 15 of Jany. aforesaid the Judge gave the following decree viz.

I have considered this Libel with the plea made by the Deft. and find that the Plts. were severally shipped as set forth in the Libel

and accordingly decree them their respective wages from the time of their shipping to ye 7th of October last deducting thereout what each of them have recd. as per the libel; & ten pounds old Tenour to each of them for salvage and order the Regr. to pay them the same out of the proceeds of the ship Dragon & appurces. now in his hands and that ye costs of this Court be also paid out of the same.

GEORGE CRADOCK *D. Judge.*

At a Court of Admiralty holden at Boston before the Honoble. Robt. Auchmuty Esq. Judge of said Court March ye 10th 1741.

Province of the Massachu'ts. Bay Court of Admiralty

Memorandum that on the 12th day of January 1741 before the Honoble Robt. Auchmuty Esq Judge of said Court came Peter Brazier Jr. Gentm. Tide surveyor of all the Rates, Duties & Impositions growing due to his Majesty at Boston within the Province aforesd. who sues as well for our Sovereign Lord the King and his Excy. Wm. Shirley Esq. Governr. of the said Province as for himself, and on behalf of his Majesty the said Govr. & himself informs this Honoble. Court that on the 14th day of Decr. last. he seized as forfeited to the use of his Majy. the said Govr. & himself, in the Port of Boston aforesaid. a certain vessell named the Brigt. Hannah of the Burthen of 120 tons or thereabouts with her tackle apparel & furniture & 7 cwt. of Junk, the property of Persons unknown for that the said Junk & sundry other commodities all of the groth, production & Manufacture of Europe, with which the said ship was laden between the first day of November last & the seizure aforesaid, were imported in the said vessell into this province from Rotterdam the particulars of which other commodities the said Peter cannot here ascertain for that the same have been clandestinely unladen from the said vessel since her arrival in this Province and concealed wh. Junk & other commodities aforesaid were not laden and Shipped on board the said vessell in Great Brittain Wales or the Town of Berwick upon Tweed. and also for that between the first day of November last & the seizure aforesaid the said vessell came into this Province & there divers Goods & Commodities were taken out of and unladen from the said vessell the particulars of which

goods and Commodities cannot be here set forth because the same were Clandestinely unladen removed and Concealed wh. Goods & Commoditys were unladen from the said vessell. before the Master or commander thereof had made known to the Govner of the said Province or to the person or officer by him thereunto authorised & appointed the aforsd. arrival of the said vessell contrary to the form of the Stat. in that Case made and provided

Wherefore the said Peter as well on behalf of his Majesy. & the said Govr. as himself prays the advisement of this Honoble. Court. upon the premies the cognizance whereof properly appertains to the same by force of the Statute aforesaid and that the aforesaid vessell with her appurces. and the Junk aforsd. seized as aforsd. may for the causes aforsd. be adjudged by this Honoble. Court. to remain forfeited to the uses aforsd. and that the said Peter may have one third part thereof pursuant to the Statute aforesaid

W. Bollan.[1]

1740 *Jany.* 12. filed & Allowed & ordered that the Brig Hannah be arrested and taken into the Marshall's custody and the master and owners cited (if they are to be found) to answer this information on the 14th currt. at 6 o'clock P. M.

Robt. Auchmuty *Judge Adv.*

Accordingly on the 14th of January aforsd. the Court was opened and the information read after which proclamation was made for all persons concerned to appear, and then Mr. Gridley appeared in Court. and claimed the vessell on behalf of Messers. Quincey's and made the following Plea viz

Edmund & Josiah Quincey owners of the aforsd. Brigt. come into Court & Say that no Commodity of the groth, production or manufacture of Europe excepting the aforsd. wt. of Junk were imported in the sd. Brigt. from Rotterdam into this Province and they say they had a right to transport the aforesaid wt. of Junk as necessary stores for the navigation of said vessell and they further say that no goods or Commoditys were taken out of or unladen from the said Brigt. as the informant above sets forth ; and pray their costs.

Jer. Gridley.

[1] Advocate General.

The Court was then adjourned at the instance of ye informer to ye 22nd. Currt. and from thence by several adjournts. to the 10th of March following by reason the witnesses could not be found and on the 6th of March Richard Barry's examination was taken in the Register's office and is as follows, viz. . . . . .

. . . . . .

And on the 10th of March aforsd. the Court was opened according to adjournment at which time Edmund & Josiah Quincey claimers of ye Brigt. Hannah were three times solemnly called to appear & answer their claim but they did not appear but made default whereupon

The Judge decreed the Brigt. Hannah with her Tackle apparel & furniture together with the Junk informed against to be forfeited and ordered the same to be appraized & sold by publick vendue and the moneys arising from such sale after the Costs of Court & other contingent charges are deducted to be distributed one third to his majesty, one other third to his Exelency the Governr. and the remaining third part to the informer and further decreed the claimants to pay the Costs of Court as shall be taxed and allowed by ye Judge

Att. JOHN PAYNE *D Regr.*

A warrant was then issued out of Court directed to Col. Hatch Capt. Bedgood & Mr. Benj. Hallowell to inventory and appraize the Brigt. Hannah & appurces. together with the Junk aforesd. and on the 15th March they made the following return, viz. . . .

. . . . . .

And on the 18th of March a warrant was issued out of Court directed to the Marshall of Court or his Deputy, Commanding him to expose the Brigt. Hannah & Appurces. together with the Junk to sale by publick vendue to the highest bidder &c upon which the Marshall made the following return, viz.

Boston 18*th March* 1741.

I have sold the Brigt. Hannah to Mr. Edmund Quincey for two Thousand & nine Pounds three shillings and one penney and the Junk for three pounds fifteen shillings P cwt. to said Quincey.

CHA. PHAXTON *Marshall.*

Boston March 19. 1741.

I find by the return of the Marshall that Mr. Edmund Quincey was the highest bidder and purchaser of the Brigt. Hannah and appurces. together with the Junk and accordingly confirm the sale he complying with the conditions thereof

GEORGE CRADOCK *Depy. Judge.*

II.

VARIOUS FORMS OF SHIPPING ARTICLES.

BOSTON SHIPPING ARTICLES, FOR TRADING VESSELS.

No ardent spirits allowed on board.

UNITED STATES OF AMERICA.

IT IS AGREED between the master and seamen, or mariners, of the of whereof is at present master, or whoever shall go for master, now bound from the port of

That, in consideration of the monthly or other wages against each respective seaman or mariner's name hereunder set, they severally shall and will perform the above-mentioned voyage: And the said master doth hereby agree with or hire the said seamen and mariners for the said voyage, at such monthly wages or prices, to be paid pursuant to this agreement, and the laws of the Congress of the United States. And they, the said seamen or mariners, do severally hereby promise and oblige themselves to do their duty, and obey the lawful commands of their officers on board the said vessel or the boats thereunto belonging, as become good and faithful seamen or mariners; and at all places where the said vessel shall put in, or anchor at, during the said voyage, to do their best endeavors for the preservation of the said vessel and cargo, and not to neglect or refuse doing their duty by day or night, nor shall go out of the said vessel on board of any other vessel, or be on shore, under any pretence whatsoever, until the above-said voyage be ended, and the said vessel be discharged of her loading, without leave first obtained of the captain or commanding officer on board; and in default thereof, he or they shall be liable to all the penalties and forfeitures mentioned in the marine law, enacted for the government and regulation of seamen in the merchants' service, in which it is enacted, "That if any seaman or mariner shall absent himself from on board the ship or vessel, without leave of the master or officer commanding on board,

and the mate, or other officer having charge of the log-book shall make an entry therein of the name of such seaman or mariner on the day on which he shall so absent himself; and if such seamen or mariner shall return to his duty within forty-eight hours, such seamen or mariner shall forfeit three days pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which are on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owner or owners of the said ship or vessel, and moreover shall be liable to pay him or them all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place." And it is further agreed, that in case of desertion, death, or impressment, the wages are to cease. And it is further agreed by both parties, that each and every lawful command which the said master or other officer shall think necessary hereafter to issue for the effectual government of the said vessel, suppressing immorality and vice of all kinds, to be strictly complied with, under the penalty of the persons disobeying, forfeiting his or their whole wages or hire, together with everything belonging to him or them on board said vessel. And it is further agreed on, that no officer or seaman belonging to the said vessel shall demand or be entitled to his wages, or any part thereof, until the arrival of the said vessel at the last above-mentioned port of discharge, and her cargo delivered. And it is hereby further agreed between the master, officer, and seamen of the said vessel, that whatever apparel, furniture, and stores each of them may receive into their charge, belonging to the said vessel, shall be accounted for on her return; and in case any thing shall be lost or damaged, through their carelessness or insufficiency, it shall be made good by such officer or seaman, by whose means it may happen, to the master and owners of the said vessel. And whereas it is customary for the officers and seamen, while the vessel is in port, or whilst the cargo is delivering, to go on shore at night to sleep, greatly to the prejudice of such vessel and freighters, be it further agreed by the said parties, that neither officer nor seaman, shall on any pretence whatever, be entitled to such indulgence, but shall do their duty by day in discharging of the cargo, and keep such watch by night as the master shall think necessary to order relative to said vessel or cargo; and whereas it frequently happens that the owner or captain incurs expenses while in a foreign port, relative to the imprisonment of one or more of his officers or crew; or in attendance of nurses, or in payment of board on shore, for the benefit of such person or persons: now, it is understood and agreed by the parties hereunto, that all such expenditures as may be incurred by reason of the foregoing premises, shall be charged to, and deducted out of, the wages of any officer, or such

one of the crew by whose means or for whose benefit the same shall have been paid. And whereas it often happens that part of the cargo is embezzled after being safely delivered into lighters, and as such losses are made good by the owners of the vessel, be it therefore agreed by these presents, that whatever officer or seaman the master shall think proper to appoint, shall take charge of her cargo in the lighters, and go with it to the lawful quay, and there deliver his charge to the vessel's husband, or his representative, to see the same safely landed: That each seaman or mariner who shall well and truly perform the above-mentioned voyage (provided always, that there be no desertion, plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores,) shall be entitled to the payment of the wages or hire that may become due to him, pursuant to this agreement, as to their names is severally affixed and set forth. Provided, nevertheless, that if any of the said crew disobey the orders of the said master or other officer of the said vessel, or absent himself at any time without liberty, his wages due at the time of such disobedience or absence, shall be forfeited; and in case such person or persons so forfeiting wages shall be reinstated or permitted to do further duty, it shall not do away such forfeiture. It being understood and agreed by the said parties, that parol proof of the misconduct, absence, or desertion of any officer, or any of the crew of said vessel, may be given in evidence at any trial between the parties to this contract, any act, law, or usage to the contrary thereof notwithstanding. That for the due performance of each and every of the above-mentioned articles and agreements, and acknowledgment of their being voluntary, and without compulsion, or any other clandestine means being used, agreed to, and signed by us.

In testimony whereof, we have, each and every of us, hereunto affixed our hands, the month and day against our names, as hereunder written. And it is hereby understood, and mutually agreed, by and between the parties aforesaid, that they will render themselves on board the said vessel on or before the day of at o'clock in the noon.

Date of Entry.	Time came on board.	Names.	Place of Residence.	Ratings.	Witness to Signing.	Wages per Month.	Time of Service, Months.	Days.	Whole amount of Wages.	Advanced Wages.	Wages due.	We, who have subscribed our names in this column, do promise that the man who has engaged for this present voyage, and signed his name in the third column of the same line, shall proceed on the said voyage outside of Boston lights, agreeably to the shipping papers, or refund the advance money with like amount, according to act of Congress, to on demand.

[The following is endorsed on the back of the articles.]

We, the undersigned, late mariners on board the on her late voyage described on the other side of this instrument, and now performed to this place of payment, DO HEREBY, EACH ONE FOR OURSELVES, with our signatures and seals, acknowledge to have received of agent or owner of said the full sum hereunder set against our respective names. It being in full for our services, as wages, on board of said vessel, and in consideration whereof, and particularly the further sum of to each of us paid, we have released, and do hereby release and discharge for ever, the master, officers and owners of said vessel, and each of them, of and from all suits, claims and demands, for ASSAULT AND BATTERY OR IMPRISONMENT, and every other matter and thing, of whatever name or nature against said master, owners and officers, to the day and date hereunder also set against our names.

Names.	Amount.	Amount in writing.	Place and date of payment.	Signatures and Seals.	Witness to signing.

PHILADELPHIA SHIPPING ARTICLES FOR TRADING VESSELS.

UNITED STATES OF AMERICA.

IT IS AGREED, between the master, seamen or mariners of the whereof is at present master, or whoever shall go for master, now bound from the port of to

That, in consideration of the monthly or other wages against each respective seaman or mariner's name hereunto set, they severally shall and will perform the abovementioned voyage: and the said master doth hereby agree with and hire the said seamen or mariners for the said voyage, at such monthly wages or prices, to be paid pursuant to this agreement, and the laws of the Congress of the United States of America, and the custom and usage of the port of And they, the said seamen or mariners, do severally hereby promise and oblige themselves to do their duty, and obey the lawful commands of their officers on board the said vessel, or the boats thereunto belonging, as become good and faithful seamen or mariners; and at all places where the said vessel shall put in, or anchor at, during the said voyage, to do their best endeavors for the preservation of the said vessel and cargo, and not to neglect or refuse doing their duty by day or night, nor shall go out of the said vessel, on board any other ves-

sel, or be on shore under any pretence whatsoever, until the above said voyage be ended, and the said vessel be discharged of her loading, without leave first obtained of the captain or commanding officer on board; that in default thereof, they will be liable to all the penalties and forfeitures mentioned in the marine law, enacted for the government and regulation of seamen in the merchants' service, in which it is enacted, "that if any seaman or mariner shall absent himself from on board the ship or vessel, without leave of the master or officer commanding on board, and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner on the day on which he shall so absent himself; and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages: but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all wages due to him, and all his goods and chattels, which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owner or owners of the said ship or vessel; and moreover shall be liable to pay him or them all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place." And it is further agreed, that in case of capture, death, or impressment, the wages are to cease. And it is further agreed by both parties, that each and every lawful command which the said master shall think necessary hereafter to issue for the effectual government of the said vessel, suppressing immorality and vice of all kinds, to be strictly complied with, under the penalty of the person or persons disobeying, forfeiting his or their whole wages or hire, together with everything belonging to him or them on board said vessel. And it is further agreed on, that no officer or seaman belonging to the said vessel, shall demand or be entitled to his wages or any part thereof, until the arrival of the said vessel at the above-mentioned port of discharge, and her cargo delivered. And it is hereby further agreed between the master and officers of the said vessel, that whatever apparel, furniture, and stores, each of them may receive into their charge, belonging to the said vessel, shall be accounted for on her return; and in case any thing shall be lost or damaged, through their carelessness or insufficiency, it shall be made good by such officer or seaman by whose means it may happen, to the master and owners of the said vessel. And whereas it is customary for the said officers and seamen, on the vessel's return home, in the harbor, and whilst the cargo is delivering, to go on shore each night to sleep, greatly to the prejudice of such vessel and freighters, be it further agreed by the ship parties, that neither officer nor seaman shall, on any pretence whatever, be entitled to such indulgence, but shall do their

duty by day in discharge of the cargo, and keep such watch by night as the master shall think necessary to order for the preservation of the above. And whereas it often happens that part of the cargo is embezzled after being safely delivered into lighters, and as such losses are made good by the owners of the vessel, be it therefore agreed by these presents, that whatever officer or seaman the master shall think proper to appoint, shall take charge of her cargo in the lighters, and go with it to the lawful quay, and there deliver his charge to the vessel's husband, or his representative, to see the same safely landed: that each seaman or mariner who shall well and truly perform the abovementioned voyage, (provided always that there be no plunderage, embezzlement, or other unlawful acts committed on the said vessel's cargo or stores,) shall be entitled to the payment of the wages or hire that may become due to him, pursuant to this agreement, as to their names is severally affixed and set forth. Provided, nevertheless, that if any of said crew disobey the orders of the said master or other officer of the said vessel, or absent himself at any time without liberty, his wages due at the time of such disobedience or absence, shall be forfeited, and in case such person or persons so forfeiting wages shall be reinstated or permitted to do further duty, it shall not do away such forfeiture. That for the due performance of each and every of the abovementioned articles and agreements, and acknowledgment of their being voluntary, and without compulsion, or any other clandestine means being used, agreed to and signed by us. In testimony whereof, we have each and every of us under affixed our hands, month and day against our names as hereunto written. And it is hereby understood and mutually agreed, by and between the parties aforesaid, that they will render themselves on board the said on or before the day of at o'clock in the noon

Seamen's Names.	Stations.	Time of Entry.		Day and hour when they are to render themselves on board.				Wages for the voyage or month.		Wages advanced.		Names of Sureties.	Places of abode of the Sureties.	
		Month.	Day.	Month.	Day.	Hour A. M.	Hour P. M.	Dollars.	Cents.	Dollars.	Cents.		Street.	No.

We, the undersigned, late mariners on board the on her late voyage described on the other side of this instrument, and now performed to this place of payment, DO HEREBY, EACH ONE FOR OURSELVES, with our signatures, acknowledge to have received of agent or owner of said the full sum hereunder set against our names; it being in full amount of our wages for our services,

and of all demands for ASSAULT AND BATTERY OR IMPRISONMENT, and of whatever name or nature against said her owners and officers, to the day and date hereunder also set against our names.

Note. A consideration must be given for a discharge for assault and battery, and this receipt understood by the signers.

Names.	Amount.	Amount in writing.	Place and date of payment.	Signatures.	Witness to signing.

ARTICLES USED IN THE COD FISHERIES OF THE NEW ENGLAND STATES.

IT IS HEREBY AGREED between the master or skipper of the fishing schooner of the burthen of tons, and feet, and the fishermen thereof, now bound from , on a fishing voyage . That, in consideration of the said master or skipper, and fishermen being entitled to *five eighth parts* of the FISH which may be caught on board said schooner during their service on board the same, and also to *five eighth parts* of the MONEY which by law is allowed to said schooner during the same term, after deducting the general supplies and other supplies, according to the usage and custom of they severally shall and will perform their duty on board the schooner aforesaid, during the term for which they herein engage: And the said master or skipper doth hereby agree with and hire the said fishermen, agreeably to the terms aforesaid, for and during the fishing season ending the last day of November next, and until the voyage or voyages of said season shall be completed. And the said fishermen oblige themselves faithfully to perform their duty on board said schooner during said season; and in all things, and at all times, to fulfil the lawful commands of said master or skipper. And the said master or skipper, and the said fishermen, mutually hold themselves bounden by the rules, orders and regulations set forth in an Act of Congress for the regulation and government of fishermen, in which it is enacted,

"That if any Fisherman, having engaged himself for a voyage or fishing season, in any fishing vessel, and signed an agreement therefor as aforesaid, shall thereafter, and while such agreement remains in force, and to be performed, desert or absent himself from such vessel, without leave of the master or skipper thereof, or of the owner or his agent, such deserter shall be liable to the same penalties as deserting seamen and mariners are subject to in the merchants' service, and may in like manner, and upon the

like complaint and proof, be apprehended and detained; and all costs of process and commitment, if paid by the master or owner, shall be deducted out of the share of fish, or proceeds of any fishing voyage, to which such deserter had or shall become entitled. And any fisherman having engaged himself as aforesaid, who shall, during said fishing voyage, refuse or neglect his proper duty on board the fishing vessel, being thereto ordered or required by the master or skipper thereof, or shall otherwise resist his just commands, to the hindrance or detriment of such voyage, beside being answerable for all the damage arising thereby, shall forfeit to the use of the owner of such vessel his share of the allowance which shall be paid upon such voyage, as is herein granted."

And it is further agreed, in conformity to said act, that the *five eighths* of all the fish taken as aforesaid, and which shall accrue to the master or skipper, and fishermen, according to the foregoing terms, shall be divided among them in proportion to the quantities or number of said fish they may respectively have caught; and that the *five eighths* of the money allowed by law to said schooner, accruing to said master or skipper, and the fishermen, according to the terms aforesaid, shall be divided among them in such proportions as the fish they shall respectively have taken, may bear to the whole quantity of fish taken on board said schooner during said season.

For the due performance of each and all the above articles and agreements, and in witness of their being freely and voluntarily entered into, we have hereunto severally affixed our hands, the month and day against our names respectively affixed, and in the year of our Lord one thousand eight hundred and

Time agreed to enter on board for duty.	Men's names.	Quality.	Where born.	Witnesses to signing.

ACCOUNT OF THE FISHING FARES OF THE WITHIN NAMED VESSEL.

Fares.	Days on which the vessel sailed.	Days on which the vessel returned.	Time actually employed at sea.		Tons.	Quintals of Fish.
	18	18	MONTHS.	DAYS.		
1st,						
2d,						
3d,						
4th,						
5th,						
6th,						
7th,						
8th,						
9th,						
10th,						
11th,						
12th,						

I do solemnly swear, that the paper now by me produced, is the original agreement made the day of 18 between the owner and fishermen of the schooner skipper; and that the above is a true statement of the days on which the schooner sailed and returned; and that said schooner and crew have been actually employed four months of the preceding fishing season solely in the Bank and Cod Fisheries.

COLLECTOR'S OFFICE — DISTRICT OF

Sworn this day of 18

Collector.

WHALEMEN'S SHIPPING PAPER USED IN THE PORT OF NEW BEDFORD.

1st. IT IS AGREED between the owner , master, seamen and mariners, of the now bound from the port of That in consideration of the share against each respective seaman or mariner's name hereunder set, they severally shall and will perform the above-mentioned voyage; and the said owner and master, do hereby agree with, and hire the said seamen or mariners for the said voyage, at such shares of the net proceeds, or of the actual products of the voyage, to be paid pursuant to this agreement, and the custom and usage in the port of

2d. And they, the said seamen and mariners, do severally hereby promise and oblige themselves to do their duty, and obey the lawful commands of the officers on board said or the boats thereunto belonging, as become good and faithful seamen or mariners, while cruising for whales, and at all places where the said shall put in, or anchor at, during the said voyage; — to use their best endeavors to obtain a cargo of oil; — and for the preservation of the said vessel and cargo; — and not to neglect or refuse doing their duty by day or night; — and that they shall not go out of said on board any other vessel, or be on shore, under any pretence whatsoever, until the aforesaid voyage be ended, and the vessel discharged of her loading, without leave first obtained of the captain, or commanding officer on board; that in default thereof, he or they shall be liable to all the penalties and forfeitures mentioned in the Marine Law, enacted for the Government and Regulation of Seamen in the Merchants' Service; it being understood that said forfeiture shall be estimated according to his or their respective shares of the net proceeds of the voyage, and the length of the same conjointly.

3d. And it is further agreed by all the parties to this contract, that such regulations as a just regard to the good order, effectual government, health and moral habits of the officers and men shall be established and observed on board the said vessel. And to ensure proper attention to this important object, it shall be the duty of the officer having the care of the log book, to note therein daily all flagrant breaches of the same. It shall especially be his duty to record all instances of drunkenness, all cases of absence from the said by any officer or seaman with or without permission after sunset, or beyond the time prescribed for their absence, — every instance of absence, by any officer or seaman through the night, whether on shore or on board of any other vessel, — every instance of the introduction of any woman or women into the ship for licentious purposes, — every instance of disability for the performance of ship's duty, which may occur, with the cause of it, — if occasioned by sickness or infirmity, the nature and origin of the same, if known, to be particularly stated, especially if it be the consequence of their own misconduct. And in case of the officer who may usually have charge of the log book being implicated in any of the misdemeanors or disabilities herein mentioned, it shall be the duty of the master to make, or cause to be made by another hand, an entry of the same on the log book. And it shall be the duty of the master to see that a proper record is kept therein of all the matters mentioned in this article according to its true intent and meaning.

4th. The officer having charge of the watch on deck for the time being, shall be responsible for the maintenance of the regulation in regard to the admission of women — and in case of any getting on board unperceived, they shall forthwith be expelled by him, or if not able to do so, the case shall be immediately reported to the captain or commanding officer on board, whose duty it shall be to enforce their immediate expulsion. On the failure of any officer in this part of his duty, either wilfully or through negligence, each and every officer so failing, shall forfeit twenty days pay for every such offence, and any other officer or seaman who shall abet any breach of the said regulation — or refuse when lawfully called upon to aid in sustaining it, or shall be proved to have had a criminal intercourse with any such woman or women on board, shall forfeit for each such offence, five days pay — for every instance of drunkenness two days pay shall be forfeited, and a similar forfeiture shall take place for each day that any seaman or officer shall be off duty from sickness or disability caused by intemperance or licentiousness — the forfeitures in all these cases to be estimated as in the second article, and to go to the use of the owners of said

5th. All expenses which may be necessarily incurred during the voyage with direct reference to any of the misdemeanors or disabilities enumerated

in the third article — or to any attempt at desertion or other disobedient or mutinous conduct, shall be charged to the individual or individuals by reason of whom they may have been incurred.

6th. It is further agreed that if any officer or seaman, after a fair trial, if his abilities and disposition shall be judged by the master incompetent or indisposed to the proper discharge of the duties of his station, the master shall have the right to displace him and substitute another in his stead, — a corresponding reduction of the lay of such officer or seaman with reference to the duty which he may afterwards perform, thenceforth to take effect; and a reasonable increase of the lay of the individual who may thereupon be promoted to a higher station, shall be made on the final adjustment of the voyage.

7th. It is understood and agreed that if any officer or seaman shall be prevented by sickness or death from performing the voyage, his legal representatives shall be entitled to such part of the whole amount of his stipulated share, as the time of his services on board shall be of the whole term of the voyage.

8th. It is further agreed that whatever apparel, furniture, or stores belonging to the said vessel, may be given in charge by the master to any officer or seaman, shall be accounted for by him, and in case any thing shall be lost or damaged through his carelessness or neglect, it shall be made good to the owners, by such officer or seaman. And whatever officer or seaman the master shall appoint for the duty, shall take charge of any portion of the cargo or ship's stores required to be landed or brought on board in any boats or lighter, and faithfully perform the service assigned, and see that the said cargo or stores are safely landed and delivered, or brought on board the said vessel as the case may be.

9th. Each and every officer and seaman, who shall well and truly have performed the above mentioned voyage, complied with the regulations and duties herein specified, and committed no dishonest or unlawful acts, shall be entitled to the payment of his share of the net proceeds of the voyage pursuant to this agreement, as soon after the return of the said to as the oil and other products of the voyage can be sold and the settlement adjusted by the owner or agent of the said

10th. In testimony of our assent, consent and agreement faithfully to perform the various duties and obligations implied in the preceding articles, and in acknowledgment of their being voluntary, and without any compulsory or clandestine means being used, we have, each and every of us, severally, hereunto affixed our names, on the day and year against them respectively written. And it is hereby understood, and mutually agreed, by and between the parties aforesaid, that they the seamen and mariners will

render themselves on board the said vessel on or before the day of at o'clock in the noon.

☞ No distilled spirituous liquor will be put on board this vessel by the owner, except for strictly medical use: — and by their signatures the other parties to this contract *pledge* themselves not to take any of these articles with them as their private stores, or for traffic, either from this port or any other port or place, where they may be, during the voyage. And in case of a violation of this *pledge* by the master or any officer or seaman, his entire share of the voyage shall be thereupon forfeited to the use of the owners of the said

Time of Entry.	Names.	Quality.	Witness to Signing.	Shares.

NOTES ON THE WHALE FISHERY.[1]

1. The master has a *lien* upon the lay of a sailor for necessaries, &c., advanced to him. See *Barrey* v. *Coffin*, 3 Pick. R. 115.

2. If a seaman should die during the voyage, the vessel having procured a quantity of oil before his death, and the ship should afterwards be totally lost, quære, whether his representatives could recover his wages according to the above named articles in the shipping paper? See American Jurist, vol. x, p. 260, and Hall's American Law Journal, 359.

3. *Mateship.* See the custom explained, and the law in relation to it stated in the following cases. *Baxter* v. *Rodman*, 3 Pick. R. 435; *Grazier* v. *Atwood*, 4 Ibid. 234. The contract of mateship, which was once rather common in the whale fishery, is now rarely entered into.

4. The rule with regard to the occupancy of these animals "feræ naturæ," is believed to be somewhat different from the rule of the common law in regard to land animals. The whaling craft of every vessel is marked, harpoons, lances, &c. When a whale has been *actually killed*, and other game is in sight, or it is inconvenient for any other reason to take him on board, it is usual for the captors to fasten a "*waif*," (marked iron) into the body and leave it. Many days may elapse before the animal is recovered. And if, in the meantime, another ship should fall in with it, and the waif is still adhering to the body, the right of property is considered

[1] The author is indebted for these notes to a learned friend, H. G. O. Colby, Esq. of New Bedford.

as remaining in the original captors, and is strictly respected. If it were violated, trover would undoubtedly lie. When a number of vessels are engaged in pursuit of the same whale, and a boat's crew succeeds in making fast to it, no crew from any other vessel have any right to attack the whale. But should the harpoons of the first draw, and the boat become detached, they then have a right to renew the chase equally with the others. See Cooper's Justinian, Note, page 457, as to land animals.

5. In the settlement of the voyage, at its termination, the following charges are usually made against the whole quantity of catchings of every description.

Pilotage to and from sea, and to wharf, say $50.

Wharfage, bbs. oil, bone, &c.

Guaging.

Cooperage.

Scales to weigh whale bone.

Cartage and storage of whale bone.

Filling up and pumping off cargo.

Commission, 2 1-2 per cent on the sum total.

The net proceeds are then divided amongst the officers and men, according to the lay agreed upon. The ship's agent makes up the voyage at the current price of oil and bone at the time of the arrival of the ship, and pays off the men in money.

6. It has been questioned whether the provisions of the act of July 20, 1790, "For the government and regulation of seamen in the merchant service," in reference to deserting seamen, apply to seamen engaged in the whale fishery. The statute has, however, been always acted upon in the port of New Bedford, as applying to seamen engaged in the whale fishery, that is to say, warrants are issued against seamen after they have signed the shipping paper, and before the sailing of the same, for their arrest, and they have been put on board by virtue of them, but we are not aware of any judicial decision upon the question.

WHALEMEN'S SHIPPING PAPER USED IN THE PORT OF NANTUCKET.

It is agreed between the owners, master, seamen and mariners of the of , master, now bound on a whaling voyage to the Pacific Ocean. That in consideration of the shares affixed to our names, we, the said seamen and mariners, will perform a whaling voyage from Nantucket and return to Nantucket, promising hereby to obey the lawful

commands of the said master, or the other officers of said ship, and faithfully to do and perform the duty of seamen, as required by the said master, by night or by day, on board the said ship or in her boats; and on no account or pretence whatever to go on shore without leave first obtained from the master or commanding officer of the said ship: hereby engaging, that forty-eight hours absence, without such leave, shall be deemed a total desertion. And in case of disobedience, neglect, pillage, embezzlement, or desertion, the said mariners do forfeit their shares, together with all their goods, chattels, &c. on board the said ship: hereby for themselves, heirs, executors and administrators, renouncing all right and title to the same. And the owners of said ship hereby promise, upon the above conditions, to pay the shares of net proceeds of all that shall be obtained during the said voyage, agreeably to the shares set against the names of seamen and mariners of the [*ship's name*,] as soon after the return of said ship to Nantucket as the oil, or whatever else may be obtained, can be sold, and the voyage made up by the owners of said ship ————.

It is further agreed between the owners of said ship on the one part, and the captain, officers, and crew, on the other part, that if the captain, officers, and crew, or either of them, is prevented by sickness or death from performing said voyage in said ship, that he or they so falling short, shall receive of his lay or share in proportion as the time served on board, is to the whole time said ship is performing her voyage.

It will be seen that, though this paper provides for the case of a mariner who dies, or becomes disabled by sickness, during the voyage, it does not provide expressly for the case of one who ships in place of the person so dying or disabled. A case was tried in the Supreme Court of Massachusetts, (Bristol, in 1840, *Shaw* v. *Mitchell*,) in which this question arose, but the case went off upon another point. The following extracts are made, however, from two depositions which were used in the case, and which were admitted to state the custom truly:

"I have been in the habit of settling whaling voyages, since the year 1830, in which business my duty has been to receive the cargo at the wharf, ascertain the contents, and apportion to the crew and owners respectively their shares, according to their several demands and established usage. These are uniformly the duties of agents for settling voyages at Nantucket. When a mariner has not served on board a whaler during the whole voyage, having left by reason of sickness or by mutual consent, the usage is, to pay such man, in proportion as the time during which they serve, bears to the entire duration of the voyage."

"I have been in the habit of settling whale voyages for the last sixteen years as a general agent, taking into possession the whole cargoes as they arrive, making distributions of the same among the owners and crew, according to their several interests. It is the uniform practice, where seamen serve but part of the voyage, to ascertain the time they did serve, from the shipping paper, or other proper documents, and to settle with them in the same manner as is expressed by the shipping paper in relation to persons leaving a ship in consequence of sickness or death, unless there should exist a special contract or written agreement to the contrary."

BRITISH SHIPPING ARTICLES FOR TRADING VESSELS, REQUIRED BY THE ACT 5 & 6 WILLIAM IV, CH. 19.

An agreement made, pursuant to the directions of an act of Parliament, passed in the sixth year of the reign of His Majesty King William the Fourth, between the master of the ship , of the port of , and of the burthen of tons, and the several persons whose names are subscribed hereto.

It is agreed by and on the part of the said persons, and they severally hereby engage, to serve on board the said ship in the several capacities against their respective names expressed, on a voyage from the port of , to [*here the intended voyage is to be described as nearly as can be done, and the places at which it is intended the ship shall touch, or if that cannot be done, the nature of the voyage in which she is to be employed,*] and back to the port of , and the said crew further engage to conduct themselves in an orderly, faithful, honest, careful, and sober manner, and to be at all times diligent in their respective duties and stations, and to be obedient to the lawful commands of the master in every thing relating to the said ship, and the materials, stores, and cargo thereof whether on board such ship, in boats, or on shore [*here may be inserted any other clauses which the parties may think proper to be introduced into the agreement, provided that the same be not contrary to or inconsistent with the provisions and spirit of this act.*] In consideration of which services to be duly, honestly, carefully, and faithfully performed, the said master doth hereby promise and agree to pay to the said crew, by way of compensation or wages, the amount against their names respectively expressed. In witness whereof the said parties have hereto subscribed their names on the days against their respective signatures mentioned.

Place and Time of Entry.			Men's Names.	Age.	Place of Birth.	Quality.	Amount of wages per calendar month, share or voyage.	Witness to Signature.	Name of ship in which the seaman last served.
Day.	Month.	Year.							

NOTE. — Any embezzlement or wilful or negligent loss or destruction of any part of the ship's cargo or stores may be made good to the owner out of the wages (so far as they will extend) of the seaman guilty of the same; and if any seaman shall enter himself as qualified for a duty to which he shall prove to be not competent, he will be subject to a reduction of the rate of wages hereby agreed for in proportion to his incompetency.

BRITISH SHIPPING ARTICLES FOR THE FISHERIES, &C., REQUIRED BY THE SAME ACT.

An agreement made, pursuant to the directions of an act of Parliament passed in the sixth year of the reign of His Majesty King William the Fourth, between the master of the ship , of the port of , and of the burthen of tons, and the several persons whose names are subscribed hereto.

It is agreed by and on the part of the said persons, and they severally hereby engage, to serve on board the said ship in the said several capacities against their respective names expressed, which ship is to be employed in [*here the nature of the ship's employment is to be described, whether in the fisheries, on the coast, or in trading from one port in the United Kingdom to another, or to any of the islands of Jersey, Guernsey, Alderney, Sark, and Man, or to any port on the continent of Europe, between the river Elbe inclusive and Brest;*] and the said crew further engage to conduct themselves in an orderly, faithful, honest, careful, and sober manner, and to be at all times diligent in their respective duties and stations, and to be obedient to the lawful commands of the master in every thing relating to the said ship, and the materials, stores, and cargo thereof, whether on board such ship, in boats, or on shore [*here may be inserted any other clauses which the parties may think proper to be introduced into the agreement, provided that the same be not contrary to or inconsistent with the provisions and spirit of this act.*] In consideration of which services, to be duly, honestly, carefully, and faithfully performed, the said master doth hereby promise to pay to the said

crew, by way of compensation or wages, the amount against their names respectively expressed: provided always, and it is hereby declared, that no seaman shall be entitled to his discharge from the ship during any voyage in which she may be engaged, nor at any other than a port in the United Kingdom. In witness whereof the said parties have hereto subscribed their names on the days against their respective signatures mentioned.

Place and Time of Entry.			Men's Names.	Age.	Place of Birth.	Quality.	Amount of wages per calendar month, share or voyage.	Witness to Signature.	Name of ship in which the seaman last served.
Day.	Month.	Year.							

NOTE.—Any embezzlement or wilful or negligent loss or destruction of any part of the ship's cargo or stores may be made good to the owner out of the wages (so far as they will extend) of the seamen guilty of the same; and if any seaman shall enter himself as qualified for a duty to which he shall prove to be not competent, he will be subject to a reduction of the rate of wages hereby agreed for in proportion to his incompetency.

III.

STATUTES OF THE UNITED STATES.

20*th July*, 1790.

CHAP. 56. [29.] An act for the government and regulation of seamen in the merchant's service.

§ 1. *Be it enacted, &c.* That from and after the first day of December next, every master or commander of any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel, shall carry out any seaman or

mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seamen and mariners, such master or commander shall pay to every such seaman or mariner, the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping: *Provided* such seaman or mariner shall perform such voyage: or if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall, moreover, forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States: and such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures, contained in this act.

§ 2. That at the foot of every such contract there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall so ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall, on the day on which such neglect happened, make an entry in the logbook of such ship or vessel, of the name of such seaman or mariner, and shall, in like manner, note the time that he so neglected to render himself, (after the time appointed,) every other seaman or mariner shall forfeit, for every hour which he shall so neglect to render himself, one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner, or consignee, of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any court, or before any justice or justices of any state, city, town, or county, within the United States, which, by the laws thereof, have cognizance

of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage.

§ 3. That if the mate, or first officer under the master, and a majority of the crew of any ship or vessel, bound on a voyage to any foreign port, shall, after the voyage is begun, (and before the ship or vessel shall have left the land,) discover that the said ship or vessel is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores, to proceed on the intended voyage, and shall require such unfitness to be inquired into, the master or commander shall, upon the request of the said mate (or other officer) and such majority, forthwith proceed to or stop at the nearest and most convenient port or place where such inquiry can be made, and shall there apply to the judge of the district court, if he shall there reside, or if not, to some justice of the peace of the city, town, or place, taking with him two or more of the said crew, who shall have made such request; and thereupon such judge or justice is hereby authorized and required to issue his precept, directed to three persons in the neighborhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same, in respect to the defects and insufficiencies complained of, and to make report to him, the said judge or justice, in writing, under their hands, or the hands of two of them, whether in any, or in what, respect the said ship or vessel is unfit to proceed on the intended voyage, and what addition of men, provisions, or stores, or what repairs or alterations in the body, tackle, or apparel, will be necessary; and upon such report, the said judge or justice shall adjudge and determine, and shall endorse on the said report his judgment, whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made, or deficiencies supplied, where the ship or vessel then lays, or whether it be necessary for the said ship or vessel to return to the port from whence she first sailed, to be there refitted; and the master and crew shall in all things conform to the said judgment; and the master or commander shall, in the first instance, pay all the costs of such view, report, and judgment, to be taxed and allowed on a fair copy thereof, certified by the said judge or justice. But if the complaint of the said crew shall appear, upon the said report and

judgment, to have been without foundation, then the said master, or the owner or consignee of such ship or vessel, shall deduct the amount thereof, and of reasonable damages for the detention (to be ascertained by the said judge or justice) out of the wages growing due to the complaining seamen or mariners. And if, after such judgment, such ship or vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs, or alterations, as may be directed, the said seamen or mariners, or either of them, shall refuse to proceed on the voyage, it shall and may be lawful for any justice of the peace to commit, by warrant under his hand and seal, every such seaman or mariner (who shall so refuse) to the common jail of the county, there to remain without bail or mainprise, until he shall have paid double the sum advanced to him at the time of subscribing the contract for the voyage, together with such reasonable costs as shall be allowed by the said justice, and inserted in the said warrant, and the surety or sureties of such seaman or mariner (in case he or they shall have given any) shall remain liable for such payment; nor shall any such seaman or mariner be discharged upon any writ of habeas corpus, or otherwise, until such sum be paid by him or them, or his or their surety or sureties, for want of any form of commitment or other previous proceedings. *Provided*, that sufficient matter shall be made to appear, upon the return of such habeas corpus and an examination then to be had, to detain him for the causes hereinbefore assigned.

§ 4. That if any person shall harbor, or secrete, any seaman or mariner, belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof, before any court in the city, town or county, where he, she, or they, may reside, shall forfeit and pay ten dollars for every day which he, she, or they, shall continue so to harbor or secrete such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and no sum exceeding one dollar, shall be recoverable from any seaman or mariner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage, for which such seaman or mariner engaged, shall be ended.

§ 5. That if any seaman or mariner who shall have subscribed such contract as is hereinbefore described, shall absent himself from

on board the ship or vessel, in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the logbook, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages: but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them, all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place; and such damages shall be recovered with costs, in any court, or before any justice or justices, having jurisdiction of the recovery of debts to the value of ten dollars, or upwards.

§ 6. That every seaman or mariner shall be entitled to demand and receive, from the master or commander of the ship or vessel to which they belong, one third part of the wages which shall be due to him, at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract: and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract: and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners, touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then, for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackle, furniture, and apparel, according to the course of admiralty courts, to answer for the said wages: and if the master shall neglect to appear, or appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute

shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used; and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and logbook, if required, to ascertain any matters in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law, for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast.

§ 7. That if any seaman or mariner, who shall have signed a contract to perform a voyage, shall, at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of peace within the United States (upon the complaint of the master) to issue his warrant to apprehend such deserter and bring him before such justice; and if it shall then appear, by due proof, that he has signed a contract within the intent and meaning of this act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction, or common jail of the city, town, or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner.

§ 8. That every ship or vessel, belonging to a citizen or citizens of the United States, of the burthen of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once, at least, in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner.

§ 9. That every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores, and live stock, as shall, by the master or passengers, be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance in water, flesh, or bread, during the voyage, the master or owner of such ship or vessel shall pay, to each of the crew, one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages. [*Approved, July* 20, 1790.]

28th May, 1796.

Chap. [36.] An act for the relief and protection of American seamen.

§ 4. That the collector of every district shall keep a book or books, in which, at the request of any seaman, being a citizen of

the United States of America, and producing proof of his citizenship, authenticated in the manner hereinafter directed, he shall enter the name of such seaman, and shall deliver to him a certificate, in the following form, that is to say: "I. A. B., collector of the district of D, do hereby certify that E F, an American seaman, aged years, or thereabouts, of the height of feet inches, [describing the said seaman as particularly as may be] has, this day, produced to me proof, in the manner directed in the act, entitled 'An act for the relief and protection of American seamen;' and, pursuant to the said act, I do hereby certify, that the said E F is a citizen of the United States of America: in witness whereof I have hereunto set my hand and seal of office, this day of ." And it shall be the duty of the collectors aforesaid, to file and preserve the proofs of citizenship, produced as aforesaid: and for each certificate delivered, as aforesaid, the said collecter shall be entitled to receive, from the seaman applying for the same, the sum of twenty-five cents.

§ 5. And, in order that full and speedy information may be obtained of the seizure or detention, by any foreign power, of any seamen employed on board any ship or vessel of the United States, *Be it further enacted*, that it shall, and hereby is declared to be the duty of the master of every ship or vessel of the United States, any of the crew whereof shall have been impressed or detained by any foreign power, at the first port at which such ship or vessel shall arrive, if such impressment or detention happened on the high seas, or if the same happened within any foreign port, then in the port in which the same happened, immediately to make a protest, stating the manner of such impressment or detention; by whom made, together with the name and place of residence of the person impressed or detained; distinguishing, also, whether he was an American citizen; and if not, to what nation he belonged. And it shall be the duty of such master, to transmit by post, or otherwise, every such protest made in a foreign country, to the nearest consul or agent, or to the minister of the United States resident in such country, if any such there be; preserving a duplicate of such protest, to be by him sent, immediately after his arrival within the United States, to the secretary of state, together with information to whom the original protest was transmitted: and in case such protest shall be made within

the United States, or in any foreign country, in which no consul, agent or minister, of the United States resides, the same shall, as soon thereafter as practicable, be transmitted, by such master, by post or otherwise, to the secretary of state.

§ 6. That a copy of this law be transmitted, by the secretary of state, to each of the ministers and consuls of the United States resident in foreign countries, and, by the secretary of the treasury, to the several collectors of the districts of the United States, whose duty it is hereby declared to be, from time to time, to make known the provisions of this law to all masters of ships and vessels of the United States entering or clearing at their several offices. And the master of every such ship or vessel shall, before he is admitted to an entry, by any such collector, be required to declare on oath, whether any of the crew of the ship or vessel under his command have been impressed or detained, in the course of his voyage, and how far he has complied with the directions of this act: and every such master as shall wilfully neglect or refuse to make the declarations herein required, or to perform the duties enjoined by this act, shall forfeit and pay the sum of one hundred dollars. And it is hereby declared to be the duty of every such collector, to prosecute for any forfeiture that may be incurred under this act.

§ 7. That the collector of every port of entry in the United States shall send a list of the seamen registered under this act, once every three months, to the secretary of state, together with an account of such impressments or detentions as shall appear by the protests of the masters to have taken place. [*Approved, May* 28, 1796.]

16*th July*, 1798.

Chap. [94.] An act for the relief of sick and disabled seamen.

§ 1. *Be it enacted, &c.* That from and after the first day of September next, the master or owner of every ship or vessel of the United States, arriving from a foreign port into any port of the United States, shall, before such ship or vessel shall be admitted to an entry, render to the collector a true account of the number of seamen that shall have been employed on board such vessel since she was last entered at any port in the United States, and shall pay, to

the said collector, at the rate of twenty cents per month for every seaman so employed; which sum he is hereby authorized to retain out of the wages of such seamen.

§ 2. That from and after the first day of September next, no collector shall grant to any ship or vessel whose enrollment or license for carrying on the coasting trade has expired, a new enrollment or license, before the master of such ship or vessel shall first render a true account to the collector, of the number of seamen, and the time they have severally been employed on board such ship or vessel, during the continuance of the license which has so expired, and pay to such collector twenty cents per month for every month such seamen have been severally employed as aforesaid; which sum the said master is hereby authorized to retain out of the wages of such seamen. And if any such master shall render a false account of the number of men, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay one hundred dollars.

§ 3. That it shall be the duty of the several collectors to make a quarterly return of the sums collected by them, respectively, by virtue of this act, to the secretary of the treasury; and the president of the United States is hereby authorized, out of the same, to provide for the temporary relief and maintenance of sick, or disabled seamen, in the hospitals or other proper institutions now established in the several ports of the United States, or in ports where no such institutions exist, then in such other manner as he shall direct: *Provided*, that the moneys collected in any one district, shall be expended within the same.

§ 4. That if any surplus shall remain of the moneys to be collected by virtue of this act, after defraying the expense of such temporary relief and support, that the same, together with such private donations as may be made for that purpose, (which the president is hereby authorized to receive,) shall be invested in the stock of the United States, under the direction of the president; and when, in his opinion, a sufficient fund shall be accumulated, he is hereby authorized to purchase or receive cessions or donations of ground or buildings, in the name of the United States, and to cause buildings, when necessary, to be erected as hospitals for the accommodation of sick and disabled seamen.

§ 5. That the president of the United States be, and he is hereby, authorized to nominate and appoint, in such ports of the United States as he may think proper, one or more persons, to be called directors of the marine hospital of the United States, whose duty it shall be to direct the expenditure of the fund assigned for their respective ports, according to the third section of this act; to provide for the accommodation of sick and disabled seamen, under such general instructions as shall be given by the president of the United States for that purpose, and also, subject to the like general instructions, to direct and govern such hospitals, as the president may direct to be built in the respective ports: and that the said directors shall hold their offices during the pleasure of the president, who is authorized to fill up all vacancies that may be occasioned by the death or removal of any of the persons so to be appointed. And the said directors shall render an account of the moneys received and expended by them, once in every quarter of a year, to the secretary of the treasury, or such other person as the president shall direct; but no other allowance or compensation shall be made to the said directors, except the payment of such expenses as they may incur in the actual discharge of the duties required by this act. [*Approved, July* 16, 1798.]

3d May, 1802.

CHAP. [51.] An act to amend an act, entitled "An act for the relief of sick and disabled seamen," and for other purposes.

§ 1. *Be it enacted, &c.* That the moneys heretofore collected in pursuance of the several acts "for the relief of sick and disabled seamen," and at present unexpended, together with the moneys hereafter to be collected by authority of the beforementioned acts, shall constitute a general fund, which the president of the United States shall use and employ, as circumstances shall require, for the benefit and convenience of sick and disabled American seamen: *Provided*, That the sum of fifteen thousand dollars be, and the same is hereby, appropriated for the erection of an hospital in the district of Massachusetts.

§ 2. That it shall be lawful for the president of the United States to cause such measures to be taken as, in his opinion, may be expe-

dient for providing convenient accommodations, medical assistance, necessary attendance, and supplies, for the relief of sick or disabled seamen of the United States, who may be at or near the port of New Orleans, in case the same can be done with the assent of the government having jurisdiction over the port; and for this purpose, to establish such regulations, and to authorize the employment of such persons, as he may judge proper; and that, for defraying the expense thereof, a sum, not exceeding three thousand dollars, be paid out of any moneys arising from the said fund, not otherwise appropriated.

§ 3. That from and after the thirtieth day of June next, the master of every boat, raft, or flat, belonging to any citizen of the United States, which shall go down the Mississippi, with intention to proceed to New Orleans, shall, on his arrival at fort Adams, render to th collector or naval officer thereof, a true account of the number of persons employed on board such boat, raft, or flat, and the time that each person has been so employed, and shall pay, to the said collector or naval officer, at the rate of twenty cents per month, for every person so employed; which sum he is hereby authorized to retain out of the wages of such person: and the said collector or naval officer shall not give a clearance for such boat, raft, or flat, to proceed on her voyage to New Orleans, until an account be rendered to him of the number of persons employed on board such boat, raft, or flat, and the money paid to him by the master or owner thereof: and if any such master shall render a false account of the number of persons, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay fifty dollars, which shall be applied to, and shall make a part of, the said general fund, for the purposes of this act: *Provided*, That all persons employed in navigating any such boat, raft, or flat, shall be considered as seamen of the United States, and entitled to the relief extended by law to sick and disabled seamen.

§ 4. That the president of the United States be, and he is hereby, authorized to nominate and appoint, for the port of New Orleans, a fit person to be director of the marine hospital of the United States, whose duties shall be, in all instances, the same as the directors of the marine hospitals of the United States, as directed and required by the act, entitled "An act for the relief of sick and disabled seamen."

§ 5. That each and every director of the marine hospitals within the United States, shall, if it can with convenience be done, admit into the hospital of which he is director, sick foreign seamen, on the application of the commander of any foreign vessel to which such sick seaman may belong; and each seaman so admitted shall be subject to a charge of seventy-five cents per day for each day he may remain in the hospital, the payment of which the master or commander of such foreign vessel shall make to the collector of the district in which such hospital is situated: and the collector shall not grant a clearance to any foreign vessel, until the money due from such master or commander, in manner and form aforesaid, shall be paid; and the director of each hospital is hereby directed, under the penalty of fifty dollars, to make out the accounts against each foreign seaman that may be placed in the hospital, under his direction, and render the same to the collector.

§ 6. That the collectors shall pay the money collected by virtue of this and the act to which this is an amendment, into the treasury of the United States, and be accountable therefor, and receive the same commission thereon, as for other money by them collected.

§ 7. That each and every director of the marine hospitals shall be accountable, at the treasury of the United States, for the money by them received, in the same manner as other receivers of public money, and for the sums by them expended shall be allowed a commission at the rate of one per cent. [*Approved, May* 3, 1802.]

28th February, 1803.

Chap. [62.] An act supplementary to the "Act concerning consuls and vice-consuls," and for the further protection of American seamen.

§ 1. *Be it enacted, &c.* That, before a clearance be granted to any vessel bound on a foreign voyage, the master thereof shall deliver to the collector of the customs a list, containing the names, places of birth, and residence, and a description of the persons who compose his ship's company, to which list the oath or affirmation of the captain shall be annexed, that the said list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them, and the said collector shall deliver him

a certified copy thereof, for which the collector shall be entitled to receive the sum of twenty-five cents; and the said master shall, moreover, enter into bond with sufficient security, in the sum of four hundred dollars, that he shall exhibt the aforesaid certified copy of the list to the first boarding officer, at the first port in the United States at which he shall arrive, on his return thereto, and then and there also produce the persons named therein, to the said boarding officer, whose duty it shall be to examine the men with such list, and to report the same to the collector; and it shall be the duty of the collector at the said port of arrival, (where the same is different from the port from which the vessel originally sailed,) to transmit a copy of the list so reported to him, to the collector of the port from which said vessel originally sailed: *Provided*, That the said bond shall not be forfeited on account of the said master not producing to the first boarding officer, as aforesaid, any of the persons contained in the said list, who may be discharged in a foreign country, with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent, there residing, signified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew, as aforesaid; nor on account of any such person dying or absconding, or being forcibly impressed into other service, of which satisfactory proof shall be then also exhibited to the collector.

§ 2. That it shall be the duty of every master or commander of a ship or vessel, belonging to citizens of the United States, who sail from any port of the United States, after the first day of May next, on his arrival at a foreign port, to deposit his register, sea-letter, and Mediterranean passport, with the consul, vice-consul, commercial agent, or vice-commercial agent, (if any there be at such port;) that in case of refusal or neglect of the said master or commander, to deposit the said papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul, vice-consul, commercial agent, or vice-commercial agent, in his own name, for the benefit of the United States, in any court of competent jurisdiction; and it shall be the duty of such consul, vice-consul, commercial agent, or vice-commercial agent, on such master or commander producing to him a clearance from the proper officer of the port where his ship or vessel may be, to deliver

to the said master or commander all of his said papers: *Provided*, such master or commander shall have complied with the provisions contained in this act, and those of the act to which this is a supplement.

§ 3. That whenever a ship or vessel, belonging to a citizen of the United States, shall be sold in a foreign country, and the company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul, vice-consul, commercial agent, or vice-commercial agent, the list of his ship's company, certified as aforesaid, and to pay to such consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman, two thirds thereof to be paid by such consul or commercial agent, to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, and may be in such foreign port; and the several sums retained for such fund shall be accounted for with the treasury every six months, by the persons receiving the same.

§ 4. That it shall be the duty of the consuls, vice-consuls, commercial agents, vice-commercial agents of the United States, from time to time, to provide for the mariners and seamen of the United States, who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the secretary of state shall give; and that all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are hereby required and enjoined to take such mariners or seamen on board of their ships or vessels, at the request of the said consuls, vice-consuls, commercial agents, or vice-commercial agents, respectively, and to transport them to the port of the United States to which such ships

or vessels may be bound, on such terms, not exceeding ten dollars for each person, as may be agreed between the said master and consul, or commercial agent. And the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels, according to their several abilities: *Provided*, That no master or captain of any ship or vessel shall be obliged to take a greater number than two men for every one hundred tons burthen of the said ship or vessel, on any one voyage; and if any such captain or master shall refuse the same, on the request or order of the consul, vice-consul, commercial agent, or vice-commercial agent, such captain or master shall forfeit and pay the sum of one hundred dollars for each mariner or seaman so refused, to be recovered, for the benefit of the United States, in any court of competent jurisdiction. And the certificate of any such consul or commercial agent, given under his hand and official seal, shall be prima facie evidence of such refusal, in any court of law having jurisdiction for the recovery of the penalty aforesaid.

§ 5. That the seventh and eighth sections of the act, entitled "An act concerning consuls and vice-consuls," be, and the same are hereby, repealed; and that the secretary of state be authorized to reimburse the consuls, vice-consuls, commercial agents, or vice-commercial agents, such reasonable sums as they may heretofore have advanced for the relief of seamen, though the same should exceed the rate of twelve cents a man per diem.

§ 6. That it shall and may be lawful for every consul, vice-consul, commercial agent, and vice-commercial agent, of the United States, to take and receive, for every certificate of discharge of any seaman or mariner in a foreign port, fifty cents; and for commission on paying and receiving the amount of wages payable on the discharge of seamen in foreign ports, two and a half per centum.

§ 7. That if any consul, vice-consul, commercial agent, or vice-commercial agent, shall, falsely and knowingly, certify that property belonging to foreigners is property belonging to citizens of the United States, he shall, on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceeding ten thousand dollars, at the discretion of the court, and be imprisoned for any term not exceeding three years.

§ 8. That if any consul, vice-consul, commercial agent, or vice-

commercial agent, shall grant a passport, or other paper, certifying that any alien, knowing him or her to be such, is a citizen of the United States, he shall, on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceding one thousand dollars.

§ 9. That all powers of attorney, executed after the thirtieth day of June next, in a foreign country, for the transfer of any stock of the United States, or for the receipt of interest thereon, shall be verified by the certificate and seal of a consul, vice-consul, commercial agent, or vice-commercial agent, if any there be, at the place where the same shall be executed, for which the person giving the certificate shall receive fifty cents. [*Approved, February* 28, 1803.]

2d March, 1805.

CHAP. [88.] An act to amend the act, entitled "An act for the government and regulation of seamen in the merchants' service."

§ 1. *Be it enacted, &c.* That all the provisions, regulations, and penalties, which are contained in the eighth section of the act, entitled "An act for the government and regulation of seamen in the merchants' service," so far as relates to a chest of medicines to be provided for vessels of one hundred and fifty tons burthen, and upwards, shall be extended to all merchant vessels of the burthen of seventy-five tons, or upwards, navigated with six persons, or more, in the whole, and bound from the United States to any port or ports in the West Indies. [*Approved, March* 2, 1805.]

3d March, 1813.

CHAP. [184.] An act for the regulation of seamen on board the public and private vessels of the United States.

§ 1. *Be it enacted, &c.* That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ on board any of the public or private vessels of the United States any person or persons except citizens of the United States, or persons of color, natives of the United States.

§ 2. That from and after the time when this act shall take effect, it shall not be lawful to employ as aforesaid any naturalized citizen of the United States, unless such citizen shall produce to the commander of the public vessel, if to be employed on board such vessel, or to a collector of the customs, a certified copy of the act by which he shall have been naturalized, setting forth such naturalization, and the time thereof.

§ 3. That in all cases of private vessels of the United States sailing from a port in the United States to a foreign port, the list of the crew, made as heretofore directed by law, shall be examined by the collector for the district from which the vessel shall clear out, and, if approved of by him, shall be certified accordingly. And no person shall be admitted or employed as aforesaid, on board of any vessel aforesaid, unless his name shall have been entered in the list of the crew, approved and certified by the collector for the district from which the vessel shall clear out as aforesaid. And the said collector, before he delivers the list of the crew, approved and certified as aforesaid, to the captain, master, or proper officer, of the vessel to which the same belongs, shall cause the same to be recorded in a book, by him for that purpose to be provided; and the said record shall be open for the inspection of all persons, and a certified copy thereof shall be admitted in evidence, in any court in which any question may arise, under any of the provisions of this act.

§ 4. That the president of the United States be, and he hereby is, authorized, from time to time, to make such further regulations, and to give such directions to the several commanders of public vessels, and to the several collectors, as may be proper and necessary, respecting the proofs of citizenship, to be exhibited to the commanders or collectors aforesaid: *Provided*, That nothing contained in such regulations or directions shall be repugnant to any of the provisions of this act.

§ 5. That, from and after the time when this act shall take effect, no seaman or other seafaring man, not being a citizen of the United States, shall be admitted or received as a passenger on board of any public or private vessel of the United States, in a foreign port, without permission, in writing, from the proper officers of the country of which such seaman or seafaring man may be subject or citizen.

§ 6. That, from and after the time when this act shall take effect,

the consuls or commercial agents of any nation at peace with the United States shall be admitted, (under such regulations as may be prescribed by the President of the United States,) to state their objections to the proper commander or collector as aforesaid, against the employment of any seaman or seafaring man on board of any public or private vessel of the United States, on account of his being a native subject or citizen of such nation, and not embraced within the description of persons who may be lawfully employed, according to the provisions of this act; and the said consuls or commercial agents shall also be admitted, under the said regulations, to be present at the time when the proofs of citizenship, of the persons against whom such objections may have been made, shall be investigated by such commander or collector.

§ 7. That if any commander of a public vessel of the United States shall knowingly employ, or permit to be employed, or shall admit or receive, or permit to be admitted or received, on board his vessel, any person whose employment or admission is prohibited by the provisions of this act, he shall, on conviction thereof, forfeit and pay the sum of one thousand dollars for each person thus unlawfully employed or admitted on board such vessel.

§ 8. That if any person shall, contrary to the prohibitions of this act, be employed or be received on board of any private vessel, the master or commander, and the owner or owners of such vessel, knowing thereof, shall, respectively, forfeit and pay five hundred dollars for each person thus unlawfully employed or received, in any one voyage; which sum or sums shall be recovered, although such seaman or person shall have been admitted and entered in the certified list of the crew aforesaid by the collector for the district to which the vessel may belong; and all the penalties and forfeitures arising under, or incurred by virtue of this act, may be sued for, prosecuted, and recovered, with costs of suit, by action of debt, and shall accrue and be, one moiety thereof to the use of the person who shall sue for the same, and the other moiety thereof to the use of the United States.

§ 9. That nothing in this act contained shall be construed to prohibit any commander or master of a public or private vessel of the United States, whilst in a foreign port or place, from receiving any American seaman in conformity to law, or supplying any de-

ficiency of seamen on board such vessel, by employing American seamen, or subjects of such foreign country, the employment of whom shall not be prohibited by the laws thereof.

§ 10. That the provisions of this act shall have no effect or operation with respect to the employment, as seamen, of the subjects or citizens of any foreign nation which shall not, by treaty or special convention with the government of the United States, have prohibited, on board of her public and private vessels, the employment of native citizens of the United States, who have not become a citizen or subject of such nation.

§ 11. That nothing in this act contained shall be so construed as to prevent any arrangement between the United States and any foreign nation, which may take place under any treaty or convention, made and ratified in the manner prescribed by the constitution of the United States.

§ 12. That no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not, for the continued term of five years, next preceding his admission as aforesaid, have resided within the United States without being, at any time during the said five years, out of the territory of the United States.

§ 13. That if any person shall falsely make, forge, or counterfeit, or cause, or procure to be falsely made, forged, or counterfeited, any certificate or evidence of citizenship referred to in this act; or shall pass, utter, or use as true, any false, forged, or counterfeited certificate of citizenship, or shall make sale or dispose of any certificate of citizenship to any person other than the person for whom it was originally issued, and to whom it may of right belong, every such person shall be deemed and adjudged guilty of felony; and, on being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a period not less than three, or more than five, years, or be fined in a sum not less than five hundred dollars, nor more than one thousand dollars, at the discretion of the court taking cognizance thereof.

§ 14. That no suit shall be brought for any forfeiture or penalty incurred under the provisions of this act, unless the suit be commenced within three years from the time of the forfeiture. [*Approved, March* 3, 1813.]

19*th June*, 1813.

CHAP. [2.] An act for the government of persons in certain fisheries.

§ 1. *Be it enacted, &c.* That the master or skipper of any vessel of the burthen of twenty tons or upwards, qualified according to law for carrying on the bank and other cod fisheries, bound from a port of the United States, to be employed in any such fishery, at sea, shall, before proceeding on such fishing voyage, make an agreement in writing or print with every fisherman who may be employed therein, (except only an apprentice or servant of himself or owner) and, in addition to such terms of shipment as may be agreed on, shall, in such agreement, express whether the same is to continue for one voyage or for the fishing season, and shall also express that the fish or the proceeds of such fishing voyage or voyages, which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish which they may respectively have caught; which agreement shall be endorsed or countersigned by the owner of such fishing vessel or his agent. And if any fisherman, having engaged himself for a voyage, or for the fishing season, in any fishing vessel, and signed an agreement therefor, as aforesaid, shall thereafter, and while such agreement remains in force and to be performed, desert or absent himself from such vessel without leave of the master or skipper thereof, or of the owner or his agent, such deserter shall be liable to the same penalties as deserting seamen or mariners are subject to in the merchant service, and may, in the like manner, and upon the like complaint and proof, be apprehended and detained: and all costs of process and commitment, if paid by the master or owner, shall be deducted out of the share of fish, or proceeds of any fishing voyage, to which such deserter had or shall become entitled. And any fisherman, having engaged himself as aforesaid, who shall, during such fishing voyage, refuse or neglect his proper duty on board the fishing vessel, being thereto ordered or required by the master or skipper thereof, or shall otherwise resist his just commands, to the hindrance or detriment of such voyage, besides being answerable for all damages arising thereby, shall forfeit, to the use of the owner of such vessel, his share of any public allowance which may be paid upon such voyage.

§ 2. That where an agreement or contract shall be made and signed, for a fishing voyage, or for the fishing season, and any fish, which may have been caught on board such vessel during the same, shall be delivered to the owner or to his agent for cure, and shall be sold by said owner or agent, such vessel shall, for the term of six months after such sale, be liable and answerable for the skipper's and every other fisherman's share of such fish, and may be proceeded against in the same form, and to the same effect, as any other vessel is by law liable and may be proceeded against for the wages of seamen or mariners in the merchant service. And upon such process for the value of a share or shares of the proceeds of fish delivered and sold as aforesaid, it shall be incumbent on the owner or his agent to produce a just account of the sales and division of such fish, according to such agreement or contract; otherwise the said vessel shall be answerable, upon such process, for what may be the highest value of the share or shares demanded. But in all cases the owner of such vessel or his agent, appearing to answer to such process, may offer thereupon his account of general supplies made for such fishing voyage, and of other supplies therefor made, to either of the demandants, and shall be allowed to produce evidence thereof in answer to their demands, respectively; and judgment shall be rendered upon such process for the respective balances which, upon such an inquiry, shall appear: *Provided always*, That when process shall be issued against any vessel liable as aforesaid, if the owner thereof, or his agent, will give bond to each fisherman in whose favor such process shall be instituted, with sufficient security, to the satisfaction of two justices of the peace, one of whom shall be named by such owner or agent, and the other by the fisherman or fishermen pursuing such process, or if either party shall refuse, then the justice first appointed shall name his associate, with condition to answer and pay whatever sum shall be recovered by him or them on such process, there shall be an immediate discharge of such vessel: *Provided*, That nothing herein contained shall prevent any fisherman from having his action at common law for his share or shares of fish, or the proceeds thereof, as aforesaid. [*Approved, June* 19, 1813.]

2d *March*, 1819.

CHAP. 170. An act regulating passenger ships and vessels.

§ 1. *Be it enacted, &c.* That, if the master or other person on board of any ship or vessel, owned in the whole or in part by a citizen or citizens of the United States, or the territories thereof, or by a subject or subjects, citizen or citizens, of any foreign country, shall, after the first day of January next, take on board of such ship or vessel, at any foreign port or place, or shall bring or convey into the United States, or the territories thereof, from any foreign port or place; or shall carry, convey, or transport, from the United [States,] or the territories thereof, to any foreign port or place; a greater number of passengers than two for every five tons of such ship or vessel, according to custom-house measurement, every such master, or other person so offending, and the owner or owners of such ship or vessel, shall severally forfeit and pay to the United States, the sum of one hundred and fifty dollars, for each and every passenger so taken on board of such ship or vessel, over and above the aforesaid number of two to every five tons of such ship or vessel; to be recovered by suit, in any circuit or district court of the United States, where the said vessel may arrive, or where the owner or owners aforesaid may reside: *Provided, nevertheless*, that nothing in this act shall be taken to apply to the complement of men usually and ordinarily employed in navigating such ship or vessel.

§ 2. That if the number of passengers so taken on board of any ship or vessel as aforesaid, or conveyed or brought into the United States, or transported therefrom as aforesaid, shall exceed the said proportion of two to every five tons of such ship or vessel, by the number of twenty passengers, in the whole, every such ship or vessel shall be deemed and taken to be forfeited to the United States, and shall be prosecuted and distributed in the same manner in which the forfeitures and penalties are recovered and distributed under the provisions of the act, entitled "An act to regulate the collection of duties on imports and tonnage."

§ 3. That every ship or vessel bound on a voyage from the United States to any port on the continent of Europe, at the time of leaving the last port whence such ship or vessel shall sail, shall have on board, well secured under deck, at least sixty gallons of water, one

hundred pounds of salted provisions, one gallon of vinegar, and one hundred pounds of wholesome ship bread, for each and every passenger on board such ship or vessel, over and above such other provisions, stores, and live stock, as may be put on board by such master or passenger for their use, or that of the crew of such ship or vessel; and in like proportion for a shorter or longer voyage; and if the passengers, on board of such ship or vessel in which the proportion of provisions herein directed shall not have been provided, shall at any time be put on short allowance, in water, flesh, vinegar, or bread, during any voyage aforesaid, the master and owner of such ship or vessel shall severally pay, to each and every passenger who shall have been put on short allowance as aforesaid, the sum of three dollars for each and every day they may have been on such short allowance; to be recovered in the same manner as seamen's wages are or may be recovered.

§ 4. That the captain or master of any ship or vessel arriving in the United States, or any of the territories thereof, from any foreign place whatever, at the same time that he delivers a manifest of the cargo, and, if there be no cargo, then at the time of making report or entry of the ship or vessel, pursuant to the existing laws of the United States, shall also deliver and report, to the collector of the district in which such ship or vessel shall arrive, a list or manifest of all the passengers taken on board of the said ship or vessel at any foreign port or place; in which list or manifest it shall be the duty of the said master to designate, particularly, the age, sex, and occupation, of the said passengers, respectively, the country to which they severally belong, and that of which it is their intention to become inhabitants; and shall further set forth whether any, and what number, have died on the voyage; which report and manifest shall be sworn to by the said master, in the same manner as is directed by the existing laws of the United States in relation to the manifest of the cargo, and that the refusal or neglect of the master aforesaid, to comply with the provisions of this section, shall incur the same penalties, disabilities, and forfeitures, as are at present provided for a refusal or neglect to report and deliver a manifest of the cargo aforesaid.

§ 5. That each and every collector of the customs, to whom such manifest or list of passengers as aforesaid shall be delivered, shall,

quarter yearly, return copies thereof to the secretary of state of the United States, by whom statements of the same shall be laid before congress at each and every session. [*Approved, March* 2, 1819.]

2d March 1829.

CHAP. [202.] An act to provide for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States.

§ 1. *Be it enacted, &c.* That on application of a consul or vice-consul of any foreign government, having a treaty with the United States, stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of said vessel, it shall be the duty of any court, judge, justice, or other magistrate, having competent power, to issue warrants to cause the said person to be arrested for examination; and if, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the said consul or vice-consul, to be sent back to the dominions of any such government, or, on the request, and at the expense, of the said consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government: *Provided nevertheless,* That no person shall be detained more than two months after his arrest; but at the end of that time shall be at liberty, and shall not be again molested for the same cause: *And provided further,* That if any such deserter shall be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect. [*Approved,* 2 *March,* 1829.]

20th July, 1840.

CHAP. [23.] An act in addition to the several acts regulating the shipment and discharge of seamen, and the duties of consuls.

[§ 1.] *Be it enacted, &c.*, As follows;

First. The duplicate list of the crew of any vessel bound on a foreign voyage, made out pursuant to the act of February twenty-eighth, eighteen hundred and three, shall be a fair copy in one uniform handwriting, without erasure or interlineation.

Second. It shall be the duty of the owners of every such vessel to obtain from the collector of the customs of the district from which the clearance is made, a true and certified copy of the shipping articles, containing the names of the crew, which shall be written in a uniform hand, without erasures or interlineations.

Third. These documents which shall be deemed to contain all the conditions of contract with the crew as to their service, pay, voyage, and all other things, shall be produced by the master, and laid before any consul, or other commercial agent of the United States, whenever he may deem their contents necessary to enable him to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance.

Fourth. All interlineations, erasures, or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such papers, unless satisfactorily explained in a manner consistent with innocent purposes and the provisions of law which guard the rights of mariners.

Fifth. Any consul of the United States, and in case there is none resident at a foreign port, or he is unable to discharge his duties, then any commercial agent of the United States authorized to perform such duties, may, upon the application of both the master and any mariner of the vessel under his command, discharge such mariner, if he thinks it expedient, without requiring the payment of three months' wages, under the provisions of the act of the twenty-eighth of February, eighteen hundred and three, or any other sum of money.

Sixth. Any consul, or other commercial agent, may also, on such joint application, discharge any mariner on such terms as will, in his judgment, save the United States from the liability to support such

mariner, if the master gives his voluntary assent to such terms, and conforms thereto.

Seventh. When a mariner is so discharged, the officer discharging him shall make an official entry thereof upon the list of the crew and the shipping articles.

Eighth. Whenever any master shall ship a mariner in a foreign port, he shall forthwith take the list of his crew and the duplicate of the shipping articles to the consul, or person who discharges the duties of the office at that port, who shall make the proper entries thereon, setting forth the contract, and describing the person of the mariner; and thereupon the bond originally given for the return of the men shall embrace each person so shipped.

Ninth. When any mariner shall complain that the voyage is continued contrary to his agreement, or that he has fulfilled his contract, the consul, or other commercial agent performing like duties, may examine into the same by an inspection of the articles of agreement; and if on the face of them he finds the complaint to be well founded, he shall discharge the mariner, if he desires it, and require of the master an advance, beyond the lawful claims of such mariner, of three months' wages, as provided in the act of February twenty-eighth, eighteen hundred and three; and in case the lawful claims of such mariner are paid upon his discharge, the arrears shall from that time bear an interest of twenty per centum: *Provided, however,* if the consul, or other commercial agent, shall be satisfied the contract has expired, or the voyage been protracted by circumstances beyond the control of the master, and without any design on his part to violate the articles of shipment, then he may, if he deems it just, discharge the mariner with exacting the three months' pay.

Tenth. All shipments of seamen, made contrary to the provisions of this and other acts of congress, shall be void; and any seamen so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment.

Eleventh. It shall be the duty of consuls and commercial agents to reclaim deserters and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner.

Twelfth. If the first officer, or any officer, and a majority of the crew of any vessel shall make complaint in writing that she is in an unsuitable condition to go to sea, because she is leaky, or insufficiently supplied with sails, rigging, anchors, or any other equipment, or that the crew is insufficient to man her, or that her provisions, stores, and supplies are not, or have not been, during the voyage, sufficient and wholesome, thereupon, in any of these or like cases, the consul or commercial agent who may discharge any duties of a consul shall appoint two disinterested, competent, practical men, acquainted with maritime affairs, to examine into the causes of complaint, who shall in their report state what defects and deficiencies, if any, they find to be well founded, as well as what, in their judgment, ought to be done to put the vessel in order for the continuance of her voyage.

Thirteenth. The inspectors so appointed shall have full power to examine the vessel and whatever is aboard of her, as far as is pertinent to their inquiry, and also to hear and receive any other proofs which the ends of justice may require, and if, upon a view of the whole proceedings, the consul, or other commercial agent, shall be satisfied therewith, he may approve the whole or any part of the report, and shall certify such approval, and if he dissents, shall also certify his reasons for so dissenting.

Fourteenth. The inspectors in their report shall also state whether, in their opinion, the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, or through mistake or accident, and in case it was by neglect or design, and the consul or other commercial agent approves of such finding, he shall discharge such of the crew as require it, each of whom shall be entitled to three months' pay in addition to his wages to the time of discharge; but, if in the opinion of the inspectors the defects or deficiencies found to exist have been the result of mistake or accident, and could not, in the exercise of ordinary care, have been known and provided against before the sailing of the vessel, and the master shall, in a reasonable time, remove or remedy the causes of complaint, then the crew shall remain and discharge their duty; otherwise they shall, upon their request, be discharged, and receive each one month's wages in addition to the pay up to the time of discharge.

Fifteenth. The master shall pay all such reasonable charges in the premises as shall be officially certified to him under the hand of the consul or other commercial agent, but in case the inspectors report that the complaint is without any good and sufficient cause, the master may retain from the wages of the complainants, in proportion to the pay of each, the amount of such charges, with such reasonable damages for detention on that account as the consul or other commercial agent directing the inquiry may officially certify.

Sixteenth. The crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained or hindered therein by the master or any officer, unless some sufficient and valid objection exist against their landing; in which case, if any mariner desire to see the consul or commercial agent, it shall be the duty of the master to acquaint him with it forthwith; stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon it shall be the duty of such consul or commercial agent to repair on board and inquire into the causes of the complaint, and to proceed thereon as this act directs.

Seventeenth. In all cases where deserters are apprehended, the consul or commercial agent shall inquire into the facts; and, if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged, and receive, in addition to his wages to the time of the discharge, three months' pay; and the officer discharging him shall enter upon the crew-list and shipping articles the cause of discharge, and the particulars in which the cruelty or unusual treatment consisted, and subscribe his name thereto officially.

Eighteenth. If any consul or commercial agent shall neglect or omit to perform, seasonably, the duties hereby imposed upon him, or shall be guilty of any malversation or abuse of power, he shall be liable to any injured person for all damage occasioned thereby; and for all malversation and corrupt conduct in office, he shall be liable to indictment, and, on conviction by any court of competent jurisdiction, shall be fined not less than one nor more than ten thousand dollars, and be imprisoned not less than one nor more the five years.

Nineteenth. If any master of a vessel shall proceed on a foreign voyage without the documents herein required, or refuse to produce them when required, or to perform the duties imposed by this act, or

shall violate the provisions thereof, he shall be liable to each and every individual injured thereby, in damages, and shall, in addition thereto, be liable to pay a fine of one hundred dollars for each and every offence, to be recovered by any person suing therefor in any court of the United States in the district where such delinquent may reside or be found.

Twentieth. It shall be the duty of the boarding officer to report all violations of this act to the collector of the port where any vessel may arrive, and the collector shall report the same to the secretary of the treasury and to the attorney of the United States in his district.

Twenty-first. This act shall be in force from and after the first day of October next; and shall not apply to vessels which shall have sailed from ports of the United States before that time. [*Approved, July 20th* 1840.]

4th April, 1840.

CHAP. [6.] An act to cancel the bonds given to secure duties upon vessels and their cargoes, employed in the whale fishery, and to make registers lawful papers for such vessels.

§ 1. *Be it enacted, &c.* That all vessels which have cleared, or hereafter may clear, with registers for the purpose of engaging in the whale fishery, shall be deemed to have lawful and sufficient papers for such voyages, securing the privileges and rights of registered vessels, and the privileges and exemptions of vessels enrolled and licensed for the fisheries; and all vessels which have been enrolled and licensed for like voyages shall have the same privileges and measure of protection as if they had sailed with registers if such voyages are completed or until they are completed.

§ 2. That all the provisions of the first section of the act entitled "An act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American seamen," passed on the twenty-eighth day of February, Anno Domini eighteen hundred and three, shall hereafter apply and be in full force as to vessels engaged in the whale fishery in the same manner and to the same extent as the same is now in force and applies to vessels bound on a foreign voyage.

§ 3. That all forfeitures, fees, duties and charges of every description required of the crews of such vessels, or assessed upon the vessels or cargoes, being the produce of such fishery, because of a supposed insufficiency of a register to exempt them from such claims, are hereby remitted; and all bonds given for such cause are hereby cancelled, and the secretary of the treasury is hereby required to refund all such moneys as have been, or which may be, paid into the treasury, to the rightful claimants, out of the revenues in his hands. [*Approved, April* 4, 1840.]

IV.

MISCELLANEOUS.

SUPPLEMENTARY NOTE TO PAGE 290: UPON THE QUESTION OF A FURTHER REWARD IN CASES OF SHIPWRECK, IN THE NATURE OF SALVAGE.

Since the text upon this subject was written, there has been a further hearing in the United States District Court for Maine, of the case of *The Dawn*, reported in Ware's R. p. 425, for the settlement of the question, to what a mariner is entitled upon condemnation and sale of the ship abroad, rendered necessary by perils of the sea; and since the sheets of this work passed through the press, I have been favored by the learned Judge with a copy of his decision, the substance of which is as follows:

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 February, 1803, chap. 63; or a sum in addition to his wages to pay his expenses home.

Ruled, that the Act of Congress applies only to the case of a voluntary sale of a vessel, and not to a sale rendered necessary by mis-

fortune, and 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.

In case of shipwreck, the seamen are by the maritime law bound to remain by the vessel, and exert themselves to save all that is possible of the ship and cargo.

When they do this they are entitled to their full wages, without deduction, against the materials which they save of the ship, if enough is saved to pay them.

And they are entitled to a further reward in the nature of salvage against the whole mass of property saved.

Their claim is not as general or volunteer salvors, nor are they entitled to an equally large salvage; but they are entitled to a reasonable allowance, *pro opera et labore*, according to the circumstances of the case and the merits of their services.

When the disaster happens in foreign parts this ought not to be less than the expenses of their return home.

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