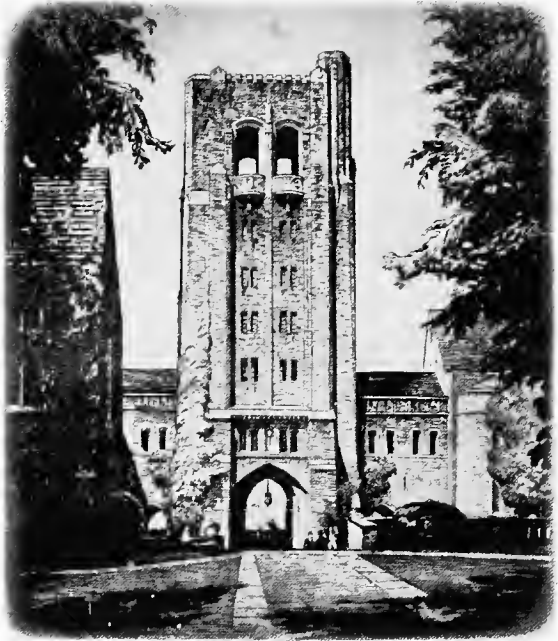




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THE
ADMIRALTY
JURISDICTION, LAW AND PRACTICE

OF THE
COURTS OF THE UNITED STATES:

WITH AN APPENDIX,

CONTAINING THE

NEW RULES OF ADMIRALTY PRACTICE PRESCRIBED BY THE SUPREME COURT OF THE
UNITED STATES, THOSE OF THE CIRCUIT AND DISTRICT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF NEW-YORK,

AND NUMEROUS

PRACTICAL FORMS

OF PROCESS, PLEADINGS, STIPULATIONS, ETC.,

COMPRISING THE ENTIRE PROGRESS OF A SUIT IN ADMIRALTY; ACCOMPANIED BY
EXPLANATORY NOTES.

BY ALFRED CONKLING.

SECOND EDITION, REVISED AND CORRECTED.

IN TWO VOLUMES.

VOL. I.

ALBANY:
W. C. LITTLE & CO., LAW BOOKSELLERS,
1857.

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Entered according to Act of Congress, in the year 1857,
By ALFRED CONKLING,
in the Clerk's office of the District Court of the Northern District of
New-York.

WEED, PARSONS & CO., }
PRINTERS. }

PREFACE TO THE FIRST EDITION.

THE design of the following work is not to supersede other books, but to supply a want. Of the existence of this want, the author became painfully sensible, when, by the passage of a late act of Congress, imposing upon the District Courts of the United States a *quasi* admiralty jurisdiction over certain causes arising upon the Great Lakes, he became for the first time unexpectedly charged with the duty of making himself intimately acquainted with the limits of the admiralty jurisdiction of the Courts of the United States; with the principles of maritime law, pertaining to the several subjects falling within the scope of that jurisdiction; and especially with the forms of Admiralty Procedure. This work has its origin in the pressing necessity under which the author found himself thus placed; and it is now offered to the public, in the earnest hope that it will prove useful to others.

The foregoing observations, it is true, apply with less cogency to the first than to the second part of the work; but if the principal subjects of admiralty jurisdiction have been more ably, and some of them more amply treated by others, the author trusts that he has not erred in

believing that an exact and methodically arranged summary of the principles which belong to them, embracing a much fuller analysis of the admiralty decisions of the American Courts than has hitherto been attempted, could not fail to be, at least, highly convenient. Such is the design of the first part of the work.

With respect to the second part, it is scarcely necessary to observe, that until since the promulgation of the Rules prescribed by the Supreme Court of the United States, in 1845, any attempt to describe the practice of the American Courts of Admiralty must unavoidably have been in a great measure fruitless. These rules were designed to constitute the entire frame-work of our system of Admiralty Practice. The aim of the author has been, first thoroughly to understand, and next to elucidate them. If he has not fully succeeded, it is not for want of strenuous and persevering efforts to accomplish his design. The difficulties of the task will be best appreciated, and most readily acknowledged, by the few already familiar with the subject.

With regard to the numerous Precedents of pleadings, processes, stipulations, bonds, etc., etc., contained in the Appendix, the author can only say that he has taken unwearied pains to render them trustworthy and unexceptionable. Such of them as are not now for the first time published, differ, it will be observed, from those which have heretofore appeared, in some essential particulars, as well as in others merely formal; but the author entertains no apprehension that the attentive reader will see in these differences any ground for the imputation of a love for unnecessary innovation. Ample collections of

Forms, relating to actions at Law and in Equity, have long since been published ; but with the exception of precedents for the libel and answer, no such collection, pertaining to actions in the Admiralty, has, to the knowledge of the author, hitherto appeared in this country(*a*) ; and he ventures to indulge the hope, that by this effort on his part to supply the deficiency, and thus to, contribute, to the extent of his ability, towards the attainment of a greater degree of uniformity and precision in the forms of procedure in the American Courts of Admiralty, he shall not subject himself to the charge of arrogance or presumption.

In conclusion, he cannot refrain from an expression of his sincere regret at the necessity, which his undertaking has unexpectedly imposed upon him, of burthening his professional brethren with so voluminous a work : but he cannot tax himself with any want of a constant desire to compress the numerous subjects and matters, with which he had to deal, within the narrowest limits compatible with his design ; and he trusts the learned reader will meet, in its perusal, with no evidence to the contrary, whatever opinion he may form of the author's success in this respect.

(*a*) The only publication of this nature in England (with the exception of a few scarcely intelligible fragments contained in Chitty's General Practice) is believed to be the collection entitled Marriott's Formulary ; a passing notice of which will be found in a note accompanying chapter second of the second volume. Of this work, it is probable but very few copies have found their way to this country. From that in the possession of the author, which he obtained from England several years ago, he has derived invaluable aid.

PREFACE TO THE SECOND EDITION.

IN submitting the present revised edition of the following work to his professional brethren, the author deems it proper to preface it by a few explanatory observations relative to the manner in which the revision has been conducted. Those of his readers who have been attentive to the legislation of Congress, and especially to the adjudication of the Supreme Court of the United States, during the few years that have elapsed since the original publication of the work, will not require to be reminded of the necessity thereby imposed on the author of largely modifying its contents. To have done this exclusively, by means of annotations, would have left the text encumbered with many pages of matter that had become obsolete, and many more that had become erroneous. In most instances of these descriptions, therefore, he has deemed it expedient simply to conform the text to the existing state of the law, while, in a few others he has adopted the easier process of adding notes.

He has not scrupled, moreover, to avail himself of so favorable an opportunity to endeavor to improve the original by modifications in a few instances, in point of arrangement, the principle of which, however, consists in

bringing together at the close of the first chapter, and reconstructing, what he desired to say on the kindred subjects of the right of third persons to intervene *pendente lite*, and the right of demanding payment out of surplus proceeds in the registry of the court, instead of adhering to the arrangement of the former edition where these rights were separately treated.

The most important of the judicial decisions above alluded to is that, in the case of *THE GENESEE CHIEF*, by which the constitutional grant of admiralty and maritime jurisdiction is declared to extend as well to inland waters—the great rivers and lakes—as to the high seas, and the waters connected therewith subject to the ebb and flow of tide, to which the jurisdiction had before been supposed and uniformly held to be limited. This important decision rendered it necessary to recompose the first chapter and to modify the language of many other parts of the work. The author, as an act of justice to himself, has availed himself of the opportunity thus afforded to offer some observations upon the decision in the case of *THE GENESEE CHIEF*, to which he begs leave to invite the attention of the learned reader, as he also has of a like opportunity to comment, at considerable length, in the second chapter, upon the decision of the presiding judge of the Circuit Court of the Northern District of New-York, in the case of *THE GLOBE*, in a manner he would gladly have avoided, but from which he did not feel himself at liberty to abstain. The foregoing exposition, the author trusts, will, in the estimation of the learned reader, furnish a sufficient justification for his omitting to preserve the paging of the former edition.

The first part of the work having been considerably enlarged, it has been deemed advisable to make two separately bound volumes, which, however, the author is happy to assure his professional brethren, are to be sold at a lower price than the very high one which, without his assent or approbation, and to his mortification and regret, was exacted, on account, as he understood, of rivalries in which he had no concern, for copies of the first edition in one volume.

ERRATA.

Page 26, line 6, for "tonnage," read towage.

231, line 15, for "laws," read losses.

233, expunge lines 23, 24, 25, by inadvertence reprinted.

252, in 3d side note, for "The," read Its.

345, at the end of note (b), for 103, read 142.

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ADMIRALTY JURISDICTION AND PRACTICE.

VOLUME I.

JURISDICTION.

CHAPTER I.

EXTENT OF THE ADMIRALTY AND MARITIME JURISDICTION OF THE UNITED STATES.

THE Constitution of the United States declares that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction;" and by the Judiciary Act of September 24, 1789, it is enacted that the District Courts "shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

Extent of the admiralty jurisdiction as defined by the Constitution and Judiciary Act.

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The jurisdiction conferred by the act with respect to civil causes, it will be observed, is in terms exactly coextensive with the constitutional grant. In order, therefore, to determine the limits of the admiralty jurisdiction possessed by the District Courts it became necessary to ascertain the just scope of this grant; or, in other words, to determine the true interpretation of the words "admiralty and maritime jurisdiction." This inquiry, however, proved to be one of no little difficulty and embarrassment, and it accordingly led to a very marked diversity of opinion, not only among the judges of the District Courts, but also among the justices of the Supreme Court. Recourse was naturally had to the decisions of the English courts, and it was strenuously insisted that these decisions were obligatory upon ours. But the jurisdiction of the High Court of Admiralty, invaded and crippled as it had been by prohibitions from the Court of King's Bench, in the time of Lord COKE, was found to be restricted to bounds so narrow, especially in cases arising *ex contractu*, as, in the ultimate judgment of a majority of the judges of the Supreme Court, to render them unfit for unqualified adoption in this country. The departures from them were, however, slight, and were made with cautious and timorous steps; and in one highly important particular they were by common consent rigidly adhered to. It was a settled principle of English jurisprudence, that the admiralty jurisdiction was limited to cases arising on the ocean or on tide waters, and in the first case, in which it became the duty of the Supreme Court authoritatively to

English de-
cisionsas to tide
waters
adopted.

define the limits of the admiralty jurisdiction, so far as it depended on locality, this principle was unanimously adopted. The suit, instituted in the District Court of Kentucky, was for wages earned on a voyage from Shippingport, in that state, up the Mississippi and Missouri and back again to the port of departure. The libel was dismissed by the District Court for want of jurisdiction, and the libelants having appealed from the decree, it was, apparently without the slightest hesitation, affirmed by the Supreme Court. "In the great struggles," said Mr. Justice STORY, in delivering the opinion of the Court, "between the courts of common law and the admiralty, the latter never attempted to assert any jurisdiction except over maritime contracts. In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise any jurisdiction, except in cases where the service was substantially performed or to be performed upon the sea, or waters within the ebb and flow of tide. This is the prescribed limit which it is not at liberty to transcend. We say the service was to be substantially performed on the sea, or on tide water, because there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of tide. The material consideration is, whether the service is essentially a maritime service. In the present case, the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred miles above the ebb and flow of tide, and in no just sense can the

VOL. 1. wages be considered as earned in a maritime employment(a).”

This principle was distinctly reaffirmed and enforced in the subsequent case of *The Steamboat Orleans* v. *Phœbus*, which originated in a controversy between part owners, whose vessel had been employed in navigating between the port of New Orleans and the interior towns on the borders of the Mississippi and its tributary streams; and in accordance with the principle established in the case of *The Jefferson*, the admiralty jurisdiction over the case was denied, although one of the termini of the voyages of the vessel was within tide water(b).

In the intermediate case of *Peyroux* v. *Howard*, which was a suit in admiralty for labor and services in repairing the steamboat *Planter*, at New Orleans, the jurisdiction was sustained on the grounds alone that the place where the repairs were made was within the ebb and flow of tide, and that the just inference from the pleadings and evidence, in the opinion of the Court, was, that the *Planter* was to be considered as a vessel employed in navigating tide waters. In this case the Court also laid down another important principle, viz: that those rivers in which the tides of the ocean occasion a regular rise and fall of the water, although the current may not be turned back, are to be deemed, to that extent, tide waters(c).

(a) *The Steamboat Thomas Jefferson*, 10 Wheaton's R., 428 (6 Curtis's Decis. S. C., 465).

(b) 11 Peters's R., 175 (12 Curtis's Decis. S. C., 391).

(c) 7 Peters's R., 324 (10 Curtis's Decis. S. C., 506).

This interpretation of the language of the Constitution and Judiciary Act, of course, excluded as well the great lakes as all navigable streams beyond the influence of the ebb and flow of tide. Nor did this consequence or the gross inconsistency it involved escape the attention of the Court. But the commerce carried on upon these waters, at the date of the decision in the case of *The Jefferson*, was trivial, compared with the magnitude it has since attained, and the jealous, not to say hostile spirit towards the admiralty jurisdiction then entertained by many of the legal profession, and from which the Supreme Court itself was not wholly free, discouraged the desire that could not but have been felt, and restrained any effort that might otherwise have been made, by the Court, to avoid this absurd incongruity by a more liberal construction accordant with the spirit of the Constitution and the actual exigencies of the case. Had the decision of the question been deferred until our inland navigation and commerce had increased, as it has long since done, more than a hundred-fold, and until the superior adaptability and value of the admiralty remedies had, as they have since, become better understood, it may reasonably be supposed that the Court would have been irresistably led to a different conclusion. Nevertheless, the growing importance of this commerce was already sufficient to awaken solicitude for its prosperity, and it is evident from the language of the Court that its exclusion from the admiralty jurisdiction was contemplated with regret; for, while yielding to the supposed necessity of this exclusion, the Court seems to

CHAP. 1.
Inland wa-
ters exclu-
ded.

VOL. 1. have been anxious, if possible, to devise an antidote for the evil. This desire is manifested by the following observations contained in the judgment of the Court, as delivered by Mr. Justice STORY: "Whether, under the power to regulate commerce among the states, Congress may extend the remedy by the summary process of the admiralty, to the case of voyages on the western waters, it is unnecessary for us to consider. If the public inconvenience, from the want of a process of an analogous nature, shall be extensively felt, the attention of the Legislature will doubtless be drawn to the subject."

This was said in 1825, and just twenty years later Congress saw fit to pass the act entitled "*An act extending the jurisdiction of the District Courts to certain cases upon the lakes, and navigable waters connecting the same.*"

The act consists of a single section, and is as follows:

Act of Feb.
26, 1845.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the District Courts of the United States shall have, possess and exercise the same jurisdiction, in matters of contract and tort arising in, upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between ports and places in different states and territories upon the lakes and navigable waters connecting the said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States; and in all suits brought in such courts, in all such matters of contract or tort, the remedies, and the forms of process, and the

modes of proceeding, shall be the same as are or may be used by such courts in cases of admiralty and maritime jurisdiction; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner, and to the same extent, and with the same equities, as it now does in cases of admiralty and maritime jurisdiction; saving, however, to the parties the right of trial by jury, of all facts put in issue in such suits, where either party shall require it; and saving also to the parties the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the state laws, where such steamer or other vessel is employed in such business of commerce and navigation" (a).

CHAP. 1.

In the first case that arose under this act, very soon after its passage, in the District Court for the Northern District of New-York, its constitutionality was strenuously controverted at bar, and was doubtfully assumed rather than formally adjudicated by the Court. In cases subsequently occurring in that court during the next year or two, the validity of the act was tacitly conceded. It was under these circumstances, and before any light had been shed on the subject from any external source, that the first edition of this work was prepared for the press and published. The act was too important not to require a particular notice, and as the author, at that time holding the office of District Judge, was actually engaged in carrying it into effect, he deemed it incumbent on him to undertake the embarrassing task of discussing its constitutionality. Any attempt to vindicate it on the ground that the constitutional grant of admiralty jurisdiction comprised other than

Its constitutionality questioned in Northern District of New-York.

Notice of it in the first edition explained.

(a) Act of February 26, 1845; 5 Stat. at Large, 726, ch. 20.

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tide waters, was forbidden to him by the decisions of the supreme judicial tribunal of the nation ; and to have argued, nevertheless, that Congress, in reality looked to this grant as the source of its authority to pass the act, would have been, according to those decisions, equivalent to a charge of intentional usurpation. But in truth the circumstances under which the act was passed, its title, its obvious intent, and the very nature of its provisions, appeared to the author wholly inconsistent with this hypothesis. In organizing the judicial department of the government, Congress possessed a discretionary authority to suffer any portion of the mass of judicial power confided to the nation, except the original jurisdiction vested in the Supreme Court by the Constitution itself, to remain dormant, either by express exceptions, or by omitting to provide for its exercise. And assuming the admiralty jurisdiction conferred by the Constitution to have extended as well to interior as ocean navigation and commerce, it might in this manner, nevertheless, have been expressly restricted to the latter. If this had been done, and so remained until the passage of the act of 1845, the natural inference would have been that it was designed, though by no means aptly framed, for the purpose, partially to supply the deficiency. But the actual predicament of the case was the reverse of this. The power vested in Congress by the constitutional grant of admiralty jurisdiction in civil cases had already been exercised and exhausted by conferring on the District Courts jurisdiction of "all civil causes of admiralty and maritime jurisdiction."

The entire admiralty jurisdiction conferred on the District Courts by Judiciary Act.

Such was the disposition that had been made of this branch of the judicial power, by the Congress of 1789, in the organic Judiciary Act, and the law in this respect remained unchanged until the passage of the act of 1845. If therefore the admiralty jurisdiction, as defined in the Constitution, extended to controversies arising "on the lakes and navigable waters connecting the same," it had already been conferred in more ample terms on the District Courts, and the new act, instead of being entitled "An act *extending* the *jurisdiction* of the District Courts," should have been denominated an act *curtailing* the *admiralty* jurisdiction of these courts, in "cases arising," &c.

CHAP. 1.

Legal consequences resulting therefrom.

It was unquestionably the intention of Congress, however, as the title of the act imports, to enlarge the jurisdiction of the District Courts by extending it, for the first time, to the cases specified, and authorizing the use of the admiralty forms of process in its exercise. But to suppose that it was intended to extend the *admiralty* jurisdiction of these courts, would be to impute to Congress not only very gross inconsistency, but a defiance of the decisions of the Supreme Court. Such a hypothesis did not seem to the author to be admissible, and the only remaining alternative was to refer the act to the authority conferred by the Constitution on Congress, to regulate commerce among the several states. That it was no easy matter to maintain the constitutionality of the act on this ground, the author was but too well aware; but it seemed to him, nevertheless, sufficiently manifest that this was in fact the

Legislative intent.

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ground on which the Legislature had proceeded. In the first place it was, in the opinion of the author, a circumstance of no trivial importance that the Supreme Court, when in the act of unequivocally denying the applicability of the grant of admiralty jurisdiction to inland commerce, had, as already stated, indicated the power to regulate commerce between the states as the source from which the authority to pass precisely such an act as this might be drawn; for it seemed highly improbable that either the decision or the intimation that accompanied it had been overlooked by Congress. The act, upon its face, moreover, appeared to infer a disclaimer of the power to confer admiralty jurisdiction. It is true, it ordains that "the District Courts of the United States shall have, possess and exercise the *same* jurisdiction," in the cases specified, "as is now possessed and exercised by the said courts" in cases arising out of navigation and commerce "upon the high seas, or tide waters within the admiralty and maritime jurisdiction of the United States;" but it directs also that "in all suits brought in such courts, and in all matters of contract or tort, the remedies and the forms of process, and the mode of proceeding, shall be the same as are or may be used by such courts in cases of admiralty and maritime jurisdiction; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits." These latter provisions, so pertinent in such an act passed in virtue of the power to regulate commerce, were clearly supererogatory in an

act extending the admiralty jurisdiction proper. CHAP. 1.
Nor will the attentive reader fail to observe that they are in striking accordance with the suggestions of the Supreme Court in the case of *The Jefferson*.

The act presented another feature also, of no light significance, tending to the same conclusion. The suggestions of the Supreme Court were limited to "the power to regulate commerce between the states;" and the jurisdiction which the act purports to confer is studiously restricted to matters relating to vessels "of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in the business of commerce and navigation between ports and places in different states and territories." Why were these limitations imposed, unless for the express purpose of confining the new jurisdiction within the scope of the power to regulate commerce, and that, too, the one particular branch of it indicated by the Supreme Court? To say nothing of commerce with the British dominions, the extension of the admiralty remedies to voyages between places in the same state — Dunkirk, Buffalo, Lewiston, Oswego, Sacketts Harbor and Ogdensburgh, in the State of New-York, for example — was as much needed, and would have been as useful, as to voyages between places in different states.

It was under these circumstances and these views of the subject that, in the first edition of this work, the author felt himself constrained to speak of the act in the terms he did, and to denominate the jurisdiction conferred by it a *quasi* admiralty juris-

VOL. 1. diction(a). Nor was he singular in his views of the subject. In *The New Jersey Steam Navigation*

(a) The following is the passage here referred to, preceded by a recital of the act: "In the first case which arose in the Northern District of New-York, under this act, its constitutionality was strenuously denied; and if, as was insisted by the counsel who urged the objection, the act is to be considered as assuming to confer *admiralty* jurisdiction, *as such*, it is evident from what has already been stated, that Congress had no authority to pass it. But the terms of the act are not such as necessarily to require this construction; nor does its language imply a reliance on the constitutional grant of admiralty and maritime jurisdiction, as the source of the power exercised in its enactment. On the contrary, Congress seems to have had an eye rather to those provisions of the Constitution which confer upon the national Legislature power "to regulate commerce with foreign nations, *among the several states*, and with the Indian tribes;" and upon the judiciary, jurisdiction of "all cases arising under the laws of the United States:" and to have intended merely to subject the descriptions of cases specified in the act to the practical operation of these constitutional provisions, and, *sub modo*, to the admiralty forms of procedure.

The want of power in Congress to regulate commerce was one of the chief defects in the Articles of Confederation; and this power is among the most important and necessary of the legislative powers conferred by the present Constitution. It is held to be exclusive. There are cogent reasons why it should be so; and the term *regulate* — a word of very comprehensive import — clearly indicates the intention of its framers to make it so. (*Gibbons v. Ogden*, 9 Wheaton's R., 1.; 5 Cond. R., 562.)

In virtue of this ample power, Congress may doubtless define the force and effect of commercial contracts, and, independently of state laws, devise and prescribe remedies for their violation, and for torts and injuries committed in the prosecution of commerce; subject only to the constitutional restriction requiring the right of trial by jury to be preserved in suits at common law, where the value in controversy shall exceed twenty dollars. And this, in effect, is what Congress may be supposed to have designed to do by the above recited act, so far as one of the branches of commerce specified in the Constitution is concerned, viz: that "among the several states."

The cases designated in the act are, in their nature, of common law jurisdiction; and as such, they were cognizable in the state courts, and,

Company v. The Merchants' Bank of Boston (6 Howard's R., 344), decided at the next term of the Supreme Court, Mr. WEBSTER, as counsel for the respondents, without any professional motives for misinterpreting the act, took occasion to observe that "*it pitched the power upon the wrong location.*" Its proper home was in the admiralty and maritime grant, as in all reason, and in the common sense of all mankind out of England, admiralty and maritime jurisdiction ought to extend, and does extend, to all navigable waters, fresh or salt." But in a late case which arose in the Northern District of New-York, in which the plaintiff sought to recover the value of a schooner and her cargo, sunk by a collision on Lake Ontario, the act was held by the Supreme Court, on appeal, to be wholly indefensible as an exercise of the power of Congress to regulate commerce; but it was ad-

CHAP. 1.

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repudiated.

concurrently, in the national courts, where the citizenship of the parties was such as to confer jurisdiction.

When prosecuted in the state tribunals, they were of course to be governed by the state laws, both as concerned the rights of the parties and the forms of judicial proceeding: and such was also the case in the national courts; the Judiciary Act of 1789 having adopted the state laws as rules of decision in trials at common law, and the process acts of 1789 and 1792 having adopted the state forms of procedure. The object of this act appears to be, first, to bring these cases within the cognizance of the District Courts, without regard to the citizenship of the parties, as cases arising under a law of the United States (that is to say, under the act itself); and, secondly, as far as it could constitutionally be done, to apply to them the same rules, both of procedure and of decision, as if they had pertained to ocean instead of inland navigation, and so been strictly of admiralty jurisdiction; or, in other words, to subject them to the operation of the maritime law of the United States.

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judged nevertheless to be valid "on the ground that the lakes and the navigable waters connecting them are within the scope of the admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted." "If," said Chief Justice TANEY, in pronouncing the judgment of the Court, "the meaning of these terms was now for the first time brought before the Court for consideration, there would, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes have been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic, applies with equal force to the lakes. There is equal necessity for the instance and the prize power of the admiralty court to administer international law, and if the one cannot be abolished neither can the other." Regarding the subject under this aspect, the Court was led to the conclusion that the dogma restricting the admiralty jurisdiction to tide waters, borrowed from the jurisprudence of England, where all public waters, with a few small and unimportant exceptions, were of this description, was inapplicable to this country, differing, in this respect, so widely in its physical features, and

that it ought to be discarded as unreasonable and fallacious. The reasons for this decision extend as well to all public rivers and other waters where commerce is carried on between states, or with foreign nations, as to the lakes, and the former as well as the latter were expressly declared to be embraced by the newly established principle. The judgment is elaborate, and is strongly marked by the remarkable perspicacity and vigor that uniformly characterize the judicial opinions of the eminent Judge by whom it was pronounced. The Court was by no means insensible to the high respect due to the decision in the case of *The Thomas Jefferson*, and yielded only to a sense of imperative duty in overruling it. That case, it was observed, "did not decide any question of property, or lay down any rule by which the right of property should be determined. If it had, we should have felt ourselves bound to follow it, notwithstanding the opinion we have expressed. * * * * In such a case, *stare decisis* is the safe and established rule of judicial policy, and should always be adhered to. * * * * But the decision referred to has no relation to rights of property. It was a question of jurisdiction only, and the judgment we give can disturb no right of property nor interfere with any contracts heretofore made. And as we are convinced that the former decision was founded in error, and that the error, if not corrected, must produce serious public inconvenience and loss, it becomes our duty not to perpetuate it(*a*)."

(*a*) *The Propeller Genesee Chief*, 12 Howard's R., 443 (19 Curtis's Decis. S. C., 233).

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It may be presumed that this interpretation of the Constitution will generally be regarded with favor. If adhered to, as it doubtless will be, it will constitute an important epoch in the history of our national jurisprudence. For myself, believing it to be sound and beneficent, I rejoice that it has at length been adopted and authoritatively proclaimed. But I am obliged, nevertheless, to withhold my assent from much of what is said by the Court of the act of 1845. Cheerfully conceding, as I do, the sufficiency of the reasons assigned for deciding that its constitutionality cannot be maintained in virtue of the power to regulate commerce, I cannot acquiesce in the conclusion of the Court that "it is evident from the title as well as the body of the law, that Congress, in passing it, did not intend to exercise their power to regulate commerce; nor to derive their authority from that article of the Constitution." The reasons given by the Court for this conclusion appear to me wholly unsatisfactory, and I cannot but think that I have already shown them to be fallacious.

Conse-
quence of
the decision
in the case of
The Genesee
Chief.

The act of 1845 having led to the correction of an unfortunate mistake, the practical evils of which would probably otherwise have been of long continuance, its passage ought not, perhaps, to be regarded as a misfortune. But its complication with the great question decided by the Court is much to be regretted. It was a disturbing and embarrassing element. The assumed necessity of maintaining its validity, and, for that purpose, of referring it to the grant of admiralty jurisdiction, has imparted a false coloring

to the decision; and the act now stands an incongruous and mischievous excrescence upon our judicial system. If the court had come to the conclusion that it ought to be regarded and treated as a regulation of commerce, and consequently void, thus leaving the jurisdiction of the district court to rest simply on the authority of the Constitution and the Judiciary Act of 1789, the newly discovered jurisdiction would have been placed in harmony with the old, and would have more than effectuated the policy of the act of 1845. While this act remains, if it is to be operative at all, it can only be in direct opposition to the actual legislative intent, as an act arbitrarily and injuriously curtailing a jurisdiction existing independently of it. It becomes a serious judicial question, therefore, whether it is not superseded and rendered nugatory by the late decision of the Supreme Court. If not, few, probably, will doubt that it ought to be repealed. While it is suffered to remain, the district courts, it may be presumed, will consider themselves bound, according to the maxim, *expressio unius exclusio est alterius*, to restrict themselves, with respect to the lakes and their connecting straits, to the jurisdiction it defines(*a*). Elsewhere it can, of course, have no influence; so that, upon all the great navigable inland rivers of the country, the admiralty jurisdiction is now to be regarded as in full force, to the same

(*a*) Since this was written, the author has been informed that in one, at least, of the inland districts, admiralty suits are entertained without regard to the limitations imposed by the act, subject, however, to the privilege for which it provides, of a trial by jury.

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extent, and under the like conditions, as on the oceanic tide waters(*a*).

Nature of
the jurisdic-
tion under
the act of
1845.

The act of 1845, in imitation of the Judiciary Act of 1789, expressly reserves to the parties seeking redress for the breach of any contract, or for any injury cognizable in the admiralty, "the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the state laws." And even where a suit in admiralty is resorted to, the act contains a saving "to the parties of the right of a trial by jury, of all facts put in issue in such suits, where either party shall require it:" so that in no case can the civil law mode of trial be followed without the tacit consent of both parties. It is believed, however, that in no instance in the Northern District of New-York has this privilege been asserted

(*a*) I have now completed all that I think it necessary here to say of the act of February 26, 1845, considered in connection with the decision of the Supreme Court in the case of *The Genesee Chief*. I trust that I shall not appear to have been wanting in the respect so eminently due, and which I habitually cherish, towards the high court by which that decision was pronounced.

I could not reasonably be expected to forego this opportunity, the only one I was likely ever to have, to explain and vindicate the remarks contained in the first edition of this work relative to the constitutionality of the act. My observations upon it are alluded to in the judgment of the Supreme Court; and if, in proceeding to express its dissent from them, the court had seen fit simply to acknowledge that the view I took of the question was the only one compatible with its antecedent decisions and the circumstances in which I was placed, I might well have contented myself with a somewhat less extended notice of the subject. I do not complain of this omission, however, and I refer to it only as an apology for what might otherwise provoke the charge of undue prolixity.

With respect to the subjects of litigation brought by this act under the cognizance of the district courts as courts of admiralty, the act declares the jurisdiction defined by it to be "the *same* jurisdiction in all matters of contract and tort, as is now possessed and exercised by the said courts" in cases arising out of the prosecution of "navigation and commerce upon the high seas or tide waters." No further separate inquiry, therefore, concerning the nature of the controversies embraced by the act, is necessary; for the inquiry would but resolve itself into an examination of the limits of the admiralty and maritime jurisdiction of the district courts of the United States, in civil cases, exclusive of questions of prize: and to this examination it is proposed now to proceed.

I. As to matters of CONTRACT.

The admiralty jurisdiction in cases of contract, depends, primarily, upon the nature of the contract; and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation(*a*).

The correctness of this definition has never been denied(*b*); but the actual limits of the jurisdiction

(*a*) *Peyroux et al. v. Howard et al.*, 7 Peters's R., 324 (10 Curtis's Decis. S. C., 506); *The Steamboat Orleans v. Phæbus*, 11 Peters's R., 175 (12 Curtis's Decis. S. C., 391); *Thackery et al. v. The Farmer*, Gilpin's R., 524; *The Thomas Jefferson*, 10 Wheaton's R., 428 (6 Curtis's Decis. S. C., 465); Story's Commentaries on the Constitution, 527.

(*b*) By the decision of the Supreme Court in the case of *The Genesee Chief*, however, the word "maritime" in its ordinary acceptation, cannot, with strict propriety, be any longer employed as descriptive of the

VOL. 1. it concedes, have, nevertheless, been a subject of earnest and protracted controversy in our courts.

The late Mr. Justice STORY, who had devoted much attention, with his accustomed ardor and success, to the study of maritime law, in his celebrated judgment in the case of *De Lovio v. Boit*(a), entered into a comprehensive and minute survey and examination of the whole subject. His conclusion was, that national policy, as well as judicial logic, required the clause of the Constitution, extending the judicial power of the United States "to all cases of admiralty and maritime jurisdiction," to be so construed as to embrace *all* maritime contracts, torts and injuries. He was of opinion that the word *maritime* was superadded by the framers of the Constitution, *ex industria*, to remove every latent doubt. The disputes and discussions respecting the limits of the admiralty jurisdiction could not but have been well known to them. It was wise, therefore, to dissipate all question, by giving cognizance of all cases of maritime jurisdiction, or, what is precisely equivalent, of all maritime causes.

species of contracts cognizable in the American admiralty, the jurisdiction of our courts being held to embrace, not only the lakes, which may not very inaptly be denominated seas, but all public navigable rivers used as channels of commerce between the states, or with foreign nations, though unaffected by the ebb and flow of tide. The frequent occurrence of the term "maritime" in the reports of the decisions of our courts relating to this branch of our jurisprudence, renders it necessary not to lose sight of this great innovation. For the same reason it will be impossible for the author, without inconvenient circumlocution, altogether to avoid the use of this word where it has ceased to be strictly proper.

(a) 2 Gallison's R., 398.

With regard to what may properly be denominated maritime contracts, the learned judge was of opinion that "in this particular there is little room for controversy. All civilians and jurists agree, that in this appellation are included, among other things, charter-parties, affreightments, marine hypothecations, contracts for marine service in building, repairing, supplying and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettisons, and policies of insurance." And he adds, that "in point of fact, the admiralty courts of other foreign countries have exercised jurisdiction over policies of insurance as marine contracts; and a similar claim has uniformly been asserted on the part of the admiralty of England." His judgment accordingly was, that "policies of insurance are within (though not exclusively within) the admiralty and maritime jurisdiction of the United States." This decision was pronounced in 1815.

During the period of thirty years which elapsed between that date and the time of his decease, the doctrines of that case were repeatedly reiterated and firmly adhered to by him, in the Circuit Court for the First Circuit, both as respects the general principles which form the basis of these doctrines, and as to the particular point adjudicated(a). In the last of the cases here referred to, which was

(a) *Andrews et al. v. The Essex Fire and Marine Insurance Company*, 3 Mason's R., 6; *Peele et al. v. The Merchants' Insurance Company*, id., 27; *The Schooner Tilton*, 5 Mason's R., 465; *Hale et al. v. The Washington Insurance Company*, 2 Story's R., 176.

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a libel on a policy of insurance, decided in 1842, referring to the case of *De Lovio v. Boite*, as one in which, nearly twenty-seven years before, he had occasion to consider and to affirm the jurisdiction of the district courts of the United States, as courts of admiralty, over policies of insurance, he remarked, that "having not unfrequently been called upon in the intermediate period to reëxamine the same subject, he deliberately adhered to the doctrine therein stated: that in the various discussions which had since taken place in his circuit and elsewhere, he had found nothing to retract, and nothing to qualify, in that opinion, in respect to the true nature and extent of that jurisdiction, and its importance to the commercial and maritime world: that to no nation was it of more importance and value to have it preserved in its full vigor and activity, than to America, as one of the best protections to its maritime interests and enterprises: that it had been his hope and expectation, many years ago, that the jurisdiction of the admiralty over policies of insurance would have been finally settled in the Supreme Court of the United States, in a cause from his circuit, which, however, went off without a decision; but that he had reason to believe that, at that time, his learned brothers, Mr. Chief Justice MARSHALL and Mr. Justice WASHINGTON, were prepared to maintain the jurisdiction, and that he had no reason to believe that a majority of the other judges were opposed to it."

Conflicting
judicial
opinions.

But the opinions of Mr. Justice STORY, with respect to the scope of the admiralty jurisdiction of

the American courts, were warmly contested by two of his associates on the bench of the Supreme Court—by Mr. Justice JOHNSON, in a learned and able opinion in the case of *Ramsay v. Allgre(a)*; and by Mr. Justice BALDWIN, soon after he took his seat upon the bench, in a tone of undoubting confidence, in the case of *Bains v. The Schooner James and Catherine(b)*. It would be inconsistent with the design of this brief summary, to enter into a detailed examination of the grounds of these conflicting opinions(c).

The question on which the controversy mainly turns, is, whether or not in giving a practical construction to the constitutional grant of jurisdiction over all cases of admiralty and maritime jurisdiction, the decisions of the English courts of common law, since the statutes of Richard II., constitute the test by which the extent of the grant is to be determined. The doctrines of these decisions were advanced and established during a protracted and angry contest between the common law courts and the Court of Admiralty, in which the former, being armed with the power of issuing writs of prohibition to the latter, of course, came off victorious. Mr. Justice STORY, and those who concur with him,

(a) 12 Wheaton's R., 611 (7 Curtis's Decis. S. C., 395).

(b) 1 Baldwin's R., 544.

(c) This subject is canvassed by Chancellor KENT, with his accustomed ability and acuteness, in the third volume of his Commentaries, 3d edition, p. 364 et seq. See also Conkling's Treatise on the organization, jurisdiction and practice of the Courts of the United States, 3d edition, p. 260 et seq., where the opposite views taken of the question by Mr. Justice STORY and Mr. Justice JOHNSON are summarily stated.

VOL. 1. denied the authority of these decisions altogether; while his opponents insisted that they were obligatory upon us. The course of decision, not only in the courts of the districts composing the First Circuit, but in the Circuit Court for the Southern District of New-York, in the Circuit Court for the Third Circuit during the time of Mr. Justice WASHINGTON, and in the district courts of the commercial districts of Pennsylvania and Maryland during the times of Judges PETERS and WINCHESTER, has been in accordance with the views of the subject entertained by Mr. Justice STORY; while the elder Judge HOPKINSON, and Judge BEE, took the opposite view. In the Supreme Court of the United States, the subject has been treated with great caution; but I am not aware of anything in its decisions thus far, that conflicts with the doctrines held by Mr. Justice STORY. On the contrary, its decision in the case of *Peyroux v. Howard*(a), and its language in several other cases, are wholly at variance with the opinions advanced by Mr. Justice JOHNSON and Mr. Justice BALDWIN(b). The precise question whether it extends to contracts of marine insurance, remains yet to be definitely settled by the Supreme Court. But these contracts, relating, as they do,

Contracts of
marine insu-
rance.

(a) 7 Peters's R., 343 (10 Curtis's Decis. S. C., 506).

(b) In several more recent cases the authority of the decisions of the English common law courts, as a criterion by which the limits of the admiralty jurisdiction of the American courts are to be determined, is unequivocally denied. See *Waring v. Clarke*, 5 Howard's R., 441 (16 Curtis's Decis. S. C., 456); *The Genesee Chief*, 12 Howard's R., 443 (19 Curtis's Decis. S. C., 233); *Fretz v. Bull*, 12 Howard's R., 46 (19 Curtis's Decis. S. C., 249).

purely to maritime pursuits, and being eminently conducive, if, indeed, they are not to be regarded as indispensable to the successful prosecution of navigation and commerce, it is not easy to perceive upon what ground they can consistently be excepted from the principles already established by that court. It is not to be diguised, however, that the prevalent sentiment of the legal profession seems to be opposed to their subjection to the admiralty jurisdiction.

Mr. Justice STORY, in his Commentaries on the Constitution, after adverting to the uncertain state of the law touching the boundaries of the admiralty jurisdiction, and disclaiming any design to go into a consideration of the vexed questions affecting it, proceeds to what he denominates “a brief view of that which is admitted and indubitable”; and he enumerates the following as “among” the matters of contract falling within the admiralty jurisdiction of the district courts: “The claims of material-men and others for the repair and outfits of ships belonging to foreign nations, or to other states¹; bottomry bonds for moneys lent to ships in foreign ports, to relieve their distresses, and enable them to complete their voyages²; surveys of vessels damaged by perils of the seas³; pilotage on the high seas⁴; and mari-

To what matters of contract the admiralty jurisdiction extends.

“¹ *The St. Jago de Cuba*, 9 Wheaton’s R., 409, 416; *The Aurora*, 1 Wheaton’s R., 106.

² *The Aurora*, 1 Wheaton’s R., 96.

³ *Janney v. The Columbian Insurance Company*, 10 Wheaton’s R., 412, 415, 418.

⁴ *The Ann*, 1 Mason’s R., 508.

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There is also another acknowledged branch of admiralty jurisdiction, founded in a rule of national comity. It is that of enforcing the judgments of foreign courts, when the ends of justice require it; and it is held to be a good cause of reprisal for a sovereign not to compel his courts to execute the sentence of a foreign court, when the person or goods sentenced are within his jurisdiction(*d*).

¹ *The Thomas Jefferson*, 10 Wheaton's R., 428."

(*a*) *The New Jersey Steam Nav. Co. v. The Merchants' Bank of Boston*, 6 Howard's R., 344 (16 Curtis's Decis. S. C., 722); *Rich & Harris v. Lambert & Lambert*, 12 id., 347 (19 Curtis's Decis. S. C., 171); *The New World*, 16 Howard's R., 469 (21 Curtis's Decis. S. C., 261); *The Volunteer*, 1 Sumner's R., 151; *Certain Logs of Mahogany*, 2 Sumner's R., 589; *The Tribune*, 3 Sumner's R., 144; *The Cassius*, 2 Story's R., 81; *Freight and Cargo of The Spartan*, Ware's R., 149; *The Reeside*, 2 Sumner's R., 567; *The Rebecca*, Ware's R., 189; *The Phebe*, id., 263; *The Paragon*, id., 322.

General
average.

The only suit in admiralty to enforce a claim for general average, that appears to have been brought to the notice of the Supreme Court, if it be not indeed the only one that has been instituted in an American court, is that of *Cutler v. Rae*, 7 Howard's R., 729. It was an

(*b*) *Andrews v. Wall et al.*, 3 Howard's R. (15 Curtis's Decis. S. C., 556).

(*c*) *Ex parte Lewis*, 2 Gallison's R., 483; *The McDonough*, Gilpin's R., 101; *The Phebe*, Ware's R., 354.

(*d*) 2 Bro. Civ. and Adm. Law; *The Jerusalem*, 2 Gallison's R., 191, 197.

Although, as we have seen, it is no longer necessary, in order to render a contract, claim or service cognizable in the admiralty, that it should relate to transactions on the high seas or tide waters, it must

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Limited to matters pertaining to commerce and navigation.

action *in personam* by a ship-owner against the consignee of the cargo which it was alleged had been saved from destruction by the voluntary stranding of the ship, and which, on its arrival in port, had been delivered to the consignee.

The district court decreed the sum of \$2,500 to the libellant, and the decree was affirmed by the circuit court. On appeal to the Supreme Court, however, the judgment was reversed for the want of jurisdiction in the courts below. It was conceded that the admiralty jurisdiction extends to cases where the vessel or cargo is subject to a lien created by the maritime law; and that where, as in the cases of bottomry, salvage, seamen's wages and the claims of material-men, the lien adheres to the property, it may be enforced in the admiralty, not only by process *in rem*, but by a suit *in personam*, against the party who holds the property or the proceeds, whoever he may be. In such cases the maritime law attaches an absolute and unconditional lien upon the property. •

But the lien of the party entitled to contribution by way of general average was held not to be of this nature. The master has a right to retain the goods until the general average with which they are charged has been paid or secured. In exercising this right he must be regarded as, in this respect, the agent of the party entitled, acting for his security, and exerting his rights. But this right of retainer conferred by the maritime law is a qualified lien, depending on the possession of the goods by the master or ship-owner, and ceases when they are delivered to the owner or consignee.

Whether by receiving the goods the consignee renders himself liable in any form for the contribution, the court considered it unnecessary to decide; for assuming that he stood in the place of the owner, and was liable to the same extent, the opinion of the court was that the case was not of admiralty jurisdiction. "The owner," say the court, "is liable, because, at the time he receives the goods they are bound to share the loss of other property by [the sacrifice of] which they have been saved; and he is not entitled to demand them until the contribution has been paid. And as this lien is discharged by the delivery, the law implies a promise that he will pay it. But it

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appertain to the business of commerce and navigation; and cases may arise in which the application of this test would be attended with difficulty and embarrassment. Such a case arose in the Eastern

is not implied by the maritime law which gave the lien. It is implied upon the principles of the common law courts, upon the ground that in equity and good conscience he is bound to pay the money, and is therefore presumed to have made the promise when he received the goods."

From the admissions of the court that the admiralty jurisdiction comprises all subsisting liens given by the maritime law, and that such a lien attaches to goods in favor of the party entitled to contribution, while they remain in the possession of the master, it would seem to follow very clearly, that this lien might be enforced by a suit *in rem* before the delivery of the goods to the owner. But, adverting to this point, the court contented itself with observing that the question did not arise in the case and that no opinion would therefore be expressed upon it.

The court took occasion, also, to repel any inference that the admiralty jurisdiction of the American courts was supposed to be restricted to the subjects over which the English Court of Admiralty exercised jurisdiction at the time our Constitution was adopted; the reverse it was observed, having "been repeatedly decided in this court."

Conveyance
of passen-
gers.

What I have observed of general average, viz: that it does not appear from the Reports of the Decisions of the Supreme Court, to have given rise to more than one admiralty suit, is true also of contracts for the conveyance of passengers. The case I refer to is that of *The New World* above cited. It was an action *in rem* by a passenger on board a steamer from Sacramento to San Francisco, in California, to recover compensation for injuries sustained from the explosion of her boiler. No objection appears to have been made to the jurisdiction, nor does there appear to be any foundation for such an objection except the now exploded ground assumed by Mr. Justice DANIELS in his dissenting opinion, that the libel contained no allegation that the cause of action "did not occur either *infra corpus committatus* nor *infra fauces terræ*."

Towage.

For including the subject of towage among the subjects of admiralty jurisdiction, no specific judicial authority, it will be observed, is cited.

District of Pennsylvania, before the late Judge HOPKINSON. It was a suit *in rem*, for wages earned on board a boat employed in bringing wood for fuel across the Delaware river to the city of Philadelphia, from Cooper's creek in New Jersey, about ten miles above the city. After adverting to the great and increasing frequency of applications for admiralty process to recover wages for services performed on board the river craft, in which little regard was paid "to the character of the use or employment of the vessel * * * * the common river boats, of every size, having become ships or vessels navigating the high seas; their daily trips from shore to shore, voyages on the high seas; and the loading and unloading of wood and similar articles for the market, brought from places within a few miles of the city, for daily wages, being denominated marine services or maritime contracts," the court, yielding to what it considered the necessity of the case, expressed a desire, if possible, to fix some principle which might in future serve as a guide in that court with respect to cases of the like nature with that before it. The learned judge, however, frankly acknowledged his inability to draw any line of distinction between cases which were, and those which were not properly cognizable in the admiralty, so definite and clear, as to remove all difficulty from the subject. With respect to services rendered on the

CHAP. 1.

Does not extend to boats employed in petty traffic.

The jurisdiction, however, results plainly from the nature of the service. The term itself furnishes its own definition, and as the subject does not appear to require further notice I do not propose to revert to it.

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sea, *extra fauces terræ*, there was little room for controversy: the difficulty attending the subject related to cases arising on inland tide waters. The general rule, that the objects of the contract must be essentially maritime, and must pertain to commerce and navigation was indisputable: the difficulty lay in its application. The circumstances of any given case, the kind of vessel, the business she is engaged in, the places between which she is navigated, may make it apparent that it cannot be one for the cognizance of the admiralty, and yet it might furnish no general rule of exclusion. The jurisdiction did not depend on the manner in which the vessel was equipped, whether with or without masts and sails; nor upon the power by which she was propelled, whether by sails, by oars or by steam. Steamboats, engaged in trade or commerce, were clearly subject to the admiralty jurisdiction; and it had been held to extend to lighters employed on tide waters, in the carriage of goods to and from ships. On the other hand, boats having masts and sails, might be clearly without this jurisdiction. Ferry boats plying on tide waters, and boats bringing fruit to market, for example, were supposed to be of this character. They could, in no proper sense, be said to perform voyages on the high seas; nor could the persons employed on board of them—frequently farmers and gardeners from the field, or persons hired for the occasion—be properly denominated mariners. These terms, in their just sense, were inapplicable to such petty domestic traffic. Under these views of the subject, it is hardly necessary to add, the court

was led to the conclusion that the case before it was not within the scope of its admiralty jurisdiction.

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The admiralty jurisdiction does not extend to preliminary contracts merely leading to the execution of maritime contracts. Thus, if there were a contract to sign a shipping paper, or execute a bottomry bond, and the party refused to perform it, the enforcement of such a contract would not belong to the admiralty (*a*). And, upon this ground, a contract between two persons, one of whom had chartered the vessel, whereby he was to act as master, and the other as mate of the vessel, and the two were to share equally in the profits of the contemplated voyages, was held not to be within the admiralty jurisdiction (*b*). But whatever may be the particular name or character of the contract, if it imports a maritime contract, that is sufficient to bring the case within the admiralty jurisdiction. It was held to attach, therefore, to a memorandum of a contract contemplating the execution of a more formal charter-party at another place, to which the vessel was required to proceed by sea to complete her cargo, before her final departure from the United States; the cargo for that part of the voyage having been put on board, and the voyage having then been voluntarily broken up by the claimants (*c*). So, contracts to serve in fishing voyages, for a share of the proceeds of the voyage, the stipulated share being of the nature of wages, are within the

Does not extend to mere preliminary contracts.

(*a*) *The Essex Fire & Marine Insurance Company*, 3 Mason's R., 6.

(*b*) *The Crusader*, Ware's R., 437.

(*c*) *The Schooner Tribune*, 3 Sumner's R., 144.

VOL. 1. admiralty jurisdiction, notwithstanding they constitute a species of partnership(*a*).

II. Jurisdiction in cases of TORT.

Depends on
locality.

The jurisdiction of the admiralty in cases of tort, depends upon *locality*, and “respects civil torts and injuries done on waters within the admiralty jurisdiction of the courts of the United States, comprising, according to a recent decision of the Supreme Court, not only the ocean and tide waters, but the lakes and all the great navigable rivers of the United States(*b*).”

The following cases are enumerated by Mr. Justice STORY, as unquestionably falling within this branch of jurisdiction, viz: Assaults, or other personal injuries; collisions; spoliation and damage (as they are technically called), such as illegal seizures, or depredations on property; illegal dispossession, or withholding possession from the owner of ships, commonly called possessory suits; cases of seizure under municipal authority, for supposed breaches of revenue or other prohibitory laws; and cases of salvage(*c*). This enumeration, it will be

(*a*) *Macomber v. Thompson*, 1 Sumner’s R., 384; *The Crusader*, Ware’s R., 437, 440.

(*b*) 3 Story’s Com. on the Const., 527, 530; *The Genesee Chief*, 12 Howard’s R., 443 (19 Curtis’s Decis. S. C., 233); *Fretz v. Bull*, id., 466 (19 Curtis’s Decis. S. C., 249).

(*c*) 3 Story’s Commentaries on the Constitution, 527, 530.

There can, it is supposed, be little room for doubt that the admiralty jurisdiction of the courts of the United States, in cases both of contract and of tort, will be firmly asserted and upheld, to the extent, at least, indicated in the text. Indeed, with two or three exceptions undeniably within the admiralty jurisdiction, all the specified subjects

seen, comprises every description of probable injury to person or property, which would constitute a fit subject for private redress in a judicial tribunal. The admiralty jurisdiction in these cases, therefore, may be said to depend purely upon the place where the cause of action arises. In cases of contract, although the jurisdiction is said to result primarily from the nature of the contract; yet as locality con-

are enumerated and expressly recognized as embraced within it, by the Rules of Practice in admiralty and maritime cases recently adopted by the Supreme Court of the United States. The enumeration includes also the additional subjects of disputes concerning the *title* to ships, suits for the adjustment of which are denominated petitory suits (Appendix, Rule 20); and "suits against the ship or freight, founded upon a mere marine hypothecation, either express or implied, of the master, for moneys taken up in a foreign port for supplies or other necessaries for the voyage, without any marine interest." (Appendix, Rule 17.)

In hazarding the prediction that the admiralty jurisdiction of the American courts will not, by any future decision of the Supreme Court, be restricted to limits less ample than those above defined, I desire, however, to be understood, touching matters of contract, to refer more particularly to suits *in rem*. The proposition which Mr. Justice JOHNSON, in his opinion in the case of *Ramsey v. Allegre*, labored most zealously to establish, was, that the admiralty has no jurisdiction at all, purely *in personam*, in cases arising *ex contractu*, except in the single instance of seamen's wages; and all the cases in which the admiralty jurisdiction, to the extent I have indicated, has been maintained by the Supreme Court, were suits *in rem*; but a coextensive jurisdiction *in personam* was *incidentally* distinctly asserted by that court in the case of *The General Smith* (4 Wheaton, 438), and is virtually declared in the new Rules. (See Appendix, Rules 12, 14, 17, 18.) [Since the first edition of this work, containing the foregoing note, the distinction insisted on by Mr. Justice JOHNSON has been distinctly repudiated by the Supreme Court. See *The New Jersey Steam Navigation Co. v. The Massachusetts Bank of Boston*, 6 Howard's R., 344 (16 Curtis's Decis. S. C., 922); and *infra* CONTRACTS OF AFFREIGHTMENT.]

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stitutes one of the essential elements of this species of contract, the jurisdiction may also be said, to that extent, to depend upon locality. The required localities, in each of the two classes of cases, are the same.

Jurisdiction
of controver-
sies between
foreigners.

Considering the extent of our commercial intercourse with other nations, and the number of foreign vessels which annually visit our ports, it becomes important to inquire, to what extent foreigners, transiently here, are entitled to seek redress on the instance side of the American courts of admiralty.

In cases of
salvage.

In the High Court of Admiralty of England, this branch of jurisdiction seems to have been the subject of considerable doubt and difficulty. The earliest and most important reported case on this subject was decided by Sir WILLIAM SCOTT in 1799, the next year after that great judge took his seat in the court^(a). It was a suit for salvage against an American ship and cargo, rescued by her crew from French captors, and carried into an English port. The crew was composed chiefly of Americans, who were not parties to the suit, they having been referred, by the American ministers, to the courts of their own country. The rest of the crew were British subjects, and it was by them that the suit was instituted. The jurisdiction of the court was contested on account of the foreign character of the vessel; and also on the ground that the libellants, although in fact British subjects, were, as it was insisted, nevertheless to be regarded, in that suit, as

(a) *The Two Friends*, 1 Robinson's R., 271.

Americans, by reason of their having enrolled themselves, in the United States, as a part of the crew of the American vessel, on board of which the salvage services had been rendered.

Sir WILLIAM SCOTT, after laying down the principle "that every person assisting in rescue has a lien on the thing saved," is reported to have expressed himself as follows: "Then where is this lien to be demanded? It should seem that that was an unnecessary question to be proposed, when the goods were admitted to be in England; but, strange as it may appear, it is argued that this claim is to be enforced in America, because the ship is an American ship, and the parties are American sailors." Having shown that the libellants were to be considered as British subjects, and that the objection that they were to be regarded as American seamen was unfounded in fact, he deemed it unnecessary to answer the question, whether, if the libellants were American seamen, the court would hold plea of their demands. But he significantly added, "In the mean time I will say, without scruple, that I can see no inconvenience that would arise, if a British court of justice was to hold plea in such a case; or, conversely, if American courts were to hold pleas of this nature respecting the merits of British seamen on such occasions: for salvage is a question of the *jus gentium*, and materially different from the question of a mariner's contract, which is a creature of the peculiar institutions of each country, to be applied, and construed, and explained, by its own particular rules. There might be good reason, therefore, for

VOL. 1. this court to decline to interfere in such cases, and to remit them to their own domestic forum: but this is a general claim upon the ground of *quantum meruit*, to be governed by a sound discretion, acting on general principles; and I can see no reason why one country should be afraid to trust to the equity of the courts of another on such a question, of such a nature, to be so determined."

After noticing and answering the further objection which had been urged at the bar, that different rules relative to the amount of distribution of salvage might prevail in different countries, he summed up the matter thus: "These considerations, therefore, found no solid objections against the exercise of the jurisdiction; but I go farther, and say, that I think there is great reason for it, because it is the only way of enforcing the best security—that of the lien on the property itself. Between parties who were all Americans, if there was the slightest disinclination to submit to the jurisdiction of this court, I should certainly not incline to interfere; for this court is not hungry after jurisdiction, where the exercise of it is not felt to be beneficial to the parties between whom it is to operate. At the same time, I desire to be understood to deliver no decided opinion whether American seamen, rescuing an American ship and cargo brought into this country, might not maintain an action *in rem* in this court of the law of nations; but if there was British property on board, and American seamen were to proceed here against that, I should think it a criminal desertion of my duty did I not support their

claim. In the present case, no American seaman has appeared; nor is it proved that there was any British property on board. But as to these British seamen, holding no connection with America^(a), and having rescued foreign property, I have no doubt that they are entitled to have their services rewarded here; for it would be a mere mockery, and derision of their claims, to send them back to America, to hunt out their redress against each individual owner of separate bales of goods: it were better to inform them that they were entitled to nothing, than to remit them on such a wild pursuit. I should therefore think it a reproach to the courts of this country, if they were not open to lend their assistance in such a case."

Although the only question directly involved in this case, was, whether the court would entertain an action *in rem*, in behalf of British seamen, for remuneration as salvors of a foreign ship and cargo when brought into an English port, I have quoted thus liberally from Lord STOWELL'S judgment, because in the extracts which I have given, he has shadowed forth the leading principles by which that court has since professed to be governed, not only during his illustrious presidency of thirty years, but to the present time.

He recognizes a distinction, it will be observed, between cases resting upon the general ground of *quantum meruit*, depending on the principles of the

(a) They had shipped on board *The Two Friends*, for the purpose of returning to their own country, without any engagement to serve on the return voyage.

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general maritime law, and which therefore form a part of the *jus gentium*; and cases depending on the laws of the particular country to which the parties belong. It is clear, also, that in cases of the former description, he did not consider the nationality of the libellants, any more than he did that of the vessel, essential to the jurisdiction of the court. Accordingly, he did not afterwards scruple to take cognizance of suits in behalf of foreigners, against foreign ships, on bottomry bonds; these being instruments in familiar use by all commercial nations, and deriving their validity and effect from the general maritime law(a).

Suits between foreigners, on bottomry bonds, entertained in the English admiralty.

Suits by foreign seamen for wages not entertained without the consent of the resident minister of their country

Lord STOWELL subsequently declined to entertain suits for wages by foreign seamen, without the consent of the minister or other accredited resident representative of their country; except where, from the nature of the case, no such consent could be obtained, and where the seamen would otherwise be left without the means of redress. In a case which arose not long afterwards, of a suit by American seamen, for wages, and for the three months' extra pay to which they were entitled by an act of Congress, on being discharged in a foreign port, he said it was the first case of the kind which had been brought to the notice of the court, and he certainly felt great difficulty respecting the propriety of entertaining it. "We know," he proceeded to remark, "the language which has been occasionally held in the courts of common law, with respect to the jurisdic-

(a) *The Gratitude*, 3 Robinson's R., 240; *The Jacob*, 4 Robinson's R., 245; *The Madonna D'Ira*, 1 Dodson's R., 37.

tion which this court exercises in cases of mariners' wages. Suits for wages due to mariners of our own country, have been said to be entertained by the Court of Admiralty, more from a kind toleration founded upon the general convenience of the practice, than by any direct jurisdiction properly belonging to it, although the exercise of such jurisdiction has existed from the first establishment of such court. In various instances, in order to prevent a failure of justice, this court has gone a step further, and as wages are due by the general maritime law, however modified by the particular regulations of different countries, it has, with the consent of the accredited agent of their own government, entertained proceedings for wages, at the suit of foreign seamen, against foreign vessels in which they served, such vessels being in the ports of this kingdom. But here the other part of the claim does not arise out of the general maritime law, but merely out of a municipal law of the United States; and I should find great difficulty in considering this recital of the act of Congress as any part of the contract, as it is only printed on the back of the instrument, and is not at all referred to therein." Time having been taken for further consideration, on a subsequent day, Lord STOWELL observed: "With respect to the wages, I am so far willing to entertain the suit, with the consent of the representative of the United States; but I do not think I have jurisdiction to enforce a municipal regulation of that country: had I that power, I should be glad to do it in the present instance; but I think the probable

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effect of this court entertaining it in its present form, would be a prohibition. At the same time, it appears to me, that if the regulation were embodied in the contract, so as to compose a part of it, the court might be empowered, in that case, to carry it into full effect as an article of the contract between the parties(a).”

unless in cases where the consent of the minister cannot possibly be obtained.

In the *Vrow Mina*(b), a suit for wages was allowed to be maintained against a Dutch ship which had come to England under a British license, England and Holland then being at war. “The court,” said Lord STOWELL, however, “is extremely shy, of interfering in cases of this kind, where foreigners only are concerned, without the consent of the representative of the nation to which the parties belong.” He was of opinion, nevertheless, that he ought to exercise jurisdiction in the case, because it was “impossible that any such consent should be obtained; the ship being an enemy’s ship, coming to the ports of this country under a license obtained for that purpose from the British government.”

The same principle was applied in the case of the *Maria Theresa*, an American vessel(c); the court remarking that the crew could “get no redress in an American court of justice,” because “the whole transaction was illegal by the laws of that country.”

In the case of a Greek ship(d) which had been libelled in England on a bottomry bond, the crew were permitted, under the circumstances, to intervene for wages and maintenance. A memorial in

(a) *The Courtney*, Edwards’s R., 239.

(b) 1 Dodson’s R., 234.

(c) 1. Dodson’s R., 303.

(d) *The Madonna D’Ira*, 1 Dodson’s R., 37.

their behalf had been presented to one of the secretaries of state, stating that they had been defrauded by the captain of their wages, and left destitute; and the King's proctor had been directed to take such steps as might be requisite to recover their wages. Directions had also been given for the support of the crew in the meantime, and for afterwards sending them back to their own country. The court, regarding them as "in an eminent degree *inopes consilii*," said, it "would to such suitors give every relief in its power, by departing from forms, as far as is consistent with the justice due to others, especially when the Crown has interfered for the protection of the parties." With respect to the claim for subsistence, no express provision for it being contained in the seamen's contract, the court received the oath of the Consul-General of the Sublime Porte, resident in Great Britain — who had himself been twenty years captain of an Ottoman vessel — as to the customary regulations of Turkey on the subject; and the demand appearing to be in accordance therewith, it was decreed accordingly.

Causes of possession between foreign part-owners, have been considered, in the English admiralty, to rest on the same footing, in respect to jurisdiction, as suits for wages. The general usage of that court accordingly is, to decline all interference in such cases. Lord STOWELL therefore refused to entertain a cause of possession, at the suit of the owners of fifteen sixteenth shares of a Hamburgh ship. "If this," said he, "were a British ship, there can be no doubt that by the practice of the court, it would,

Jurisdiction of controversies between part-owners of vessels subject to the like conditions.

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upon the application of a majority of the parties interested, proceed to dispossess the master, though a part-owner, without minutely considering the merits or demerits of his conduct; but I know of no instance in which the Court of Admiralty has entertained a suit of this nature, in the case of a foreign ship. The court, with the consent of the parties, and of the accredited agent of the country to which they belong, certainly does hold plea of causes between foreigners, arising on the *jus gentium*; but this, I think, is a case which cannot be so considered, because, whatever may have been the general rule under the old civil law in cases of possession, it has been variously modified by the municipal law of different countries; and, therefore, by entertaining this suit, I might deprive the parties of those rights to which they are entitled by the law of their own country, as administered in those courts to which they are directly and properly amenable(a).”

In a subsequent case, the same doctrine was reiterated: but the master, who was the owner of a small share of the ship, having detained her five years in foreign ports, and refusing still to return to his own country, to abide the decision of the court of admiralty there; and that court having, in the mean time, made a decree directing the master to deliver up the ship — this decree was deemed equivalent to the consent of the foreign government, and the jurisdiction was maintained(b).

(a) *The Johan and Sigmund*, Edwards's R., 242.

(b) *The See Reuter*, 1 Dodson's R., 22. See also *The Martin of Norfolk*, 4 Robinson's R., 298.

As far as any judgment can be formed from the meagre reports we have of the early decisions of the district courts of the United States, little or no distinction seems to have been originally made in respect to jurisdiction, between cases in which foreigners were alone concerned, and those in which our own citizens were interested. In a suit for wages by British seamen against a British ship *which came before the District Court of the United States, for the District of South Carolina, in 1798, a plea to the jurisdiction of the court was overruled, the judge declaring it to be "the daily practice of our courts, *as well as those of England*," to entertain suits for mariners' wages, both being guided by the *lex loci*, and regulating their proceedings accordingly, and there being in his opinion no solid ground for any distinction, in this respect, between such cases and those of bottomry and hypothecation, in which, he said, the jurisdiction seemed to be conceded(a). But in two similar cases which came before the same court in 1805, the earlier of the above cited decisions of Lord STOWELL having in the mean time been pronounced and become known in this country, the same able and upright judge deemed it to be his duty to reëxamine and reconsider the question of his jurisdiction touching suits between foreigners; and his conclusion was "that this court should be very cautious in exercising jurisdiction as to foreigners, unless under peculiar circumstances," and he accordingly declined its exercise in the cases

(a) *The Bellona*, Bee's R., 112, 114. See also *The Aurora*, *ib.*, 161.

VOL. 1. before him; desiring, however, "not to be understood as relinquishing jurisdiction where it may appear proper and necessary to prevent a failure of justice(a).

In the District Court for the Pennsylvania District, the course of decision appears to have been substantially the same(b).

Opinion of
Mr. Justice
StoRY in
The
Jerusalem.

Under this state of the authorities upon the subject, the case of *The Jerusalem*(c) came before the Circuit Court for the District of Massachusetts. It was a suit on a bottomry bond executed at Smyrna; the ship was a Greek vessel, and the parties were subjects of the Ottoman Porte. The master, himself a part-owner, appeared as claimant, under protest to the jurisdiction of the court, setting forth the alienage of the parties. The question of jurisdiction was fully discussed at the bar, and Mr. Justice Storry applied himself to its examination with his accustomed ardor and ability. Leaving out of view certain particular features of the case tending to narrow the discussion, he stated the question to be, "Whether the courts of the United States, in the exercise of their authority over causes of admiralty and maritime jurisdiction, have cognizance of maritime suits *in rem* between foreigners, whose permanent domicile is in a foreign country, when the specific property is within our territory?" His conclusion was

(a) *Thompson v. The Nancy*, Bee's R., 217.

(b) *L'Heureux*, 2 Peters's Ad. Decis., 415; *The Catharina*, 1 Peters's Ad. Decis., 104; *The St. Orloff*, 2 Peters's Ad. Decis., 428; *The Forsoket*, 1 Peters's Ad. Decis., 197.

(c) 2 Gallison's R., 191.

that the jurisdiction was unquestionable. The admiralty was the only tribunal capable of enforcing a specific performance *in rem*, by seizing into its custody the very subject of hypothecation. The commercial world look to it for security and redress; and a jurisdiction so ancient and beneficial, which exercises its powers according to the law of nations, and those rules and maxims of civil right which may be said to form the basis of the institutions of Europe, ought not to be restrained within narrow bounds, unless authority or public policy distinctly requires it. However the case may be as to remitting the defendant to his domestic forum in personal controversies, it is very clearly settled, that in proceedings *in rem*, or the real actions of the civil law, the proper forum is the *locus rei sitæ*. Mr. Justice STORY was of opinion, therefore, that with reference to what may be deemed the public law of Europe, a proceeding *in rem* may well be sustained in our courts, where the property of a foreigner is within our jurisdiction. Nor was he able to perceive how the exercise of such a judicial authority clashes with any principles of public policy. On the contrary, he thought the refusal might well be deemed a disregard of national comity, inasmuch as it would be withholding from a party the only effectual means of obtaining his right.

As to the inconvenience which it had been supposed might result from the existence, among the different commercial nations, of discordant regulations relative to maritime contracts, he thought it had been overrated. These contracts in general are

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The jurisdiction of the American courts of admiralty held to extend to suits *in rem* between foreigners.

The proper forum in such cases is the *locus rei sitæ*.

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substantially governed, in almost all civilized countries, by the same rules. Almost all Europe have derived their maritime codes from the Mediterranean; and even in this country, we take pride in conforming our decisions to the rules of the venerable *consolato del mare*.

Suits in
behalf of
foreign sea-
men not
entertained
where the
voyage is not
terminated.

With respect to the contracts of seamen for wages, it was true, that where the voyage has not terminated, or the seamen have bound themselves to abide by the decisions of the tribunals of their own country, foreign courts have declined any interference, and remitted the parties to their own tribunals for redress. But where the contract has been dissolved by the regular termination of the voyage, or by the wrongful act of the other party, the cases are not unfrequent, in which foreign courts have sustained the claim for mariners' wages.

The jurisdiction of the admiralty, in matters of contract, depends not on the character of the parties, but on that of the contract, whether maritime or not. When, therefore, its jurisdiction once attaches on the subject matter, it will exercise it conformably with the law of nations, or with the *lex loci contractus*, as the case may require.

Upon the whole, the opinion of Mr. Justice STORY was, that the rule of the civil law, *in actionibus in rem speciale forum tribuit locus in quo res sitæ sunt*, is applicable to maritime contracts.

The same doctrine was held, in a much more recent case, after a thorough examination of the question, by the learned and able judge of the

District Court of Maine(*a*). His opinion was, that CHAP. 1.
it might safely be assumed, on the ground both of principle and authority, that the alienage of the parties formed no impediment to the jurisdiction of a court of admiralty over maritime contracts; and that the court in which the thing is situated was the proper forum for the prosecution of a suit *in rem*, though all the parties are foreigners.

The result, therefore, of the American authorities seems to be, that though the admiralty courts of this country are not bound to take jurisdiction of controversies growing out of maritime contracts, between foreigners having no domicile in this country, as they are when the parties are citizens or resident here, yet that they may lawfully exercise it, and ought to do so in obedience to the demands of justice(*b*).

(*a*) *The Bee*, Ware's R., 332.

(*b*) Had Lord STOWELL felt himself at liberty freely to consult his own liberal and enlightened judgment, and to follow its dictates, on this subject, there is good reason to believe that such would also have been his conclusion concerning his own powers and duty; but the court in which he presided, had, for a century and a half, been so trammelled by the arbitrary distinctions and narrow rules imposed upon it by the jealousy of the common law courts, as scarcely to be left at liberty, in deciding questions affecting the limits of its jurisdiction, to look for guidance to those comprehensive principles of justice and expediency which alone could enable it to place the subject on a rational and intelligible basis. By a late act of Parliament, entitled "An act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England" (3 & 4 Victoria, chap. 65), that court is at length relieved, to a considerable extent, from the shackles by which its efficiency and usefulness had so long been impeded.

OF THE RIGHTS OF THIRD PERSONS, NOT ENTITLED TO APPEAR AS CLAIMANTS IN A SUIT IN REM, TO INTERVENE THEREIN, PENDENTE LITE, FOR THE PROTECTION OF THEIR INTERESTS; OR, AFTER CONDEMNATION AND SALE, TO DEMAND PAYMENT OUT OF SURPLUS PROCEEDS IN COURT.

The subjects above indicated are of great practical importance, and if they do not strictly pertain to the head of jurisdiction, they are so nearly allied to it as to be fit subjects for consideration in this place. Their importance arises from the nature of a suit *in rem*, in which the thing proceeded against — usually a ship and her appurtenances — is, at the outset, arrested and held, under the process of the court, for the purpose of being eventually sold, if necessary, to satisfy the demand of the libellant. But it is a principle of this form of action, that (as it is usually expressed) all the world are parties to it, and, as a legal consequence, that all the world are bound by the decree. The effect of the sale, therefore, is to invest the purchaser with an indefeasible title to the property, discharged of all further liability for the debts of the owner, even though they were liens thereon. And when a balance remains, after paying the debtor damages awarded to the libellant, as there often does, and sometimes of large amount, unless some other claim to it is interposed, which the court is permitted to recognize as superior to that of the owner, it is a matter of course at once to direct its payment to him. The demand of the libellant, moreover, though ostensibly just, may, for some

reason susceptible of proof, be in reality, invalid, and yet the owner may not choose to appear and contest it. The extent and nature of the right of intervention belonging to third persons, whose interests may be injuriously affected by the proceeding, becomes, therefore, an interesting subject of inquiry.

In the judicial discussions to which it has given rise, the two rights under consideration, as from their close relationship might have been expected, are sometimes so blended and interwoven, not to say confounded, as to render it somewhat difficult, in the brief survey which I propose to take of them, to keep them altogether distinct.

The right to sue against surplus proceeds is that which has most frequently been the subject of controversy, and that with regard to which the law may at length be considered as most clearly ascertained. In the English High Court of Admiralty its agitation has been attended with an extraordinary degree of perplexity, and the course of decision concerning it has been vacillating and inconsistent. There are two general principles pertaining to it, however, about which there has been no serious controversy. On the one hand it seems never to have been doubted that a *lien conferred by the maritime law* entitled its possessor to payment. A mariner to whom wages were due, or a salvor, for example, was always permitted to sue against the proceeds of the ship arising from its sale in a suit on a bottomry bond. The justice of such a practice being unquestionable, its admissibility was considered

Payment out of surplus proceeds.

Right unquestionable in favor of the possessor of a maritime lien.

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Does not
belong to
a general
creditor.

to be but a question of jurisdiction ; and it being a part of the especial business of the court to entertain original suits founded on maritime liens, the authority thus collaterally to take cognizance of such liens was supposed to be incidental and was accordingly exercised without scruple. And on the other hand, it has never been supposed that the court could exercise jurisdiction in this form in favor of a mere general creditor.

Material-
men.Claims of,
how treated
in England.

But until within the last few years everything relating to this branch of the admiralty jurisdiction, not embraced by these two general principles, remained unsettled. The subject with regard to which it was most frequently drawn into discussion is that of the claims of material-men. It is true the law of England, as expounded by the common law courts, denied to the material-man the lien given by the general maritime law as understood and administered on the continent of Europe, and therefore, strictly speaking, the material-man should at once have been placed by the English Court of Admiralty on the same footing, in this respect, with other general creditors. But although it was debarred from entertaining suits instituted by material-men, the court seems to have regarded the restraint as unjust to this class of creditors, and never having been expressly prohibited from taking cognizance of their claims in this form, in the case of a foreign ship, the court, in several instances, allowed them, under favorable circumstances, to sue against surplus proceeds ; while in others, not essentially different, it denied them this

privilege. In several earlier cases mentioned by Dr. Haggard in a note to the 3d volume of his Admiralty Reports, the court had decreed payment of this species of claims. But the first fully reported case of this nature is that of *The John*, decided by Sir WILLIAM SCOTT about the commencement of the present century. The *John* was an American ship, and while lying in the Thames had obtained from a mercantile house in London, supplies of which she stood in need, for a voyage to Venice. On her return to London the next year, proceedings were instituted against her in the Court of Admiralty by the crew for wages; the master having in the meantime died, and the owner, residing in Philadelphia, having become bankrupt. A surplus remaining in court after the sale of the ship under decrees in the suits for wages, the merchants by whom the supplies had been furnished petitioned for payment out of such surplus; and Sir WILLIAM SCOTT, after having "had the cases on this point looked up," directed the payment. But another application of a like nature, in the same case by another London merchant, was rejected. He had, as ship's agent, advanced money to defray the expenses of the outfit and insurance of the ship preparatory to her voyage to Venice, and had made various advances and disbursements on her account after her return to London. The facts and circumstances of the case were detailed in an affidavit; and "The court, on hearing the affidavit read, rejected the petition; observing, that the account

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The John.

VOL. 1. was of too general and unsettled a nature to entitle the party to this remedy(a).”

The Maitland.

In another case decided by the immediate successor of Lord STOWELL, the application of material-men for payment out of surplus proceeds was peremptorily denied. The application in that case was opposed by the owners; and Sir CHRISTOPHER ROBINSON said that in the case of *The John*, there was no opposition, and no argument, and the effect of the former practice was stated only in general terms. The authorities referred to related, moreover, he observed, only to proceeds *remaining* in the registry — an ambiguous term, which seemed rather to apply to cases where no appearance had been given for the owner, than to cases in opposition to their claims, as in such cases the proceeds can hardly be said to be *remaining* in the registry, being detained there only by the warrant of the court, and adversely to the demand of the owner. And there did not, he added, “seem to be any solid distinction between original suits, and suits against proceeds, in cases that are opposed; whereas in cases unopposed, the exercise of a judicial discretion by the court in permitting bills of this kind to be paid out of unclaimed proceeds, instead of being indefinitely impounded, may be a sound discretion and capable of being justified to that extent, notwithstanding the general prohibition(b).”

The Neptune.

In another case, occurring not long afterwards, Sir JOHN NICHOLL, who succeeded Sir CHRISTOPHER

(a) *The John*, 3 Robinson’s Adm. R., 288.

(b) *The Maitland*, 2 Haggard’s R., 255.

ROBINSON, in a very elaborate judgment, pronounced for the claim of material-men, although it was opposed by the mortgagee of the ship "in possession." "If the owner," he observed, "has not usually appeared, the only legitimate inference is, that the law in favor of the claim of the material-men has been considered to be settled, and that their claim was just; otherwise, no doubt, prohibitions would have been applied for, or appeals interposed." Considering the views taken of the subject by the predecessors of Sir JOHN NICHOLL, this language seems somewhat remarkable; but the declaration with which he concluded his decision will, I think, appear to the learned reader not less so. It is as follows: "This long practice, founded on principle; on the law, civil and maritime; on the usage of other nations; on the ancient practice of this court, unchecked by prohibitions, except in the case of proceedings against the ship itself — this practice, so founded and so allowed to grow up, I shall not disturb(a)." Decision in favor of material-men reversed.

This case led to the final judicial determination of the question in England, adversely to the material-men; for, on appeal by the mortgagee to the Privy Council, the decree of the High Court of Admiralty was reversed by the unanimous decision of the judicial committee, who were of opinion that the appellant, as mortgagee in actual possession at the time of the arrest of the ship (for wages), was entitled to the balance of the proceeds. It had been argued, or rather assumed, by the advocate of Held never to have had a lien.

(a) *The Neptune*, 3 Haggard's R., 129.

VOL. 1. the respondents, that prior to the reign of Charles II., a lien on the ship had been conceded to the material-men, in virtue of which he was entitled to sue in the admiralty court; and, indeed, this impression seems to have been long prevalent in that court; but the judicial committee declared the assumption to be wholly groundless. "No authority," they said, "but that of the Legislature, could alter the law, or destroy the existing rights of the material-men by taking away their remedy. But the common law courts assumed no such power; they did not affect to alter the law, or control the exercise of acknowledged rights, but they declared that the maritime courts had erroneously applied the doctrine of foreign maritime law to contracts made in this country, and denying that material-men ever had, by the English maritime law, in respect of such contracts, any lien upon the ship, or any preference over simple contract creditors, they prohibited those proceedings which could only be justified by the existence of such a lien(*a*)."

Ship-master
excluded.

For the same reason that excluded material-men from payment out of surplus proceeds in England, ship-masters to whom wages are due, are also excluded, no lien on the ship being conferred upon them by the maritime law. It seems, however, that before the time of Sir WILLIAM SCOTT, this privilege had in some instances been allowed to the master(*b*).

(*a*) *The Neptune*, 3 Knap's P. C. Cases, 94.

(*b*) *The Favorite*, 2 Robinson's Adm. R., 232.

On the death of the master during the voyage, his office devolves on the mate. But although the mate has a lien on the ship for his

But supposing the court to have had the authority and the disposition to extend this remedy beyond the holders of maritime liens, it would have been natural to expect that the possessor of other liens would be thought to have the best claim to it. But it has been denied to a mortgagee of the ship^(a), and also to a judgment creditor, although the ship when arrested on the admiralty process (in a suit for wages), had already been seized in execution on a *feri facias* in his favor issued from the court of Kings Bench. On appeal, however, to the court of delegates, the judges reversed this decision, and directed the balance of the proceeds to be paid to

Mortgagees
and judgment
creditors.

wages as such, he has none for the additional compensation to which he may become entitled for his services as master. It was, however, nevertheless, in this case, held that in a suit against the ship he has a right to claim the wages stipulated to be paid to him *as mate*, for the whole term of his service in his capacity of master as well as in that of mate. The course of reasoning by which Sir WILLIAM SCOTT arrived at his conclusion, is, to say the least of it, highly ingenious. He considered the new character of master to have been superinduced to the original one of mate. The contract of the mate to serve in that character legally implied that he should likewise act as master in case of the death or removal of the actual master; but the character of mate was not necessarily merged in that of the master, nor was his title to mate's wages totally extinguished, by his acquired title to a *quantum meruit* for his additional services as master, unless it could be shown that the office of mate was regularly devolved upon somebody else, and the duties of it were entirely performed by some other person. The judgment of the court therefore was that the mate should be paid [out of the proceeds of the ship] for the whole period of his service, at the rate of thirty-five dollars a month; but "that he must go elsewhere for the reward of the additional services performed as master."

(a) *The Portsea*, 2 Haggard's R., 84; *The Exmouth*, id., 88, note; *The Fruit Preserver*, id., 181; *The Prince George*, 3 Haggard's R., 376; *The Percy*, id., 402.

VOL. 1. the sheriff; being of opinion that “although the Court of Admiralty cannot enter into the contracts of general creditors, yet it may be bound to take notice of a judgment on record as a debt(a).” From the reason assigned by the delegates for their decision it may be inferred that the right claimed by the judgment creditor was considered to belong to him as such independently of his execution and levy.

Such, in brief, had been the course of decision on this subject in England, prior to the passage of the act (3 & 4 Vict., chap. 65), entitled “An act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England.” [7th August, 1840.]

Right of
intervention
extended to
material-
men, by
statute

By this act (§ 6), jurisdiction is conferred on the High Court of Admiralty, to decide all claims and demands whatsoever for necessaries supplied to any foreign vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a country or upon the high seas, at the time when the necessaries were furnished, in respect of which such claim is made. The act does not, in terms, confer upon the material-man a lien on the ship, and thereby directly bring him within the rule entitling the possessors of maritime liens to payment out of surplus proceeds; but it unquestionably confers a right of action against the ship, and thereby infers the grant of a lien. It may be presumed, therefore, that the Legislature designed to confer, incidentally, the privilege of suing against proceeds.

and to
mortgagees.

(a) *The Flora*, 1 Haggard's R., 298, 303.

This act (§ 3) also, in express terms, empowers the court to take cognizance in this form of mortgages of the ship, from the sale of which the proceeds have accrued(a). CHAP. 1.

(a) The supposed inability of the court to take cognizance of the rights of mortgagees, before the passage of the act 3 & 4 Victoria, and the extent of the authority conferred by it, have been the subject of comment by Dr. LUSHINGTON, in several cases that came before him soon after its passage. In the first of the cases to which I allude (*The Dowthorpe*, 2 Wm. Robinson's R., 73), referring to the case of *The Percy*, above cited, in which his predecessor rejected the claim of a mortgagee, he observes, "I greatly doubt whether the principles which governed the proceedings of this court, at the time when this decision was made, were not carried too far in the judgment of Sir J. NICHOLL." And he proceeds to intimate an opinion that a mortgagee ought to have been allowed to intervene for the protection of his interest, before the passage of the act. But however this may have been, "the question," he adds, "is now put at rest by the late act of Parliament."

Some expressions used by Dr. LUSHINGTON, in *The Dowthorpe*, seem strongly to infer an apprehension on his part that the act authorized the institution of an independent suit in the Court of Admiralty, by the mortgagee — a construction by no means warranted by its terms, and accordingly, in *The Fortitude* (2 Wm. Robinson's R., 217), which arose soon afterwards, and in which the power conferred by the act was fully discussed, it was held not to warrant such a proceeding. "Prior to the passing of this statute," said the learned judge, "it was more than doubted in this court, whether, in cases where a ship had been arrested under the jurisdiction of the court, the court could take cognizance of the claims of mortgagees. * * * * *

In order to obviate this state of things so detrimental to justice, the statute 3 & 4 Victoria was enacted. The intention of the Legislature in passing the statute, I conceive, was, that the remedy should be commensurate with the evil. It was not, I apprehend, intended to confer any new, separate and distinct powers on this court, but merely to enable the court to exercise its ordinary jurisdiction to the full extent." In accordance with this construction of the act, in the intermediate case of *The Highflyer* (2 Wm. Robinson's R., 109), a

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 Extent of
 this right in
 the United
 States. *The
 New Jersey.*
 Disburse-
 ments of
 master
 allowed:
 his claim
 for wages
 rejected.

The earliest of the few American reported cases on this subject, is that of *Gardiner v. The Ship New Jersey*(a). The ship, on her return from a long foreign voyage, had been sold at the suit of the crew for wages; and there remained in court a surplus of money, after the satisfaction of their claims. Against this surplus a proceeding was instituted by the master, for disbursements made by him during the voyage, for supplies, and in the payment of seamen's wages, and also for his own wages. Judge PETERS availed himself of the occasion to state the principles by which, upon mature consideration, he had determined to be governed in all cases of this nature. He was aware of the decision of Sir WILLIAM SCOTT in the case of *The Favorite*, above cited from Robinson, and refers to it; but he seems not to have

motion on behalf of a mortgagee for a warrant of arrest, for the purpose of enforcing bail for the safe return of the vessel had been denied.

Perhaps it ought to be conceded, however, that a mere cursory reading of the 3d and 4th sections of the statute might not very unnaturally suggest the opposite construction. But it seems incredible that any one at all conversant with the nature of the admiralty jurisdiction should imagine that a court of admiralty, *without the aid of a statute*, could take cognizance, in an original suit, of a mortgage of a ship, any more than it could of a mortgage on a coach. It appears, nevertheless, that such a suit was lately instituted in the District Court of the Southern District of New-York, and carried thence by appeal first to the circuit court and thence to the Supreme Court. The prayer of the libel was, that the court would decree a sale of the ship to pay the mortgage (which was for purchase money), or else her delivery in specie to the libellant.

It seems hardly necessary to add that the libel was dismissed for want of jurisdiction in the district court, and that the decision was affirmed in the appellate courts. *Bogart et al. v. The John Jay*, 17 Howard's R., 399 (21 Curtis's Decis. S. C., 572).

(a) 1 Peters's Adm. Decis., 223.

seen the report of the case of *The John*, which probably had not yet then made its appearance in this country. He states it to have been his practice, when he first came into the court, to entertain applications of this nature to an extent which had involved him in difficulties; that he had found it necessary, therefore, to establish some general rules upon the subject; and that the rule by which, for the last several years, he had been governed, was, "that it shall appear that a sum claimed out of the surplus or remnant is either of itself, or in its origin, a *lien* on the ship, or other thing out of which the moneys were produced." In another part of the opinion, his language is, "I shall continue to adhere to the principles I have endeavored to establish, not to admit the distribution or payment of surplus to others than those who originally had liens, or legal appropriations, on the subject from which the moneys in court were raised." Guided by these principles Judge PETERS allowed the master's claims for disbursements, but rejected his claims for wages. The doctrine of this case was affirmed in two cases that arose in the same court many years later.

In the first of these cases, the American brig *The Hercules* had been wrecked on the coast of Mexico; and the property saved from the wreck had been brought to the port of Philadelphia, by the schooner *Packet*, in which the men composing the crew of the *Hercules* also took passage. On their arrival at Philadelphia they libelled this property for wages, which were decreed, and the property was sold. One-half of the proceeds was

The Hercules.
Claim for
passage money due from
seamen of a
wrecked
vessel,
against the
proceeds of
property
saved, re-
jected.

VOL. 1. directed to be paid to the owner of the *Packet*, in pursuance of an agreement to that effect, for bringing the property home. That portion of the proceeds which had been decreed to the seamen for wages, still remaining in court, the owner of the *Packet* petitioned the court for the payment, out of this fund, of the passage money due from these seamen for bringing them from Mexico to Philadelphia; for which, it was alleged, they had severally agreed to pay the sum of twenty dollars. The court, referring to the case of *Gardiner et al. v. The Ship New Jersey*, and recognizing its authority, rejected the claim; on the ground that it was a mere personal demand against the sailors, constituting no lien on the property, cognizable in a court of admiralty, or in "*any other court.*" The concluding part of the judgment of the court is as follows:

"Nor has this court any jurisdiction to try and determine this demand. It is strictly a personal contract, not made at sea, nor from any cause cognizable in the admiralty. It must be prosecuted before a common law tribunal, in like manner as any other personal contract and debt. It is true, the money in court belongs to these men, by virtue of the decree of the court; but by what authority can I undertake to pay it to a particular creditor, or to disburse it among all the creditors? In the language of Judge PETERS, I should soon 'be involved in many difficulties and mistakes,' by assuming this office. I must try the case of every creditor preferring a claim. This is certainly a novel case. No claim like the present has ever before, in my know-

ledge, been presented to a court of admiralty. It is not a case of surplus and remnants, in which the petitioner, having a claim against the defendant in this court, asks for the money which shall remain in court, after satisfying the decree of the court in favor of the libellant; such creditor or petitioner having had a lien on the property from which the moneys were produced. The peculiar feature of this case is, that the petitioner does not ask for the surplus funds of the defendants, but for the money which had been ordered and adjudged to be paid to the libellants. It is not a case of surplus or remnants to be appropriated in favor of a creditor having a secondary right in the goods sold, but an application to take from the libellants the money which had been decreed to them, and appropriate it to the payment of one who claims to be their creditor. This is going far beyond any case of surplus and remnants, and has never, I believe, been attempted by any court of admiralty, which, in doing so, would try a cause collaterally, of which directly it could have no jurisdiction(a).”

This case seems, indeed, to have been a very clear one; but it serves, nevertheless, in some degree, to dissipate the obscurity resting upon the subject of surplus and remnants.

The next and only remaining reported case I have met with, which sheds any light upon the subject, is that of *Harper et al. v. The New Brig*(b), already cited, at some length, for another purpose.

The New Brig.
Claim of material-men in home port, having no lien, rejected; of mortgages allowed.

(a) *Bracket et al. v. The Hercules*, Gilpin's R., 184.

(b) *Gilpin's R.*, 536.

VOL. 1 The brig had been condemned and sold at the suit of material men, in virtue of the lien secured to them by the laws of Pennsylvania, and a surplus remained in the registry after payment of their demands. Among the petitioners against this surplus, were *Harper and Bridges*, who had also supplied materials for the construction of the vessel; but not being persons of the description provided for by the statute of Pennsylvania, they had acquired no maritime lien. They, however, held a bill of sale of the vessel, executed by the owner, to them, absolute in terms, but in reality designed only to secure them for large sums of money advanced, and materials furnished for the use of the owner in building the brig.

The court, upon a critical review of the cases of *The John* and *The New Jersey*, above cited, came to a clear conclusion, 1, that, independently of the bill of sale, the claim of the petitioners could not be sustained, inasmuch as it was founded in a mere personal contract with the owner, conferring upon the petitioners no right of priority over his other general creditors; and, 2, that whether the bill of sale was to be regarded as importing an absolute sale, or as a *mortgage*, it entitled the petitioners to the remaining proceeds in court. According to this well considered and well reasoned case, therefore, whoever has a lien or fixed right of priority of payment, attaching to the thing from which the surplus and remnants in court proceeded, whatever may be the nature or origin of the lien or right, is entitled to resort to this fund for satisfaction.

Although the claim of the petitioners embraced a great variety of articles furnished, at their instance, by different persons and at different times, and of several distinct advances of money, there seems to have been no question concerning the amount actually due to the petitioners, nor any credits or counter claims; and I infer, moreover, that the surplus was insufficient to pay the debt. It appears, also, that there was no party before the court, entitled to contest the claim(a). Had the case, in these respects, been different, the claim might have been considered, notwithstanding the mortgage, to be obnoxious to the objection which led, as we have seen, to the peremptory rejection by Sir WILLIAM SCOTT, of the petition of the ship's agent in *The John*.

The doctrine of these cases seems to have been fully sanctioned by Mr. Justice STORY, in *The Ship*

(a) The court was, however, fully aware of its responsibility in regard to the surplus. The judge, adverting to the absence of any party entitled to controvert the rights of the petitioners against the fund, observed that it was "nevertheless the duty of the court to look carefully to the disposal of it. It cannot go out of the custody of the court, but by the action and order of the court; and no such order will be made, until the court is well satisfied that the party asking for it is legally entitled to it. It is not a derelict to be picked up by the first person who may lay his hand upon it: it has a legal owner somewhere, and to him only should it be transferred."

Soon after the passage of the late act of Congress, conferring admiralty jurisdiction on the district courts, in relation to inland commerce, a case of salvage arose in the District Court for the Northern District of New-York, in which the cargo of the vessel had been insured. A surplus of the proceeds of the sale of the cargo remaining in court, after the payment of the amount of salvage awarded, the underwriters, *who had paid for a total loss*, petitioned to have this surplus paid to them; and the court directed the payment, on the ground that they stood in the place of the insured.

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Packet(a), and in *The Boston and Cargo*(b), in which he repelled the claims of insurers, on the ground that, though the property concerned had been abandoned to them, they had not accepted the abandonment. "This court," said he, "in the ship *Packet*, looks only to the ownership, general or special, in the thing itself, and to such claims as are direct, as a lien, or a *jus ad rem*."

The general principle on which these decisions are founded, as the learned reader will not fail to observe, is this: that the right of intervention for payment out of surplus proceeds, extends to all claims supported by liens, whether implied by the maritime law, or expressly created by special contract. The right, therefore, is placed by these cases on substantially the same footing as that on which it has at length been placed in England by the aid of the statute 3 & 4 Victoria. It is true that the application of it by Judge PETERS, in *The New Jersey*, in favor of the master's claim for disbursements, would have been unwarrantable in England, where no lien is allowed to the master, whether on the ship or freight, for advances; and that it was questionable here, where it has not even yet, as I am aware, been decided, that the master has a lien on the ship, though he is held to have a lien on the freight(c). It is true, also, that the principle laid down in the American cases does not embrace judgment creditors as such, though in England, as we have seen, a judgment creditor was, in *The Flora*,

(a) 3 Mason's R., 255.

(c) *Vide infra*, MARINERS' WAGES.

(b) 1 Sumner's R., 328.

held to be entitled to payment out of surplus proceeds, apparently without reference to the levy in his behalf on the ship, previous to her arrest by the admiralty process(a).

It is not to be disguised, that the duty of courts of admiralty, touching this form of redress, seems to have been supposed, both in England and in this country, to depend, in some measure, upon considerations of expediency, as well as upon the mere question of jurisdiction.

To exclude misapprehension it is proper to add that the principles above stated are to be deemed applicable in their full extent only to those cases of which the court takes cognizance as an instance court of admiralty, and that with respect to the proceeds of vessels condemned and sold by order of the court in the exercise of its prize jurisdiction, these principles require to be qualified. It is a settled principle, both in England and in this country, that in prize cases, no mere lien created by contract between the parties, and not perceptible to the captor, can be recognized as against the rights of capture. These act upon the property, without regard to secret liens held by third parties; as, on the other hand, the rights of the captor do not extend to liens possessed by enemies upon property itself protected from capture. He has, in general, no means of discovering liens of this latter description; and if effect were to be given to the former, the consequence would be, that the captor would

(a) *Vide supra*, p. 55.

VOL. 1. be subject to the disadvantage of having neutral liens set up to defeat his claims upon hostile property, while he could never entitle himself to any advantage from hostile liens upon neutral property.

It is only therefore where the liens result from the known principles of the general maritime law of nations, independently of express contract, that it can be recognized in a prize court of admiralty. The lien which a neutral ship-owner has upon the cargo of an enemy on board, is an instance of this. The owner of the ship having the cargo in his possession, subject to his demand for freight, is entitled by the general law to detain it until the freight is paid. He has "an interest directly and visibly residing in the thing itself." On these grounds his claims are respected even in a prize proceeding, and the freight is to be paid out of the proceeds of the captured property; but the reason of the exceptions determines its extent. The rights of the captor have accordingly been held to be unaffected by the lien of a neutral bottomry bond-holder(a), or a lien by way of pledge for the payment of purchase money(b).

II. Inter-
vention *pen-*
dente lite.

Having now completed what I had to say of the right of intervention against surplus proceeds, I proceed to a very brief consideration of the right of intervention in hostility to the libellant, pending the suit. Whether these rights are exactly coextensive is a question to which the reported judicial

(a) *The Tobago*, 5 Robinson's Adm. R., 221.

(b) *The Marianna*, 6 id., 24; *The Frances*, 8 Cranch's R., 418 (3 Curtis's Decis. S. C., 200).

decisions do not appear thus far to furnish a satisfactory answer. From the terms in which they have been spoken of in our own courts, and also with, so far as I am aware, one exception, in the English Court of Admiralty, the just inference appears to be that they are regarded in both as strictly correlative. But an observation of Dr. LUSHINGTON in *The Dowthorpe* would seem to imply that in his opinion the right to intervene pending the suit for the purpose of contesting the claims of the libellant may be exercised by one who, from the nature of his interests, would not be entitled to payment out of the surplus proceeds. Speaking generally of the sort of interest requisite to establish a *persona standi in judicio*, Dr. LUSHINGTON said it was not even necessary that the intervenor should possess "an absolute right to a given sum of money; but if a person may be injured by a decree in a suit, he has a right to be heard as against the decree, although it may eventually turn out that he can derive no pecuniary benefit from the suit itself (a)."

The only additional case I have met with, to which it will be useful to refer, is that of *The Mary Ann*, decided in the District Court of the United States for the District of Maine. It is the only reported case, as far as my information extends, in which the right of intervention and defence *pendente lite* has been *discussed* with reference to the principles of justice on which it rests. It was a case well calculated to awaken attention to those principles,

(a) Ware's R., 104.

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and to render them impressive. The suit was prosecuted in behalf of the United States, to enforce an asserted municipal forfeiture, in which the owner of the property interposed no claim. In the event of a sentence of condemnation, the confiscation of the entire proceeds of the property must follow; the lien set up by the party claiming a right to intervene, being a common law lien, or privilege which would be extinguished by the sentence. Prior to the seizure of the vessel, she had been attached for a debt due from the owner; and the question was, whether the attaching creditors were entitled to appear and contest the forfeiture. Their right to do so was controverted by the district attorney, who, it seems, also contended that their appearance was premature, and that they ought to have awaited the issue of the prosecution; and then, in the event of a decree of condemnation, to petition against the proceeds in the registry.

The learned judge, in pronouncing his decision, observed: "As a general principle, it is certainly true that in admiralty process *in rem*; all persons having an interest in the thing may intervene *pro interesse suo*, file their claims, and make themselves parties to the cause to defend their own interest. The process acts on the thing itself, and places it in the custody of the court. When thus in its possession, the court is bound to preserve it for all who have an interest in it, and not to deliver it but to those who prove a title. It follows as a necessary consequence that all who have a legal interest may appear, and, by suitable allegations and proofs, show

what that interest is, and claim to have it allowed. If it were not so, the greatest injustice would be done; because a decree of the court *in rem* is binding on all the world, as to the points which are directly in judgment before it."

After detailing the course of proceedings enjoined by the act of Congress in cases of municipal seizure, which, when no defence is interposed, must necessarily result in a condemnation by default, and an indefeasible title to the purchaser on the sale of the property in virtue of the decree, Judge WARE asks, "If this be so, what reason can be given why every person having an interest in the thing, whether it be a proprietary interest or a mere lien or privilege, should not be admitted to intervene for his own interest, and contest the forfeiture so far as his right or interest would be prejudiced by the decree?" He next proceeds to show the inapplicability of the rigorous principles of exclusion enforced in the cases of prize^(a), and in conclusion answers the objection that the intervenor was bound to defer his claims until after the sentence of condemnation and sale. "To say," he observes, "that he must wait until after a decree, and then come in and petition against the proceeds, would be little better than a mockery; for if the decree is against the vessel, it annihilates his claim, and he can maintain no claim against the proceeds. It is not a claim, like that of seamen's wages, or material-men, which overreaches the forfeiture. The attachment operates only to the extent

(a) *Vide supra*, p. 65, *et seq.*

VOL. 1. of the debtor's interest, to whose rights, so far as his lien goes, the attaching creditor succeeds ; while the maritime lien of seamen for their wages, and of material-men for supplies and repairs, is a species of proprietary interest in the thing itself, which is independent of any title of any particular individual. It inheres in the thing, whoever may be the general owner ; but the interest of an attaching creditor can only be defended by the same means which will be a defence for the owner whose interest is attached, that is, in this case, by showing that no forfeiture has been incurred. To decide that he cannot make himself a party to the cause, before a decree on the merits, is to decide that he cannot be admitted to defend his rights at all."

The decision of the learned judge, therefore was, that the attaching creditors were entitled to intervene in defence of their interests.

It is difficult to resist the course of reasoning which governed the court in this case, or to withhold assent from the particular conclusion to which it led. It will be observed that, for the reason assigned by Judge WARE, the right of intervention against proceeds does not exist in a case of municipal forfeitures, except in favor of the possessors of maritime liens, these alone being preferred to the claims of the government.

Waiving any further inquiry concerning the identity of the two rights in point of scope, and conceding that, according to the intimation of Dr. LUSHINGTON, the right to intervene for the purpose of contestation may be maintained on the ground

of interests that would be inadequate to uphold the right to sue against proceeds, suffice it to say, that the true rights are, in this respect, essentially coequal.

Whether, in any particular instance, the one or the other shall be exercised by him to whom they belong, will be a question of expediency depending on the circumstances of the case. If, by reason of the insufficiency in value of the thing proceeded against, to satisfy his own claims upon it in addition to those of the libellant, or for any other reason, he desires to contest the libellant's demand, he will, of course, elect to appear seasonably for that purpose. But the responsibility for costs and damages imposed, and the security exacted therefor, as the condition on which he will be allowed to intervene *pendente lite*, may form an element of the problem to be solved, not unworthy of consideration. These rights are recognized, and the modes of their exercise prescribed, by two of the rules promulgated in 1842 by the Supreme Court, to regulate proceedings in admiralty suits. They belong more properly to the second part of this work ; yet, nevertheless, as they seem to require no commentary, it may not be amiss to cite them here, for the purpose of avoiding the necessity of reverting to the subject of intervention. They are the thirty-fourth and forty-third, and will be found in the appendix.

Having now completed this summary view of the general scope of the admiralty jurisdiction of the district courts of the United States, I propose, in

VOL. 1. the succeeding chapters of this part of the work, to revert to the several subjects of this jurisdiction which have been designated, for the purpose of more exactly defining their nature, and of stating the more important principles of law applicable to each.

CHAPTER II.

OF THE CLAIMS OF MATERIAL-MEN.

SUITS in behalf of *material-men* constitute an important branch of the admiralty jurisdiction. Under this general denomination are comprised all persons who furnish materials for the building, equipment, repair, outfit, or use of vessels employed in maritime navigation.

Who are
material-
men.

Contracts of this nature, except those relating to the building of vessels (which will be separately noticed in the sequel), are usually made by the master of the vessel. It is necessary, therefore, before proceeding to a consideration of the remedies afforded by law for the enforcement of the demands of material-men, to define the limits of the master's authority to bind the owner and his property for the fulfilment of his contracts with this description of persons.

The master of a ship is the confidential agent of the owners, and as such, in general, he appears to all the world, in matters relating to the usual employment of the ship, and to the means of employing her; the business of fitting out, victualing and manning the ship being left wholly to his management, in ports where the owners do not reside and have no established agent, and frequently, also,

Extent of
the master's
authority to
bind the
owner for
repairs and
supplies.

VOL. 1. even in the place of their own residence. His character and situation, therefore, furnish presumptive evidence of authority from the owners to act for them in these cases; liable indeed to be refuted by proof that they, or some other person for them, managed the concern in any particular instance, and that this fact was known to the particular creditor, or was of such general notoriety that he may reasonably be supposed not to have been ignorant of it. In general, therefore, the owners are bound to the performance of the master's contracts for repairs and supplies; such contracts being esteemed, in law, to have been made by them(*a*).

Restricted to such repairs and supplies as are fit and proper.

But the safety of the ship-owner, and the interests of commerce, require that this presumed authority of the master should be subject to some limitation; and the established rule upon the subject accordingly is, that it extends only to such repairs and supplies as are reasonably fit and proper, and apparently necessary to enable the vessel to navigate the sea, and pursue her voyage in safety. But where there is no ground for the imputation of bad faith, the rule is indulgently enforced. The repairs made, or articles supplied, need not be shown to have been absolutely necessary; but it is sufficient if they appear to have been such as a prudent owner would probably have ordered, or assented to, if present at the time(*b*).

(*a*) Abbot on Shipping, Part II., chap. 2, § 2, 3; *ibid.*, Part II., ch. 3, § 3.

(*b*) Abbot on Shipping, Part II., ch. 3, § 3; 3 Kent's Commentaries, 3d ed., 163; *The Fortitude*, 3 Sumner's R., 228; *Webster v. Seekamp*, 4 Barn. & Ald. R., 352.

To this extent the master has power, it is supposed, to bind the owners *personally*, as well *in the place where they reside*, as abroad(*a*).

CHAP. 2.
Owner personally liable for contracts made at the place of his residence. Master personally liable, unless etc.

The master, however, is also always personally answerable for his contracts of this kind, unless he takes care by express terms to confine the credit to his owners only, or unless the circumstances clearly show that the credit was given to them alone; for, in favor of commerce, the law will not *compel* the material-man to seek after the owners and sue them, although it gives him power to do so; but affords him a remedy against each(*b*).

It may now, at length, be regarded as definitely settled that contracts of this kind, being in their nature maritime, may be enforced in the admiralty courts of the United States, by an action *in personam*, against the owner, when the contract is made by him, or on his credit alone; and against the master or owner, when the contract is made by the former, without any stipulation, express or implied, on the part of the creditor, to look to the owner exclusively(*c*).

Suits *in personam* in behalf of material-men maintainable in the district courts, as courts of admiralty.

(a) Abbot on Shipping, Part II., ch. 3, § 2, 4.

(b) Abbot on Shipping, Part II., ch. 2, § 2; *ibid.*, ch. 3, § 2.

(c) *The General Smith*, 4 Wheaton's R., 438 (4 Cond. R., 493); *Andrews v. Wall et al.*, 3 Howard, 568; Rule 12 of the Rules of Admiralty Practice, 3 Howard's R., vi.; *De Lovio v. Boit*, 2 Gallison's R., 398; *Hale v. The Washington Insurance Company*, 2 Story's R., 176; *The Centurion*, Ware's R., 477; *Shepard et al. v. Taylor et al.*, 5 Peters's R., 675 (9 Curtis's Decis. S. C., 531); 4 Mason's R., 380.

The admiralty and maritime jurisdiction conferred upon the national courts being declared by the Constitution to be *exclusive*, it has been gravely doubted whether the state courts were not thereby deprived of their jurisdiction over all cases falling within the scope of this grant of judicial power to the United States; and the question has given

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Suits *in rem*
also main-
tainable
against the
ship.

But the material-man has also, subject to certain limitations, a further and still more effective remedy, peculiar to the admiralty.

According to the general principles of the maritime law, following in this respect the civil law, a material-man, who repairs or furnishes supplies to a ship, obtains thereby, without any express contract to that effect, a lien(*a*) or specific claim upon the

rise to much discussion, and some diversity of opinion. But it appears to be now agreed that the national and state tribunals possess a concurrent jurisdiction in cases of this description, where the common law originally afforded a remedy. See note 59 at the close of the report of the case of *De Lovio v. Boit*, 2 Gallison's R., 476; *Hallet v. Novion*, 14 Johnson's R., 273; S. C. 16 Johnson's R., 327; *Percival v. Hickey*, 18 Johnson's R., 257; 1 Kent's Comm., 3d ed., 377, note c; and 1 Story's Comm. on the Constitution, 533, note. See also Conkling's Treatise, 3d ed., 271, note a.

(*a*) It has been remarked by the late Mr. Justice STORY, that this right to priority of satisfaction given by the maritime law, is not, in a strict sense, a *lien*; though that term is commonly used in our law to express, by way of analogy, the nature of such claims. This application of the term, he observes, is an instance of the deflection from its original meaning, which language frequently undergoes by applying it to things which have a strong similitude, but are not a perfect identity. The maritime lien differs both from the *pignus* [pawn] and from the *hypotheca* [hypothecation] of the civil law. The term *pignus*, in an accurate sense, applied to cases where there was a pledge of the thing, accompanied by an actual delivery of possession to the person for whose benefit the pledge was made; and the *hypotheca*, where the possession of it was retained by the owner. The lien given by the maritime law attaches and exists independently of possession, and in this respect resembles the Roman hypothecation (though it is different in other respects), and is often called a tacit hypothecation. It also somewhat resembles what is called a *privilege* in that law, that is, a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors (*The Brig Nestor*, 1 Sumner's R., 73, 81).

But notwithstanding this criticism, this application of the term *lien* is now sanctioned by general usage, and is highly convenient. There is no danger of being misled by it, and it saves circuitry of language.

ship for remuneration, which he may enforce directly against the ship by an action *in rem*; and neither of these three remedies is displaced, except by conclusive proof that an exclusive credit was given either to the master or owner, or both, or to the ship itself(*a*).

The maritime law of continental Europe makes no distinction between the cases of domestic ships and foreign ships, nor between supplies furnished in a home port and abroad. The result of the modern decisions of the English courts appears, however, to be, that with the exception of the common law lien in favor of a shipwright while he continues in possession of the ship which he has built or repaired, no lien or preference is given by the common or maritime law of England, for repairs made or supplies furnished in a home port, without an express hypothecation(*b*).

In this country, the general maritime law of Europe on this subject has been explicitly adopted, with the exception of the case of an American ship repaired or supplied in a port of the state to which she belongs; and even in this case, if (as in Maine, New-York, Pennsylvania and other states) a lien is

(*a*) *The Nestor*, 1 Sumner's R., 73; *The Barque Chusan*, 2 Story's R., 455, 486; *Andrews et al. v. Wall et al.*, 3 Howard's R., 568, 572.

(*b*) Abbot on Shipping, Part II., ch. 3, § 9; Kent's Comm., 3d ed., 169. By the act of 3 & 4 Victoria, ch. 65, § 6, however, the High Court of Admiralty is now invested with jurisdiction to decide all claims and demands whatsoever for services rendered or for necessaries supplied to any foreign or sea-going vessel, and to enforce the payment thereof, whether such ship may have been within the body of a county, or upon the high seas, at the time when the services were rendered or necessaries furnished, in respect of which such claim is made.

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given by the local law, it may be enforced by admiralty process^(a).

In the case of foreign ships, or of American ships in foreign ports, the lien is implied from the nature of the contract and the circumstances attending it; contrary to the rule of the common law, which admits no lien upon goods not in the possession, actual or constructive, of the creditor. The creditor is supposed to have looked to the vessel for security, and the contract of the master imports a hypothecation. But in the case of a vessel in her home port, it has been thought in the American courts that the credit may well be supposed to have been given to the owner; and, in this country, no lien is implied. Hence the necessity, in that case, of having recourse to the local law. Not that it can confer jurisdiction on the courts of the United States; but if it gives a lien, and the contract be maritime, then the lien, being attached to it, can be enforced according to the mode of administering remedies in the admiralty. The state law furnishes the rules to ascertain the rights of the parties; and thus assists in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States.

(a) See inter. al., *The General Smith*, 4 Wheaton, 438 (4 Curtis's Decis. S. C., 440); *The St. Jago de Cuba*, 9 Wheaton, 409 (6 Curtis's Decis. S. C., 110); *The Jefferson*, 10 Wheaton, 429 (6 Curtis's Decis. S. C., 465); *Peyroux v. Howard*, 7 Peters's R., 324 (10 Curtis's Decis. S. C., 506); *The Steamboat Orleans v. Phæbus*, 11 Peters's R., 175 (12 Curtis's Decis. S. C., 391); *The Jerusalem*, 2 Gallison's R., 345; *The Fulton*, Paine's R., 620; *Davis et al. v. A New Brig*, Gilpin's R., 473; Rule 12 of Ad. Practice, 3 Howard's R., vi.

It will be seen, therefore, that in the American courts of admiralty, suits *in rem* may be maintained by material-men, 1, in the case of foreign ships, including ships belonging to other states, these being regarded as foreign ; 2, in the case of domestic ships, when the repairs have been made or supplies furnished out of the state to which the vessel belongs ; and, 3, in the case of domestic ships obtaining repairs or supplies in a home port, provided the local law gives a lien therefor.

I have hitherto spoken of this lien in general terms, as affecting the *ship*. It is necessary, therefore, distinctly to add, that it is to be considered as attaching also to the *freight*, earned in the voyage during or preparatory to which the supplies were furnished. It was so held indirectly by Judge WARE, in the case of *The Brig Spartan*(a), many years ago ; and in the case of *Shepard et al. v. Taylor et al.*(b), it was decided by the Supreme Court of the United States, that the mariner's lien for wages extended likewise to the freight : and the claims of material-men are held, by the maritime law, in equal favor with wages ; repairs and supplies being no less essential than the services of the mariner, to furnish "wings and legs" to the ship, for the purpose of enabling her to complete her voyage for the benefit of all concerned. But the question may be considered as put at rest by the twelfth Rule of Admiralty Practice, by which it is expressly declared that "In all suits by material-men, for supplies or repairs, or other necessaries for a foreign ship, or

May be maintained also against the freight.

(a) Ware's R., 149.

(b) 5 Peters's R., 676 (9 Curtis's Decis. S. C., 531).

VOL. 1. for a ship in a foreign port (which, as we have seen, includes a port of another state), the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*."

Material-man not bound to proceed against the freight.

The terms of this rule may seem to infer, that when the material-man proceeds against the ship, he is bound to proceed also against the freight; but this construction, it is supposed, could not have been intended. The right of the material-man to maintain a suit in the admiralty against the ship alone, had been firmly established by antecedent decisions, and it could not have been designed to interfere with this right. The extension of the lien to freight had not been before directly asserted by the court. The object of the rule doubtless was, therefore, for the purpose of dissipating any doubt which might be entertained upon the subject, distinctly to declare the existence of the lien against the freight as well as against the ship.

No lien created by contracts of the owner.

To guard against possible misapprehension, it is proper to state, that no lien is ever *implied* from contracts made by the owner in person. It is only those contracts which the master enters into in his character of master, that specifically bind the ship, or affect it by way of lien or privilege in favor of the creditor. When the owner is present, and acting in his own behalf as such, the contract is presumed to be made with him on his ordinary responsibility, without a view to the vessel as a fund from which compensation is to be derived(*a*).

(*a*) See the cases of *The St. Jago de Cuba*, 9 Wheaton's R., 409 (6 Curtis's Decis. S. C., 110); and *The Phebe*, Ware's R., 263, 275, where this principle is incidentally stated.

We have seen that in the case of repairs or supplies to an American vessel in a port of the state to which she belongs, no lien is implied in favor of the material-man, because he is presumed to have relied on the personal responsibility of the master and owner. But when, as is sometimes done for the purpose of illicit trade, the vessel is made to assume a foreign guise so as to conceal her true character, it is obvious that the reason on which the distinction is founded does not exist; and it has accordingly been adjudged that, in such a case, the lien attaches. The rights of the material-man depend not on facts, but upon his knowledge or belief concerning them; and the owner is precluded by his own acts from denying the foreign character of the ship^(a).

The case just cited establishes also another important principle, viz., that the maritime lien or privilege of the material-man in all cases, is entitled to preference over the title of the United States acquired by forfeiture, provided the creditor had no knowledge of the offence by which the forfeiture was incurred. The necessities of commerce require that this should be so. The lien is given for the express purpose of inspiring confidence abroad, and thus enabling the master to obtain the means of pursuing his voyage, and getting home in safety; and it would be inconsistent with this policy to allow priority to a forfeiture accruing from acts, wherever committed, of which the creditor was ignorant when he parted with his property, or rendered the services for which

CHAP. 2.
Extends to claims for repairs, etc., even in a home port, when vessel appears under foreign aspect.

Lien in favor of material-men preferred to the claim of forfeiture,

(a) *The St. Jago de Cuba*, 9 Wheaton's R., 409 (6 Curtis's Decis. S. C., 110).

VOL. 1. he seeks remuneration. And where a vessel to which the lien of material-men had attached, had been sold on execution upon a judgment in favor of the United States, the lien was enforced against the proceeds in the hands of the marshal(a).

and to the rights acquired by a *bona fide* purchaser,

It is scarcely necessary to add, that the lien of material-men prevails over the title of a *bona fide* purchaser without notice; but to have this effect, it must be enforced within a reasonable time(b).

and to bottomry bonds.

In the case of *The Jerusalem*(c), it was held by Mr. Justice STORY, that the lien of a material-man for repairs which appear to have been indispensable, is to be preferred to a bottomry bond, though the bond be prior in point of time.

The lien given by a state law to shipwrights and others, while in possession, may be enforced by a suit in admiralty.

When a lien for repairs is given by the local law, in the case of a domestic ship repaired in her home port, it matters not whether it is conferred by the statute or by the common law of the state. The lien in either case being in its nature maritime, the moment its existence is established, the jurisdiction of the admiralty attaches to it *proprio vigore*. And it has accordingly been held that the lien given to a shipwright for materials furnished and repairs made, and not divested by a surrender of the possession of the vessel, might be enforced by a suit *in rem* in the district court(d).

Construction of state laws. Of Maine.

A statute of a state, providing "That all ship-carpenters, caulkers, blacksmiths, joiners and other

(a) *The Scattergood*, Gilpin's R., 1.

(b) *The Barque Chusan*, 2 Story's R., 456.

(c) 2 Gallison's R., 345.

(d) *The Schooner Marion*, 1 Story's R., 68.

persons who shall perform labor or furnish materials for or on account of any vessel building or standing on the stocks, by virtue of a written or parol agreement, shall have a lien on such vessel for his wages," etc., is inapplicable to the case of a mechanic hired at monthly wages, upon a *quantum meruit*, to perform any kind of work or labor in which the hirer might choose to employ him, under a general agreement or retainer, without reference to any particular vessel, or other specific objects. Such a statute applies only to agreements for work to be done upon a particular vessel, as a distinct and independent service. There is no principle which authorizes the court to subdivide and apportion the value of the work done upon different things in the course of the month, in pursuance of a general hiring like that above mentioned. The employer, in such a case, may have a lien for the work, for the other party is his servant; but the servant can acquire none. Besides, it is not the mere fact that labor and services have been performed, or materials used upon a vessel, which, according to such a statute, entitles the party to a lien therefor. The "written or parol agreement," spoken of in the act, means an agreement relating to the particular vessel on which the labor and services are to be performed, or for which the materials are to be furnished. The contract, then, must be, not a general contract or retainer for labor and services, but a specific contract or retainer for the particular vessel embraced and referred to in the contract(a).

(a) *Read v. The Hull of the New Brig*, 1 Story's R., 244.

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The case in which the above mentioned decision was made, arose under the statute of Maine, and was an affirmance, on appeal, of the judgment of the district court.

Of New-York.

The statute of New-York conferring a lien for repairs, supplies and wharfage, declares that the lien shall cease at the expiration of twelve days after the day of the departure of the vessel to some other port in the state, and immediately after her departure from the state. With respect to domestic vessels, in regard to which, as we have seen, no lien is given by the maritime law of the United States, these limitations are binding upon the national courts of admiralty; but with respect to foreign vessels, and vessels belonging to other states, they are inoperative. The courts of the United States, in the exercise of their admiralty and maritime jurisdiction, are exclusively governed by the legislation of Congress, or, in the absence thereof, by the general maritime law; and no state can, by its local legislation, narrow or enlarge such jurisdiction. In the case of foreign vessels the lien is given by the general maritime law, and is not therefore defeated by the departure of the vessel, although the statute makes no distinction in terms between domestic and foreign vessels. And it has accordingly been held that a lien acquired by the supply, in the port of New-York, of materials for the repairs of a vessel belonging to Massachusetts, might be enforced in the admiralty, after the return of the vessel to her home port(a).

(a) *The Barque Chusan*, 2 Story's R., 455.

A question of considerable importance has also been decided by the late learned Judge HOPKINSON, depending on the true construction of the statute of Pennsylvania. The title of the act declares its object to be, "to secure the persons employed in the building and fitting vessels and ships for sea, by making the body, tackle, furniture or apparel of such ships or vessels, liable to pay the several tradesmen employed in building and fitting them, for their work and materials." The preamble of the act declares that the business of ship-building is an important branch of the commerce of the state; that the "tradesmen employed in this business are liable to losses, by reason that the persons employing them are frequently masters of ships, strangers, and persons having no fixed property in the country;" and that the ships and vessels are not liable to pay the amount of their bills, "whereby their labor and materials have been taken to pay other debts." To remedy this evil, it is enacted, "That ships and vessels of all kinds, built, repaired and fitted within this state, are hereby declared to be liable and chargeable for all debts contracted by the masters or owners thereof, for or by reason of any work done, or materials found or provided by any carpenter, blacksmith or others, for, upon and concerning the building, repairing, fitting, furnishing and equipping such ship or vessel, in preference to any, and before any other debts, due and owing from the owners thereof." A petition^(a) was filed in the

CHAP. 2.
Of Pennsyl-
vania.

(a) The proceeding was against *proceeds* in court.

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district court, to enforce a lien which the libellant claimed to have in virtue of this act, upon a vessel, for the value of materials used in her building. In point of fact, the libellants had only "procured and caused" the materials in question "to be provided and furnished by other persons, which persons were afterwards paid and satisfied therefor by the petitioners." The petitioners had contracted on their own credit and personal responsibility, in pursuance of an engagement to that effect entered into by them with the owner. Under these circumstances it was held that the act did not extend to the case, and therefore gave no lien on the vessel. According to the spirit as well as the language of the act, the debts to be preferred are those which were contracted by the master or owner of the vessel; and the persons to be secured are the mechanics and material-men, by whom the work is done and the materials are supplied. When this object is accomplished by other means, there is nothing left upon which the act can operate. By no fair legal implication or intendment could the material-men and mechanics be considered as having *virtually* contracted with the owner, through the petitioners as his agents, or otherwise; but even admitting them to have done so, it was a sufficient answer to say that they had been paid, and the object of the act thus satisfied. To hold that the petitioners were entitled to be substituted in the place of the original creditors, or, by the use of their names, to obtain for themselves the benefit of the security designed

by the act for the benefit of material-men and me- OHAP. 2.
chanics alone, would be equally inadmissible(a).

The state laws above noticed appear to be judi- of Ohio.
cious regulations conceived in a spirit of moderation and justice, adapted rather to supply the deficiencies of the general maritime law, by virtually extending its peculiar remedies to domestic vessels, than to supersede and defeat them, by unnecessary and wanton interference. It would have been well if the example of these states, in this respect, had been followed by all the other states that have seen fit to legislate on the same subject. But the State of Ohio, by an act of the General Assembly of that State, passed February 26, 1840, has made itself a remarkable exception. In the case of *The Velocity*, decided in February, 1850, and again in that of *The Globe*, decided in December of the same year, in the District Court of the United States for the Northern District of New-York, it became necessary to subject this act to a careful scrutiny.

In *The Velocity*(b), a vessel owned in the State of Ohio, having been sold at the port of Buffalo under a decree for seamen's wages, certain persons, being also citizens of Ohio, petitioned for payment out of the surplus proceeds of the sale, for supplies furnished by them in that state, insisting that they had a lien therefor on the vessel in virtue of the above mentioned act. Upon a full examination of the subject, the court decided that according to the

(a) *Harper et al. v. The New Brig*, Gilpin's R., 536.

(b) 13 Law Rep. (3 N. S.), 61.

VOL. 1. true interpretation of the act, no lien was conferred by it, and accordingly rejected the petition.

The Globe. The decision in *The Globe*(*a*) turned on the effect of a sale of the vessel on execution upon a judgment obtained in Ohio under the act in question. As the subject is one of great interest, and as this case underwent a reëxamination on appeal in the circuit court, a somewhat extended notice of it will probably be acceptable to the reader.

The libellant was a citizen of New-York residing at Buffalo, where the *Globe* was arrested on admiralty process in a suit for necessary supplies furnished at that port, from time to time during the preceding year at the master's request, the vessel being at the time owned in the State of Michigan. A claim was interposed by Joshua Maxwell, as owner, deriving his title from Elisha T. Sterling, by whom she had, shortly before, been purchased at a public sale made by the sheriff of Cayahoga county, in the State of Ohio, in virtue of an execution on a judgment in favor of *The Cayahoga Steam Furnace Co.* recovered in a local court against the *Globe*, in a proceeding instituted, as already mentioned, under the Ohio statute. Of the provisions of this statute it is sufficient, in this place, to state, that it is by the first section enacted, "That steamboats and other water craft navigating the waters within or bordering upon this state, *shall be liable* for debts contracted on account thereof," &c., &c. ; by the second section, that "any person having such demand may proceed

(*a*) Law Rep. (3 N. S.), 488.

against the owner or owners, or master of such craft, or against the craft itself ;” that the sixth section authorizes the sale on execution, of the property arrested, to satisfy the judgment, if any, which may be rendered for the plaintiff, and directs that “the surplus money, if any, arising from such sale, shall be returned to the owner, master or agent, on demand, as the surplus money is in other cases of execution ; and if the proceeds of the sale shall fall short of satisfying the judgment, the balance shall remain to be collected on execution, as upon other judgments.” The act does not in terms, purport to confer any lien, and, although it prescribes the mode of procedure against the vessel, it requires no notice, in any form, to be given of the proceedings, except of the sale, after judgment, on execution, and there was no evidence or pretence that any was given of the proceedings against the *Globe*. But at the trial or hearing, an attorney did, in fact, appear in behalf of the owner who resided in Detroit. The supplies for which the action was brought in the district court, were furnished before the right of action had accrued under the Ohio act, in favor of the parties at whose suit the *Globe* had been sold on execution. The question for decision arising upon the foregoing facts, was, whether the lien acquired by the libellant under the general maritime law was extinguished by that sale. If it was so, it could only be because the proceedings and judgment in the Ohio court, being, in point of form, against the *Globe*, the judgment carried with it the same obligatory force that belongs to the sentence or decree of a court of admiralty, of

VOL. 1. competent jurisdiction, proceeding *in rem*, and conducting its proceedings in subordination to the principles of natural justice.

Such a judgment is held to be conclusive upon the rights of all parties concerned, not only in the courts of the country where it is pronounced, but, by a rule of the international law, in the courts also of all other countries. This is because all persons having an interest in the subject matter, are, in law, deemed parties; and they are deemed to be parties, because they are permitted, and, by the most effective forms of notice of which the case is susceptible, are summoned to become so in fact. To those not familiar with these forms of procedure, the effect ascribed to them may seem to be one at variance with the rule which limits the binding force of judgments at common law to the actual parties and their privies. But in reality it is not so; for it binds only those who are at least potentially parties, by having the opportunity afforded to them, if they choose to avail themselves of the privilege, not only to contest the claims of the party by whom the suit has been instituted, but to supersede him by setting up superior claims of their own. But law is said to be "the perfection of reason;" and it would be strange, therefore, if the maxim *cessante ratione cessat et ipsa lex* had not, as it has done, found an undisputed place among its axioms. It is accordingly an established principle of jurisprudence as well as of ethics, that no person is to be held bound by an adjudication affecting his legal rights unless he had notice of the proceedings that led to it, and an opportunity of

appearing and making a defence. If a government should see fit to tolerate such injustice, a sentence passed without notice might be held binding within its own jurisdiction; but, in the language of Mr. Justice STORY, in *Bradstreet v. The Neptune Ins. Co.(a)*, “upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations.” The doctrine was asserted in emphatic language by the Supreme Court of the United States in *The Mary(b)*. “It is,” said Ch. J. MARSHALL, “a principle of natural justice of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him.” And in the case before Mr. Justice STORY, just above cited, speaking of a seizure and condemnation under a municipal law of Mexico, he also declared it to be “A rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned.” “If,” he added, “a seizure is made, and condemnation is passed without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making defence, the sentence is not so much a judicial sentence as an arbitrary edict. * * * * I hold, therefore, that if it does not appear, from the face of the record of the proceedings *in rem*, that due notice, by some public

(a) 3 Sumner's R., 607.

(b) 9 Cranch's R., 126 (3 Curtis's Decis. S. C., 292).

VOL. 1. proclamation, or by some notification or monition, acting *in rem* or attaching to the thing, so that parties in interest may appear and make defence, and in point of fact the sentence of condemnation has passed upon *ex parte* statements without their appearance, it is not a judicial sentence conclusive upon the rights of foreigners." These distinguished judges, it is true, were speaking in reference to adjudications in the courts of foreign countries; but the great principle they assert has been repeatedly held applicable, in the courts of one state of this Union, with respect to the judgments of the courts of another(*a*). That it should be so ought not to be doubted; for although the Constitution declares that "Full faith and credit shall be given in each state to the public acts, records and proceedings of every other state(*b*)," and by the act of 26th May, 1790, ch. 11, it is declared that such records and judicial proceedings, authenticated in the manner prescribed in the act, "shall have such faith and credit given to them in every court of the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken," these enactments ought not to receive, nor could they have been intended to receive an interpretation that would compel the judicial tribunals of one state to uphold and enforce

(*a*) See *D'Arcy v. Ketchum*, 11 Howard's R., 165 (18 Curtis's Decis. S. C., 586), where this is expressly adjudged, and the correspondent decisions of the Supreme Court of the State of New-York therein cited by Mr. Justice CATRON. See also 1 Kent's Comm., 3d ed., 261, and *ib.*, note b.

(*b*) Art. 4, § 1.

the judgments of the tribunals of another acting in open defiance of the fundamental principle in question. CHAP. 2.

But assuming that the Legislature of Ohio, in authorizing proceedings against the vessel, really intended to give them the whole force and effect usually ascribed to judgments *in rem*, and that the state court, in its adjudication against the *Globe*, so understood the law, then, not only is the judgment obnoxious to this charge, but the statute also, for it requires no notice. But is the great principle of natural right by which notice is enjoined, less obligatory upon the Legislatures of the several states than upon their courts? It has been declared by the highest authority, to be of universal obligation. Can it, by any reasonable intendment, be supposed that the people of the State of Ohio designed to invest their Legislature with authority to disregard it? And if they did, have such acts of legislation any binding extra-territorial obligation?

But there is another and a very grave objection to the Ohio statute arising from the political relations between the national and state governments. The Constitution of the United States declares that the judicial power of the nation shall extend "to all cases of admiralty and maritime jurisdiction;" and by the Judiciary Act of 24th September, 1789, the district courts are invested with "exclusive cognizance of all civil causes of admiralty and maritime jurisdiction." The Constitution also confers upon Congress power "to regulate commerce with foreign nations and among the several states."

VOL. 1. These constitutional and legislative provisions do not interfere with the common law jurisdiction of the state courts, but leave the suitor at liberty to pursue his concurrent common law remedy in these courts, whenever he sees fit. No inconvenience arises from this concurrent jurisdiction. The common law remedies are clearly defined and quite distinct from those administered by courts of admiralty. These latter belong exclusively to the national courts, and any attempt by the Legislature of a state to engraft them upon its system of jurisprudence, whether *eo nomine*, or only in substance and effect, under whatever name, would be void. Would it be less objectionable for a state Legislature to interpose by assuming to create new forms of remedy, unknown to the common law, but bearing a rude analogy to the admiralty remedies, and adapted, therefore, to supersede and defeat those provided by the Constitution and laws of the United States; thus exhausting the sources of the federal jurisdiction, and disturbing the commerce of the country? This question seems to admit but one answer; and precisely of this character, according to the interpretation put upon it by the claimant in the case of *The Globe*, is the statute of Ohio.

But supposing the validity of the state law,—notwithstanding its conflict with the Constitution and laws of the United States, and its silence with respect to notice, and the validity of a judgment and an execution sale under it, notwithstanding the want of notice,—to be conceded; the main question still remains unanswered whether such judgment

and sale are conclusive against all the world. The act itself is silent upon this point; and the more closely its provisions are scanned, the more numerous and the stronger will appear to be the reasons for doubting whether anything was contemplated by the Legislature beyond what belongs to an ordinary judgment and sale by execution *in personam*; and the stronger also will appear to be the extrinsic objections to the opposite construction. The great distinctive element of a civil law action *in rem* is the universality of notice, and the correspondent right of intervention. It is this that constitutes the reason and the justification of the conclusiveness ascribed to the judgment in such an action. The proceedings prescribed by the act in question are wholly wanting in this peculiar element. There is no provision for notice, or for intervention either *pendente lite*, or even against surplus proceeds. The only notice required is one of ten days of the sale of the vessel on execution; and whatever balance of proceeds may remain after satisfying the execution, the sheriff is peremptorily directed by the act to pay over to the owner or his agent, without, as I understand the act, any judicial order for that purpose, and without any provision for ascertaining to whom the vessel really belonged. The remedy against the vessel is not confined to those demands for which a lien is conferred by the maritime law, nor does the act make any distinction between foreign and domestic vessels, but it subjects all alike to "seizure" for debts contracted as well by the *owner, steward, consignee or other agent*, as by the master;

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and "for all injury done to persons or property by such craft;" and "for any damage or injury done by the captain, mate or other officer thereof, or by any person under the direction of either of them, to any person who may be a passenger or hand" on board. The question is whether an execution sale under a judgment recovered in any court, or before a "justice of the peace" of the State of Ohio for any one of the causes of action here enumerated, has the effect of extinguishing a maritime lien so highly favored in law as to be held paramount to the title acquired by a *bona fide* purchaser, without notice, and even to that of the government acquired by forfeiture. An affirmative answer to this question would, in my judgment, be repugnant alike to law and common sense.

It was under the foregoing views of the subject, somewhat amplified in the opinion he delivered, that the district judge, in the case of *The Globe*, pronounced for the libellant, holding that his lien was not extinguished by the Ohio judgment and sale, and awarding to him the value of the supplies furnished by him to the master of the *Globe*. An appeal to the circuit court was, however, interposed to this decree, and it was reversed by the presiding judge of that court, who dismissed the libel with costs^(a). The amount in controversy being less than \$2000, his judgment was final. Whether the validity or construction of the Ohio acts has been drawn in question in any other of the national courts,

(a) 15 Law Rep. (5 N. S.), 421.

I am not apprised. Probably the reversal of the decree of the district court in the case of *The Globe* may have deterred persons possessing maritime liens from contending against these acts, and as the question adjudicated is of no inconsiderable importance to the prosperity of the immense commerce of the lakes, it may not be amiss to subject the published opinion of Mr. Justice NELSON to a very brief examination. CHAP. 2.

It is not necessary to dwell upon the exordium of this remarkable judgment.

To say that the grant of admiralty jurisdiction to the courts of the United States "did not take away the concurrent remedy that existed at common law;" that "the remedy at common law is to be sought in the jurisprudence of the states;" but that "it may be administered in the federal courts, in cases where the citizenship *or residence* of the parties enables those courts to entertain the jurisdiction," is to utter trite truisms, which no one is likely to think of disputing, except that it is a mistake to suppose that *residence* is sufficient to give jurisdiction. Precisely of this character, also, is all that is said of the decision of Mr. Justice STORY, in *The Barque Chusan*; and with regard to his honor's observations concerning priority among several possessors of maritime liens, and a decision of the district judge of the Southern District of New-York, relative to the order of payment among suitors claiming payment out of proceeds in court (an extended note of which it has been seen fit, it seems, to append to the report), little else need be said, except that they are unde-

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niably wholly irrelevant to the case of *The Globe*. Indeed, I shall need no apology for affirming that, but for the high official source whence they emanate, the strange confusion of ideas they evince would be absolutely ludicrous. The question was, whether the libellant's maritime lien had been extinguished so as to deprive him of the right to maintain a suit in admiralty upon it, and to suppose that this depended on the priority of his lien in point of time, was simply preposterous. The libellant's predicament in this respect would have been exactly the same, if his lien had accrued subsequently to the origin of the Ohio creditors' demand. No one has ever imagined that the existence of a prior lien against a ship was any impediment to the maintenance of a suit *in rem* in a proper court, and the recovery of a valid and conclusive judgment against the same ship, by any one having a right of action in that form against it. It is only with respect to the application of the proceeds of the sale of the ship that the question of priority becomes important. Such was the case before the judge of the Southern District of New-York, and his observations upon it, so irrelevantly quoted as authority by Mr. Justice NELSON, had, at least, the merit of pertinency to the case before him, whatever may be thought of the soundness of the conclusion at which he arrived.

But impertinency is not the worst fault of Mr. Justice NELSON's judgment. When, after remarking that, "as a general, if not universal rule, in order to bind the defendant, or confer any rights upon the plaintiff, by force of the judgment, in all personal

actions, the former must be served with notice of the institution of the suit, so that he may have an opportunity to appear and defend"—he adds, "But a proceeding *in rem* forms an exception to the general rule, and binds the *res* in the absence of any personal notice to the party interested"—he utters a direct denial of a well settled and incontrovertible principle of law; for I will not impute to him the puerility of intending, by the expression "*personal* notice," to be understood to speak of a service of process or other notice, personally on the owner or other persons interested in the *res*, who are often unknown to the party by whom the suit is instituted. The authorities cited by Mr. Justice NELSON for this proposition are "Story's Conflict of Laws, chap. 14, § 549, and cases there cited, and chap. 15, §§ 592, 593; *Boswell's Lessee v. Otis*, 9 How., 336," which, it is scarcely necessary to observe, afford not the slightest warrant for his assertion. In describing the effect of proceedings *in rem*, they refer to properly conducted proceedings, of which notice is an essential element, and when they assert that notice is not necessary to give them validity, actual personal notice by the service of process is meant, the object being to mark the distinction in this respect between proceedings *in rem* and *in personam*.

In actions against the person, the defendant must be personally summoned, because he is known and can be notified in this form. In actions *in rem* the persons whose interests are to be affected by the proceedings are not known to the promovent, and they can therefore be notified in no other form than

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that resorted to by courts of admiralty. This form of notice, with rare exceptions, is in fact effectual, and from necessity must be held sufficient, or the decree would be nugatory. But such a notice is just as essential to the validity of a decree *in rem*, as a personal notice to the defendant is to the validity of a judgment in a personal action.

Mr. Justice NELSON proceeds, however, to say that "it is unnecessary to place the decision of this branch of the case [in his treatment of it, it had no other branch] upon the ground that the Ohio judgment, acting *in rem*, would be conclusive in the absence of any personal notice to the party interested, because Robinson, the owner of the vessel at that time, appeared in the suits in the court of Ohio, and contested the proceedings throughout." No authority is cited for this assertion, and, without giving myself the trouble to search, I hesitate not to aver that none can be found. The assertion is this: That if, in a proceeding *in rem*, of which no notice has been given, the owner, being, by some means, nevertheless, apprised of it, sees fit to appear before the court, he thereby not only concludes himself, but closes the mouth also of all third persons possessing liens on the property who do not appear and who know nothing of the proceeding. Such a qualification of the rule is inconsistent with its spirit. If the effect of the proceeding is to be to bind all the world, as it is usually expressed, which means all persons having an interest in the thing, all the world, in this sense, should have notice of it, and thus have the opportunity to become parties to it.

In other words, the notice should be public, as it is required to be in all well regulated systems of jurisprudence; and it is upon this ground alone, that the proceeding is held to be universally obligatory. The rule as qualified by Mr. Justice NELSON would lead to intolerable injustice. In a suit by one creditor against a vessel encumbered by numerous liens to the whole amount of her value, it would put it in the power of the owner to defeat the claims of all the other creditors, and to appropriate the proceeds of his vessel rightfully belonging to others, to his own use; and this evil would be aggravated by fraudulent collusions between owners and creditors, real or pretended. The principle is that notice, actual or implied, must be given of all judicial proceedings coextensive with their obligatory force. It is a fundamental principle pervading every sound system of jurisprudence. It is strictly enjoined by the statutes of the United States relative to forfeitures, as it is by numerous statutes of the State of New-York, and it is studiously and efficaciously enforced by courts of admiralty. Of this principle Mr. Justice NELSON seems to have been profoundly ignorant, and he accordingly first denies its existence altogether with respect to proceedings *in rem*, and then asserts that conceding its existence, the voluntary appearance of the owner effectually cures its non-observance with respect, not only to himself but all other persons.

After stating the decision of Judge BETTS relative "to the order in which the different demands [upon the funds in court arising from the sale of the

VOL. 1. ship] are to be satisfied when of like rank," Mr. Justice NELSON concludes as follows: "I concur fully in this view, and, *therefore*, hold, in this case, that the priority of time in the furnishing of the supplies and materials by the libellant gave him no paramount lien on the vessel over the liens of the creditors in the Ohio suits"! Certainly not, and no one ever dreamed that it did.

I have now noticed every part of Mr. Justice NELSON'S opinion and have endeavored to do it fairly. Should the reader find it difficult to credit the assertion, I refer him for its verification to the opinion itself. With the exception of two or three sentences, he will find it to consist, as I have represented it to do, of matter as inapplicable to the question before the court as the law of copy-right, and in the excepted sentences he will find only bold assumptions in conflict with "the first principles of natural justice," and contradicted by the highest judicial authorities. It is scarcely necessary to add that the question passed upon by Mr. Justice NELSON is left by his opinion, in point of judicial authority, exactly where he found it(a).

(a) If my strictures upon the judgment of Mr. Justice NELSON should seem to be marked by unusual severity, it is no fault of mine. Had he given evidence of having duly examined the case before presuming to decide upon it, he would have entitled himself at least to forbearance, and to the respect due to good intentions and honest endeavors. But this he has not done. The question depended upon a statute of extraordinary character, and there is not in his opinion the slightest mention of any one of its provisions, nor a syllable implying that he had any knowledge of them. He took it upon himself to reverse one decision and virtually to overrule another, of the district court, without even an allusion to the published reasons for these de-

If an exclusive personal credit has been given by material-men to the master, they cannot afterwards, upon any change of circumstances or opinion, resort to the ship, or shift the responsibility over to the owner; but *prima facie* the supplies are to be deemed to have been furnished on the credit of the ship and owners, as well as of the master, until the contrary is proved. It is not sufficient to show that the master is himself, in fact, personally liable; for he is in all cases so liable for supplies and necessaries furnished for the ship, unless the credit be exclusively confined to the owners(a).

CHAP. 2.
Exclusive credit given to the master, a waiver of the lien.

But it has been held that the acceptance, as a conditional payment, of a negotiable promissory note, which had not been surrendered or tendered

Acceptance of a negotiable note outstanding, a waiver;

decisions, and in a manner, therefore, compatible neither with judicial duty nor decorum. To the elaborate and obviously maturely considered judgment of the district court, he contented himself with opposing an opinion that cannot truly be characterized without the employment of epithets from which I choose to abstain. This is not a solitary instance. No judge has a right thus to trifle with his high functions. They furnish scope for the highest intellectual endowments, and the profoundest legal learning. However great may be the abilities of a judge, he is bound to devote them conscientiously and strenuously to the public service; and especially is this duty incumbent on a judge of humble capacity. He is bound to strive as far as in him lies, to supply this deficiency, by extraordinary exertions. But unfortunately judges of this character are precisely those who are most apt to be blinded by conceit and self-complacency, and thus to be rendered incapable of apprehending the responsibilities of their office. I believe this to be the only highly civilized country in the world where such men are elevated to the highest judicial stations. They require to be watched; and he, who, regardless of their displeasure, proclaims their delinquencies, and arouses them to the better performance of their duty, entitles himself to be regarded as a public benefactor.

(a) *The Brig Nestor*, 1 Sumner's R.

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but not
unless taken
in absolute
payment.

to be given up, was a waiver of the right to resort to an admiralty suit for satisfaction(*a*). If, however, the note was not taken as absolute payment, or is not, by the local law of the state where the debt was contracted, to be deemed to have been so taken, and if the creditor at the hearing offers to surrender it, the lien exists, and may be enforced in the admiralty(*b*).

Agreement
to give credit
not a waiver.

In the case of *The Nestor*, above referred to, it became necessary for Mr. Justice STORY maturely to consider and to decide upon the effect of a stipulation on the part of material-men to give a credit, whether indefinitely, or for a specified time; and, by a course of reasoning marked by consummate learning and ability, he arrived at the conclusion, contrary to the prevailing impression previously entertained(*c*), that the giving of such credit, in either form, was no waiver or extinguishment of the maritime lien.

Shipwrights
may sue in
the admiralty
for materials
and labor
furnished in
building a
vessel,
where a lien
is given.

From what has been said in the preceding chapter concerning the limitation of the admiralty jurisdiction in cases of contract, to those contracts which pertain to commerce and navigation on waters within the admiralty jurisdiction, a doubt might be entertained whether a court of admiralty could take cognizance of the claim of a shipwright for materials furnished and labor bestowed in the construction of a vessel not yet launched, or which had not yet been

(*a*) *Ramsay v. Allegre*, 12 Wheaton's R., 611 (7 Curtis's Decis. S. C., 395).

(*b*) *The Barque Chusan*, 2 Story's R., 455,

(*c*) See *Zane v. The Brig President*, 4 Washington's R. 453.

employed in maritime pursuits, although the local law might give him a lien on the vessel. Enough, perhaps, has been already said in the present chapter to dissipate such a doubt; but it is necessary, nevertheless, to bestow a particular notice upon the subject. Claims of this nature have been held to be unquestionably within the admiralty jurisdiction, provided the vessel is *designed* for the proper employment.

Read v. The Hull of a New Brig(a), was a case of this description; and the following extract from the opinion of Mr. Justice STORY, will serve to show the legal footing upon which claims of this description rest: "The brig is built and designed for maritime business and navigation upon the seas, and waters navigable from the sea; so that her employment is clearly to be maritime, and the contract for the work and labor is for maritime purposes. This is a fact, which is naturally inferable from the actual circumstances and local position of the port of Portland [in Maine], and from the size and build of the vessel itself. It ought, however, to have been positively averred in the libel, as it is, or at least may be, material to the exercise of the admiralty jurisdiction, both *in rem* and *in personam*, that the vessel is of the size and build fitted for maritime employment, and that her business is to be maritime navigation, or at least navigation upon waters which are, in some part thereof, tide waters, or navigable to and from tide waters. It is not every case, where a lien exists by the local law or the general law, that the

(a) 1 Story's R. 244.

VOL. 1. admiralty possesses and exercises jurisdiction: the lien must arise from some business, employment, or work and labor connected with maritime affairs, or navigation, or shipping.”

A like jurisdiction was exercised, upon the same ground, in the case of *Davis et al. v. A New Brig*, in the District Court for the Eastern District of Pennsylvania^(a).

(a) Gilpin's R., 473.

CHAPTER III.

MARINERS' WAGES.

THE term *mariner* may, in general, be said to embrace all persons employed on board ships, to assist in their navigation and preservation. It includes, therefore, not only the officers and the ordinary seamen of the ship, but also surgeons, carpenters, coopers, stewards and cooks, employed on board as such^(a). It may include women, also,

Who are
mariners.

(a) The right of "mariners," with the exception of the master, to sue in the admiralty for wages, was always conceded by the common law courts of England; but during the pendency of the well known controversy between these courts and the High Court of Admiralty, touching the extent of the jurisdiction of the latter, the question, who were to be considered as embraced within this denomination, often became the subject of discussion, and there are many reported decisions upon this point. It is unnecessary, however, particularly to refer to them, because their authority and influence are superseded by the decisions and established usages of our own courts. If there is ground for doubt with respect to either of the classes of persons mentioned in the text, it is that of *surgeons* or physicians. In the case of *Mills v. Long* (Sayer, 136), it was unanimously decided by the court of King's Bench, that a ship's surgeon might sue in the admiralty; but in the case of *The Lord Hobart* (2 Dodson's R., 100), Sir WILLIAM SCOTT seems to have entertained some doubt upon the point; considering the case of a surgeon to be different, in this respect, from that of a carpenter, who frequently acts in the capacity of a mariner in the strict sense of the term. It did not become necessary to decide the point; and the reporter, in a note, intimates an opinion that if the cause had been persevered in, the court would have recognized the

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as well as men(*a*); and the pilot, deck hands, engineer and firemen employed on board a steamboat have been held to fall under the denomination of mariners(*b*). It is not, however, to be understood that all persons employed, in whatever capacity, on board vessels, fall within this denomination. To constitute a mariner, the services rendered by him must pertain to the business of navigation; and must be such as are necessary, or at least conducive

authority of the case of *Mills v. Long*, and permitted the surgeon to maintain his suit. In the case of *Gardiner et al. v. The Ship New Jersey* (1 Peters's Adm. Decis., 223), however, it was assumed by Judge PETERS that the ship's physician had no lien on the ship; but in the case of *Turner et al. v. The Superior* (Gilpin's R., 514), and also in the case of *Thackarey et al. v. The Farmer* (*ibid.*, 524), which arose more than thirty years afterwards, in the same court, the right of surgeons to sue in the admiralty was incidentally asserted by the court as a settled point. In the case of *Macomber et al. v. Thompson* (1 Sumner's R., 384), no objection was interposed to the right of a cooper, on board of a whaling ship, to maintain a suit in the admiralty for his share in the earnings of the ship.

The master is not entitled to sue in the English admiralty for his wages, not having, as we shall see, any lien on the ship therefor; but this is because, from the relation in which he stands to the owners, he is presumed not to have looked to the ship for security. The right of the mate to sue for wages, in the admiralty, was also formerly questioned in England, on the same ground; but it has long been settled, both in England and the United States, that he stands, in this respect, on the same footing as the crew.

(*a*) *The Jane and Matilda*, 1 Haggard's R., 187.

(*b*) *Wilson v. The Ohio*, Gilpin's R., 505, and in the District Court of the Northern District of New-York, "porters," whose chief business it is, on board of lake steamers employed in the conveyance of passengers, to receive and bring on board, and discharge the luggage of the passengers, have been allowed to sue as mariners, their services being essential to the proper and successful navigation of the vessel as a passenger vessel, and for the same reason this privilege has been allowed to the *clerk*.

to the preservation of the vessel, or of those employed in her navigation. It has therefore been held that no suit in the admiralty could be maintained for wages, by persons hired and employed as musicians on board a vessel(*a*).

Few claims are so highly favored and so studiously protected by law, as those of mariners for their wages; and it has long been a settled principle of the maritime law, that the seaman has a three-fold remedy for the recovery of his earnings: against the ship, in virtue of a specific lien or privilege secured to him by the maritime law; against the master, by reason of his right to receive the freight earned by the ship, that being the appropriate fund for the payment of wages; and against the owner, in virtue of his contract(*b*). It is now, moreover, an established principle of the maritime law of the United States, that the mariner has a lien for his wages also on the *freight*, in the hands of the merchant, owner or consignee of the goods from whom it is due. This doctrine was laid down by the Supreme Court of the United States, for the first time, in qualified terms, and apparently with considerable

Mariner has a remedy against the ship, freight, master and owner.

(*a*) *Trainer et al. v. The Superior*, Gilpin's R., 514. The vessel, in this case, was originally designed for canal navigation; but at the time the services for which the suit was brought were rendered, was employed as a floating museum, and, in that character, left Philadelphia soon after the libellants were shipped, passed down the Delaware, through the canal and Chesapeake bay, to Norfolk, and thence to various places in North Carolina, stopping from time to time, and exhibiting her curiosities.

(*b*) *Abbot on Shipping*, Boston ed. of 1846, 781; *Bronde v. Haven*, Gilpin's R., 592; *Sheppard v. Taylor*, 5 Peters's R., 665 (9 Curtis's Decis. S. C., 531).

VOL. 1. hesitation, in the case of *Sheppard v. Taylor*, just cited. It has, however, since been distinctly asserted in several cases by Mr. Justice STORY(*a*); and is explicitly declared by the Supreme Court, in one of the rules of practice in cases of admiralty and maritime jurisdiction, promulgated in 1845(*b*). And it had also been previously maintained, in a case not then reported, by the learned judge of the District Court of the United States for the District of Maine, in an elaborate and very able opinion comprising a full review of the authorities bearing upon the question(*c*). In that case, a part of the return cargo belonged to the ship charterers, by whom the crew was shipped, and who had the entire control of the ship during the voyage. Before the return of the ship, the charterers became insolvent, and had executed an assignment of all their property, including so much of the return cargo as belonged to them. In behalf of the seamen, it was insisted that they had a lien not only upon the freight due to the charterers on account of that part of the cargo which belonged to others, but also on the residue of the cargo itself. As a judicial question, with respect both to the freight and the cargo,

Whether the mariner's lien does not extend also to the cargo, when the property of the ship-owner?

(*a*) *Brown v. Lull*, 2 Sumner's R., 443; *Pitman v. Hooper*, 3 Sumner's R., 50.

(*b*) Rule 13. "In all suits for mariners' wages, the libellant may proceed against the ship, freight and master, or against the ship and freight, or against the owner alone, or the master alone, *in personam*." This rule is not understood to *require* the mariner, when he wishes to proceed against the ship and master, to embrace also the freight, but only to declare his right to do so.

(*c*) *Poland et al. v. The Spartan*, Ware's R., 134.

it was considered and treated by the court as entirely new. The conclusion of the court was, that a lien was given by the general maritime law on freight, and, in cases like that before the court, on the cargo also.

In the case of *Sheppard v. Taylor*, cited above, it was said by the Supreme Court that seamen have no lien on the cargo; "as that is not in any manner hypothecated, or subjected to the claim for wages(*a*)."¹ But in a late case in the High Court of Admiralty of England, it is not only assumed as a settled principle, that the mariner has a lien on the freight, "as appurtenant to the ship," but it is strongly intimated that the lien may be enforced also against the cargo, when it is the property of the ship-owner. The ship, designed on a trading voyage from Liverpool to Africa and back, sailed with goods for barter; and, on her voyage home, was, with her cargo, totally consumed by fire. The ship and cargo were the property of the same owner, and were insured. The suit was in favor of one of the crew who had worked his passage to England, and was against the owner of the ship, and of "the cargo lately laden on board." The court, in discussing the questions to which the case was supposed to give rise, is reported to have said, that "a mariner has no lien on the cargo, as cargo: his lien is on 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 a security for the freight that may

(*a*) 5 Peters's R., 675 (9 Curtis's Decis. S. C., 531).

VOL. 1. *be due.* Here, however, the ship and cargo are all destroyed." But in a subsequent part of his judgment, the learned judge adds: "Whether, if any part of the cargo were saved, it could be held to represent the freight, I give no opinion: it might raise a very different question from the present; here the goods taken in barter were destroyed and lost, so that no freight could accrue(*a*)." Whatever rule may eventually be established with respect to cases where the same person is the owner of the ship and of the cargo, and where, therefore, no freight, *eo nomine*, is earned, the doctrine of the case of *The Spartan* is recommended by persuasive considerations of justice, and supported by strong analogies in the undisputed principles of the maritime law.

Priority of
mariner's
lien on ship
and freight.

Against the ship and freight, and against their proceeds, into whosoever hands they may come, the seaman's claim for wages has priority over all other claims. It is a sacred lien; and as long as a plank of the vessel or a fragment of the freight remains, the mariner is entitled to it, in preference to all other persons, as a security for remuneration. It accordingly takes precedence of bottomry bonds, and is accordingly entitled to priority of payment out of the proceeds of the sale of the ship sold under a decree in favor of a bottomry bond holder, even though the fund is insufficient to pay the bond(*b*): and it may be enforced against a subsequent *bona fide* purchaser, and even against the title of the

(*a*) *The Lady Durham*, 3 Haggard's R., 196.

(*b*) *The Favorite*, 2 Robinson's R., 232.

government acquired by forfeiture(*a*). The lien is not impaired by the forbearance of the seaman to arrest the vessel at the termination of the voyage, but may be enforced after she has made other voyages, and in any port where she may be found, until by lapse of time the claim may become stale(*b*). Nor is the remedy lost by the seizure and condemnation of the vessel, in a foreign country, if she is subsequently restored; and there is no difference in this respect, between the case of a restitution *in specie* of the ship itself, and that of a restitution in value. The lien attaches to the thing, and to whatever is substituted for it; and if, in the order or award of restitution or indemnity, freight has been allowed as a distinct item, and the proceeds of the ship are insufficient, the seaman may assert his claim against the allowance for freight(*c*). And in a case in which the owner of the captured vessel was also the owner of the cargo, and the claim was for loss of freight as well as of the vessel, and a gross sum was awarded to the claimant for his loss, without any distinct notice of the freight, it was held by Mr. Justice STORRY, that an allowance on account of freight was to be presumed; and he intimated that even if it had appeared on the face of the award that no freight had been allowed, it would not follow

CHAP. 8.
Not impaired by intermediate voyages.

Not extinguished by the condemnation of the vessel.

(*a*) *The St. Jago de Cuba*, 9 Wheaton's R., 409 (6 Curtis's Decis. S. C., 110); *Pitman v. Hooper*, 3 Sumner's R., 51; 3 Kent's Comm., 3d ed., 197.

(*b*) *The Mary*, Paine's R., 180; *The Eastern Star*, Ware's R., 185.

(*c*) *Sheppard v. Taylor*, 5 Peters's R., 675, 710 (9 Curtis's Decis. S. C., 531); *Pitman v. Hooper*, 3 Sumner's R., 50; *Brown v. Lull*, 2 Sumner's R., 443.

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that this would necessarily affect the title to wages; because the natural presumption would be, *omnia rite acta*, that the rejection was founded on objections personal to the owner, or his acts, in no respect touching the rights of the seamen. At least, it must be a very strong case which would justify a different conclusion (*a*).

In case of partial restoration, full wages recoverable.

The case just cited embraced also another and far more important question. The sum awarded to the owner as his proportion of the indemnity granted by treaty, was a little short of one-third of the amount lost; and the question was whether the libellant was entitled to receive his full wages for the homeward voyage, or whether there was a reduction to be made of the wages in the same proportion as the owner himself had been compelled to submit to under the award. The question was new; and the clear conclusion of the learned judge, after the most thorough and exhausting examination, and contrary, as he admits, to his first impression, was that the wages of seamen, in such cases, constitute a privileged lien to their full amount, and not merely *pro rata* on the sum received by the owner.

Mariner discharged before commencement of voyage, entitled to sue in the admiralty for wages.

It has been held that where a mariner is discharged from a vessel after signing the shipping articles, though before the commencement of the voyage, he may sue in the admiralty for his wages, provided the voyage for which he was engaged is actually prosecuted; but it was doubted whether if the voyage was altogether abandoned, he would not be obliged to seek his remedy at common law (*b*).

(*a*) *Pitman v. Hooper*, 3 Sumner's R., 50, 57.

(*b*) *The City of London*, 1 Wm. Robinson's R., 88.

The master, who contracts with the owners, and is not therefore supposed to look to the ship for security, has no lien on the vessel for his wages. He cannot, therefore, maintain a suit therefor *in rem* against the ship(a). But it has uniformly been held by Mr. Justice STORY, in the Circuit Court for the First Circuit, that his right of action against the owner may be enforced in the admiralty by a suit *in personam*; and in the case of *Willard v. Dorr*(b), he speaks of this as the settled doctrine of the court, and no longer open to question.

In England, it is a settled principle, also, that the master has no lien on the ship or freight for advances made, or debts incurred either at home or on the voyage, for repairs, or for supplies of any kind for the use of the ship. The rule is supposed by the English courts to be founded in sound policy, as being conducive to the interests of navigation and commerce; for it would be a great inconvenience, if, on a change of the master for misbehavior, or other cause, he would be entitled to keep possession of the ship until he has been paid, or to enforce the lien while abroad, and compel a sacrifice of the ship(c). But in this country it has been repeatedly held, and appears now to be settled, that for money paid and responsibilities incurred for the use of the ship, the master has a lien on the *freight*(d); and

CHAP. 3.
Remedies of
the master.

By suit *in
personam*,
for wages.

In rem,
against the
freight, for
advances
and respon-
sibilities.

(a) *Steamboat Orleans v. Phœbus*, 11 Peters's R., 175, 184 (12 Curtis's Decis. S. C., 391); *Willard v. Dorr*, 3 Mason's R., 91.

(b) 3 Mason's R., 91.

(c) See 3 Kent's Comm. 3d ed., 166, and the authorities there cited.

(d) *The Packet*, 3 Mason's R., 255; *Poland v. The Spartan*, Ware's R., 134, 149. See also 3 Kent's Comm., 167, note b, and the decisions to

VOL. 1. in *The Ship Packet*, just cited, the court seemed strongly inclined, in accordance with the maritime law of foreign countries, to recognize the lien of the master upon the ship also. In the case of *The Spartan*, Judge WARE, after an elaborate examination of the question, came to the conclusion that the master has a lien upon the freight, not only for his disbursements and liabilities incurred on account of the ship, but also for his wages.

For wages?

In personam, for disbursements.

It is an established principle in England as well as here, that for advances made by the master on account of the ship, the owners are personally responsible; and in this country, he may maintain a suit *in personam* in the district court, against them, for reimbursement.

The usefulness of seamen as a class of men, and their proverbial improvidence and recklessness, have rendered them peculiar objects of solicitude to the governments of all commercial nations. While, therefore, it is the aim of their commercial codes, on the one hand, to secure punctuality on the part of seamen in the fulfilment of their engagements, by arming the masters of vessels with extensive and in some respects despotic power over their crews, and by the infliction of severe penalties; it is not less their aim, on the other hand, to shield the seaman from oppression, to guard his rights and interests, and to protect him even against himself, by looking with indulgence on his faults and delinquencies, and by holding the master accountable for any wanton

the same effect, of the State Courts, there cited; and *Sheppard v. Taylor*, 5 Peters's R., 675, 711 (9 Curtis's Decis. S. C., 531).

abuse of his authority. Several acts have accordingly been passed by Congress in furtherance of these objects, some of the provisions of which require notice.

By the act for the government and regulation of seamen in the merchants' service, passed July 20, 1790(a), the master or commander of any ship or vessel bound from a home port to any foreign port, or, if the vessel is of fifty or more tons burthen, bound to a port in any other than an adjoining state, is required, before proceeding on his voyage, to "make an agreement in writing or in print, with every seaman 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

CHAP. 3.

Shipping articles to be signed: otherwise, highest rate of wages recoverable; master subject to a penalty, etc. Act of 1790.

(a) Chap. 29; 1 Statutes at Large, 131, § 1. The terms of this act being general, it is supposed to extend as well to inland as to maritime navigation.

VOL. 1. 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.”

Act of 1808. But the provisions of this act have been modified by more recent legislation. The act of February 28, 1803(*a*), directs, that before a clearance shall be granted to any vessel bound on a foreign voyage, the master shall deliver to the collector of the port a list, containing the names of the crew, their places of birth and residence, and a description of their persons; which list is to be verified by the master's oath, and a certified copy thereof is to be delivered

Act of 1840. to him by the collector: and the act of July 20, 1840(*b*), requires that this certified copy of such list “shall be a fair copy in one uniform handwriting, without erasure or interlineation;” and also that the shipping articles, including the names of the crew, shall in like manner be certified by the collector; which two certified copies, the act declares “shall be deemed to contain all the conditions of contract with the crew, as to their service, pay, voyage, and all other things.” The act directs, moreover, that whenever any master shall ship a mariner in a foreign port, he shall forthwith take the list of his

(*a*) Chap. 9; 2 Stat. at Large, 203, § 1.

(*b*) Chap. 23; 5 Stat. at Large, 394.

crew, and the duplicate [certified copy] of the shipping articles, to the consul at that port, "who shall make the proper entries thereon, setting forth the contract, and describing the person of the mariner." This act further 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.*" and it further enacts, that "if any master of a vessel shall proceed on a foreign voyage without the documents herein required, or refuse to procure 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."

It would be indiscreet, in the absence of judicial decisions touching this last act, to attempt explicitly to point out all the particulars in which it has modified the antecedent law. In conferring on the seaman a right to demand "the highest rate of wages paid to any seaman shipped for the voyage, or" [at his election] "the sum agreed to be given him at his shipment," Congress may reasonably be presumed to have intended to supersede the rule of compensation prescribed by the act of 1790, subjecting the

Rate of compensation allowed by act of 1790, changed by act of 1840.

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master to the payment of "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.

Whether this provision of the act of 1790 was limited to the case of a mariner who had served without any specific agreement as to the wages he was to receive, or extended also to cases in which the rate of compensation had been orally agreed upon, is a question never definitively decided, and concerning which different opinions seem to have been entertained^(a). No such question, it will be seen, can arise under the act of 1840; and although the act relates in other respects exclusively to foreign voyages, while the correspondent provision of the act of 1790 extends also to shipments for voyages to be performed in vessels of not less than fifty tons burthen, from a port in one state to a port in any other than an adjoining state; yet, inasmuch as the act of 1840 applies the new rule of compensation to "all shipments of seamen made contrary to this *and other acts of Congress*," this rule is supposed to embrace shipments of this latter description, as well as those for foreign voyages.

Rate of remuneration allowed by act of 1840, supposed to extend to shipments for coasting voyages.

The act of 1840, in prescribing the rate of compensation of the seaman, omits the qualification

(a) See note to the case of *The Regulus*, 1 Peters's Adm. Dec., 213 in which Judge PETERS expresses the opinion that an oral agreement supersedes the statute; and the case of *Wickham v. Blight*, Gilpin's R., 4, 52, 454, in which Judge HOPKINSON strongly intimates the opposite opinion.

contained in the former act, "*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." But it does not seem to be necessary to consider this proviso as embraced within the implied repeal of the rate of pay prescribed by the former act; and, the qualification is so obviously reasonable, that the courts would probably have deemed it to be their duty to give effect to it, even without any express legislative sanction.

But the act of 1840 declares all shipments of mariners not made in the prescribed form, that is to say, all shipments on board vessels of fifty or more tons burthen, engaged in the home trade, without an agreement in writing or print, and all shipments on board vessels bound to any foreign port, without such shipping articles and a descriptive list of the crew, both duly certified by the collector, to be *void*, and that the seaman *may leave the service at any time*; and questions of considerable importance seem not unlikely to arise, depending on the force and effect of this enactment. The act of 1790, as we have seen, declares that a seaman who has not signed shipping articles "shall not be bound by the regulations, nor subject to the penalties and forfeitures, contained" in the act. But it was held by Judge PETERS at an early date, and seems to have been uniformly considered by the courts, that the unarticled seaman was nevertheless subject to all the forfeitures denounced by the general maritime law; while, upon the other hand, he was entitled to all the privileges it confers, and, as one of "the crew"

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of the vessel, to the benefit of those provisions of the act itself, which regard the subsistence, health and safety of the mariner. In the language of Judge PETERS, he was not considered to be outlawed, and left without any control; but, on the contrary, was held to be governed by the laws existing independently of the act, and to be in precisely the same situation he would have been if our law had never been made, except that he was entitled to the highest rate of wages; and it was accordingly held that his wages would be forfeited by such acts of *desertion*, or other misconduct, as would subject him to this penalty according to the general law^(a). Indeed this is the only principle which it seems safe to apply to the case; for to hold a seaman, during the voyage, absolved from all obligation and restraint for the want of an agreement in writing, would be to augment the perils, both to life and property, unavoidably great, attendant upon nautical enterprise. But in one essential particular, at least, this principle has unquestionably been restricted by the act of 1840. The seaman "may leave the service at any time," and still demand the highest rate of wages: he is released, therefore, from all liability for desertion. It is presumed, however, that he may still be subjected to a forfeiture or reduction of wages by reason of other misconduct, such as creating a revolt, habitual drunkenness, or disobedience.

Unarticled seamen no longer subject to forfeiture of wages for desertion.

Presumed to be liable to such forfeiture for other offences.

This act evinces the earnest desire of the Legisla-

(a) *The Regulus*, 1 Peters's Adm. Dec., 212. See also, to the like effect, *The Crusader*, Ware's R., 437, 447.

ture to secure an observance of the prescribed forms of shipment; and in subjecting the master to a fine of one hundred dollars for a violation of its provisions, instead of the forfeiture of twenty dollars denounced by the act of 1790, for each seaman shipped without a written agreement, it may have been the intention of Congress to substitute the new penalty in all cases. But as it is applied, in terms, only to violations of the act itself, and as, with the exception already mentioned referring to "other acts of Congress," the act relates only to foreign voyages, this penalty is supposed to attach only to shipments of mariners for such voyages, leaving the smaller penalty still in force in other cases embraced by the act of 1790. Whether, when several seamen are shipped for the same voyage without a written agreement, the penalty of one hundred dollars attaches to each shipment, as the penalty of twenty dollars is by the act of 1790 declared to do, or to all the several shipments collectively, is a question upon which I will not venture to intimate any opinion. Agreements to serve on board merchant vessels of less than fifty tons burthen, whether upon the ocean or upon our inland waters, not being required to be in writing, when the wages have been agreed upon, the contract, though oral, unless it be impeached for fraud or imposition, is conclusive; and when there has been no express agreement in this respect, a reasonable remuneration is to be awarded(*a*).

Penalty of \$100 supposed to be limited to shipments for foreign voyages.

Whether, in case of several shipments, the penalty attaches distributively or collectively.

(*a*) The act of June 19, 1813, ch. 2, entitled "An act for the government of persons in certain fisheries" (3 Statutes at Large, 2), requires that the master or skipper of any vessel of the burthen of twenty tons

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A general
coasting and
trading voy-
age within
the act of
1790.

A strict construction of the foregoing enactments, it will be seen, would limit them to shipping contracts for single voyages with fixed and specified *termini*.

or upwards, qualified according to law for carrying on the bank and other cod fisheries, and bound from a port of the United States, to be employed in such fishery at sea, shall, before proceeding on such voyage, make an agreement in writing or in 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 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, shall, thereafter and while such agreement remains in force, desert, or absent himself from such vessel without leave of the master or skipper, 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, belonging to such deserter. And any fisherman, having engaged himself for a fishing voyage, who shall, during the voyage, refuse to perform or neglect his proper duty on board, when ordered by the master or skipper, or shall otherwise resist his just commands to the hindrance or detriment of the voyage, besides being answerable for all damage thereby, shall forfeit, to the use of the owner of the vessel, his share of any public allowance which may be paid upon such voyage.

And it is by this act (§ 2) further provided, that where such agreement or contract has been made and signed, and any fish which may have been caught on board the vessel during the voyage, shall be delivered to the owner or to his agent for cure, and shall be sold by such owner or agent, the 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

But in the case of *The Crusader*(a), it was held by the learned and distinguished judge of the District Court for the District of Maine, that an engagement

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same form and to the same effect as any other vessel is by law liable to be proceeded against for 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 so delivered and sold, 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 in the act contained shall prevent any fisherman from having his action at common law, for his share or shares of fish or the proceeds thereof.

In relation to the whale and mackerel fisheries, no similar statute has yet been passed. But the admiralty jurisdiction is held in this country to attach to the contracts of fishermen, stipulating for a share of the fruits of the voyage instead of pecuniary wages in the usual form in the merchant service, independently of any statute, on the ground that they are in their nature maritime contracts, in effect stipulating for the payment of wages; and it has accordingly been held to extend to the claims of persons employed in the whale and

(a) Ware's R., 437.

VOL. 1. for a general coasting and trading service, comprising a series of contemplated voyages to various ports in different states (other than adjoining states), without any certain *termini*, and without any limitation of time for which the engagement was made, was clearly within the act of 1790, and, if not in writing, entitled the mariner to the highest rate of wages

mackerel fisheries. *Harden v. Gordon*, 2 Mason's R., 541, 543; *Coffin v. Jenkins*, 3 Story's R., 108.

In *The Sidney Cove*, in the English admiralty (2 Dodson's R., 11), it was objected that contracts of this kind, being of an extraordinary character, and partaking of the nature of partnership transactions, the court had no jurisdiction over them. The court, intimating an opinion that it did not possess jurisdiction, directed the cause to stand over, that search might be made for precedents; and none having been found, the article of the libel setting forth the contract in question was, on a subsequent day, rejected. But in a previous case, of a prize proceeding, where specie shares of the cargo of a French whaling ship were claimed as the property of the officers and crew of the vessel, who were asserted to be subjects of America, Sir WILLIAM SCOTT said the claimants were "to be considered as mariners; and the proportion [claimed by them] of the proceeds of the voyage, as their wages:" and he rejected the claim, on the ground that no "claim can be sustained for wages on board of an enemy's ship" (*The Frederick*, 5 Robinson's R., 8). And in an action of assumpsit against the captain of a whaling ship, in the English Court of Common Pleas, founded on contract by which the plaintiff was to receive a certain proportion of the profits of the voyage in lieu of wages, Lord ALVANLEY overruled the objection that the parties were to be regarded as partners, and that the action was not, therefore, maintainable (*Wilkinson v. Frasier*, 4 Espinasse's N. P. R., 182). The same view of the subject has been taken in the American common law courts, and in other cases in the English courts. See the cases collected in *Abbot on Shipping* (Boston ed. of 1846), p. 715, note. But by a very late judgment pronounced upon deliberate consideration by Dr. LUSHINGTON, present judge of the High Court of Admiralty, it is at length settled that contracts of this sort are not cognizable in that court. *The Riby Grove*, 2 Wm. Robinson's R., 52.

paid at the port where he shipped, without regard to the terms of any oral agreement under which the service might have been rendered.

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It was also held in this case that either party, that is, either the master or the seaman, might put an end to such a contract at pleasure, subject only to the equitable restriction that this shall not be done under circumstances, or at a time particularly inconvenient or injurious to the other party. This consequence, it was supposed, resulted necessarily from the nature of the contract. Society may condemn a man to perpetual servitude as a punishment for crime: but a man cannot thus subject himself by his own voluntary act. The policy of the law will not admit of such a contract. But if a contract to serve for an indefinite period could be dissolved only by mutual consent, it would be in the power of either party to render it perpetual. In the case of such a contract between the master of a vessel and a seaman, the former would at least have it in his power to put an end to it at any time, by putting an end to the voyage; and it is the dictate of common sense, and common justice, that the mariner should have a reciprocal right to dissolve it by leaving the vessel. In this respect it is unimportant whether the contract be oral or in writing.

Either party at liberty to put an end to an engagement for such a voyage.

Between agreements of this nature, and those entered into with seamen to serve on the great lakes, there is a strong analogy; and as the act of 1790 is not restricted in terms, nor, as it is perceived, by any necessary implication, to the seacoast, it is presumed that the provisions of this act, and also those

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One-third of wages due, payable at intermediate ports.

The act of 1790 further provides that every seaman or mariner shall be entitled to be paid one-third part of the wages which shall be due to him, at every port where the vessel shall unlade and deliver her cargo before the voyage is ended, unless the contrary is expressly stipulated in the shipping articles(*a*).

Three months' pay when seamen are discharged in foreign countries.

By a subsequent act of Congress(*b*), it is made the duty of the master, upon the sale of the vessel and the discharge of the crew, or the discharge of a seaman with his assent in a foreign country, to pay to the consul or commercial agent, for every seaman so discharged, the amount of three months' pay, over and above what is due to him by the terms of his contract; two-thirds of which sum is to be paid over to the seaman, upon his engagement on board a vessel to return to the United States; the remaining third to be retained by the consul or commercial agent, to assist destitute seamen in returning home.

If the three months' wages required to be paid by this act is withheld, the seaman, on his return, may recover it in admiralty, to be applied according to

(*a*) Chap. 29; 1 Stat. at Large, 131, § 6.

(*b*) Act of February 26, 1803, ch. 9; 2 Stat. at Large, 203, § 3.

the requirements of the act ; and the *onus probandi*, to show that it has been paid, is on the master (a). CHAP. 3

How forfeited. The wages of seamen may be forfeited by desertion, or other gross misconduct.

By the act of Congress for the government and regulation of seamen in the merchant service, of July 20, 1790, if any seaman or mariner, after signing shipping articles, absents himself from the vessel without the leave of the commanding officer, and the mate or other officer having command of the log-book shall make an entry therein of the absence on the day of its occurrence, but returns to his duty within forty-eight hours, he forfeits three days' pay for every day of his absence ; and if he absents himself for more than forty-eight hours, he forfeits all the wages due to him, and all his goods or chattels on board the vessel or in any store at the time, and subjects himself moreover to an action for damages (b). Absence and
desertion.

This is a statute desertion, and in one respect an innovation upon the general maritime law. In the sense of this law, desertion is a quitting 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. If the seaman quits the ship without leave, or in disobedience of orders, but with an intent to return to his duty, however blamable his conduct may be, it does not constitute the offence of desertion, to which the maritime law

(a) *Orne v. Townsend*, 4 Mason's R., 541 ; *The Saratoga*, 2 Gallison's R., 18.

(b) Chap. 29 ; 1 Stat. at Large, 131, § 5.

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attaches the extraordinary penalty of forfeiture of all antecedent wages. And even in a case of clear desertion, if the party repents his offence, and seeks to return to his duty, and is ready to make suitable apologies and to repair the injury sustained by his misconduct, he is entitled to be received on board again, if he tenders his services in a reasonable time, and before any person has been engaged in his stead, and his prior misconduct has not been so flagrantly wrong that it would justify his discharge. According to the maritime law, therefore, an absence from duty without leave for forty-eight hours, or even a longer time, would be an equivocal act, and would at most be but presumptive evidence of desertion; whereas the statute, deeming such prolonged absence dangerous to the ship, or the due progress of the voyage, declares it to be *ipso facto* a desertion to be visited with a total forfeiture of wages. But to bring a case within the statute, there must be a strict compliance with its requirements. It is an indispensable condition, therefore, that there should be an entry in the log-book by the mate or other officer having it in charge, made on the day of the absence, stating the fact and also that the absence was without leave. The statute 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 efficacy.

To constitute an act of desertion justifying an infliction of forfeiture, whether under the statute or by the principles of the maritime law, the desertion

must occur *during the voyage*, or, in other words, before its termination in the home port; and the voyage is ended, in the sense of the maritime law, when the ship has arrived at her last port of destination, and is moored in safety in her proper place. Not that the officers and men are then discharged from any further duty. On the contrary, the seamen, and *a fortiori* the officers are bound to remain by the ship, and watch over her concerns, and assist in the delivery of her cargo, if made in a reasonable time; unless there is some express or implied agreement, or established usage, to dispense with their further services. There is a clause in the common shipping articles expressly to this effect; and for a violation of this duty, the mariner is responsible in damages by way of deduction from his wages, but not to forfeiture, *eo nomine*, or to an unreasonable extent(*a*).

The liability of seamen to a forfeiture of wages for other acts of misbehavior is limited to grave offences, such as a single act of a heinous and aggravated nature, or *habitual* neglect or disobedience, or *habitual* and gross drunkenness.

Misconduct.

This subject has been fully examined and very ably discussed by Mr. Justice STORY, in several cases, in which the principles of the maritime law which pertain to it are eloquently stated and enforced. The acts of seamen are to be judged of, not by the

Slight offences to be overlooked.

(*a*) See the case of *Cloutman v. Tunisson*, 1 Sumner's R., 373, where the whole subject is fully and ably discussed, and whence the foregoing summary is extracted. See also *The Crusader*, Ware's R., 437, and *Coffin v. Jenkins*, 3 Story's R., 108.

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courtesy or the rigid exactions of domestic society, but by that milder judgment which winks at their errors, and mitigates its own resentment in consideration of the provocations, temptations and personal infirmities incident to their employment. To visit all their ill advised and even mischievous conduct with severe penalties, would be unjust to them, and injurious to the interests of commerce; but to indulge them in gross misdemeanors, without adequate correction, would be destructive to discipline, property and life. The maritime law has therefore adopted a middle course. It treats lighter faults with an indulgent lenity, allowing compensation for any losses caused by them, passing over slight errors, unaccompanied with mischief, without notice; and correcting habitual neglect, or incompetent performance of duty, when it amounts only to *levissima culpa*, by a correspondent diminution of wages. On the other hand it punishes gross and obstinate offences with a forfeiture of wages, especially when such offences are persisted in without repentance or amends. It is the duty of the court to uphold, with a firm hand, a reasonable exercise of the authority committed to the master and other officers of the ship. It views a prompt and cheerful obedience of orders, on the part of the seaman, as of the deepest importance. It admits of no slight excuses for a slow or reluctant fulfilment of duty, and weighs not with a scrupulous nicety the language of command, or the necessity of the service. Occasional harshness of manner or matter, occasional ebullitions of passion, and other infirmities incident to nautical life, are not

Grave offences to be rigorously punished, without regard to slight provocations or excuses.

admitted as justifications of insubordination; but are deemed not wholly inexcusable, unless they degenerate into wanton and malicious abuse, or illegal severity. The very necessities of the sea service require this stubborn support of authority. On the ocean, the officers can have but little physical power compared with that of the crew. They may, at any time, become the victims of a general conspiracy to revolt; and unless they can subdue obstinacy and indolence by the moral influence of command, and enforce a prompt and uncomplaining obedience by punishment, the ship and cargo must soon be at the mercy of the winds and waves.

The proposition of Lord TENTERDEN, "that neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during a voyage, will also deprive him of his wages," is admitted by Mr. Justice STORY to be true only in a limited and restricted sense. It is not, he maintains, 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). Such, also, is the precise doctrine of recent cases decided in the High Court of Admiralty in England.

Neglect
and disobe-
dience.

(a) *The Mentor*, 4 Mason's R., 84, 86, 87, 90. Loss arising from the gross negligence of the mariner, as of a part of the cargo, in the process of lading or unlading, constitutes a valid defence by way of offset to his suit for wages (*The New Phoenix*, 2 Haggard's R., 420).

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 Held in Eng-
 land that
 the court has
 no authority
 to inflict a
 partial for-
 feiture of
 wages for
 misconduct.

In the case here alluded to, it was also held, contrary to what seems to have been the impression of the American courts, that where in a suit for mariner's wages misconduct is set up as a defence, the court has no power to mitigate the penalty, by withholding from the mariner a part of his wages, but must pronounce either for or against a total forfeiture(*a*).

In deciding upon the validity of a defence of this nature, a broad line of distinction is to be drawn between disobedience of orders in port, and acts of insubordination on the high seas, where life and property are exposed to destruction(*b*).

Drunken-
 ness.

With regard to habitual drunkenness, it is a vice which can never receive countenance from any maritime court; and it is 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 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. The maritime law is, in this, as in many other cases, founded on an indulgent consideration of human temptations and infirmities. It is not insensible to the perils and hardships, the fatigues and the excitements, incident to the sea

(*a*) *The Blake*, 1 Wm. Robinson's R., 73, 87.

(*b*) *Ib.*

service; and it allows much to the habitual thoughtlessness, irregularity and impetuosity, which, with much gallantry and humanity, is mixed up in the character of seamen. It deals out its forfeitures, therefore, with a sparing hand, and aims to arrive at just and equitable results, not by enforcing rigid and harsh rules, but by moderating compensation as well as punishment, so as to apportion each to the nature and extent of the offence(a).

Mr. Justice STORY was of opinion that even the offence of endeavoring to create a revolt, punishable as it is by fine and imprisonment under our laws, ought not, in all cases and under all circumstances, to be visited with a total forfeiture of wages. Cases, he thought, might easily be conceived, where the seamen have, in a legal sense, committed this 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. And when after the commission even of inflamed offences, and serious violations of duty, by seamen, under circumstances of an aggravated nature, if they testify by their subsequent conduct a thorough repentance and contrition; if they apologize for and offer amends for the wrong, and justify a confidence in their sincerity

Attempt to
create a
revolt.

(a) *Orne v. Townsend*, 4 Mason's R., 541, 544, 545; *The New Phœnix*, 1 Haggard's R., 198; *The Frederick*, ib., 211; *The Lady Campbell*, 2 Haggard, 5; *The Gondolier*, 3 Haggard, 190. In this last case it was held that a seaman who enters as second mate, and at a foreign port becomes first mate, is entitled, there being no new agreement to the contrary, to the rate of wages allowed to his predecessor.

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by subsequent exemplary diligence, there is no stubborn rule of law that prohibits the court from mitigating the forfeiture, and giving the whole or a portion of their wages, according to its discretion(*a*).

The master may remit a forfeiture, etc.

The master, moreover, has power to remit a forfeiture of wages; and when a seaman, after rendering himself liable to this penalty by his misconduct, repents, promises amendment and atonement by good conduct in future, and is on these grounds restored to duty by the master, the forfeiture will not be enforced(*b*).

Forfeiture incurred by desertion in case of danger.

In circumstances of peril and distress, seamen are bound to abide by the ship as long as reasonable hope remains; and if they desert when their presence and exertions might have restored the ship to safety, or prevented damage, they forfeit their wages, and are moreover answerable in damages(*c*). But if a seaman quits the ship involuntarily, or is driven ashore by cruel usage and for personal safety, he is nevertheless entitled to wages(*d*). And even when a seaman might well have been discharged in the course of the voyage, for gross misbehavior, if the master refuses to discharge him, and leaves him in imprisonment abroad, he will, in that case, be entitled to wages until his return to the United States, after deducting from the claim his time of imprisonment(*e*). If a seaman is wrongfully discharged on a voyage, the voyage is ended with respect to him,

Not by quitting the ship involuntarily, or by reason of cruel usage;

nor by imprisonment abroad.

(*a*) *The Mentor*, 4 Mason's R., 84, 93, 94. See also *The Lima*, 2 Haggard's R., 346.

(*b*) 3 Kent's Comm., 3d ed., 187, 198, 199, and the authorities there cited.

(*c*) *Ibid.*

(*d*) *Ibid.*

(*e*) *Ibid.*

and he is entitled to sue for his full wages for the voyage(*a*). CHAP. 8.

If the cargo be embezzled or injured by the fraud or negligence of the seamen, so that the merchant has a right to claim satisfaction from the master or owners, they may deduct the amount for which they are thus made responsible, from the wages of the seamen by whose misconduct the loss or injury has been produced(*b*). In some cases, seamen are also bound to contribute out of their wages for such embezzlement and injuries. Seamen answerable for embezzling or injuring the cargo.

This doctrine of contribution in cases of embezzlement was thoroughly examined, and most satisfactorily stated and defined by Mr. Justice STORY, in the case of *Spur v. Pearson*(*c*). The result of his opinion was, that where the embezzlement 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: 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 where no fault, fraud, connivance or negligence

(*a*) 3 Kent's Comm., 3d ed., 187, 198, 199, and the authorities there cited; *The True American*, Bee's R., 134.

(*b*) Abbot on Shipping (Boston ed. of 1826), 778.

(*c*) 1 Mason's R., 104. The judgment in this case has received the warm and emphatic approval of Chancellor KENT, who pronounces the doctrine of the case "so moral and so just, that it may be said to rest on immovable foundations" (3 Kent's Commentaries, 194).

VOL. 1. 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. In no case are the innocent part of the crew to contribute for the misdemeanors of the guilty; and in a case of uncertainty, the burthen of 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.

Illicit voyage.

Seamen's wages for services on an unlawful voyage or unlawful military expedition, are no lien on the vessel(*a*); and therefore the payment of wages by the owner, for such services, gives him no claim upon the proceeds of the vessel after condemnation(*b*). But where the seamen are innocent of all knowledge of, or participation in, the illegal voyage or expedition, they have a valid claim on the vessel, which will be preferred to that of the government arising from her forfeiture(*c*).

After abandonment, underwriters liable.

After an abandonment is accepted by the underwriters, they become owners for the voyage, and are liable for the seamen's wages from the time they become owners, they being thenceforth entitled to the freight earned by the ship(*d*).

(*a*) *The St. Jago de Cuba*, 9 Wheaton's R., 409 (6 Curtis's Decis. S. C., 110); *The Langdon Cheves*, 2 Mason's R., 58; *The Benjamin Franklin*, 6 Robinson's R., 350; *The Leander*, Edward's R., 35; *The Vanguard*, 6 Robinson's R., 207.

(*b*) *The Langdon Cheves*, 2 Mason's R., 58.

(*c*) *The St. Jago de Cuba*, 9 Wheaton's R., 209 (6 Curtis's Decis. S. C., 110); *The Vanguard*, 6 Robinson's R., 207, 210.

(*d*) *Hammond v. The Essex Fire and Marine Insurance Company*, 4 Mason's R., 196.

The seaman is entitled to wages for the entire voyage, notwithstanding his inability to render his service by reason of sickness or bodily injury, happening while in the performance of his duty, in the course of the voyage. So also when wrongfully discharged by the master in the course of the voyage, he is nevertheless entitled to his wages; and he is not deprived of this right by the interruption or destruction of the voyage, not by any unavoidable necessity, but by the illegal act, or misconduct, or fraud of the master or owner(*a*).

CHAP. 3.
Right to wages not affected by sickness, etc.

It has been held by Mr. Justice STORY, that by the general maritime law, the expenses of curing a sick seaman, in the course of the voyage, including not only medicines and medical advice, but nursing, diet and lodging on shore, are a charge upon the ship; that the maritime law in this respect is not abrogated as to American seamen, by the provision contained in the act for the government and regulation of seamen in the merchants' service, which requires vessels bound on foreign voyages to be provided with a chest of medicines, and, in default thereof, subjecting the master to the expenses of such advice, medicine or medical attendance as any of the crew may stand in need of in case of sickness, "*without any deduction from their wages;*" and that claims of this description are properly cognizable in the courts of admiralty(*b*).

Expenses of medical treatment, etc., of sick seaman a charge on the ship.

(*a*) 3 Kent's Comm., 186, 187; *Sheppard v. Taylor*, 5 Peters's R., 675, 710 (9 Curtis's Decis. S. C., 531).

(*b*) *Harden v. Gordon*, 2 Mason's R., 531. See also *Reid v. Canfield*, 1 Sumner's R., 195, and *The George*, *ib.*, 151.

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 Death of
 seaman on
 the voyage.

Whether, when a seaman dies on the voyage, his representatives are entitled to his wages for the whole voyage, or only to the time of his death, seems yet to be an unsettled question in the American courts(*a*).

Claims for
 wages not
 extinguish-
 ed by death
 during
 voyage.

In this country, it seems never to have been doubted, that if a seaman falls sick and dies during the voyage, his personal representatives are entitled to demand his wages, at least up to the time of his death. But whether this right extends also to the termination of the voyage, as if the seaman had lived and returned in the ship, has not even yet been definitively determined, although it has in several instances been the subject of judicial consideration. In the District Court of Pennsylvania, during the time of Judge PETERS, it was repeatedly held that wages were due for the whole voyage(*b*); and in one case(*c*), his judgment to that effect was affirmed on appeal by Mr. Justice WASHINGTON, who expressed his entire concurrence in the opinion of the district judge. But on the other hand, the opposite doctrine has been maintained by Judge DAVIS, in the District Court of Massachusetts(*d*), and by Judge BEE in the District Court of South Carolina(*e*).

Up to what
 time reco-
 verable?

According to a pervading and established principle of the maritime law, a seaman is entitled to

(*a*) 3 Kent's Commentaries, 189.

(*b*) *Walton v. The Neptune*, 1 Peters's Adm. Decis., 142; *Scott v. The Greenwich*, ib., 155.

(*c*) *Simms v. Jackson*, 1 Washington's C. C. R., 414.

(*d*) *Natterstram v. The Hazard*, Bee's R., 441.

(*e*) *Carey v. The Kitty*, Bee's R., 255.

recover his wages for the whole voyage, notwithstanding he may have been unable to render his stipulated services, by reason of sickness, or bodily injury, happening in the course of the voyage while in the performance of his duty^(a). CHAP. 8.

It is a general principle of the maritime law, that if no freight is earned, no wages are due; and hence the maxim so often met with, that "freight is the mother of wages." This is a peculiarity of this class of contracts. In ordinary contracts for hire and services, the persons employed do not partake of any of the risks of the owner in relation to the property concerned. They are entitled to their full compensation for labor and services on the property, although it be utterly lost or destroyed by accident or superior force. But it is the policy of the maritime law to subject the mariner to the risks of the voyage to a limited extent, in order the more effectually to secure his fidelity and vigilance in guarding or rescuing the ship from loss or injury by the peril of the sea, fire, robbery, capture or the like. This principle, however, is limited to those cases in which freight is not earned on the voyage in consequence of an overwhelming calamity, or an unexpected accident, such as the loss or capture of the ship. It does not therefore extend to cases in which freight might have been earned, but for the act of the owner or master. If, therefore, the voyage and freight be lost, because the ship was seized for debt, or for having contraband goods on

Wages dependent on freight;

but not where the loss of freight is occasioned by the act of the owner or master.

(a) 3 Kent's Commentaries, 187.

VOL. 1. board, or for any other cause proceeding from misconduct in the master or owner; or if the voyage has been voluntarily abandoned; or if the owner has chartered his ship to take in a cargo at a foreign port, and no freight is on this account earned on the outward voyage, wages are nevertheless recoverable to the time of the breaking up of the voyage, together with such additional allowance as shall be deemed reasonable under the circumstances(*a*).

Exception in case of shipwreck, when some thing is saved;

But to the rule, even as thus qualified, there is an important exception. Where the loss of freight, though it be total, is occasioned by shipwreck, the seamen are nevertheless entitled to have their wages paid out of the fragments of the wreck, if enough is saved to pay them (and it is presumed, *pro tanto*, when there is a deficiency), provided they remain by the ship and assist in the salvage(*b*). And in a late case in the District Court of the Massachusetts District, it was held to be sufficient, in the case of a vessel cast on shore, if the seamen were willing to assist in the salvage, and were prevented from doing so by the interposition of the owner, who appeared on the ground with other persons employed by him for that purpose, and thus took the business of salvage out of the hands of the officers and crew of the ship(*c*). This exception is founded in the same

(*a*) 3 Kent's Comm., 3d ed., 187, 188, and the authorities there cited; *Pitman v. Hooper*, 3 Sumner's R., 50, 59, 60; Abbot on Shipping (Boston ed. of 1826), 743, note 2; *The Malta*, 2 Haggard's R., 158; *The Saratoga*, 2 Gallison's R., 164, 175.

(*b*) *Pitman v. Hooper*, 3 Sumner's R., 50, 60; *The Two Catherines*, 2 Mason's R., 319; *The Neptune*, 1 Haggard's R., 227.

(*c*) *Jones v. The Wreck of the Massasoit*, Law Reporter for March, 1845, p. 522.

policy as the rule itself. The precise nature of the exception has been a subject of considerable discussion and diversity of opinion. The question has been, whether the compensation allowed to seamen in cases of shipwreck was to be considered as falling more properly under the denomination of wages, or of salvage.

In the case last above referred to, Judge SPRAGUE, in a learned, well reasoned, and, as it appears to me, unanswerable argument, maintains that to denominate it salvage would be to confound things between which there is no similitude or analogy; and that there is no substantial objection to classing it under the head of wages. The amount of the compensation allowed is always, in fact, the stipulated wages, without regard to the peril or gallantry of the service, or to the value of the property saved, except that the allowance cannot exceed that value; and the service, as we have already seen, is one which the seaman is bound by his contract to render(*a*).

The view taken of the question by the learned judge, seems, indeed, to be in strict accordance with that taken by Lord STOWELL in the case of *The Neptune*, just above cited; and it is, moreover, fully sustained by the judgment of Dr. LUSHINGTON, the present distinguished judge of the High Court of Admiralty, in a more recent case. He distinctly

even though
by the exer-
tions of third
persons.

(*a*) There are, however, certain extraordinary cases in which seamen have in this country been held entitled to be considered strictly as salvors, and to claim compensation in that character. *Vide infra* SALVAGE.

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of the mariner's claim to compensation in cases of shipwreck; and he extended the doctrine of *The Neptune* to a case where all but one of the crew perished in the shipwreck, and where the parts of the ship saved were preserved by third persons, and not by the exertions of the crew(*a*).

Wages on outward voyage due, notwithstanding subsequent loss of vessel.

Wages for the outward and for the homeward voyage are divisible; and if a ship delivers her outward cargo, and is totally lost on her return voyage, the outward freight having been earned, the seamen are entitled to wages on the outward voyage; and they cannot be deprived of this right by any stipulation between the owners and the charterer, making the voyages out and home one entire voyage, and the freight to depend on the accomplishment of such consolidated voyage. The owners may waive or modify their claim to freight as they please, but their acts cannot deprive the seamen, without their consent, of the rights belonging to them by the general principles of the maritime law(*b*). In cases calling for an application of this principle, it is necessary, therefore, to determine when the outward voyage is to be considered as ended, and the homeward voyage as begun. Strictly, the outward voyage ought to be deemed to continue as long as the seamen are engaged in purposes connected with the outward voyage; and the homeward voyage to begin, when any acts are done or preparations made, having reference exclusively to the homeward voyage.

When the outward voyage is to be deemed ended.

(*a*) *The Reliance*, 2 Wm. Robinson's R., 119. *Vide* Davis's R., 121.

(*b*) 3 Kent's Commentaries, 190.

But in many cases it is not practicable thus to divide the time accurately, because it frequently happens that acts are done, and proceedings are had simultaneously, with reference both to the outward and homeward voyage. Indeed, in some voyages the sale and discharge of the outward cargo are going on simultaneously with the purchase and loading of the homeward cargo. With a view to this practical difficulty, a rule has been established, that one-half of the time during which the vessel is lying in the port of delivery shall be deemed a part of the outward, and the other half, a part of the homeward voyage. If, therefore, a vessel be lost on the homeward voyage, wages are due for the outward voyage and half the time of the stay in the foreign port.

In this, as in many other cases, the law prefers general certainty, to the precarious results of endeavors to discriminate between particular cases. The rule is recommended by its near approximation to absolute truth and justice in a great majority of cases, and by its tendency to prevent litigation upon trifling differences. It was understood to be a settled and unquestionable rule, and as such was enforced in both the national and state courts of this country, until it was denied to be well founded, either in principle or in authority, by the late Judge HOPKINSON, in a case in the District Court of the Eastern District of Pennsylvania^(a). The conclusion at which Judge HOPKINSON seems to have arrived, was, that the outward voyage, with reference to seamen's

(a) *Blonde v. Haven*, Gilpin's R., 592.

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wages, ends with the discharge of the outward cargo, and that the homeward voyage commences when the outward voyage ends.

This led Mr. Justice STORY, in a subsequent case, "from great deference for the opinions of that able judge," to enter into an elaborate review of the grounds of the doctrine. The result of this review, marked by research and great force of reasoning, was a thorough conviction of the soundness of the above mentioned rule(a).

Intermedi-
ate voyage.

It was held by Mr. Justice STORY, in opposition to the opinion of Mr. Justice WASHINGTON(b), that the outward voyage does not necessarily terminate at the port of delivery; but that if a vessel, after landing her outward bound cargo in a foreign port, proceed in ballast to another foreign port, and there take another cargo, and be lost on her homeward voyage, the seamen would be entitled to wages to the last port of departure, and for half the time she remained there. Such a case he held not to be distinguishable in principle from that of a vessel making the whole outward voyage in ballast, in which case, should she be lost on her return voyage, the seamen would incontestibly be entitled to wages for the outward voyage; or, from the case of a vessel performing a distinct intermediate voyage and earning freight, in which case the seamen would

(a) *Pitman v. Hooper*, 3 Sumner's R., 286. See also *The Two Catherine's*, 2 Mason's R., 319, 329; *Thompson v. Faussat*, Peters's C. C. R., 182; *The Elizabeth*, ib., 130; and 1 Peters's Ad. Decis., 204; ib., 217.

(b) In the case of *Thompson v. Faussat*, 2 Peters's C. C. R., 182.

be equally entitled to wages for such intermediate voyage(a). CHAP. 8.

If the vessel be lost on the outward voyage, yet, if part of the outward freight has been paid, the seamen are entitled to wages in proportion to the amount of freight advanced(b). And in trading or divided voyages, in which cargoes are successively taken in and discharged, whereby, according to the general law, freight is earned, wages are also earned, and the mariner's right to their recovery is not defeated by the subsequent loss of the ship; and no special agreement between the owner and freighter, at variance with this general principle, is binding on the seaman(c).

Wages recoverable though vessel be lost, if freight has been advanced.

Notwithstanding the doubts formerly entertained upon the subject, it is now settled that the capture of a neutral ship does not of itself operate as a dissolution of the contract for mariners' wages, but at most only as a suspension of the contract. If the ship is restored, and perform her voyage, the contract is revived, and the mariner becomes entitled to his wages; that is, to his full wages for the whole voyage, if he has remained on board and performed his duty, or having been taken away, he has been unable, without any fault of his own, to rejoin the ship. If the ship is condemned by the prize court, then the contract is dissolved, and the seamen are discharged from any further duty on board; and

Effect of capture.

(a) *The Two Catherines*, 2 Mason's R., 319.

(b) 3 Kent's Comm., 3d ed., 191.

(c) *Ibid.*; *The Juliana*, 2 Dodson's R., 504; *The Two Catherines*, 2 Mason's R., 319.

VOL. 1. they lose their wages unless there is a subsequent restitution of the property, or 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 full wages for the whole voyage; for the decree for freight in such a case includes an allowance for 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 (a).

Stipulations
in shipping
articles, dis-
advanta-
geous to the
mariner,
void.

The peculiar character of seamen as a class—their thoughtlessness and improvidence, their ignorance of the nature, extent and value of their rights and privileges, their credulity and rashness, give them extraordinary claims to the vigilant protection of courts of admiralty. These courts are not by their constitution and jurisdiction confined to the mere dry and positive rules of the common law. They act upon the enlarged and liberal principles

(a) *Brown v. Lull*, 2 Sumner's R., 443; *The Saratoga*, 2 Gallison's R., 175. See also *Sheppard v. Taylor*, 5 Peters's R., 675 (9 Curtis's Decis. S. C., 531); *Willard v. Dorr*, 2 Mason's R., 91, 161; 3 Kent's Comm., 191, 192.

of courts of equity ; and, with regard to the subjects of their jurisdiction, they act as courts of equity. They are especially bound to scrutinize bargains and dealings between seamen and ship-owners, who are generally men of much intelligence and shrewdness. Whenever, therefore, any stipulation is found in the shipping articles, which derogates from the general rights and privileges of the seamen, courts of admiralty hold it void, as founded in imposition or undue advantage, unless it appears, first, that the nature and operation of the clause was fully explained to the seamen ; and, secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby ; and the *onus probandi* to establish these facts lies upon the ship-owner(a). It has accordingly been held that where the shipping articles contained a clause providing that in case of the loss of the vessel during the voyage, no wages were to be claimed by the seamen ; and that in case of her detention for more than thirty days at any one time, their wages were to cease during such detention, the clause was held to be void(b). So also an engagement on the part of the seamen to pay for all medicines and medical aid, further than the medicine chest afforded(c). And where seamen were hired for a voyage from Portsmouth, in England, to several distant ports, and back to the port of London, and cargoes were successively taken and delivered at different ports, whereby freight was

(a) *Brown v. Lull*, 2 Sumner's R., 443.

(b) *Ibid.*

(c) *Harden v. Gordon*, 2 Mason's R., 541.

VOL. 1. earned for the owners, and the seamen became entitled by the general maritime law to wages up to the time of delivery at each port, a stipulation inserted in the ship's articles that no seaman should be entitled to his wages or any part thereof until the arrival of the ship at the port of London, was held to be void(a).

Construction and legal effect of the words "or elsewhere," as a part of the description of the voyage in the mariners' contract.

The act for the government and regulation of seamen in the merchants' service(b), requires, as also does the correspondent English act, that the shipping articles shall specify the voyage for which the seamen are shipped; but it has been usual, nevertheless, both in England and in this country, after naming in the articles some particular port or ports of destination, to add the words "or elsewhere:" and the legal effect of these words has been the subject of judicial discussion in both countries. Thus, in an early case before Mr. Justice STORY, where the voyage was described to be "from Boston to the Pacific, Indian and Chinese oceans, or elsewhere, on a trading voyage, and from thence back to Boston;" and where the vessel in fact went to the Sandwich Islands, thence to California, and thence to the Russian settlements on the northwest coast of America, whence, with a cargo of furs, she went to Canton; one of the mariners who had signed the shipping articles, after arriving at Canton, having refused to return with the vessel to the northwest coast and back to Canton—the question arose, in a suit brought by him for his wages, whether, by

(a) *The Juliana*, 2 Dodson's R., 504.

(b) Act of July 20, 1790, ch. 29; 1 Stat. at Large, 131.

reason of such refusal, he had forfeited his right to wages; and it was held that he had not; the words "or elsewhere" being insufficient to warrant so wide a departure from the voyage specifically described in the articles. Indeed, the language of the learned judge implies that he doubted whether these words were of any avail in any case^(a); and the subsequent decisions of the High Court of Admiralty of England seem strongly to countenance such a doubt. In a case before Lord STOWELL, in which it became necessary to give a construction to the words in question, he entered into a very elaborate discussion of the general nature and obligations of the mariners' contract. The circumstances of the case before him were well calculated to awaken his well known sensibility to the rights of common seamen, and to call forth one of those eloquent bursts of mingled irony, satire and rebuke, in which he sometimes indulged, and in which gravity and urbanity were always so happily blended, as, at once, to insure their remembrance, and disarm resentment. It was a cause of subtraction of mariners' wages. The voyage was described in the shipping articles to be "from London to New South Wales and India, or elsewhere, and to return to a port in Europe." It appeared from the evidence to be highly probable that the words "or elsewhere" were fraudulently interpolated after the contract was signed; and when, after the arrival of the ship at Port Jackson, the attention of the crew was first drawn to them,

(a) *Brown v. Jones et al.*, 2 Gallison's R., 477.

VOL. 1. and the captain's intention of proceeding to distant ports not mentioned in the articles was then first made known to the crew, they expressed their extreme disappointment at the change made in their destination, in breach of the articles they had subscribed. But the captain insisted on his right to carry them where he pleased, "even to hell itself;" which, Lord STOWELL observed, seemed to be "a very favorite place of consignment" with this captain, who was "certainly a person of lofty prerogative notions." And he did carry them, against their remonstrances, to New Zealand, thence to Valparaiso, thence to Lima, thence to Otaheite, thence back to Sidney Cove, and thence to Calcutta, "to which place," Lord STOWELL said, "they ought to have proceeded originally." Here, while employed in discharging the cargo and taking another on board, they were, without any apparent necessity, compelled to labor on two successive Sundays; and when, after working six hours during the morning of the third Sunday, and being peremptorily ordered to resume their labors after dinner, they followed the example of the captain, and went on shore, he refused to receive them again on board, had them committed to the house of correction for twenty-five days, engaged other men in their places, and left them to find their way back to England as they might. The conduct of the seamen, in thus refusing to work, and going on shore, was insisted upon at the hearing, as an act of desertion, by which they had incurred a forfeiture of their wages.

Lord STOWELL's conclusion from the evidence was,

that the words "or elsewhere" composed no part of the original contract, but were interpolated afterwards to countenance a deviation from it. But admitting that they did compose a part of the original text of the contract, his opinion was that they by no means warranted the wild and eccentric rambles which the captain had thought proper to take, upon a voyage rather of experiment and discovery than of commerce, and which could be defended upon no principle, but such as he had unwarrantably laid down in asserting that he had a right to carry them wherever he pleased, and that his owners had given him that right; for it was proper to inform him that he never possessed such right, and that his owners could not convey any such right to him. His owners were only one set of parties to the contract, and the other parties were not bound to submit to variations introduced without their consent. The words "or elsewhere," he observed, he had no hesitation in asserting, were not to be taken in that indefinite latitude in which they are expressed: they were no description of a voyage; they were an unlimited description of the navigable globe; and were not to be admitted as a universal *alibi* for the whole world, including the most remote and even pestilential shores, indefinite otherwise both in space and time; they must receive a reasonable construction, a construction which, he readily admitted, must be, to a certain extent, conformable to the necessities of commerce; for he hoped that few men's minds were more remote than his from a wish to encourage any wayward opposi-

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tion in seamen to those necessities, or to the fair and indispensable indulgence which such necessities require; for no class of men was more interested in supporting the maritime commerce of the country than these persons themselves; but the entire disadvantage must not be thrown upon them: the owners must make their sacrifices as well as the mariners.

The word "elsewhere," he added, however, must, in its construction, vary much, according to the situation of the primary port of destination. If applied to a country remote from all neighboring settlements, it is entitled to a larger construction; if to one surrounded by many adjacent ports, the limitation must be much narrowed: and he could not, he said, help observing, that in the case before him, the captain had deprived himself of an extensive latitude, by describing his primary port to be in the neighborhood of many adjacent ports which could supply cargoes. Where a trade is carried on notoriously in an established course, and that in a remote part of the world, where various obstructions may occur, he would not say that the courts might not strain hard to support a change of voyage, even on an imperfect description of it contained in the articles, if it appeared conformable to the general routine of the commerce there carried on, and presumed to be generally known to all persons who resorted there. In the case, for instance, of a return voyage to India to collect a cargo; if it was the constant habit of vessels to pursue any established course, the court might possibly favor such a con-

struction of the contract, although not specifically expressed; though it would certainly very much improve the court's view of the question, if that appeared to have been done, which appeared by the evidence to have been done in several instances—making an addition to the rate of wages, conformable to the value of navigation and sea service in that quarter of the globe; for that might be properly considered by the owners, and perhaps by the court, as taking their fair share in the disadvantages that attended such an adventure.

LORD STOWELL'S conclusion from the principles thus laid down by him, was, that upon the annunciation by the master, at Port Jackson, of his intention to proceed to New Zealand, the crew of the ship were absolved from any further obligation to serve, and might lawfully have quitted the ship. And he held also, as I understand him, that their submission to the violation of the contract by remaining on board, did not impair this right; and that even if this were otherwise the treatment to which they were subjected at Calcutta, "justified their retiring from a service in which they had meritoriously hitherto submitted to what was, in its latter stage, an usurped authority(a)."

In another case, where the engagement of the mariners was, to go "from London to Batavia in the East Indian seas, or elsewhere, until the final arrival at any port or ports in Europe;" and where on the return and arrival of the ship at Cowes in

(a) *The Minerva*, 1 Haggard's R., 347.

VOL. 1. England, the master went up to London, in pursuance of a previous agreement between him and the owners, to obtain orders, and was directed to proceed to Rotterdam for the discharge of his cargo, it was held by Lord STOWELL, that the seamen were not bound to serve on this further voyage; as, according to the just construction of the contract, the voyage for which they had shipped, terminated on the arrival of the ship at a home port. To accomplish the object intended, the description of the voyage, Lord STOWELL said, ought to have been "for the ship to come to Cowes, and there receive the owners' orders for the delivery of the cargo in England, Holland, or even in the ports of the north seas, if there was any such designation intended. The mariner, upon such a description, would have received full and true information of all which it imported him to know, in order to determine his mind upon the propriety of his engagement in the contract: it would be a true description, not merely geographically for the fact of the voyage, but for a proper conformity to the purposes of the statute(a)."

It is very clear that at the time the above cited cases arose, the words "or elsewhere," as part of the description of a contemplated voyage, were supposed, by nautical men in England, to have the effect of essentially enlarging the master's lawful power of deviation from the more definite terms of the contract; and the pains taken by Lord STOWELL, in the case of *The Minerva*, to determine their true

(a) *The George Home*, 1 Haggard's R., 370. See also *The Countess of Harcourt*, id., 249.

construction, may seem to give countenance to this opinion. But in considering that case in conjunction with the additional cases above cited, and with others in the same court, in which these words were omitted, and where the payment of wages was resisted on the ground of alleged desertion, and claimed nevertheless on the ground of deviation, it appears to be doubtful whether the words in question are not practically regarded in the English admiralty as inoperative, according to the opinion expressed by Mr. Justice STORY, that they are to be considered as either void for uncertainty, under the act of 1790; "or," as he rather indefinitely adds, "that they must be construed as subordinate to the principal voyage stated in the preceding words(a)." Indeed, what is said by Lord STOWELL in *The Minerva*, of the possible right of the master to deviate to a reasonable extent from the direct course to or from the port of destination, for the purpose of visiting other ports, in accordance with an established and known usage of the particular trade in which the vessel is employed, appears to have been intended for general application, without reference to the words in question. And although in the cases of *The Dutchess of Harcourt* and *The George Home*, these words were contained in the contract, they are scarcely noticed at all; and the same is true also of the case of *The Eliza*, in which, however, the words were inserted in the articles after the ship had proceeded on her voyage, though with the knowledge, and, as

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Quere, whether by the words "or elsewhere," in shipping articles, the right of deviation is enlarged.

(a) *Brown v. Jones et al.*, 2 Gallison's R., 477, above cited.

VOL. 1. it was contended, with the implied assent of the crew(*a*).

In another case occurring a few years later, in which these words were not used, Sir CHRISTOPHER ROBINSON, in a learned and instructive opinion, discussed at length the effect of deviation upon the rights of the mariners, and referred to the above cited decisions, including that of *The Minerva*, in terms which seem to infer that he deemed the words unimportant. In the case before him, the voyage was described to be "to Madras and Calcutta, and back to London," and the deviation consisted in proceeding from Madras to Calcutta by way of Prince of Wales's Island, whereby the voyage was lengthened about six hundred miles. This deviation, when announced to the crew at Madras, he held, entitled them to their discharge, on the ground that, by the laws of England, every spontaneous deviation of importance exonerates the mariner from further service under his contract. It was otherwise according to the codes of some of the continental maritime powers — those of Denmark and Holland, in particular — which allow the master to alter and enlarge the voyage, provided he makes a reasonable addition to the wages of the seamen on that account. And with regard to what, by the law of England, was to be considered an unauthorized deviation, Sir CHRISTOPHER ROBINSON observed: "I find, in Sir EDWARD SIMPSON'S notes, cases, in which the necessity of going to St. Petersburg for a cargo, which the master

The general rule in England is that every considerable spontaneous deviation releases the seaman.

(*a*) 1 Haggard's R., 182.

had been disappointed of obtaining at Hamburgh ; and alterations, arising from stress of weather, or the order of the government, have been held not to be deviations amounting to a breach of the mariner's contract, such as would entitle them to their discharge ; and, in maritime engagements, allowances are often made in the interpretation of general terms, according to the accidents affecting the common object of the original voyage. But when no such ground of exception exists, justice and policy concur in requiring a strict observance of the specified conditions of the contract ; and in the present times, especially, of increased enterprise in distant commerce, considerations of this kind gain additional force from the length of voyage and extent of time for which such engagements are formed." The marginal abstract of the reporter shows that the learned judge was understood to adopt and sanction the doctrines of the cases mentioned by Sir EDWARD SIMPSON(a).

In accordance with the same humane and just principles, of which so many illustrations have already been given, an acquittance and release under seal, executed by a mariner on payment or settlement for wages, is treated in the admiralty as but a simple receipt, being held to be only *prima facie* evidence of payment which may be rebutted by other evi-

Release under seal, not conclusive against a claim for wages.

(a) *The Cambridge*, 2 Haggard's R., 243. In the case of *The Minerva*, 1 Haggard's R., 347, 357, Lord STOWELL speaks of the work of Sir EDWARD SIMPSON as "a manuscript book of great accuracy, composed by Sir EDWARD SIMPSON, a distinguished practitioner and judge in these courts."

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Nor an
assignment.

dence(*a*). And so where a seaman, immediately after his return from a whaling voyage, in payment for clothing and a watch, and in consideration of two dollars in cash, amounting in all to about one-third of the value of his share of the oil, gave an order on the owners for the whole of share, the order, though it had been presented and accepted, was held to be no defence to his action against the ship, except as to the amount he had received(*b*).

It was, however, held in the High Court of Admiralty of England, that the acceptance by a seaman at Calcutta, in preference to money which was offered to him, of a bill of exchange on the London owner, for a part of his wages, was to be regarded as a payment; and that he had no lien on the ship although the owner had refused payment and become bankrupt(*c*).

But the mere acceptance by a seaman, on settlement with the master, and at his instance, of a draft on the owner, was decided, in the District Court of Maine, not to be a waiver of the maritime lien on the vessel for wages(*d*).

(*a*) *The David Pratt*, Ware's R., 495.

(*b*) *The Barque Rajah*, 15 Law Reporter (5 N. S.), 208, decided in the District Court of Massachusetts.

(*c*) *The William Money*, 2 Haggard's R., 136.

(*d*) *The Eastern Star*, Ware's R., 185.

CHAPTER IV.

CONTRACTS OF AFFREIGHTMENT.

It is an established maxim of the general maritime law, that "the ship is bound to the merchandise, and the merchandise to the ship." But in England, though this maxim, as a general principle, is conceded by the English elementary writers, it is, to a great extent, ineffectual, for want of any court to enforce it by process *in rem*; for while the courts of common law are themselves incompetent to afford this remedy, they prohibit the Court of Admiralty, the only tribunal adequate to this purpose, from doing so.

Reciprocal
liens of
owners and
freighters.

Not enforce-
able in the
English ad-
miralty.

LORD TENTERDEN, speaking of the contract of affreightment by charter-party, says: "When this contract is made by the master in a foreign port, in the usual course of the ship's employment, and under circumstances which do not afford evidence of fraud; or when it is made by him at the ship's home, under circumstances which afford evidence of the assent of the owners, the ship and freight, and therefore indirectly the owners also to the amount of the ship and freight, are by the maritime law bound to the performance. 'The ship is bound to the merchandise, and the merchandise to the ship,' are the words of Cleirac." And he subsequently adds: "It is

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true, indeed, that this principle of the maritime law, by which the ship itself, *in specie*, is considered as a security to the merchant who lades goods on board it, cannot be carried into effect in this country, because the Court of Admiralty, in which alone proceedings can be carried on against the ship, has no jurisdiction in such a case (a).”

Considering the habit of American lawyers—a habit, which, in regard to maritime law at least, may be safely said to have been indulged to excess—of looking implicitly to English judicial decisions for guidance in every branch of jurisprudence, it is not surprising that this subject has led to earnest controversy, and elaborate judicial discussion in our courts. In the celebrated case of *De Lovio v. Boit* (b), in which Mr. Justice STORY took occasion to enter into a searching and thorough examination of the nature and extent of the admiralty jurisdiction conferred on the district courts by the Constitution and laws of the United States, his conclusion was that it embraced all maritime contracts, and, among others, all contracts of affreightment; and that wherever the maritime law gave a lien, it might be enforced by admiralty process against the thing *in specie*. This decision was pronounced in 1815.

But the earliest case known to have occurred in our courts, of an admiralty suit founded directly on a contract of affreightment, is that of *The Freight*

(a) Abbot on Shipping, Boston ed. of 1846, p. 160; *ib.*, 361.

(b) 2 Gallison's R., 398.

Held to be enforceable in the American courts of admiralty.

and Cargo of the Spartan(a), decided in 1828, in the District Court of the United States for the District of Maine. It was a libel upon a charter-party by which the owners let to freight the whole vessel with her appurtenances, for a specified voyage, and was brought to enforce payment of the stipulated freight. An objection having been interposed to the jurisdiction of the court, the learned judge, referring to the case of *De Lovio v. Boit*, declared his cordial acquiescence in its doctrines; for although it had been twelve years before the public, and though several attempts had been made to answer it, his opinion was that its reasonings and conclusions remained unshaken. Instead, however, of simply adopting and applying its principles to the case before him, as he said he should have considered it to be his duty to do, even though it had not been in accordance with his own judgment, he nevertheless proceeded to an original investigation of the question, and, in a very learned and well reasoned opinion, maintained the jurisdiction of the court.

The next reported case of this nature, is that of *The Rebecca*(b), which arose in the same court three years later. It differed in two respects from its predecessor. The suit was founded on a bill of lading, instead of a charter-party; and was brought by the freighter against the vessel, to enforce his claim for damages on account of the loss of his goods on the voyage.

(a) Ware's R., 149.

(b) Ware's R., 188.

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In this case, the counsel for the claimant denied the existence of any lien or privilege against the vessel; insisting that the rule that "the vessel is bound to the merchandise," existed if at all, not as a universal principle of maritime law, but only as a particular law of particular countries; deriving its authority, not from the general customs of the sea, but from local usages or special acts of legislation. But Judge WARE pronounced the objection unfounded, and vindicated his decision with his accustomed depth of learning and force of reasoning; and the doctrines of these cases were again subsequently applied by him in *The Phebe*(a).

The only remaining reported cases in admiralty, founded on the contract of affreightment, are those decided on appeal by Mr. Justice STORY. The first of these is that of *The Volunteer and Cargo* (b), in which the suit was against the cargo for freight earned under a charter-party. It occurred in 1834; and the admiralty jurisdiction of the American courts was again brought into contestation. Mr. Justice STORY, in delivering his opinion, alluding to his judgment in the case of *De Lovio v. Boit*, pronounced nearly twenty years before, availed himself of the occasion to declare his undiminished confidence in its soundness, and, in general terms, to reassert its doctrines(c). But he nevertheless

(a) Ware's R., 263.

(b) 1 Sumner's R., 551.

(c) The learned reader, I am persuaded, will require no apology for inserting the whole passage to which I refer.

"It is now approaching nearly to twenty years since I had occasion to consider, with laborious care and attention, the nature and extent

entered at large into an examination of the particular question before him, and held the jurisdiction to be

of the jurisdiction of the admiralty over maritime contracts. The conclusion, to which my mind then arrived, was, that the admiralty had an original, ancient and rightful jurisdiction over all maritime contracts, strictly so called (that is, such contracts as respect business, trade and navigation, to, on and over the high seas), which it might exert by a proceeding *in rem*, in all cases where the maritime law established a lien or other right *in rem*; and by a proceeding *in personam*, where no such lien or other right *in rem* existed. The courts of common law, it is true, had on various occasions denied, opposed and sought to restrict this jurisdiction; but their decisions have been founded in no uniform principles or reasoning, and have been, it may be so said without irreverence, more the offspring of narrow prejudice, illiberal jealousy, and imperfect knowledge of the subject, than of any clear and well considered principles. These decisions have fluctuated in different directions at different periods; and the final results, unfavorable to the admiralty, have been in a great measure owing to a deference for the learning of Lord COKE, whose hostility to the admiralty, not to speak of his disingenuousness, entitle him to very little respect in such a discussion. At all events, the contradictory nature of these decisions, and the state of the law on the subject at the time of the emigration of our ancestors, as well as the structure and jurisdiction of the vice-admiralty courts under their commissions, on that occasion seemed to me to require that the jurisdiction of the admiralty in America should be reexamined, and established upon its true principles, and maintained upon its just original foundations. If, since that period, I had found reason in any subsequent researches to change these opinions, I should not hesitate on the present occasion to avow and correct errors; for the advancement of juridical truth is, and ever ought to be, far more important to every judge, than any narrow adhesion to his own preconceived and ill founded judgments. But I am free to confess, that after everything which I have heard and seen in the intermediate period, whether in the shape of appeals to popular prejudices, or of learned and liberal arguments, or of severe and confident criticism, I have been unable to change these opinions: they remain with me unshaken and unrefuted. Whether it is fit that the admiralty jurisdiction of the United States should be administered upon its just and original principles, or whether it should be bound down and crippled by the

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unquestionable. In the subsequent case of *Certain Logs of Mahogany*(*a*), the question of jurisdiction was again raised by the pleadings in the district court, but was abandoned at the argument on appeal. A like jurisdiction has been exercised *in rem* in several other reported cases, which were finally determined by the same distinguished judge. I understand Chancellor KENT to have intended to express his approbation of its exercise(*b*); and I am not aware of any adverse decisions in any American court. It may be safely said, therefore, it is presumed, that in this country, the rule declaring the liability of the ship to the merchandise, and of the merchandise to the ship, is practically as well as theoretically true. As it is here interpreted and applied, it imports that the freighter has a lien on the ship and freight, for the safe conveyance and delivery of his goods according to the contract under which they are shipped; that the owners, upon the

arbitrary limitations of the common lawyers, it is not for me to decide. I have no desire to extend its boundaries, or, by any attempt to amplify its justice, to encourage usurpation. But, believing, as I do, that it is a rightful jurisdiction, highly promotive of the best interests of commerce and navigation, and founded in the same enlightened wisdom which has sustained the equity jurisdiction through all the earlier as well as later perils, I cannot consent to be the instrument of surrendering its powers, consistently with my own conscientious discharge of duty. Other persons with different opinions may concur in reducing it to a state of decrepitude, which will leave it neither dignity nor power; and I shall not scruple to obey their decisions, when they shall have judicially prescribed the limits which I am bound not to transcend."

(*a*) 2 Sumner's R., 589.

(*b*) 3 Kent's Comm., 3d ed., 220.

fulfilment of their engagement, have a lien on the goods for their freight; and that these liens may be enforced by admiralty process *in rem*(a).

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(a) Since the first publication of the text as it now stands, the admiralty jurisdiction over contracts of affreightment not only *in rem* but also *in personam*, has been distinctly asserted by the Supreme Court. The first of the cases here alluded to is that of *The New Jersey Steam Nav. Co. v. The Merchants' Bank of Boston*, 6 Howard's R., 344 (16 Curtis's Decis. S. C., 722).

It was an action *in personam* to recover the value of a quantity of gold and silver coin shipped on board the steamer Lexington at the port of New-York for conveyance to Stonington, in the State of Connecticut, and which was lost on the voyage in consequence of the destruction of the Lexington by fire. The suit was instituted in the District of Rhode Island. It was dismissed "pro forma" by the district court for want of jurisdiction; but on appeal to the circuit court, this decision was reversed and damages were awarded to the libellants. The case having been carried by further appeal to the Supreme Court, the question of jurisdiction was most elaborately discussed, the argument turning as usual, upon the applicability of the decisions of the English courts affecting the jurisdiction of the High Court of Admiralty. The court, in an able and lucid opinion pronounced by Mr. Justice NELSON, clearly demonstrated that to adopt these decisions as the true test of the extent of the admiralty jurisdiction of the United States, would be inconsistent at once with the dictates of enlightened reason and with its own antecedent decisions; and the contract of affreightment being in its nature a fit subject of admiralty jurisdiction, it was adjudged to fall within its scope, and the decree of the circuit court was affirmed.

A suit *in personam* founded on a contract of affreightment having by this decision been pronounced to be cognizable in the admiralty, it followed of necessity that this was true also of suits of this nature prosecuted *in rem*: and accordingly in *Rich & Harris, claimants, &c., v. Lambert*, 12 Howard's R., 347 (19 Curtis's Decis. S. C., 171), which was a suit against the ship to recover damages for injury done to the cargo in its conveyance from Liverpool to Charleston, S. C., no objection to the jurisdiction appears to have been made at the argument of the appeal in the Supreme Court, nor is the point of jurisdiction even alluded to by the Supreme Court in pronouncing its decision.

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I propose now to describe the Contract of Affreightment, according to the several forms which it assumes; briefly to state the general principles by which it is governed; and to notice, somewhat more particularly, the few reported cases to which it has given rise in the American courts of admiralty.

All contracts having for their direct object the conveyance of goods by sea, fall under the general denomination of contracts of affreightment; for although *freight*, in its original and more common acceptation, means the hire which is earned by the transportation of goods, in its more extensive sense it is applied to all rewards or compensation paid for the use of ships(a).

When the master and owners of a vessel destined to proceed on a particular voyage, enter into separate engagements with different persons to convey their respective goods to the place of the vessel's destination, the contract with the several freighters respectively is expressed and evinced by what is denominated a *bill of lading*; and the ship, in such case, is called a *general ship*. The contract is usually made personally with the master, but is nevertheless considered in law to have been made with the owners also; and both he and they are separately bound, as well as the ship *in specie*, for its performance. The bill of lading contains a description of the goods, and an acknowledgment of their receipt on board in good order at the place whence the ship is to sail; the name of the shipper,

Bill of
Lading.
General
ship.

(a) *Poland et al. v The Freight and Cargo of the Spartan*, Ware's R., 134, 138; 1 Peters's Adm. Decis., 206.

of the ship and master, of the place whither she is bound; the name of the consignee to whom or to whose order (the dangers of the seas excepted) the goods are to be delivered in the like good order, on payment of the freight, which is usually agreed upon and stated (*a*). This is the most common form of a bill of lading. It is signed by the master and delivered to the freighter. Sometimes two, and sometimes three bills of lading are thus signed and delivered, of which the merchant commonly sends one or two to his agent, factor, or other person to whom the goods are to be delivered at the place of destination, that is, one on board the ship with the goods, another by the post or other conveyance; and one he retains for his own security. The master should also take care to have another for his own use.

When a merchant hires a ship, or some defined part of it, for a voyage to one or more places, the contract, when in writing, is denominated a *charter-party* (*b*). When not under seal, as in England is often the case, it is there called a *memorandum of charter* (*c*). If the contract is made at the place of

Charter-party.

(*a*) See Abbot on Shipping, Boston ed. of 1846, 398, where the usual form of a bill of lading, such as is generally used in England, is given, and the occasional variations of it stated and explained.

(*b*) From "the Latin words *charta partita*; the two parts of this and other instruments being usually written in former times on one piece of parchment, which was afterwards divided by a straight line cut through some word or figure, so that one part should fit and tally with the other, as evidence of their original agreement and correspondence, and to prevent the fraudulent substitution of a fictitious instrument for the real deed of the parties" (Abbot on Shipping, Boston ed. of 1846, 315, 316).

(*c*) Ibid.

VOL. 1. the owners' residence, it is usually executed by them or some of them (and frequently by the master also), and by the merchant or his agent. In a foreign port, unless the owners have an agent at the port empowered to execute the instrument for them, it is of necessity executed by the master only, and by the merchant or his agent(*a*). It may be for the entire ship, or an entire part of the ship, or for each ton or other portion of its capacity; and the sum to be paid for freight is again either a gross sum for the whole voyage or voyages, or a particular sum for every month or week of the ship's employment. Sometimes also the freight is expressed to be a certain sum for every ton, cask, or bale of goods put on board; in which case the merchant usually covenants not to put on board less than a specified number of tons, casks or bales; and where the payment is to be by the ton of goods, it is usual and proper to add, "and so in proportion for a less quantity than a ton(*b*)."

May be by
parol.

In England, this contract may be by parol; but, in respect to foreign voyages, at least, it is a loose and dangerous practice. In the river and coasting trade, a formal instrument in writing is less necessary, and is no doubt frequently dispensed with(*c*). In *The Phebe*(*d*), the validity of a parol agreement of this nature seems to have been assumed as unquestionable.

Contents of
the charter-
party.

The usual stipulations on the part of the owner or master are, that the ship shall be tight and staunch,

(*a*) Abbot on Shipping, Boston ed. of 1846, 316. (*b*) *Ib.*, 321.

(*c*) 3 Kent's Comm., 3d ed., 204.

(*d*) Ware's R., 263.

furnished with all necessaries for the intended voyage, ready by a day appointed to receive the cargo, and wait a certain number of days to take it on board; that after lading, she shall sail with the first fair wind and opportunity to the destined port (the dangers of the seas excepted), and there deliver the goods to the merchant or his assigns, in the same condition they were received on board; and further, that during the course of the voyage the ship shall be kept tight and staunch, and furnished with sufficient men and necessaries, to the best of the owner's endeavors(a).

Upon the delivery by the charterer of his goods on board the vessel, in pursuance of a charter-party of the nature above described, the master signs a bill of lading for them, as in the case of shipments on board a general ship, the design of a charter-party being to secure the charterer the exclusive right to the use of the ship to the extent and upon the terms stipulated, and the bill of lading being the evidence of the shipping of the particular merchandise, to be conveyed in pursuance of the contract. So far as the rights and obligations of the parties are specified in the charter-party, that is, of course, to govern; and the parties are mutually liable to each other for the damages that may accrue from any failure to perform their respective engagements. Thus, for example, the merchant is bound to load and unload the ship within the stipulated number of days after she shall be ready to receive the cargo, and after

Bill of lading to be also given.

(a) Abbot on Shipping, Boston ed. of 1846, 323.

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Rights and obligations of the parties the same as in cases of contract by bill of lading alone.

her arrival at the destined port(*a*); and the owner is bound to take care that his ship is in readiness to sail, at the time, and to have her in the condition stipulated. But, aside from the express stipulations of the charter-party, it may be said, in general, that the rights and remedies of the parties concerned in the shipment of merchandise in pursuance of a charter-party of the kind now under consideration, are the same as in the case of a contract evidenced by a bill of lading alone for the conveyance of goods in a general ship. The general nature of the contract, in both cases, is essentially the same. A charter-party is for the whole or for a specified and generally large part of the vessel; and a bill of lading is for an indefinite and generally smaller portion of the vessel's capacity. Both contracts, in one aspect, are for the hire of the whole or a part of the vessel; both, in another aspect, are for the conveyance of merchandise. In both cases the ship-owner

(*a*) Sometimes a clause is inserted in the charter-party, giving to the freighter a right to detain the vessel for these purposes a further specified time, on the payment of a daily sum; and a memorandum is sometimes added to a bill of lading on board a general ship to the like effect, with respect to the time to be allowed for unloading the cargo at the port of delivery. The delay, and the payment to be made for it, are both called *demurrage*. If the freighter or consignee detains the ship beyond the period, or, when such clause is inserted or memorandum added, beyond the two periods specified, he is liable to pay for such detention. This unauthorized delay, and the damages which the owner has a right to claim on account of it, are also loosely termed *demurrage*: but demurrage, properly so called, arises out of the express terms of a charter-party, or out of an express stipulation in a bill of lading entered into by the master and owners, and adopted and assumed by the consignee (Abbot on Shipping, Boston ed. of 1846, 324; *id.*, 381).

is the carrier, and he has a lien on the merchandise for the transportation(a). And when by the charter-party the stipulated freight or hire is a gross sum payable on the completion of the whole voyage, the homeward cargo is liable for the entire amount. Thus where the charterer agreed to pay in full freight or hire of the vessel the sum of six hundred and fifty dollars per calendar month, and the bill of lading declared that the return cargo should be delivered to the shipper or his assigns, they paying freight, as per charter-party, it was held that a lien attached to the homeward cargo for the freight due from the whole voyage(b).

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Return cargo liable for the whole freight.

The merchant to whom the ship is lent may lade it either with his own goods, or if he has not sufficient, may take in the goods of other persons; or he may underlet the ship to another(c). But it is now the established law that the goods of third persons who are shippers under the charterer, are liable to the owner only to the extent of the freight payable to the charterers on account of such goods, as in the case of a general ship(d).

Charterer may take in the goods of others, or underlet.

Goods of third persons, how far liable for freight.

In the case of *The Tribune*(e), after the vessel was laden for the intended voyage by the charterer, the owner ordered the cargo so laden to be put on shore, and voluntarily broke up the voyage. The

Measure of damages recoverable by the charterer, when the voyage is voluntarily broken up.

(a) *Drinkwater v. The Freight and Cargo of the Spartan*, Ware's R., 149, 155.

(b) *Certain Logs of Mahogany*, 2 Sumner's R., 589.

(c) Abbott on Shipping, Boston ed. of 1846, 321.

(d) See *The Volunteer*, 1 Sumner's R., 551, and the authorities there cited.

(e) 3 Sumner's R., 144.

VOL. 1. cargo consisted of a large number of cedar posts, which the charterer had entered into a contract with the government of Cuba to deliver at Havana; and he claimed damages on account of the loss of the expected profits to be made on the voyage, and also for the supposed injury he had sustained from his inability to comply punctiliously with his contract. But Mr. Justice STORY held that these items of damage were not allowable. The due performance of the voyage was subject to many contingencies, and the item of profits was too uncertain in its nature to form a basis of damages; and all that the libellant was fairly entitled to was a compensation for his actual losses and expenses incurred in and about the voyage, and for his labor and services in procuring another vessel, and his reasonable disbursements in vindicating his rights in the suit, beyond what he would receive indemnity for in the regular taxed costs.

Contract of charter-party, by which the charterer becomes owner for the voyage.

But there is another form of contract passing under the general name of charter-party, differing so widely from that here described, that the learned judge of the United States for the District of Maine has not hesitated to speak of them as "two kinds of contracts(a)." Contracts of this nature are, however, sometimes so ambiguously framed, as to render it difficult to decide to which of these two descriptions of contract they belong. The question, it will be seen, resolves itself into the inquiry, who, according to the just interpretation of the instru-

(a) *Drinkwater v. The Freight and Cargo of the Spartan*, Ware's R., 149, 156.

ment, it is to be considered as the "*owner for the voyage.*" Judge WARE, in the case just above cited, has contrasted what he denominates the two kinds of contract of charter-party, and stated their legal incidents with so much precision, perspicuity and brevity, that I gladly avail myself of his analysis for the purpose of conveying a clear notion of the nature and distinctive character of each. "There are," says he, "two kinds of contracts passing under the general name of charter-party, differing from each other very widely in their nature, their provisions, and in their legal effects. In one the owner lets the use of the ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. The master is his agent, and the mariners are in his employment, and he is answerable for their conduct. The charterer obtains no right of control over the vessel, but the owner is in fact, in contemplation of law, the carrier of whatever goods are conveyed in the ship. The charter-party is a mere covenant for the conveyance of the merchandise, or the performance of the service which is stipulated in it. In the other, the vessel is herself let to hire, and the charterer takes her into his own possession. It is a contract for the lease of the vessel. The owner parts with possession and the right of possession, and the hirer has not only the use but the entire control of the vessel herself. He becomes the owner during the term of the contract. He appoints the master and mariners, and is responsible for their acts. If goods are taken on freight, the freight is due to him; and if by

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Characteristics and legal effects of such a contract.

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barratry or other misconduct of the master or crew, the shippers suffer a loss, he must answer for it. If he ships his own goods, he is his own carrier. Under a charter-party of the former description, the charterer may hire the use of the whole vessel, and it may be employed in carrying his own goods, or the goods of other merchants on freight. His own goods become liable to the owner of the vessel for the charter, to the full extent of their value; and though he is entitled to the freight of the goods shipped by the sub-freighters, the owner of the ship has a lien on that freight for the charter of the vessel, and his lien extends to each sub-freighter for the amount of freight due on his shipment. This was the decision in the case of *Paul v. Birch* (2 Atkins, 621), and it has ever since been held to be law (Holt, Law of Shipping, 471). It is recognized in *Christie v. Lewis* (2 Brod. & Bing., 410), and in *Faith v. East India Company* (4 Barn. & Ald., 630). In a charter-party of the second kind, not only the entire capacity of the ship is let, but the ship itself, and the possession is passed to the charterer. The entire control and management of it is given up to him. The general owner loses his lien for freight, but the lien itself is not destroyed; the charterer is substituted in his place, in whose favor the lien continues to exist when goods are taken on freight. But the general owner has no remedy for the charter of his vessel, but his personal action on the covenants of the charter-party. It is a contract in which he trusts the personal credit of the charterer. These principles appear to be firmly established by the

cases cited at the argument." After remarking upon several English cases, and referring to the review by HOLT, in his Law of Shipping, 460-471, he states the result to be, "that a ship may be so let to hire as to constitute the charterer owner under the charter-party, provided such appears to be the intention of the parties; and that this intention may be collected either from the necessary construction of the terms of the instrument, or from the nature of the service for which she is hired. But the right of the owner is strongly favored; and while he appoints the master and crew, his lien for freight can only be excluded by the most express and absolute terms of the charter-party, or by unavoidable implication. But there is no case where the owner's lien has been sustained, unless where he retained the possession by the appointment of the master."

It has already been remarked that this is the first reported American case of a suit in the admiralty on a contract of affreightment; and it is needless, therefore, to add, that it was the first in which it became necessary to apply the principles laid down in the foregoing extracts from the opinion of Judge WARE. It was a suit on a charter-party, by which the owners let to freight the whole of the vessel, for a voyage to be made by the charterer to one or more ports in the Western, Canary and Madeira islands, and back again to her port of discharge in the United States, and to Portland. The owners covenanted, that in and during the voyage, the vessel should be tight, staunch and strong, and sufficiently tackled and appareled for such a ship

Adjudications of the American courts of admiralty, on the question of ownership for the voyage.

Freight and cargo of *The Spartan*. Ware's R., 149.

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and voyage; and that it should be lawful for the freighters or their agents or factors, as well at Portland as in foreign ports, to put on board such loading and goods as they should think proper, contraband excepted. On the part of the charterers, it was agreed that they should pay for the full freight or hire of the brig, a certain sum per month during the time of the service, in thirty days after the termination of the voyage, and pay the charges of victualing and manning, and all other charges, and deliver the brig, on her return to Portland, to the owners or their order. One of the owners was named in the charter-party, as, at the time, master, and it was contemplated by the parties that he should continue to act in that capacity on the voyage. This circumstance was relied on by the owners as evidence that they did not intend to part with the possession of the vessel. Another master was, however, in fact, appointed; the right of appointing him being claimed and exercised by the charterers. The learned judge was clearly of opinion, that, according to the just construction of this contract, it was a letting of the ship to hire, and not a mere contract for the conveyance of merchandise; that the charterers were to be considered as having the possession and control of the vessel, and as owners for the voyage; and consequently that the general owners had no lien on the cargo for the stipulated hire of the ship.

Charterers held to be owners for the voyage.

The Volunteer and Cargo.

The Volunteer and Cargo(a) was a case of the

(a) 1 Sumner's R., 551.

like nature, and involved the same question. By the charter-party, the whole vessel was by the libellant let to hire, except the cabin, which was reserved for the use of the master, and the room under deck which might be necessary for provisions, wood, water and cables. The covenants relative to the condition and equipment of the vessel, and to the right of the charterer to take merchandise on board, were the same as in the case of *The Spartan*. The libellant was to victual and man the vessel during the voyage; and the other charges, port charges, pilotage, etc., were to be borne by the charterer. For the freight or hire of the vessel, the charterers were to pay four hundred dollars a month.

In nearly all the circumstances upon which the question of ownership for the voyage depends, this contract, it will be noticed, was the opposite of that in *The Spartan*. The master was appointed by the owner, and the vessel was to be equipped, manned and victualed by him, and at his expense during the voyage. It is true, as the court remarked, it was said in the instrument that he had letten to freight the whole vessel for the voyage, and that these words might seem to import a demise or grant of the vessel, and not a mere covenant for the conveyance of merchandise; but in point of fact the whole vessel was not let, for the charter-party contained an express exception of the cabin and certain portions of other rooms under deck. The general owner was accordingly held to be owner for the voyage. The views taken of the question, and the principles applied to it by Mr. Justice STORY, he

The general owner held to be owner for the voyage.

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considered to have been already expressly sanctioned by the Supreme Court of the United States: and he referred particularly to *Hooe v. Groverman*(a), in which that court, “under circumstances far less cogent and expressive,” held the general owner to be owner for the voyage; and to *Marscardier v. The Chesapeake Insurance Company*(b), which he considered to be almost identical with the case before him, and in which the distinction in question is laid down in the following terms: “A person may be owner for the voyage, who, by contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry the cargo on freight for the voyage, the charter-party is considered as a mere affreightment, sounding in covenant; and the freighter is not clothed with the character or legal responsibility of ownership.”

In the case of *Certain Logs of Mahogany*(c), this doctrine was again discussed by Mr. Justice STORRY; and he lays down the principle that the question of ownership for the voyage depends upon all the terms of the charter party taken together, and that if the intention of the parties in this respect seems doubtful on the face of the instrument, the general owner is to be deemed to continue owner for the voyage.

When the intention of the parties is doubtful, the general owner to be deemed owner for the voyage.

(a) 1 Cranch's R., 214 (Curtis's Decis. S. C., 397).

(b) 8 Cranch's R., 39 (3 Curtis's Decis. S. C., 15). See also *Gracie v. Palmer*, 8 Wheaton's R., 605 (Curtis's Decis. S. C., 523).

(c) 2 Sumner's R., 589.

His decision turned upon this principle; for he held the absolute owner to be owner for the voyage, on the ground that from the obscurity of the phrases and the apparent contradictory presumptions arising from the various clauses of the charter-party, it was really somewhat difficult to say what was the absolute intention of the parties(*a*).

(*a*) In *Calvin v. Newberry*, 6 Bligh's R. (N. S.), 189, Lord TENTERDEN, in moving for the affirmance of the judgment of the Exchequer Chamber, used the following language: "Two propositions of law are clear, as applicable to a case like the present. The first is the common case of goods shipped on board of a vessel, of which the shipment is acknowledged by a bill of lading, signed by the master, that, if the goods are not delivered, the shipper has a right to maintain an action against the owner of the ship. The other proposition, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested, charters that ship to another for a particular voyage, although the absolute owner appoints the master and crew, and finds provisions and everything else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and who is considered the owner *pro tempore*, that is, during the voyage for which the ship is chartered. In such a case the action cannot be maintained against the person who has let out the ship on charter, namely, the absolute owner."

Mr. Justice STORY, in delivering his judgment in the case last cited in the text, after quoting these remarks of Lord TENTERDEN, proceeds to observe, that "according to this decision, the fact that the absolute owner appoints the master and crew, and finds provisions for the voyage, will not alone control the other words, if there is by them a clear letting to charter of the whole ship; but the charterer will be deemed the owner for the voyage. On the other hand, the Supreme Court of the United States, in the case of *Marscardier v. The Chesapeake Insurance Company* (8 Cranch, 49), where the same question arose, used the following language:" (quoting the passage from that case given in the text.) And he adds: "Perhaps there is no real discrepancy between the doctrines held in each of these cases; and, with

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 General
 owner of a
 vessel sailed
 "on shares,"
 held not
 responsible
 for supplies.

In *Webb et al. v. Peirce*(a), the master had made a verbal agreement with the owners of the vessel to

reference to the facts, each may be perfectly correct. In the former case the master was the charterer, and not the absolute owner; in the latter, the master was the absolute owner, and entered into the charter-party, he being to continue master during the voyage. The charter-parties, too, contained very different and special provisions. In the former case, although there were express words of demise, yet the court thought that, upon the whole terms of the instrument taken together, there was in effect a letting of the whole ship to the master for the voyage, notwithstanding she was to be victualed and manned at the expense of the absolute owner. But if there be any real discrepancy between these cases, I have no difficulty, independently of my official duty to obey the decisions of the Supreme Court, in saying that I deem the American decision built upon the more solid and satisfactory distinction. I agree that it is not indispensable, to constitute the charterer the owner for the voyage, that express terms of demise and letting of the whole ship should appear on the face of the charter-party; but that it may be gathered, as a result, from the whole stipulations in the instrument. I also agree that the clause that the absolute owner shall appoint the master and crew, and victual and provision and equip the ship during the voyage, is not of itself necessarily conclusive that he retains the ownership during the voyage; and that the provision is controllable by the other stipulations, showing a clear intention that the charterer shall be owner for the voyage. But I do consider such a stipulation as very strong *prima facie* evidence in favor of the absolute owner, that he is deemed to be the owner for the voyage, and that it will require very cogent circumstances to overcome it. In short, it appears to me, that if the absolute owner does retain possession, command and control of the navigation of the ship during the voyage, and the master is deemed his agent, acting under his instructions for the voyage, though authorized and required to fulfil the terms of the charter-party, the absolute owner must, under such circumstances, be still deemed owner for the voyage, and he liable as such to all persons who do not contract personally and exclusively with the charterer by a sub-contract with the latter, knowing his rights and character under the charter-party. This seems to me the natural, and, indeed, the necessary result of the doctrine

(a) 15 Law Reporter (5 N. S.), 9.

sail her on shares. He was to victual and man the vessel, and pay one-half the port charges. He was to have full liberty to employ the vessel according to his own will, and he and the owners were to share the gross earnings equally. The action was against the owners for supplies furnished to the master while sailing the vessel under that agreement, and Mr. Justice CURTIS held the master to be owner *pro hac vice*, and that he, and not the general owners, was accordingly responsible for the supplies. The true question in the case before him, as in all similar cases, he conceived to be whether the master could properly be regarded as having stood towards the general owners in the relation of an agent towards his principal. Ordinarily the law infers this relation from that of master and owner, and holds the latter responsible for the contracts of the former accordingly, upon the familiar principles of the law of agency. But the relation of principal and agent between the general owner and the master may be superseded by clothing either the master or a third

stated in *Marscardier v. The Chesapeake Insurance Company* (8 Cranch's R., 49), and *M'Intyre v. Browne* (1 Johnson's R., 229), and *Gracie v. Palmer* (8 Wheaton's R., 632, 633; S. C., 4 Wash. Cir. R., 110). The same view is taken by Mr. Chancellor KENT, in his very learned Commentaries; and it stands confirmed by the decision of *Taggart v. Loring* (16 Massachusetts R., 336), and in *Clarkson v. Edes* (4 Cowen's R., 478). My brother, Mr. Justice WASHINGTON, in his excellent opinion in the case of *Gracie v. Palmer*, has collected the main authorities, and commented on the true results to be deduced from them with his usual clearness and accuracy; and the Supreme Court supported and approved his opinion. So that whatever minute differences or distinctions or discrepancies are found in the English cases on this subject, in America there is a general uniformity of decision upon the principles and distinctions already stated."

VOL. 1. person with a special ownership, leaving in the general owner only an interest in the nature of a reversion. In such a case the special owner stands as principal, in law as well as in fact, with respect to the employment and navigation of the vessel. And such the learned judge held to be the nature and effect of the agreement between the general owner and the master in the case before him.

Lien in favor of the shipper exists, although the charterer is the owner for the voyage.

In *The Phebe(a)*, the important question arose, whether, when by the terms of the charter-party the charterer is constituted owner for the voyage, a sub-shipper nevertheless acquires a lien on the ship for his damages in case of the loss of his goods. The question was thoroughly examined and discussed by Judge WARE, both upon principle and authority; and his decision was in favor of the existence of the lien. It was conceded that in such a case no direct personal responsibility was incurred by the owner; the general principle being, that when, by a contract of charter-party, the charterer takes the vessel into his own possession and control, and navigates her by his own master and crew, he alone is responsible for the acts of the master; and that this principle is equally applicable, although, as in the case before the court, the owner may be so far interested in the voyage that he receives for the hire of the vessel a certain proportion of her earnings, instead of a fixed sum; for although this mode of determining the hire of the vessel gives to the contract the aspect of a partnership transaction, it is held not to draw

after it the consequences of a partnership, but is considered merely as an equitable mode of ascertaining the real value of the use of the vessel. It was insisted by the counsel for the respondent, that the admitted exemption of the owner from personal responsibility extended also to his property; and the argument was, that the liability of the vessel is merely collateral or accessory to that of the owner, and stands in the nature of a surety or pledge. Judge WARE held the objection to be untenable upon two grounds. In the first place, he said, admitting the liability of the vessel to be not primary but collateral, it must, in the case before him, be deemed to be collateral to the personal responsibility of the charterer. It was he, who, for this purpose, was to be considered the owner: he was the exercitor, and it was to the quality of exercitor or employer, and not to that of proprietor, that the liability attached. But he held the argument to be founded on a misconception of the true principles of the law. The rule by which the vessel is bound *in specie* for the acts of the master, was not derived from the civil law, but had its origin in the maritime usages of the middle ages. It was to these usages, therefore, that we must look to ascertain its true character; and tracing back the rule to its source, the learned judge proceeded to show that the liability of the vessel, instead of being merely collateral or accessory to that of the owner, was originally the primary liability; that of the owner being, not personal, but merely incidental to his ownership, and limited to the value of the ship.

VOL. 1. The nature of the lien remains unchanged; and though in England, from the limited jurisdiction of the admiralty, the shipper cannot have the full benefit of it, in this country it is not only acknowledged, but is enforced by our courts of admiralty. The principle is, that whoever deals with the master, in all cases where he is acting within the scope of his authority as master, is entitled to look to the ship as security; and the authority of the master to bind the vessel is the same, whether he is appointed by the owners, or the ship is let to him by a charter-party. Applying these principles to the case before him, Judge WARE accordingly held that there was no foundation in authority for the distinction insisted upon by the respondent's counsel; and he was of opinion, moreover, that it was equally unfounded in reason and mercantile policy. If this privilege is given as an additional security to the merchant, the reason for it is quite as strong, to say the least, when the ship is employed under a charter-party, as when it is employed by the owner. The owner has his remedy against the charterer.

The Cassius(a), on appeal before Mr. Justice STORY, under one of its aspects, presented a similar question. But it was at least doubtful in that case, whether the charterer was to be deemed owner for the voyage; and the charter-party, moreover, contained an express stipulation, pledging the vessel for the due fulfilment of the contract with the shipper. Mr. Justice STORY therefore contented himself with

(a) 2 Story's R., 81.

asserting the validity and sufficiency of this stipulation, and upheld the lien on this ground. The case may, on this account, be regarded as falling short of the doctrine of *The Phebe*, although it is not supposed to contain anything adverse to that doctrine. CHAP. 4.

But in a later case, the question having been brought to the consideration of the Supreme Court, has there been definitively settled in conformity with the decision of Judge WARE in *The Phebe*. Contracts of affreightment entered into with the master in good faith, and within the scope of this apparent authority as master, were held to bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or of the special owner. If the general owner has allowed a third person to have the entire control, management and employment of the vessel, and thus become the owner *pro hac vice*, the general owner must be deemed to consent that the special owner or his master may create liens binding on the interest of the general owner in the vessel, as security for the performance of such contracts of affreightment(a).

But this presumption may be repelled by proof that the bill of lading was designed to be an instrument of fraud. Thus where the master of the special owner, at his instance, had signed bills of lading for property not shipped, it was held that the general owner was not estopped from alleging and

But no lien is created by a false bill of lading.

(a) *Schooner Freeman v. Buckingham*, 18 Howard's R., 182.

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proving the fraud, although the libellants, as consignees named in the bills of lading, had in good faith made advances thereon; and the alleged fraud having been substantiated, it was held that no lien had accrued. The result would have been the same if it had appeared that the master was cognizant of the fraud, or had committed it alone; nor, in the latter case, would a lien have been created on the interest of the general owner if the master had been appointed by him(a).

Lien of the owner may be waived.

The lien which the owner has upon the goods shipped, for the freight due thereon, like other legal rights or privileges, may be waived by consent, express or implied; and in a case of charter-parties, it often becomes a question, whether the stipulations are, or are not, inconsistent with the existence of the lien. If, for instance, the actual delivery of the goods is, by the terms of the charter-party, to precede the payment of the freight, the just inference is that the owner has been content to look to the personal responsibility of the merchant; but the *onus probandi* to establish a waiver or extinguishment of the lien, rests upon the shipper(b).

Two cases in admiralty, depending on this doctrine of implied waiver, have been decided in the Circuit Court of the United States for the District of Massachusetts. The first is that of *The Volunteer and Cargo*(c), in which the charter-party was for a voyage from Boston to Havana; and the charterers

(a) *Schooner Freeman v. Buckingham*, 18 Howard's R., 182.

(b) *Certain Logs of Mahogany*, 2 Sumner's R., 589, 594.

(c) 1 Sumner's R., 551.

agreed to pay in full for freight or hire, at the rate of four hundred dollars per month, *within ten days after the return of the vessel to Boston*, or, in case of loss, to the time she was last heard of. The parties also mutually bound themselves personally, and especially the owner bound the schooner, and the charterer the goods to be laden on board, in the penal sum of two thousand dollars, for the faithful performance of their respective engagements. The question was whether the allowance of ten days, as above mentioned, for the payment of freight, implied a waiver by the owner of the lien which he would otherwise have had upon the return cargo for the stipulated hire. Mr. Justice STORY held that it did not. From the latter clause of the stipulation in question, by which, in case of loss, the ten days were to commence running from the day when the vessel was last heard of, it was apparent that the payment of freight was not in every event to be contingent on, or subsequent to, the delivery of the cargo; nor did the other clause, by any means, necessarily carry with it any implication that the cargo was to be *delivered* before the payment of freight. Fifteen and sometimes twenty days are by our laws allowed at the custom-house, for the entry and discharge of the cargo. An unlivery might therefore be lawfully postponed beyond the ten days after the return of the vessel, when, by the terms of the charter-party, the freight would become due; and although the delivery must be within a reasonable time, Mr. Justice STORY was of opinion that a time short of that allowed by statute for unlivery of

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The other case above alluded to, is that of *Certain Logs of Mahogany*(a). The clause in the charter-party, relied upon by the respondent as a waiver or displacement of the owner's lien, was that by which it was stipulated that the freight should be paid "in five days after her [the brig's] return to and discharge at Boston." The argument of the respondent was, that "discharge," as there used, imported, not a mere unloading of the cargo, but an actual delivery thereof to the charterer or owner of the goods.

(a) 2 Sumner's R., 589.

But Mr. Justice STORY said, that in a general sense, as well as in a nautical sense, the proper meaning of the word "discharge," with reference to a cargo, is to unlade it from the ship. So it was defined in Johnson's Dictionary, and in Falconer's Marine Dictionary. This meaning ought therefore to govern the rights of the parties, unless a different use of the word was manifestly intended in the clause in question; and he saw no reason for such a construction. On the contrary, he was of opinion that, from the circumstances of the case, it might reasonably be presumed to have been the intention of the parties to use the word in its appropriate sense. "It was well known," he said, "that the goods of the shipper may not only be detained for freight, properly so called, but also for the hire agreed to be paid by the shipper under a charter-party for the use of the ship, if the owner of the ship retains possession of the cargo; and that the shipper cannot ordinarily insist on the delivery of the goods to him, until the freight or hire is paid or secured according to the terms of the agreement. But, then, the owner is not at liberty to insist that the goods shall not be landed before such payment or security is made. On the contrary, the shipper has a right, as it should seem, by the maritime law, to insist upon examining the goods, after they are unlivered, in order to ascertain whether they are damaged or not, before he makes himself liable at all events for the freight. Under these circumstances, an unlivery of the cargo becomes perfectly proper; and after it is made, the owner of the ship has a right to detain it in his custody, until

VOL. 1. the payment of or security for the freight. So the law is laid down in Lord TENTERDEN'S Treatise on Shipping (Abbot on Shipping, Part III., ch. 3, § 11, pp. 247, 248); and it appears to be the general rule adopted by foreign maritime nations. In the maritime ordinance of Louis XIV. (1 Valin., lib. III., tit. 3, art. 21, p. 665), it is expressly prescribed that the master shall not retain the merchandise on board his vessel for default of payment of the freight; but he may, at the time of the discharge, refuse to deliver it, or cause it to be held for the freight. VALIN gives, as a reason, that it would be absurd to allow the master to insist upon the payment of his freight before the goods were examined, and the damage, if any, ascertained. The modern Code of Commerce of France (lib. II., tit. 8, art. 306), contains a provision very similar in its purport and objects. It declares that the master shall not retain the merchandise on board the ship, for default of the payment of freight; but he may, at the time of discharging, insist upon having them deposited in the hands of a third person, until the freight is paid. The commentators give the same reason for this provision, which is assigned by VALIN." By the terms of the charter-party, the charterer agreed "to deliver the said brig, on her return to Boston, to the owner aforesaid, or his order." It was also stipulated that the charterer was "to load the vessel at Boston, and the owner to discharge the cargo on her return;" and by the terms of the bill of lading for the homeward voyage, the homeward cargo was to be delivered at Boston, the dangers of the seas only

excepted, "unto the order of the shipper or assigns, he or they paying freight for the said goods as per charter-party." The natural interpretation of this language taken together, Mr. Justice STORY held to be, "that the shipper or his assigns will pay the freight in five days after the cargo is unladen by the owner, if the latter will, at the time of payment, deliver the cargo to the shipper or his assigns." But if "discharge" meant delivery, there would, he said, be, at least, a seeming repugnancy between the charter-party and the bill of lading. By the latter, the payment of the freight was to be a cotemporaneous act with the delivery; while by the former it would not be until five days after the delivery. It was true the repugnancy might be avoided, or at least mitigated, by construing the words, that when the cargo is delivered, the payment of freight shall be in five days after such delivery. But this construction was less consonant with the just import of the words, and would defeat the right of the owner to any lien for freight; a lien which is favored in law, and ought not to be displaced without a clear and determinate abandonment of it.

The manner of taking the goods on board, and the commencement of the master's duty, in this respect, depend on the custom of the particular place. More or less is done by the wharfingers, lightermen, or stevedores, according to the usage. If the master receive the goods at the quay or beach, or send his boat for them, his responsibility commences with the

Lading and
stowage of
the cargo.

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Commence-
ment of the
voyage.

All things being prepared for the commencement of the voyage, the master must forthwith obtain the necessary clearances, and must then commence his voyage without delay as soon as the weather is

(*a*) Abbot on Shipping, Boston edition of 1846, 423 et seq., and the authorities there cited.

(*b*) *Ib.*; *The Reeside*, 2 Sumner's R., 567.

(*c*) *Vernard v. Hudson*, 3 Sumner's R., 405; *The Rebecca*, Ware's R., 188, 210; *The Paragon*, *id.*, 322. In the case of *Vernard v. Hudson*, above cited, the goods were shipped at an under-deck freight, but were in fact stowed and carried on deck; and although they were delivered without damage, it was held by Mr. Justice STORRY that the ship-owner was entitled only to a deck freight.

favorable; but he must by no means sail out during tempestuous weather(a).

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The voyage being commenced, the master is bound to proceed to the place of destination without delay, and without any unnecessary deviation from the direct and usual course, unless such delay or deviation be necessary to procure repairs or supplies, to avoid enemies or pirates, or to relieve a ship in distress(b). If, during an unnecessary deviation, the cargo is lost or injured, the law ascribes the misfortune to the deviation as the proximate cause, and the freighter is accordingly to recover.

To be prosecuted without delay or deviation.

The responsibility of the ship-owner having once attached by the receipt of the goods, it continues until the complete fulfilment of the contract on his part, by the actual delivery of the goods to the proper person at their place of destination, unless the delivery is waived by the previous interposition of the owner or his agent, as where the goods, after their arrival, are put on board a lighter in the usual mode, and the consignee takes charge of them on their passage to the quay(c). But the manner of

Termination of the ship-owner's responsibility.

(a) Abbot on Shipping, Boston ed. of 1846, 431; *Roccus*, Note 56.

(b) 3 Kent's Comm., 3d ed., 209; Abbot on Shipping, Boston ed. of 1846, 441. It seems to be agreed, in this country, that stopping or going out of the way to save human life is not a deviation; but where life is not in jeopardy, and the sole purpose is to save property, it may be otherwise. *Mason v. The Ship Blaireau*, 2 Cranch's R., 240 (1 Curtis's Decis. S. C., 479); *The Boston*, 1 Sumner's R., 329; *The Eubank*, ib., 400; *The Cora*, 2 Peters's Adm. R., 373; S. C., 2 Wash. C. C. R., 80; 3 Kent's Comm., 313.

(c) *Strong v. Natally*, 4 Bos. & Pull., 16; 2 Kent's Comm., 3d ed., 605; Story on Bailments, §§ 538, 542.

VOL. 1. delivery, and consequently the period at which the liability of the ship-owner ceases, often depends on the custom of particular places and the usage of particular trades(*a*). If there is an express special contract, prescribing the manner of delivery, that, of course, will govern the case. The general rule is that a delivery at the wharf is sufficient, provided it be to some person authorized to receive the goods, or due previous notice has been given to the consignee of the time and place of delivery(*b*). But the master has no right to leave the goods exposed to loss or injury on the wharf; and if the consignee is unable, or even if he refuses to receive them, the master is required to take care of them, for the owner(*c*). The law upon this subject is well defined in a recent case decided by the Supreme Court of New-York(*d*), in which it is said, that although in general the master is bound to deliver the goods to the consignee, yet where they are safely conveyed to the place of destination, and the consignee is dead or is absent, or if he refuses to receive them, or is not known or cannot be found, the master may discharge himself and his employer from further responsibility, by placing the goods in store at the place of destination, with some responsible person engaged in the kind of business to which the goods

(*a*) Abbot on Shipping, Boston ed. of 1846, 463; Story on Bailments, § 543; 3 Kent's Comm., 215.

(*b*) 3 Kent's Comm., 315; *Chickering v. Fowler*, 4 Pickering's R., 371.

(*c*) *Ostrander v. Brown*, 15 Johnson's R., 39; 2 Kent's Comm., 3d ed., 605; Story on Bailments, § 545.

(*d*) *Fisk v. Newton*, 1 Denio's R., 45.

relate, for and on account of their owner ; in which case, the depositary will become the agent or bailee of the owner.

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The owners and masters of ships employed generally in the conveyance of merchandise for hire, as well as the proprietors of vehicles employed in like manner for this purpose on land, are deemed common carriers ; and there is no distinction in this respect between foreign and inland navigation, nor between vessels navigated by means of sails, and such as are propelled by steam(*a*).

Nature and extent of the liability of the ship-owner.

(*a*) *Elliot v. Rosell*, 10 Johnson's R., 1 ; *The Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story's R., 16 ; *King v. Shepard*, 3 Story's R., 360 ; Story on Bailments, §§ 496, 497, 501 ; 2 Kent's Comm., 597, 599-609 ; 3d id., 216.

In the case of *Aymer v. Astor* (6 Cowen's R., 266), it was, however, adjudged that the owners of a vessel transporting goods from New Orleans to New-York for hire, were not to be deemed common carriers. But this decision, as reported, is certainly irreconcilable not only with the antecedent, but also with the subsequent decisions of the same court ; and Chancellor KENT does not hesitate to consider it as having been completely overruled by the case of *Allen v. Sewall* (2 Wendell's R., 327). This case was finally decided, and the judgment of the Supreme Court reversed, in the Court of Errors (6 Wendell's R., 335), on the ground that bank bills were not goods, wares and merchandise, within the meaning of the act incorporating the steamboat company, whose agent the defendant was ; and that the carriage of such bills was not a part of their ordinary business, and was moreover forbidden by instructions to the master. See 2 Kent's Comm., 3d ed., 609, note b ; Story on Bailments, § 497.

The decision of the Court of Errors accords with that of Mr. Justice STORY in the case of *The Citizens' Bank v. The Nantucket Steamboat Company* (2 Story's R., 16), which was a libel in the admiralty, for the recovery of the value of a package of bank bills delivered to the master of the defendant's steamboat, to be carried from Nantucket to New Bedford, and which was lost on the voyage. Judge STORY held that the transportation of passengers or of merchandise, by common

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By the common law, the responsibility of a common carrier extends to all losses except those occasioned by the act of God, or of the king's

carriers, does not necessarily imply that they are also common carriers of bank notes and specie. The nature and extent of the employment or business which the owners of a vessel hold themselves out as undertaking, he said, determined the limits of their rights, duties, obligations and liabilities. In the case before him, the statute incorporating the respondents granted a right to run a steamboat "for the transportation of merchandise;" and he held that the term "merchandise" did not apply to mere evidences of value, such as notes, bills, checks, policies of insurance and bills of lading, but only to articles having an intrinsic value in bulk, weight or measure, which are bought and sold; and that in order to render the respondents liable, it must be clearly proved that they had held themselves out to the public as common carriers of bank bills for hire, and that they had authorized the master to contract on their account, and not on his own, for the carriage of the notes in question. Proof of the knowledge of the owners, that the master carried money for hire, would not affect them unless the hire was on their account, or unless the master held himself out as their agent in that business, within the scope of the usual employment and service of the steamboat. He held also that the *onus probandi* was upon the libellants to make out a *prima facie* case, in the affirmative; and then the *onus probandi* would be shifted, and it would rest upon the respondents to exonerate themselves. The respondents were held not to be liable.

A disposition has been evinced in Pennsylvania, to introduce a distinction between carriers on inland waters and carriers by land. See *Gordon v. Little*, 8 Serg. and Rawle's R., 533; and *Bell v. Read*, 4 Binney's R., 127.

The owners of steamboats are liable, as common carriers, for the luggage or baggage of passengers; but to subject them, as such carriers, to damages for its loss, it must be strictly luggage, comprising only such articles of necessity, convenience or recreation as are usually carried by travelers. A trunk containing valuable merchandise, and nothing else, was therefore held not to be baggage (*Pardee v. Drew*, 25 Wendell's R., 459). Nor does the term embrace samples of goods, nor money, in a trunk, nor articles usually carried about the person. *Hawkins v. Hoffman*, 6 Hill's R., 586; *Orange County Bank v. Brown et al.*, 9 Wendell's R., 85.

enemies; and this rule, as will be seen by the authorities just cited, has been adopted and become firmly established in this country. The phrase *act of God*, when thus employed, imports "inevitable accident; and by the *king's enemies* are meant public enemies with whom the nation is at open war(a)." *Inevitable accident* is defined by Mr. Justice STORY to be "any accident, produced by physical causes, which is irresistible; such as a loss by lightning and storms, by perils of the seas, by inundations and earthquakes, or by sudden death or illness(b)."

With these exceptions, unless there be a special contract to the contrary either express or clearly implied by the circumstances of the case, the common carrier, whether by land or by water, is in effect the insurer of the goods which he undertakes to transport. In England, this principle has always been deemed to be deeply founded in urgent considerations of public policy; and in the judicial tribunals of that country, it has constantly been maintained with exemplary firmness, and enforced with nice discrimination.

But as already stated, shipments of goods for transportation by water are generally accompanied by bills of lading, which usually contain express exceptions in favor of the ship-owner, of losses by the *perils of the seas*. This exception has accordingly given rise to considerable discussion; and its precise import may be considered as, in some degree, still

Import of the phrase "perils of the seas."

(a) Story on Bailments, § 489; "And not accidents arising from the negligence of man" (id., § 511).

(b) Id., § 25.

VOL. 1. open to controversy. Perhaps it is unfortunate that it ever found its way into bills of lading at all. The general rules of law respecting common carriers are certainly sufficiently stringent; and if, in their application to marine transportation, they had been found too rigorous, they could have been mitigated, as, indeed, both in this country and in England they have been, by legislative enactments(*a*). It would probably therefore have been better, had the rights and obligations of the parties to the contracts of affreightment been left, in the absence of any special agreement to the contrary, to be determined by

(*a*) Several statutes have been successively passed in England, by which the responsibility of the ship-owner, as a common carrier, has been essentially restricted. He is exempted from liability for any loss or damage to goods, occasioned by *fire* happening on board the ship; for any loss or damage happening to any gold, silver, diamonds, watches, jewels or precious stones, by means of any robbery, embezzlement, making way with or secreting thereof, unless the owner or shipper shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, owner or owners of the ship, the true nature, quality and value thereof; for any loss or damage resulting from any neglect, default, incompetency, or incapacity of any licensed pilot acting in charge of the ship; or from there being no licensed or qualified pilot on board, unless it shall be proved that the want of such pilot is imputable to the master. It is also enacted that the owner shall not be liable for any loss or damage arising from any act or neglect, without his fault or privity, beyond the value of the ship and freight due or to grow due for the voyage. 7 Geo. II., ch. 15; 26 Geo. III., ch. 66; 53 Geo. III., ch. 159; 6 Geo. IV., ch. 125; Abbot on Shipping, Boston ed. of 1846, Part II., ch. 7, § 7; *ib.*, Part IV., ch. 6, § § 3, 4, 5; *ib.*, Part IV., ch. 7, § § 2, 3, 4. The above mentioned innovations in favor of the ship-owner, with the exception of the enactments relative to pilots, have very lately, with some modifications, been adopted in this country. The provision of the act of Congress by which this has been done will be noticed in the sequel.

these rules, or rather by the principles on which they are founded. Indeed, owing, it may be supposed, to the inconvenience and difficulty of giving an independent interpretation to the terms of this exception, the courts, both in England and in this country, seem to have been disposed to regard it in the light rather of a mutual recognition by the parties of the exceptions to the carrier's liability established by the general law, than as a distinct contract, designed of itself to define and regulate their rights.

In some of the English reported cases against the ship-owner, the exception of the "perils of the seas" has been omitted in the bill of lading, and the decision of course depended on the general principles of law affecting common carriers; and it will be found, upon comparing these cases with others in which this exception was contained in the bill of lading, that the course of reasoning, and in some instances the forms of expression, employed by the judges in stating and applying the principles by which these cases were supposed to be governed, have been essentially the same as in cases of the former description. The most accurate modern elementary writers upon this subject, accordingly, define accidents occasioned by perils of the sea, in terms synonymous with those used by them in defining accidents arising from what is denominated the act of God. "Perils of the sea," says Chancellor KENT, "denote natural accidents peculiar to that element, which do not happen by the intervention of man, nor are to be prevented by human

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prudence;" and Mr. Justice STORY has not hesitated, as we have seen, to enumerate losses produced by perils of the seas among the losses referable to the act of God(*a*). This exception has received a like interpretation by American judges.

In a case in the District Court of the United States for the District of Maine, there were two distinct contracts of affreightment, one of which was evidenced by a bill of lading containing the usual exception of the danger of the seas, and the other of which was by parol: and the learned judge recognized no distinction between the two contracts, with respect to the responsibility of the ship-owner. "In every contract of affreightment," he said, "losses by the dangers of the seas are excepted from the risks which the master takes upon himself, whether the exception is expressed in the contract or not. The exception is made by the law, and falls within the general principle that no one is responsible for fortuitous events and accidents of major force. *Casus fortuitus nemo præstat*(*b*)."
And Mr. Justice STORY, referring to a remark of the like effect by one of the judges of the Supreme Court of Connecticut(*c*), expresses no dissent from the proposition. But "the law," by which the exception is supposed to be made, "whether the exception is expressed in the contract or not," can be no other than the general rule of law, by which common carriers are exempt from liabilities

(*a*) Story on Bailments, § 25.

(*b*) *The Paragon*, Ware's R., 322, 324.

(*c*) Per GOULD, J., *Williams v. Grant*, 1 Connecticut R., 487; Story on Bailments, § 512.

for losses proceeding from the act of God or of the king's enemies.

But though it seems to be conceded that this exception comprises all losses proceeding from what is denominated the act of God, it is said to have been doubted by the court of King's Bench, in the case of *Bever v. Tomlinson*, whether it extends to losses occasioned by public enemies; the express exception, says Lord TENTERDEN, affording "room to contend that the exception of the act of the king's enemies, which arises out of general rules of law, was meant to be excluded in the particular instance." The case, however, never proceeded to final judgment, and the question was left undecided(a).

A similar doubt seems to have existed in the mind of Mr. Justice STORY, in deciding the case of *The Reeside*. "The phrase 'danger of the seas,' " he observed, "whether understood in its most limited sense, as importing only a loss by natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence(b)."

But losses by pirates have been adjudged to be within the exception of perils of the seas, and, as Mr. Justice STORY understands the doctrine, on the

(a) Abbot on Shipping, Boston ed. of 1846, 472.

(b) 2 Sumner's R., 567, 571.

VOL. 1. ground that pirates are deemed the enemies of the whole human race (*hostes humani generis*); and by the common consent of all nations, are, everywhere, when taken, punished with death(*a*).

Chancellor KENT, after giving the definition of perils of the seas, already mentioned, making the phrase synonymous with that of the act of God, adverts to the doctrine exempting the ship-owner from liability for losses from capture by pirates, and speaks of it as the only exception to his definition of perils of the seas(*b*). But if Mr. Justice STORY is right in supposing this exemption to result from the hostile character of pirates, then the definition should include the other branch of the common law rule, viz., the act of the king's enemies, and thus be made exactly coextensive with the exceptions implied by law when no express exceptions are made. According to this view of the subject, the phrase "perils of the seas" might not unfitly be defined to be a conventional nautical formula, comprising all those inevitable perils or accidents incident to marine transportation, which human foresight cannot guard against, and all losses occasioned by the act of public enemies; or, more tersely, all those perils which, upon general principles, are held to excuse a common carrier.

The *onus probandi* lies on the defendant.

From the principles above stated, it follows that in considering whether the ship-owner is answerable

(*a*) Abbot on Shipping, 472 (citing *Pickering v. Barclay*, 2 Roll. Ab., 248; *Barton v. Wallerford*, Comb., 56); 3 Kent's Comm., 216; Story on Bailments, §§ 25, 526.

(*b*) 3 Kent's Comm., 3d. ed., 216.

for any particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law, or the particular contract of the parties, afford an excuse for the non-performance of the contract(*a*). And the *onus probandi* is on the carrier to exempt himself from liability; for, *prima facie*, the law imposes the obligation of safety on him(*b*).

Having thus briefly stated the general nature of the ship-owner's and master's responsibility, it remains to notice some of the judicial decisions tending to illustrate the principles already mentioned.

The difficulty in the administration of this, as of other branches of the law, consists chiefly in the application of admitted principles: and it is frequently a difficult question to determine whether the loss or injury is attributable to a peril of the sea, in the legal sense of these terms, or to what in point of law is to be deemed the negligence or misconduct of the owner or his agents.

There are indeed cases of such a nature as to exclude this question. Thus, lightning is held to be a peril of the sea, or act of God(*c*); and as it is the effect of natural causes operating independently of

Loss by lightning.

(*a*) Abbot on Shipping, Boston ed. of 1846, 467.

(*b*) Story on Bailments, § 529; *King v. Shepherd*, 3 Story's R., 349, 355; *The William*, 6 Rob. Adm. R. (N. Y. ed. of 1810), 316, 318; *Rich et al. v. Lambert*, 12 Howard's R., 347.

(*c*) Abbot on Shipping, Boston ed. of 1846, 475.

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human agency, where the loss is shown to have been occasioned by lightning, there can in general be no room for further inquiry; because although there may have been previous negligence or misconduct on the part of the master and crew from which no loss or injury had accrued, the loss will nevertheless be attributed to the lightning, and a peril of the sea(a). On the other hand, a loss by fire proceeding from any other cause, whether the fire originated in the same ship, or was communicated to it from another, has been held not to be a peril of the sea(b); and therefore, this being the law, it would, in such a case, be impertinent to inquire into the circumstances under which the fire occurred. Its occurrence would *per se*, in legal contemplation, be evidence of negligence. But by an act of Congress, passed March 3, 1851, it is enacted "That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more persons, any loss which may happen to any goods or merchandise whatsoever, which shall be shipped, taken or put on board any such ship or vessel, by reason or by means of any fire happening to or on

Owner not
liable for loss
by fire unless
by design or
negligence.

(a) Story on Bailments, § 515; *Powers v. Mitchell*, 3 Hill's R., 545. Unless, possibly, in case of deviation from the voyage; in which case, it is said the carrier is responsible, by relation, for all losses, even from inevitable accident. Story on Bailments, § 509; *Davis v. Garrett*, 6 Bingham's R., 716.

(b) Abbot on Shipping, Boston ed. of 1846, 475, and 3 Kent's Comm., 5th ed., 217; *Forward v. Pittard*, 1 Term R., 27; *Hyde v. The Trent and Mersey Navigation Company*, 5 ib., 389. But in the case of *Hunt v. Morris* (6 Martin's Louisiana R., 676), the liability of the owners of a steamboat destroyed by fire, was held to depend on the question of proper diligence.

board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: *Provided*, That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners(a).” The words “answer for or make good” seem, by their generality, to have been designed to exempt as well the ship and freight from liability to a suit by admiralty process *in rem*, as the owner from personal responsibility.

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Provided, &c.

The owner only being mentioned in this section, the master would probably on that ground alone have been held not to be embraced by it. But by the sixth section of the same act it is expressly enacted, “That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers or mariners, for or on account of any embezzlement, injury, loss or destruction of goods, wares, merchandise or other property, put on board any ship or vessel, or on account of any negligence, fraud or malversation of such master or mariners respectively; nor shall anything herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of such ship or vessel.”

Act not to embrace the master.

By the second section of this act it is further enacted, “That if any shipper or shippers of platina,

Shipper of gold, &c., to give notice thereof.

(a) Ch. 43, § 19; Stat. at Large, 635.

VOL. 1. gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the nature and according to the character thereof so notified and entered." This section, it will be observed, expressly embraces the master, as, from the nature of the enactment, it certainly ought to do, and yet, as we have just seen, the sixth section expressly excepts the master from the operation of all the preceding sections of the act. The two sections appear, therefore, on their face, to stand in direct conflict in this respect, and to be likely to give rise to a judicial question not devoid of difficulty. To effectuate the obvious legislative intent, it would be necessary to assume the responsibility of holding the second section to be excepted, by implication, from the operation of the sixth.

Inconsistency of 2d and 6th sections.

Charterer, when to be deemed the owner.

The fifth section enacts, "That the charterer or charterers of any ship or vessel, in case he or they shall man, victual or navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship

or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof."

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The seventh and last section of this act declares that it "shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatever, used in rivers(*a*) or inland navigation." This exception seems likely to give rise to the question, apparently not altogether devoid of difficulty, whether or not it comprises vessels employed in navigating the great lakes. The proper answer to this question depends on the interpretation that ought to be given to the word "inland;" and unless its abstract signification should be thought too unequivocal and definite to admit of the exercise of judicial discretion, its interpretation may depend on a consideration of the motives to which the exception shall be ascribed. The reasons for making it may at least help to determine its scope; for the modifications of the antecedent law being in the opinion of Congress in their nature salutary, it is reasonable to conclude that no other than what were deemed necessary exceptions, would be made in their practical application.

Act not to embrace owners of canal boats, &c. Vessels used in inland navigation.

Quere, whether it extends to the owners of vessels navigating the great lakes.

But before proceeding further, it is proper to

(*a*) I cannot but strongly suspect that the word "rivers," as printed in the Statutes at Large, has, inadvertently, either in copying or in printing, been erroneously substituted for the word *river*. If the plural noun had been the word intended, it seems reasonable to suppose that the phrase would have been *ON rivers*, or *IN inland navigation*. The interpretation of the word "inland" being a point of considerable nicety, this change, if it has been made, may have some influence on its determination.

VOL. 1. apprise the learned reader that in addition to the partial exemptions of carriers by water from responsibility for losses by fire, and on account of shipments of the precious metals and other like articles of small bulk and great value, specified in the first and second sections above cited, the third section of the act exempts the ship-owner, unless personally in fault, absolutely from liability beyond the value of his ship(*a*). Such are the innovations upon the ancient law that are, by the seventh section, declared inapplicable to the owner of every canal boat, barge or lighter, or to [of?] any vessel used in rivers or inland navigation. Now, supposing there had been no jurisdictional impediment to the extension of these innovations to the owners of canal boats, &c., and of river vessels, their exclusion might nevertheless be naturally accounted for by imputing it to the apprehension of peculiar danger from so great a relaxation of the existing law with respect to them.

(*a*) This section as well as the fourth (which has no connection with the present inquiry) will be more particularly noticed towards the close of this chapter, in connection with the rule of damages.

The seventh section of this act contains the following enactment, which, though it forms a part of the penal code of the United States, it may nevertheless be proper to mention in this place, it being also a regulation of commerce: "That if any person or persons shipping oil of vitriol, unslacked lime, inflammable matches or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, or officer or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars." Another act passed the next year contains more ample and highly stringent regulations relative to the shipment and transportation of inflammable and explosive articles on board of vessels propelled by steam and carrying passengers. Act of August 30, 1852, ch. 106, §§ 7, 8, 25.

But in reality there was, I imagine, another and conclusive reason for excepting them from the operation of the act. The authority of Congress to pass this act I understand to have been derived from the power conferred by the Constitution to regulate commerce with foreign nations and among the states. It could not, therefore, without transcending the limits of the grant, have been extended to the owners of craft employed in the prosecution of the purely internal commerce of a state. With regard, however, to lake vessels, it is to be considered that comparatively few of them are of this description, most of them being engaged in the two species of commerce designated in the Constitution. With regard to these, therefore, there was no lack of constitutional power. Nor were they obnoxious to the other objection above mentioned, arising from prudential considerations, for in this respect there is no ground for distinction between them and vessels employed in navigating the ocean. Why then should they have been intentionally excluded? If no satisfactory reason can be discerned, and if, on the contrary, the policy of this remedial act unquestionably embraces the commerce carried on by means of the great lakes, no less forcibly than that prosecuted upon the ocean, the only remaining question is whether the phrase "inland navigation" in the act, absolutely requires an interpretation which would exclude the owners of vessels employed in the business of commerce and navigation upon the lakes. In determining this question it will not be forgotten that these waters are of vast extent; that they border, on

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the one side, upon different states of the American Union, and, on the other, upon the dominion of a foreign power; that of the immense commerce carried on upon them, a very large proportion is between ports in those different states, and is therefore external with regard to each; and that no inconsiderable proportion of this commerce is with the subjects of that foreign power, and therefore external with respect to the United States. It is true there is still a remaining portion of it prosecuted between ports in the same state; but even this, it is presumed, is in a greater or less degree connected with one or the other of the two other branches, and Congress has not scrupled to treat it as a part of the coasting trade of the United States, and as such to regulate it, by requiring "that *any* boat, sloop or other vessel of the United States, navigating the waters on our northern, northeastern and northwestern frontiers, otherwise than by sea, shall be enrolled and licensed in such form as may be prescribed by the Secretary of the Treasury; which enrollment and license shall authorize such boat, sloop or other vessel to be employed either in the coasting or foreign trade(*a*)."

Nor, in the acts to provide for the better security of the lives of passengers on board steamers, did Congress deem it necessary to discriminate in this respect between vessels navigating the ocean and those navigating the lakes or even rivers. "Vessels propelled in whole or in part by steam, and carrying passengers," are, by those acts, without regard to

(*a*) Act of March 2, 1831, ch. 93, § 2; 4 Stat. at Large, 487.

place, subjected to the most unsparing regulations and control; and though their provisions would probably be held not to be constitutionally applicable to steamers employed on navigable waters wholly within the limits and jurisdiction of a state, like Cayuga and Seneca lakes in the State of New-York, for example, no doubt can be entertained of their validity with respect to steamers navigating the great lakes(*a*). For losses occasioned by theft or embezzlement at sea, or even by robbery while the ship is in a port or river within the body of a county, the master and owners are absolutely answerable, although they have been guilty of neither fraud nor fault; "the law," says Lord TENTERDEN, "holding them responsible from reasons of public policy, and to prevent the combinations that might otherwise be made with thieves and robbers(*b*)."

But the phrase "perils of the sea," in its just sense, as we have seen, embraces only those losses which arise from some inevitable accident, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. If, therefore, the loss occurs by what would otherwise be deemed a peril of the sea, if it might have been avoided by any reasonable skill and diligence, the carrier is responsible.

(*a*) Act of July 7, 1838, ch. 191; 5 Stat. at Large, 304; act of March 3, 1843, ch. 94; *id.*, 626; act of March 3, 1851, ch. 43; 9 Stat. at Large, 635; and see *Waring v. Clark*, 5 Howard's R., 441 (16 Curtis's Decis. S. C., 456), where the scope of the act of 1838 is asserted to be unlimited over the waters of the United States.

(*b*) Abbot on Shipping, Boston ed. of 1846, 424; Story on Bailments, § 526; *King v. Shepherd*, 3 Story's R., 349.

VOL. 1. Thus, although the ship-owner is not answerable for a loss or injury arising from a leak occasioned by tempest, yet, if the leak is caused by the unseaworthiness of the ship, whether it exist at the commencement of the voyage(*a*), or arise from negligence during the voyage, as from worms, for want of seasonable repairs of the copper sheathing which might have been made(*b*); or, according to the better opinion, from rats(*c*), the loss is not imputable to a peril of the sea, but to culpable negligence. So also, if the unseaworthiness and consequent loss result from the wear and tear of the equipments of the ship(*d*).

Leak.

Worms.

Rats.

(*a*) Abbot on Shipping, Boston ed. of 1846, 417.

(*b*) *Hazard v. The New England Marine Insurance Company*, 1 Sumner's R., 218; S. C., 8 Peters's R., 557 (11 Curtis's Decis. S. C., 215); 3 Kent's Comm., 5th ed., 300; *Rohl v. Parr*, 1 Espinasse, 445.

(*c*) 3 Kent's Comm., 301; Story on Bailments, § 513; Abbot on Shipping, Boston ed. of 1846, 454; *Aymar v. Astor*, 6 Cowen's R., 266. But if the master has used all reasonable precautions to prevent injury by rats, as by having cats on board, it is, by the general consent of the writers upon the foreign maritime law, held to be a loss by a peril of the sea, or inevitable accident (Story on Bailments, *ubi supra*). And so it was held in Pennsylvania, in the case of *Garigues v. Coxe*, 1 Binney's R., 592. But in *Laveroni v. Dewey et al.* (5 Law Rep., N. S., 506), determined in 1852, in the English Court of Exchequer, where the bill of lading contained the usual exceptions, the action being for damages done to cheese by rats, it was held, on a review of the authorities and upon full consideration, to be no defence that the master had kept cats on board. Referring to Roccus, who, as well as Emérigou, lays down the opposite rule, the court say, "whatever might be the case when Roccus wrote, we cannot but think that rats might now be banished from a ship by no very extraordinary degree of diligence on the part of the master. And we further are very strongly inclined to believe that in the present mode of stowing

(*d*) 3 Kent's Comm., 300; Story on Bailments, § 512 a.

The extent of the carrier's liability on the ground of unseaworthiness, is, however, limited to the just scope of the principle from which it results. The principle is, that the man who undertakes to transport goods by water for hire, is bound to provide a vessel sufficient in all respects for the voyage; well manned, and furnished with sails and all necessary furniture; and that if any loss happens through defects in any of these respects, he must make it good. If therefore the loss is occasioned by a peril of the sea, wholly independent of the want of seaworthi-

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Wear and
tear.

Owner not
responsible
for loss by
peril of the
sea, inde-
pendent of
unseawor-
tiness.

cargoes, cats would offer a very slight protection, if any, against rats. It is difficult to understand how, in a full ship, a cat can get at a rat in the hold at all, or at least with the slightest chance of catching it." Whether the doctrine of this case ought not to be adopted and enforced in the American courts of admiralty, as in strict harmony with the policy that lies at the foundation of the rigid responsibility imposed upon the common carrier, is, to say the least, a question that requires grave consideration. The opposite rule allows the dangerous liberty of leaving port with the ships overrun by rats, provided only the precaution, not at all likely to be effectual, be taken, of putting cats on board, when, by the means alluded to by the court, the rats might probably be destroyed.

But the intimation which, after the judgment was pronounced, fell from C. B. Pollock and B. Alderson, that "if the rats had made a hole in the ship, through which water came in and damaged the cargo, that might very likely be a case of sea damage," seems more than questionable. Indeed, so far as I can discern, it is in direct conflict with *Dale v. Hall*, 1 Wils. R., 281, cited and mainly relied on by the court as a "conclusive" authority in the case before them. In *Dale v. Hall* there was no question about cats. The action was for damage done to cutlery by leakage. The defence set up was, that the leakage was occasioned by rats, and that the defendants pumped and did all they could to prevent the goods from being damaged. The only question before the court was whether this was a good defence. The court held it to be invalid, and the evidence in support of it to have been improperly admitted.

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 Vessel not
 to be deem-
 ed unsea-
 worthy when
 reasonably
 sufficient.

ness, the loss must be borne by the freighter(*a*). The responsibility of the owner, on account of unseaworthiness, is subject also to this further qualification; that if a vessel, reasonably sufficient for the voyage, be lost by a peril of the sea, the owner cannot be charged by showing that a stouter ship might have withstood the peril. Thus, where a hoy in attempting to pass a bridge was driven by a sudden gust of wind against the pier and sunk, the owner was held not to be liable, although it was shown that if the hoy had been better it might have sustained the shock without sinking. "The damage," said the Chief Justice PRATT, "was occasioned by the act of God, which no care of the defendant could foresee or prevent; and no carrier is obliged to have a new carriage for every journey: it is sufficient if he provide one which, without any extraordinary accident, will probably perform the journey(*b*).

Loss by
 striking on a
 rock.

It follows from the general principle under consideration, that if a ship perish by striking against a rock or shallow, the circumstances under which the event took place must be ascertained, in order to decide whether the loss is justly attributable to a peril of the sea, or to the fault of the master. If the situation of the rock or shallow is generally known, and the ship is not forced upon it by adverse

(*a*) Story on Bailments, § 413 d, 515; *Hastings v. Pepper*, 11 Pick. R., 41; *Bell v. Reed*, 4 Binn. R., 127; *Keeler v. Firemen's Insurance Company*, 3 Hill's R., 250; *Hollingsworth v. Broderick*, 7 Adolp. and Ellis's R., 50; *Swan v. Union Insurance Company of Maryland*, 3 Wheat. R., 168 (4 Curtis's S. C. Decis., 188).

(*b*) *Amies v. Stevens*, 1 Stra., 128; Bull. N. P., 69; Abbot on Shipping, 475.

winds or tempest, the loss is to be imputed to the fault of the master. On the other hand, if the ship is forced upon such rock or shallow by adverse winds or tempest, or if the shallow was occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety, the loss is to be attributed to the act of God, or the perils of the sea^(a). In cases of loss by accidents of this nature, the omission of the master to take a pilot on board in entering or leaving port, constitutes of itself a want of due diligence^(b).

Omission to take a pilot.

(a) Abbot on Shipp., Bost. ed. of 1846, 475; Roccus de Nav., n. 55. And this writer adds, that if a vessel fall upon a shoal in the night, in consequence of being misled by the lights of fishermen, the navigator is not to be deemed in fault.

(b) *The William*, 6 Rob. Adm. R. (N. Y. ed. of 1810), 316; *The Portsmouth*, id., 317 n. In *Keeler v. The Firemen's Insurance Company*, 3 Hill's R., 250, it was held that a vessel is to be considered unseaworthy, if, in navigating where it is customary to have on board a licensed pilot, she should proceed without one; but that if there is no such custom, the captain, mate, or other person possessing the requisite skill, may act as pilot. See, also, *Low v. Hollingsworth*, 7 T. R., 160.

Lord TENTERDEN lays down the law relative to the employment of pilots, as follows: "Pilots are established at several places in this country, by ancient charters of incorporation. In general the master of a ship engaged in a foreign trade must put his ship under the charge of such a pilot, both in his outward and homeward voyage, within the limits of such establishment" (citing *Low v. Hollingsworth*, 7 Term R., 160; 52 Geo. III., ch. 39, § 59; *Phillips v. Headlam*, 2 Barnw. and Adolph. R., 380).

In the case of *Bolton and others v. The American Insurance Company*, tried before C. J. JONES, in the Superior Court of New-York, and cited by Chancellor KENT (3 Kent's Comm., 176), it was held that in every well appointed port, where pilots were to be had, a vessel, arriving upon pilot ground, was bound to take a pilot, and the ground was to be approached carefully; and if in the night, the master was to hold out a light for a pilot, and wait a reasonable time for one, and to

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Striking an
anchor with-
out a buoy.

Where a vessel was sunk in a river by striking against the anchor of another vessel, the anchor being under water and without a buoy, whereby some goods on board the former vessel were

approach one if he can do it with safety. If he attempted to enter the port without a pilot, or steered rashly or negligently in approaching the ground where it was unsafe to navigate without a pilot, and damages ensued, the underwriters would not be responsible for them. The duty of the master is the more imperative on the approach to New-York, which is of dangerous access; as the channel is only a mile and a half wide between the bars, and the coast is lined with shifting sandbars. In cases of great danger, as in the case of a storm, if the captain cannot wait with safety for a pilot he must come in without one.

Whether the owner is responsible for losses and injuries occasioned by the fault and negligence of a licensed pilot on board, seems not to have been very clearly settled by judicial decisions. Lord TENTERDEN expresses himself cautiously on the subject, observing that for any loss arising from the negligence or misconduct of a local pilot, to whom the direction of the ship was necessarily entrusted, the owner and master would, probably, be answerable (Abbot on Shipping, Bost. ed. of 1846, 468); but the only authority to which he refers, is the case of *Bowcher v. Nordstrom* (1 Taunt. R., 568), in which MANSFIELD, C. J., held the *master* responsible for an act of trespass on another vessel, committed, while he was asleep, by order of the pilot on board his vessel. This decision, made at *Nisi Prius*, was overruled by the court of King's Bench, on a rule *nisi* to set aside the verdict; the court holding, "that as it did not appear that the captain had done any act in this case," the action against him could not be maintained. The decision therefore was, simply, that the master was *not* responsible; and the case is wholly silent with respect to the liability of the owner. Chancellor KENT understands the cases to warrant the assertion of such liability; and he cites to this point, *Bussey v. Donaldson*, 4 Dallas's R., 206; *Haggart v. Montgomery*, 5 Bos. Pull., 446; *Yates v. Brown*, 8 Pick. R., 23; *Pilot Boat Washington v. Ship Saluda*, U. S. District Court, S. C., April, 1831; *Williamson v. Price*, 16 Martin's Louis. R., 399. Some of these cases are sufficiently explicit with respect to the owner's liability for injuries arising from collision, occasioned by the negligence or unskilfulness of the pilot. The owner was held to be clearly answerable in such cases, also, by Lord STOWELL, in *The Nep-*

injured, the owners thereof were held responsible for the injury. Both parties were deemed to be in fault: the one in leaving his anchor without a buoy; the other, because, not seeing the buoy, he was bound, on that account, to use a greater degree of caution(a). And where goods were injured by steam which escaped from the steam boiler through a crack occasioned by frost, the court held it to have been gross negligence in the carrier to fill his boiler with water over night, without keeping up a sufficient fire to prevent such an accident(b). But the freezing of canals and rivers on which the transportation was to be performed, has been held to be such an intervention of the *vis major*, as excuses the

tune the Second, 1 Dodson's R., 467. His liability is deduced from the relation of agent in which the pilot stands towards him; and the principle seems to be comprehensive enough to embrace all injuries and losses, however occasioned, arising from the carelessness or misconduct of the pilot. The owner must seek his remedy against the pilot, who is answerable as strictly as if he were a common carrier, for his fault, negligence or unskilfulness. *The Neptune the Second*, 1 Dodson's R., 467; *Yates v. Brown*, 8 Pick. R., 23, 24; 3 Kent's Comm., 3d ed., 176.

In the above mentioned remark of Lord TENTERDEN, asserting the liability of the owner, he includes, as we have seen, the master also. But the decision of the King's Bench, as already stated, was the reverse of that of the Chief Justice at the trial, cited by Lord TENTERDEN; and in this country the master has been considered not to be answerable for injuries resulting from the fault of the pilot. The pilot, while on board, has the exclusive management and control of the ship; and, *pro hac vice*, is considered as master. Provided the crew act in obedience to his commands, the master ought not therefore to be held responsible as master (*Snell v. Rich*, 1 Johns. R., 305; *Yates v. Brown*, 8 Pickering's R., 23; 3 Kent's Comm., 176).

(a) *Proprietors of Trenton Navigation v. Wood*, 3 Espinasse's R., 127; *Abbot on Shipping*, 455.

(b) *Siordel v. Hall*, 4 Bingham's R., 607.

VOL. 1. delay of the carrier. He is, however, bound to exercise ordinary forecast in anticipating the obstruction, and to use proper means to overcome it. He is bound also to take due care of the property during its detention, and to complete the transportation as soon as the obstruction ceases(*a*).

Loss by
collision;

In cases of loss or damage to goods, proceeding from collision of the carrier-ship with another vessel, the carrier's liability depends upon the question of actual negligence on his part. If it appear that the accident could not have been prevented by human prudence, it is to be deemed a peril of the sea, and the carrier is excused(*b*). So, if a vessel, under a misapprehension of the nature of her employment or her character, be forcibly taken in tow by a ship-of-war of her own nation, and being obliged to use an extraordinary press of sail in order to keep up, ship a quantity of water in a gale and high sea, whereby damage is done to her cargo, such damage has been held to be a loss by perils of the sea(*c*).

By being
forcibly
taken in
tow;

By action of
the tide.

If a vessel, properly moored in a harbor, be unavoidably injured by collision with the bottom,

(*a*) *Bowman v. Teal*, 23 Wendell's R., 306.

(*b*) *Buller et al. v. Fisher et al.*, 3 Esp. R., 69; *Smith et al. v. Scott*, 2 Taunt., 227. In the first of these cases, it did not appear that either vessel was in fault. In the second, there was no fault on the part of the carrier-ship, but gross negligence on the part of the other. "I do not know," said MANSFIELD, C. J., "how to make this out to be a peril of the sea. What drove the *Margaret* against the *Helena*? The sea. What was the cause that the crew of the other ship did not prevent her from running against the *Helena*? Their gross and culpable negligence; but still the sea did the mischief."

(*c*) *Hagerdorn et al. v. Whitmore*, 1 Starkie's R., 157.

in consequence of the action of the tide, and her cargo be thereby injured, the loss so occasioned has been adjudged to be attributable to a peril of the sea(a).

CHAP. 4.

The master is bound, during the voyage, to take all possible care of the cargo. If it require to be aired or ventilated, as fruit and some other things do, he must take the usual and proper methods for this purpose; and if by the neglect of these means, the cargo is spoiled or injured, the master and owner are responsible for the loss(b).

Ship-owner answerable for loss from want of ventilation, etc.

In order to exempt the ship-owner from responsibility, the act of God, on which he relies for this purpose, must appear to have been the immediate cause of the loss. Thus, where a ship, sailing into a harbor, struck against a floating mast belonging to a sunken vessel and tied to some part of it, and the mast not giving way, the ship was in consequence forced towards the bank until she struck, and upon the ebbing of the tide, her stern sunk into the water, and the goods were spoiled; the owner was held to be liable, although it appeared that the part of the bank on which she struck had been swept away by a great flood a short time before, so that it had become perfectly steep, and that the ship would otherwise have remained perfectly safe on the bank. The court held that the act of God, which could excuse the owner, must be immediate; and that as the collision with the mast was the proximate cause of the misfortune, the change which the bank had

Act of God must be proximate cause of the loss.

(a) *Fletcher v. Inglis*, 2 Barn. & Ald. R., 315.

(b) *Abbot on Shipping*, Boston ed. of 1846, 454.

VOL. 1. undergone was too remote. The bank, previous to the recent flood, was shelving, and vessels used to lie on it in safety; and Lord KENYON said that if it had been removed by an earthquake, at the time of the accident (that is to say, as I understand him, after the ship got on it), the master would have been excused(a). In that case the earthquake would have been the proximate cause of the disaster; whereas, in the case before the court, the bank having been previously removed, the immediate cause was the collision with the floating mast, which, for aught that appeared, might, by extraordinary precautions, have been prevented.

Owner answerable for loss by theft or embezzlement consequent on shipwreck.

This doctrine was asserted and applied, with obvious propriety, by the late Mr. Justice STORY, in a recent case(b), which involved also other important principles affecting the liability of carriers by water. His judgment is very elaborate, and abounds with sound learning and instruction. The suit was in the Admiralty, *in personam*; and was brought to recover the value of a box of gold sovereigns shipped on board the ship *North America*, to be carried for hire from New-York to Mobile. The bill of lading contained the usual exception of the "perils of the seas;" and the ship having been wrecked on the "Honda Reefs," the captain then removed the box from the state-room where it could be locked up, and placed it in the run where

(a) *Smith v. Shepherd*, cited in *Abbot on Shipping*, Boston ed. 1846, 468, 475.

(b) *James G. King and others v. George Shepherd and others*, 3 Story's R., 349.

the crew had free access, and allowed it to remain there, without personally superintending it while the wreckers were on board, and it was lost. Mr. Justice STORY held that the burthen of proof was on the respondents, to show that the loss occurred by a peril of the seas; and the reasonable inference from the evidence, on the contrary, being that the box had been stolen or embezzled—and whether by the officers and crew of the ship, or by the salvors employed by the master, it mattered not—he held that the owners were responsible, on the ground that the loss was attributable, not to the stranding of the ship, but to the theft or embezzlement, as its proximate cause. The mere fact that the vessel was wrecked, did not vary the liabilities of the owners and master as common carriers; the property not being shown to have perished with the wreck, and in consequence of the wrecking. They were not thereby exempted from all liability, except for reasonable diligence and care in their endeavors to save the property; but on the contrary, their duties and obligations as common carriers still continued, and they were bound to show that no human diligence, or skill, or care, could have saved the property from being lost by the shipwreck. Had it perished with the wreck, the maxim, *Res perit domino*, might have applied; but it could not apply where the loss was by theft or embezzlement, by persons in the employ of the owners and master, not acting piratically and with hostile force or irresistible violence.

CHAP. 4.

The duties and responsibilities of the ship-owner and master as common carriers are not terminated by shipwreck.

VOL. 1.
 Theft :
 Robbery :
 Piracy.

But although embezzlement is not, by the maritime law of this country, a peril of the seas, and theft or robbery is a peril of the seas only where it is piracy on the high seas; yet if upon the stranding and wreck, the property has been plundered by pirates, or even by robbers from the shore, acting with violence and force, *animo furandi*, the loss might perhaps have been properly attributed to the first peril—the stranding or wreck: though even in that case there are authorities tending to show that the same rule ought not to be applied to the liability of the common carrier.

In case of shipwreck, the master is bound to send the goods by another ship, or otherwise safely to dispose of, or keep them.

It was suggested in behalf of the respondents in this case, that the contract being in terms for the carriage of the goods in the ship *North America*, and not in any other ship, the duties of the carrier were ended when she was lost, the fulfilment of the contract having been prevented by the perils of the seas. But Mr. Justice STORY held this view of the subject to be sophistical and unsound. The gold coin was to be transported in the *North America*, if she was in a condition to carry it; but when she became disabled, it was the duty of the master to carry it on, or send it in another ship, if practicable; and his duties as carrier were not ended until the property was delivered at the port of destination, or returned to the possession of the owner, or kept safely until the owner could resume it, or it was otherwise carefully disposed of.

It was also suggested by the counsel for the respondents, that the master had no command over the wreckers, and that he surrendered all to their care and custody.

Mr. Justice STORY was of opinion that the asserted facts were not supported by the evidence, and he moreover emphatically repudiated the legal consequence which it was proposed to draw from them. The master, he said, had no right to make such a surrender of his authority and responsibilities. The wreckers were to act under him, not over him.

CHAP. 4.

The master has no right to abandon his vessel to the care and custody of wreckers.

When goods are thrown overboard, in a case of necessity, for the purpose of saving the vessel from foundering, and of preserving the lives of the crew, the loss is held to be referable to the act of God(*a*): and when goods are shipped to be stowed on deck, where, from their situation, they are peculiarly liable to be thrown overboard to lighten or disencumber the vessel in case of distress, the carrier is exonerated, and the owner must bear the loss without contribution, although the necessity for the jettison arose from such stowage(*b*). But it is otherwise if the goods are stowed on deck without the consent of the shipper, either express or clearly implied, unless the carrier can show that the jettison would have been equally unavoidable, had the goods been stowed under deck(*c*); and so, also, if the necessity arise from the overloading of the vessel(*d*).

Jettison.

The liability of the ship-owner may be limited by

Limitation of carrier's responsibility by special contract.

(*a*) *Bird v. Astcock*, 2 Bulstrode's R., 280; Jones on Bailments, 108; *Smith v. Wright*, 1 Caines's R., 43; Story on Bailments, §§ 525, 531.

(*b*) 1 Caines's R., 43; *Lenox v. The United Insurance Company*, 3 Johnson's Cas., 178; Story on Bailments, § 531.

(*c*) *The Paragon*, Ware's R., 322; *The Rebecca*, id., 188, 211

(*d*) Case cited in *Boggs v. Bernard*, 2 Lord Raymond, 909, 911.

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Such contract may be implied.

Notices.

special contract; and such contract may be either express or implied. An express contract for this purpose would naturally find its place in a bill of lading(*a*). A special contract to this effect may be *implied* from the particular dealing between the parties, either generally or in a given case, or from the general course of trade or business, or by the general law of England, from public advertisements and notices, given by carriers, stating the terms and limits of their responsibility(*b*). The expediency of admitting the right of the common carrier to limit his responsibility *ad libitum*, has been strongly questioned and seriously doubted in the English courts; but the right of making such qualified acceptances, as they are called, and the validity of notices for this purpose, seem nevertheless to have been firmly established by judicial decisions(*c*).

But in order to render the notice effective, it must be clearly shown, either by direct evidence or constructively, to have been previously brought to the actual knowledge of the bailor, and must be clear,

(*a*) The exception of "dangers of the seas," is said to have been latterly altered in England, and now to be made in the following 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." In the case, however, of ships homeward bound from the West Indian islands, which send their boats to fetch the cargo from the shore, there is introduced a saving out of this exception, "of risks of boats, so far as ships are liable thereto." Abbot on Shipping, Boston ed. of 1846, 399.

(*b*) Story on Bailments, § 551.

(*c*) Story on Bailments, § 549-564; 2 Kent's Comm., 606.

explicit and consistent(*a*); and whatever may be the form of the notice, the carrier is nevertheless responsible for any loss or damage resulting from gross negligence or misfeasance in him or his servants(*b*). The reported English decisions upon this subject have generally turned upon the question of gross negligence, and the question of the carrier's liability for ordinary negligence seems not to have been determined(*c*).

CHAP. 4.
Ship-owner liable, notwithstanding notice, for gross negligence or misfeasance.

In this country, the validity of notices for the purpose of exempting common carriers from liability has been questioned in several of the states of the Union; and in New-York, such notices have been decided, by a series of adjudications, to be against public policy, and on that ground altogether ineffectual. Thus it has been held by the Supreme Court of this state, that the proprietors of a stage coach, or of a steamboat, cannot relieve themselves from responsibility as common carriers, by publishing a notice that "all baggage is at the risk of the owner(*d*)."

And so of a notice that "all boxes and parcels sent by a stage coach will be at the risk of the owner(*e*)."

It was said, however, in one of these

Validity of notices questioned in this country, and denied in New-York.

(*a*) 2 Kent's Comm., 606; Story on Bailments, § 558. The cases on this subject are collected and lucidly arranged, by Mr. Justice STORY, in this excellent work.

(*b*) 2 Kent's Comm., 607; Story on Bailments, § 570.

(*c*) Story on Bailments, § 571.

(*d*) *The Camden and Amboy Railroad Transportation Company v. Burk*, 13 Wendell's R., 611; *Hollister v. Nolan*, 19 Wendell's R., 234; *Cole v. Goodwin*, id., 251; *The Camden and Amboy Railroad Transportation Company v. Belknap*, 21 Wendell's R., 351.

(*e*) *Clark v. Faxton*, 21 Wendell's R., 153.

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cases(*a*), that a common carrier, like other insurers, may demand a premium proportionate to the hazards of his engagement; and he may therefore require the owner of the goods to give such information, as to their nature and value, as will enable him to determine the amount of compensation which he ought to exact; though it was also said that a general notice requiring such information was insufficient, unless it was clearly shown to have actually come to the knowledge of the owner of the goods: and the same doctrine was reiterated by the court in another of these cases(*b*), in which the right of the carrier to make a special acceptance was asserted. In a subsequent case(*c*), the same court, Chief Justice NELSON dissenting, went to the extreme length of deciding that a common carrier cannot limit his responsibility, or evade the consequences of a breach of his duties as such, even by an express agreement for that purpose with the owner of the goods: and, accordingly, where upon the receipt of the goods for transportation, the carrier gave to the owner a memorandum by which they promised to forward the goods to their place of destination, "danger of fire," etc., excepted, it was held that the carriers were liable for a loss by fire, though not occasioned by negligence(*d*).

Express contracts to restrict carrier's liability, held invalid in New-York.

(*a*) *Hollister v. Noland*, supra.

(*b*) *Cole v. Goodwin*, supra.

(*c*) *Gould v. Hill*, 2 Hill's R., 623.

(*d*) Care was taken by the court, in the above cited cases, to limit the doctrine therein laid down strictly to common carriers. It does not therefore extend to other bailees, who are at full liberty to prescribe the limits of their own responsibility. In a suit, therefore, against the owners of a steamboat employed in the business of towing canal boats on the Hudson for hire, to recover the value of the cargo

But since the publication of the first edition of this work, the legal effect of a special contract designed to limit the liability of the common carrier, has been brought directly and forcibly to the consideration of the Supreme Court of the United States, in the case of *The New Jersey Steam Navigation Company v. The Merchants' Bank of Boston*(a). The action (being an admiralty suit *in personam*) was brought to recover the value of a large amount of coin belonging to the appellees, and lost by the burning, on Long Island Sound, of the steamer Lexington, belonging to the appellants. The money had been delivered to Mr. F. Harnden, an "express carrier," in the city of New-York, for conveyance to Stonington, and had by him been placed on board the Lexington for that purpose. The appellants claimed

of a canal boat, lost by reason of the negligence of the master of the steamboat, the Supreme Court of New-York being of opinion that the owners of the steamboat were not common carriers, and it having been expressly stipulated that the canal boat in question should be towed at the risk of her master, that court held that the defendants were not responsible even for ordinary care and skill (*Alexander v. Green*, 3 Hill's R., 1). This decision was, however, reversed by the Court of Errors, that court, without deciding whether the owners of the steamboat were to be deemed common carriers or not, being of opinion that they were bound to exercise ordinary diligence, notwithstanding the special agreement (S. C., 7 Hill's R., 533).

In England, at least, it appears to be an unsettled question whether the general rule requiring ordinary diligence in common cases of hire, is applicable to the case of carriers under notice, or whether they are rendered responsible only by gross negligence. See, on this subject, Story on Bailments, § 571, and the cases collected, p. 574 (4th edit.), note 3. Indeed, it seems to be doubtful whether in cases of this nature, there is, in reality, any distinction between negligence and gross negligence. (Story on Bailments, § 570).

(a) 6 Howard's R., 344 (16 Curtis's Decis., S. C. 722).

VOL. 1. exemption from liability in virtue of a special agreement previously entered into by them, under seal, with Harnden, by which it was stipulated that, in consideration of a specified pecuniary compensation, he should have the privilege of transporting in the steamers of the appellants running between the ports of New-York and Providence, once a day, one wooden crate of certain specified dimensions, subject, however, to the condition that the "crate, with its contents," should "be at all times exclusively at the risk of" Harnden; and that the appellants should not, "in any event, be responsible, either to him or his employers, for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any and every description, to be conveyed or transported by him in the said crate, or otherwise, in any manner, in the boats of the said company." The agreement contained a further stipulation that the advertisements to be published by Harnden, and also his receipts or bills of lading should be accompanied by a full notice of the above mentioned condition. Such a notice was published by Harnden, but it does not appear in the report of the case whether it was appended to his bills of lading or not. A general notice of the like import was published by the appellants in their own names.

In speaking of the case under this aspect, the court, however, held these notices to be wholly unimportant, not only because they were couched in language no more comprehensive than that of the special agreement, but also because "the carrier cannot in this way exonerate himself from duties

which the law has annexed to his employment.” CHAP. 4.
“He is,” say the court, “in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned. And this is not to be implied or inferred from a general notice to the public, limiting his obligation, which may or may not be assented to.”

But with regard to the special agreement, the court, advertng to the decision of the Supreme Court of New-York, above cited, pronouncing such agreements nugatory, declared itself unable to perceive any well founded objection against holding it to be valid to the extent of exempting the appellants from responsibility for laws against which they would otherwise have been liable as insurers. It was conceded also, that, as the appellees claimed through the agreement they were bound by its provisions so far as they were consistent with law. But general and strong as its language was, the court was of opinion that “to regard it as stipulating for wilful misconduct, gross negligence or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or management would be inadmissible according to “any fair and reasonable construction of the agreement” The appellants must therefore be “deemed to have incurred the same degree of responsibility as that which attaches to a private person, engaged casually in the like occupation,” and were, therefore, “bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and

VOL. 1. means of conveyance for their transportation." It was accordingly held to be incumbent on the appellees to prove their loss to have been "occasioned by want of due care or gross negligence," and the court, on looking into the evidence, having come to the conclusion that this had been done, affirmed the decree of the circuit court, awarding damages to the amount of the loss.

This decision, it will be noticed, involved also the determination of another point. The contract of affreightment on which the action was founded, was entered into by the appellants, not with the appellees, but with Harnden, and it was objected that no action could be maintained upon it except by him, or, at least, in his name. But upon what was deemed ample authority establishing the rule of law, that, where a contract, not under seal, is made by an agent in his own name for an undiscovered principal, either the agent or the principal may sue upon it, the court held the action to be maintainable, the circumstance of the contract in the case under consideration, being under seal, not being considered important in a suit in the admiralty, where technicalities are less regarded than in the courts of common law (*a*).

In cases of notice, the *onus probandi* is on the shipper.

In cases of notice, the burthen of proof of negligence is on the party who sends the goods, and not of due diligence on the part of the carrier (*b*), which,

(*a*) It was in this important case, also, the attentive reader will remember, that the contract of affreightment was, for the first time adjudged by the Supreme Court to be cognizable, and that in a suit *in personam* as well as *in rem*, in our courts of admiralty.

(*b*) Story on Bailments, § 573.

as we have seen, is contrary to the general rule in cases of carriers, where there is no notice(*a*). CHAP. 4.

The question, both in an ethical and in a legal point of view, has been much discussed, how far a contracting party may innocently be silent with respect to matters which, if known to the other party, would be likely to have an influence on his judgment. In relation to contracts for the carriage of goods, where there is no notice, the better opinion seems to be, that the party who sends the goods is not bound to disclose their value unless he is asked. But if the carrier makes the inquiry, he is entitled to a true answer; and if a false answer is given, and the carrier is deceived, he will not be responsible for any loss. If he makes no inquiry, and no artifice is used to mislead him, he is responsible, whatever may be the value of the goods sent. But whether the same rule applies to cases of notice, is an unsettled question admitting of much more doubt. It is scarcely necessary to add, that if any deception is intentionally practiced, the carrier will not be answerable(*b*).

Whether the shipper is bound to disclose the value of the goods sent.

The doctrine of restricting the carrier's liability by notice, does not appear as yet to have been judicially established in this country(*c*).

The general rules of law relative to the responsibility of the ship-owner as a common carrier, may also, as we have seen, be modified by *usage*. The admissibility of parol evidence for the purpose of establishing the existence of some usage or custom Usage.

(a) *Supra*, p. 161.

(b) Story on Bailments, § 569.

(c) 2 Kent's Comm., 608.

VOL. 1. in reference to which the parties may be supposed to have contracted, for the purpose of varying what might otherwise be the legal effect of the contract, has long been established in the English courts, and was distinctly recognized by the Supreme Court of New-York in the early case, *Coite v. The Commercial Insurance Company*(a). A usage may be either General or special general, or it may be peculiar to some place or trade; and in this latter case it is denominated a particular usage. Many of what are now deemed to be established principles of commercial law, and are recognized as such by courts without proof, had their origin in antecedent general mercantile custom. Of this nature, for example, is the allowance of three days' grace for the payment of promissory notes; and the necessity, for the purpose of charging the endorser, of making a demand of payment on the third day after the day of payment specified in the note.

But in a suit by a bank against the endorser of a note made and endorsed for the purpose of being discounted at that bank, payment having been demanded, and notice to the endorser given on the fourth instead of the third day after the designated day of payment, parol evidence was held by the Supreme Court of the United States to be admissible to prove that it had been the uniform custom of the bank from the time of its incorporation, twenty-five years before, and was also the custom of all the other several banks in the same place, to defer the

(a) 7 Johnson's R., 385.

demand of payment and the notice until the fourth day; and a judgment in favor of the bank was affirmed upon this ground(*a*). The usage set up in this case, it will be seen, was peculiar to a particular place, and also to a particular business or trade.

But although commercial contracts are admitted to form an exception, to some extent, to the rules applicable in this respect to other contracts, the introduction of usages of trade for the purpose of controlling the construction of contracts and the ordinary principles of law, is subject to certain reasonable restrictions; and both in England and in this country, the courts have latterly evinced an inclination to confine it to the narrowest limits compatible with established doctrines(*b*). The subject seems to have been much and anxiously considered by Mr. Justice STORY, and he has repeatedly taken occasion to express his disapprobation of the extent to which the practice of admitting evidence of usage

Evidence of usage, in what cases admissible.

(*a*) *Renner v. The Bank of Columbia*, 9 Wheaton's R., 581 (6 Curtis's Decis. S. C., 195). The decision of the court was pronounced in an elaborate opinion by Mr. Justice THOMPSON. Mr. Justice STORY dissented; and Chief Justice MARSHALL, and Justices WASHINGTON and DUVALL, did not sit in the case. A like decision was, however, afterwards made unanimously by the same court, in the case of *Mills v. The Bank of the United States*, 11 Wheaton's R., 431 (6 Curtis's Decis. S. C., 653), in which it was further held that the usage was binding on the dealers with the bank, without proof of previous notice of its existence.

(*b*) *Trueman v. Loder*, 11 Adolph. & Ellis's R., 589; *Palmer v. The American Insurance Company*, 1 Hall's N. Y. R., 619; *Donnell v. The Columbian Insurance Company*, 2 Sumner's R., 366; *The Reeside*, 2 Sumner's R., 567; *The Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story's R., 16, 45; *Anderson v. Pitcher*, 2 Bos. & Pull. R., 164, 168.

VOL. 1. had in some cases been carried(*a*). In several cases which arose before him, it became necessary also to state the principles deducible from authority and expediency, by which, according to his apprehension, this practice ought to be regulated.

In a suit for wages brought by the mate, who, upon the death of the master during the voyage, had succeeded him as master, where the owners brought forward a claim in the nature of a set-off for money expended for the libellant on account of his sickness on shore in a foreign port, and relied upon an alleged usage prevailing among the merchants of the port from which the vessel sailed on her voyage, by which expenses of this nature were made a personal charge on the master when incurred on his account — which usage, it was contended, was applicable to the case of a mate, under the circumstances of the case — the learned judge said, that it was certainly sometimes useful, in order to ascertain what the law ought to be in new cases open for future decision, to ascertain what the customs and usages of merchants on such subjects generally are; for such customs and usages may have a material influence as to the rule which ought to be adopted. But he thought that the usages of a particular port or place could never be properly admitted for such purposes; much less, even when general, to control or alter the settled maritime law. The most that could ever be allowed to such customs and usages was to give them effect, when, from their being

(*a*) 2 Sumner's R. and 2 Story's R., *ubi supra*.

generally known, and invariably used as fixed rules, they might be said to constitute a direct and positive element of the particular contract; and he had long thought, he said, that too much deference had been allowed to loose and floating customs and usages of this sort, founded on no known principle, and arising more often from ignorance of right, and mere acquiescence, than from any intentional recognition of a fixed rule. In cases of this sort, he was not disposed to set up customs and usages against principles of law, or to suffer new inroads to be made upon old doctrines; but was content to stand *super antiquas vias*, and to go where they lead^(a).

In another case, after declaring himself "no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs in almost all kinds of business and trade, to control, vary or annul the general liabilities of parties, under the common law as well as under the commercial law;" and after expressing his apprehension of the danger of the practice, and his gratification at finding "that the courts of law, both of England and America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them," he adds, "The true and appropriate office of a usage or custom is, to interpret

Evidence of usage, for what purposes admissible.

(a) *The Brig George*, 1 Sumner's R., 151. See, also, *Donnell v. The Columbian Insurance Company*, 2 Sumner's R., 366, 367, where the same learned judge expresses the opinion that "usages among merchants should be sparingly adopted as rules of law, by courts of justice; as they are often founded in mere mistake, and still more often in the want of enlarged and comprehensive views of the full bearing of principles."

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the otherwise indeterminate intentions of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful and equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject matter to which they are applied. But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations of a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom; for the latter may always be waived at the will of the parties: but a written and express contract cannot be controlled, or varied or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary or contradict, the formal and deliberate written declarations of the parties." The case in which this was said, was a suit *in rem* for damages done to certain goods shipped on a voyage from New-York to Boston. There was a bill of lading in the usual form, whereby the goods were to be delivered in good order and condition at the port of Boston, "*the dangers of the seas only excepted.*" The goods, consisting of carpeting, having been injured on the

Inadmissible to control an express contract.

voyage by leakage from oil casks, one of the grounds of defence set up was, that according to the established usage or custom of the packet vessels engaged in trade between New-York and Boston, the ship-owners were not "liable to pay for any damage not occasioned by their neglect." It was in deciding on an exception taken, preliminarily, to the article containing this ground of defence, that Mr. Justice STORY laid down the general principles above stated; and proceeding to apply them to the case before him, he expressed himself as follows: "Now, what is the object of the present asserted usage or custom? It is to show, that, notwithstanding there is a written contract (the bill of lading), by which the owners have agreed to deliver the goods, shipped in good order and condition, at Boston, the dangers of the seas only excepted, yet the owners are not to be held bound to deliver them in good order and condition, although the danger of the seas had not caused or occasioned their being in bad condition, but causes wholly foreign to such peril. In short, the object is, to substitute for the express terms of the bill of lading an implied agreement on the part of the owners, that they shall not be bound to deliver the goods in good order or condition; but that they shall be liable only for damage done to the goods occasioned by their own neglect. It appears to me, that this is to supersede the positive agreement of the parties; and not to construe it. The exception must therefore be sustained(*a*)."

(*a*) *The Reeside*, 2 Sumner's R., 567. See, also, *The Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story's R., 47, 50, where,

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The usage
must be
clear and
uniform.

A usage, to be admissible, must be clearly shown to exist, and to be so uniform, and so well known, as to warrant the presumption that the parties contracted with reference to it, and intended to adopt it as one of the elements of their contract(a).

In the case of *The Paragon*, just cited, the suit was for the value of goods thrown overboard in tempestuous weather for the safety of the vessel and the lives of the crew, on a voyage from Boston to Portland. The goods were stowed on deck, contrary to a settled general rule of the maritime law, requiring the cargo to be stowed under deck; and the defence set up by the ship-owner was an alleged usage or custom of trade between the above mentioned ports, authorizing the master to carry goods on deck without the consent of the shipper. But the evidence touching the usage being in the opinion of the learned judge inconclusive, he decreed damages to the libellant on account of the improper stowage, notwithstanding the loss was occasioned by the dangers of the seas.

Rule of
damages.

After considerable research, I have not had the good fortune, extraordinary as it may seem, to find that any definite rule has been definitively established with respect to the measure by which the damages

in speaking of a supposed usage or practice to treat the owners of vessels as not liable for losses of bank bills entrusted to them, even though their business as common carriers embraced the carriage of bank bills, Mr. Justice STORY said he "was not prepared to say that any such evidence would be admissible to control the well-established rules of law."

(a) *Trott v. Wood*, 1 Gallison's R., 445; *The Paragon* Ware's R., 322; *Davis et al. v. A New Brig*, Gilpin's R., 473.

of the shipper, in case of loss or injury to his goods, are to be estimated. CHAP. 4.

In cases of illegal capture, or other marine trespass, it is, however, a settled rule that no damages are to be awarded on account of the possible or probable profits which might have accrued to the shipper if the goods had gone safe to the port of delivery (*a*); and the same principle has, in a late case, been adopted by the Supreme Court of the United States, with respect to losses occasioned by collision (*b*). Such being the rule in cases of tort, it would seem to follow, *a fortiori*, that there ought to be no allowance for contingent prospective profits in the case of a mere non-performance of a contract of affreightment, the breach of which is very rarely intentional. But what seems still more to the point, no damages on account of such profits are recoverable on an open policy of insurance. This appears to be a settled doctrine in England, and other commercial countries, including our own (*c*). The measure of damages adopted in each of these classes of cases is the value of the goods at the time and place of shipment, in case of loss; and in case of

Whether damages for prospective profits are allowable.

(*a*) *The Anna Maria*, 2 Wheaton's R., 327 (4 Curtis's Decis. S. C., 123); *The Amiable Nancy*, 3 Wheat. R., 546 (4 Curtis's Decis. S. C., 287); *La Amistad de Rues*, 5 Wheat. R., 385 (4 Curtis's Decis. S. C., 673); *The Lively*, 1 Gallison's R., 315; *Dusar v. Murgatroid*, 1 Washington's C. C. R., 13.

(*b*) *Smith et al. v. Condry*, 1 Howard's R., 28 (14 Curtis's Decis., S. C., 487). But see *Williamson v. Barret*, 13 Howard's R., 101, where this rule appears to have been qualified, if not subverted. And *vide infra*, COLLISION.

(*c*) 3 Kent's Comm., 3d ed., 335; *Carson v. The Marine Insurance Company*, 2 Washington's C. C. R., 468.

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damage, the diminution of value by reason of the injury; with interest thereon to the time of judgment, including all proper charges, and the premium of insurance where it has been paid(a).

In the case of *The Cassius*(b), Mr. Justice STORY awarded the value at the place of destination, deducting the freight and duties; but I understand him to have put his decision distinctly upon the ground that the cargo had been actually carried to the place of destination, where it ought to have been, and but for the improper conduct of the master, would have been unladen; and I infer from his language that he considered the value of the goods lost at the time and place of shipment, to be the proper measure of damages in the ordinary case of a loss accruing before the termination of the voyage. Indeed, in a suit on

(a) Mr. Justice WASHINGTON seems, however, to have been of opinion, that in an action on the contract of affreightment, no interest ought to be allowed (*Dusar v. Murgatroid*, 1 Washington's C. C. R., 13; *Gilpins v. Consequa*, 1 Peters's C. C. R., 86; *Willings v. Consequa*, id., 172; *Yonqua v. Nixon*, id., 221). But I am unable to discover any reason, founded either in justice or analogy, for withholding it. The shipper is fairly entitled to full indemnity for the loss he has sustained; and it is very clear that the tardy recovery of the mere actual original cost or value of his goods will not, in general, afford him a just remuneration. In cases of marine tort, it is uniformly allowed upon the value of property lost, and upon the diminution in value of property injured (See inter al. *The Anna Maria*, 2 Wheaton's R., 327, 4 Curtis's Decis., S. S., 122; *The Amiable Nancy*, 3 Wheat. R., 546, (Curtis's Decis., S. C., 287). It is believed to be universally true, that in actions arising *ex contractu*, for the recovery of a sum certain, or which may be rendered certain, unless it be for a penalty, interest is recoverable; and it has been held, also, to be allowable by way of damages, both in the action of trover and of trespass *de bonis asportatis* (*Wilson v. Conine*, 2 Johnson's R., 280; *Beals v. Guernsey*, 8 Johnson's R., 446).

(b) 2 Story's R., 81.

a memorandum of charter-party, where the voyage was broken up and the goods relanded by the ship-owners in a home port, the same learned judge expressly decided that nothing was to be allowed for contingent profits. "I have no doubt," he observed, "that the expected profits to be made on the voyage, and the supposed injury to the libellant, from his inability to comply punctiliously with his contract with the government of Cuba, are not proper items of damage. The due performance of the voyage was subject to many future contingencies; and the item of profits is too uncertain in its nature to form any basis of damages, even if, in a case like the present, there were not other objections to it(a)." In a later case in the same court, the value at an intermediate port, where the vessel was wrecked, and the goods embezzled or stolen, *with interest*, was awarded(b); but the case was peculiar, and does not appear to me to militate against the views above suggested.

The decisions upon the subject in this state have not been uniform, and are very unsatisfactory. In the case of *Smith et al. v. Richardson(c)*, the value of the goods at the place of shipment was adjudged to be the just measure of damages. In a subsequent case of assumpsit against the master, in which it appeared that several trunks, containing a part of the goods shipped, had been broken open during the voyage, and rifled of a portion of their contents,

(a) *The Tribune*, 3 Sumner's R., 144, 151.

(b) *King v. Shepherd et al.*, 3 Story's R., 349.

(c) 3 Caines's R., 219.

VOL. 1. though without the knowledge of the defendant, he was held to be answerable for "the clear net value of goods of the like quality at the place of destination;" "the rule of the maritime law, in such cases," being, it was said, "that the master must answer for the value of the goods missing," according to this mode of computation. "All the ordinances and authorities," say the court, "declare this to be the rule, when the goods are sold by the master from necessity, in the course of the voyage; and why should not the same rule apply when the goods are missing by any other means(a)?" The case of *Smith v. Richardson* is commented upon by the court, without any expression of disapprobation; and the case in judgment was distinguished from it chiefly on the ground of embezzlement. The plaintiff claimed a right also to recover interest; but the court, conceding that interest might be allowed by the jury as damages in cases of malfeasance by the master, refused, though apparently with considerable hesitation, to allow it. In a case which occurred several years later(b), the rule of damages does not appear to have been discussed by the counsel; and the court, without referring to the case of *Smith v. Richardson* at all, applied the rule of computation adopted in the case of *Wilkinson v. Laughton*, without referring to any other authority, and without comment.

The rule upon which I have presumed to insist, is strongly recommended by its substantial justice

(a) *Wilkinson v. Laughton*, 8 Johnson's R., 213.

(b) *Amory v. M'Gregor*, 15 Johnson's R., 24.

and simplicity ; and in a case (*a*) very recently decided in the District Court of the United States for the Northern District of New-York, it was, upon full consideration, adopted and applied.

CHAP. 4.

But by an act of Congress, passed March 3, 1851 (*b*), many of the provisions of which have already been cited in this chapter, a limit to the responsibility of the ship-owner, not only as a carrier but for every species of loss or injury for which, he is answerable, has been prescribed, that, in some cases, supercedes the necessity of any minute inquiry into the extent of the damages actually sustained by the suffering party. The third section of this act ordains "that the liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners, respectively, in such ship or vessel, and her freight then pending." And by the next section it is further enacted, "that if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value

Liability of owner limited to value of ship, unless he is personally in fault.

(*a*) *The Propeller Goliath*, determined October, 1847.

(*b*) Ch. 43, 9 Stat. at Large, 635.

VOL. 1. of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel or freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease." The new rule introduced by this statute is slightly restricted by the act of August 30, 1852, ch. 106, §§ 20, 30; 10 Stat. at Large, 72 72(a).

By whom
the action
is to be
brought.

The action for a breach of a contract for the transportation of goods, evidenced by a bill of lading, is sometimes to be brought by the consignor, and sometimes by the consignee of the goods. In general there is little or no difficulty in deciding to which of these parties the right to sue pertains; but as each case depends, in this respect, upon its own

particular circumstances, the question is sometimes one of considerable difficulty, and it has given rise to numerous judicial decisions, which are not in all respects easily reconcilable. The general result of the English cases, however, is supposed to be, that an action can be maintained only by a person who has some property in the goods at the time of the breach of the contract; and the consignee will be deemed to have such a property, unless the contrary appears—a delivery to the ship-master, in the ordinary course of mercantile transactions, being, in effect, a delivery to the consignee(*a*). But if by the terms of dealing between the consignor and consignee, the latter is not to acquire a property in the goods, and they are to remain at the risk of the consignor until actual delivery, the property remains in him until their delivery, and he is the person to sue the carrier for the loss of them(*b*): and this will be so, notwithstanding that the freight is to be paid by the consignee. Thus, where goods were purchased and shipped in this country by American merchants, consigned to merchants in France, under an agreement by which the former were to deliver the goods at St. Vallery, for which they were to be allowed a commission of eight per cent, and take on themselves all risks; the consignees to pay the freight on delivery, and to pay also in bills on London; it

Consignee
in general
entitled
to sue.

(*a*) See Abbot on Shipp., Bost. ed. of 1846, 402, 403, 414; *Coleman v. Lambert*, 5 M. & W., 502.

(*b*) *Freeman v. Birch*, 1 Nev. & Man. R., 420; Abbot on Shipping, 403; *M'Intyre v. Bowne*, 1 Johns. R., 229.

VOL. 1. was held that the goods remained the property of the consignors, until their delivery in France(*a*).

Where goods are sent upon the account and risk of the shipper, the delivery to the master is a delivery to him as agent of the shipper, not of the consignee; and it is competent for the consignor, at any time before actual delivery to the consignee, to countermand it, and thus prevent the assignee's lien from attaching(*b*). The shipper and owner may

(*a*) *Ludlow v. Bowne*, 1 Johnson's R., 1. See also, to the like effect, *Brant v. Bowlby*, 2 B. & Ad., 932; *The Merimack*, 8 Cranch's R., 317 (3 Curtis's Decis. S. C., 153), and *The St. Joze Indiano*, 1 Wheaton's R., 208 (3 Curtis's Decis. S. C., 523).

(*b*) *The Frances*, 8 Cranch's R., 418 (3 Curtis's Decis. S. C., 200). "Goods may be shipped to the order, and 'on account and risk,' of the consignee as purchaser, and yet his right to the possession of them be incomplete (*Wilmshurst v. Bowker*, 5 Bing. N. C., 5; 7 Scott, 561; 4 M. & G., 792). It commonly happens that goods are not to be paid for before or at the time of their shipment, but by bills of exchange drawn for their amount on the consignee, or on other parties. Between the consignor and consignee, the agreement or understanding may be that the property in the goods shall not vest in the latter, until such bills are accepted. When this is the case, the master will generally be required to sign bills of lading, to deliver the goods to the order of the shipper, by whom one part unendorsed will be forwarded to the consignee, to notify the shipment; another part, endorsed, to the agent of the consignor, to be delivered to the consignee when the condition of the consignment has been performed, by the acceptance of the bills of exchange." Abbot on Shipping, Boston ed. of 1846, 404.

"Bills of lading to the order of the shipper or to _____, or order, or assigns, convey notice to the master that although the goods be shipped on account and risk of a consignee, and delivery to him be the object and intention of the shipment, there may yet be some condition unperformed, on which his right of possession depends, or some circumstances which have induced the shipper to retain in his own hands the ultimate appointment of the consignment. It is the master's duty, in such cases, to retain, and he cannot safely deliver

also attach conditions to the consignment, or revoke it, even after the shipment has been made and a bill of lading making the goods deliverable to a consignee by name has been signed, at any time before the bill of lading or the goods are actually delivered to the consignee(*a*); but if such subsequent acts of the consignee involve fraud or imposition upon the person on whose account the shipment was made, they will be ineffectual(*b*).

If the consignor purchase goods merely as agent of the consignee, and which are to be transported at the risk of the latter; by the delivery to the carrier, the property of the consignor is divested, and he cannot bring an action against the carrier; and if the papers accompanying the goods state them to be shipped on account and risk of the consignee, he paying freight, without further explanation, it will be intended that the consignor was a mere agent to make the purchase(*c*). But although the shipper is, in fact, only the agent of the owners of the goods resident abroad, yet, if the bill of lading states the goods to have been shipped and the freight to have been paid by him, he may maintain an action for the non-performance of the contract. In such a case, there is a privity of contract between

the goods, until they are claimed of him by the holder of a bill of lading, endorsed by the shipper, to whose order he has engaged to deliver them." *Id.*, 407.

(*a*) *Mitchell v. Ede*, 3 Perry & Davidson, 513; 11 Ad. & Ell., 888; Abbot on Shipping, 404.

(*b*) *Ogle v. Atkinson*, 1 Mars. R., 323, and 5 Taunt., 759; Abbot on Shipping, 406.

(*c*) *Potter v. Lansing*, 1 Johnson's R., 215.

VOL. 1. the ship-owners and the shipper. It is from the latter that the consideration moves, and to him that the promise is made. After such a contract has been signed by the master as the agent of the ship-owners, they cannot say to the shipper that he has no interest in the goods, and is not damnified by their breach of the contract. If the goods are lost, the shipper is entitled to recover their value, and will hold the sum recovered as a trustee for the real owners(*a*).

According to what appears to be the predominance of authority in the English courts, if the person to whom, by the terms of the bill of lading, the goods are to be delivered, is only the agent of the shipper, and has no property in the goods, he cannot maintain an action in his own name for not delivering them(*b*). But the reverse of this has been decided in Pennsylvania, in a case where goods had been shipped by the owner at Liverpool, who paid the freight on them and consigned them to his agent or his assignees at Philadelphia; the court holding that the legal property, by the bill of lading, vested in the consignee in trust for the consignor(*c*).

GENERAL AVERAGE.

One of the remaining subjects of litigation enumerated in the first chapter, as cognizable in the American courts of admiralty, is GENERAL AVERAGE.

(*a*) *Joseph v. Knox*, 3 Camp. R., 320.

(*b*) See Abbot on Shipping, Boston ed. of 1846, 411, *et seq.*

(*c*) *Griffiths v. Ingledeu*, 6 Serg. & Rawle's R., 429.

In England it has always been regarded as belonging exclusively to the courts of common law, while in this country it has only lately, and, as already observed (*a*), in but a single instance, so far as appears, been brought under the cognizance of a court of admiralty. Having at length found its way thither it may eventually become a familiar guest, and the principles by which it has hitherto been governed may, to some extent, be here modified by the influence of the civil law. But as yet it is unnecessary, and would scarcely be consistent with the design of this work to attempt to treat the subject at large, and I shall accordingly content myself with a few general observations upon it, and a very brief notice of two decisions of the Supreme Court of the United States, by which questions of great importance that would otherwise have remained in doubt, may, so far as relates to our national courts, be regarded as settled.

The principle of average contribution is understood to have been first asserted in the once celebrated maritime code of the ancient Rhodians, which for centuries before the Christian era was acknowledged by the maritime communities of that early age as a part of the laws of nations. This code was lost in the darkness of succeeding centuries, and all the knowledge we now have of its contents is derived from the title *De lege Rhodia de Jactu*, in the Roman Pandects, and is accordingly limited to the single subject of jettisons. The Rhodian ordinance as there cited is this: "If goods are thrown overboard

Origin of the doctrine.

The Rhodian ordinance.

(*a*) *Supra*, p. 15, note.

VOL. 1. for the purpose of lightening the ship, the loss is to be made good by the contribution of all, because it was incurred for the benefit of all."

Adopted by all maritime nations.

Difficulties attending its application.

The restriction

and extension.

The abstract principle of equity embodied in this rule is too obvious and impressive not to have found a place among the maritime laws of every commercial nation of modern times, and it has accordingly done so under the name of General or Gross Average. But the attempts of legislators and judges to reduce it to practice by defining its applicability, have been attended with no little embarrassment, and have led to diverse results. The difficulty springs from the nature of the subject, and being inherent it is unavoidable. The desideratum has been to limit and define the scope of the principle in accordance with its spirit. On the one hand, as it is not every jettison, though made "for the purpose of lightening the ship," that should entitle the owner of the goods to remuneration in this form, it became necessary to restrict the rule by prescribing the condition requisite to confer the right of contribution. On the other hand, while the Rhodian ordinance was, in terms, limited to goods voluntarily thrown overboard, the principle on which it was founded embraced other forms of injury or sacrifice suffered for the common benefit, and it has accordingly been extended far beyond the limits designated by the terms in which it was originally expressed. Thus, for example, it has been applied to goods damaged or destroyed in the act of jettison, or in order to accomplish it, or in consequence of it; to goods lost or injured by being unladen from the ship to enable

her to take refuge in a port to which she was not destined, and into which she cannot enter without being lightened; to the furniture of the ship; and to the ship itself. But each extension of the rule was virtually a new rule, and, in turn, called for new restrictions. The doctrine of general average, therefore, besides being in its nature perplexing, has thus become complex. But no application that has been made of the principle of contribution has led to more earnest discussion or a more remarkable discordance of opinion than that made in favor of the ship-owner where the cargo is saved by means of the voluntary stranding of the ship.

Its applica-
tion in cases
of strand-
ing.

The applicability of the principle to such a case, with regard to damages and expenses so incurred, *provided the vessel was got off* and thus enabled to complete her voyage, and under circumstances in other respects favorable, has been universally conceded.

But whether, when the vessel is lost, the rescued goods are subject to contribution, is a question that has led to much disputation among the jurists of other countries, and to conflicting judicial decisions in our own. But on being at length brought under the consideration of the Supreme Court of the United States, the right of contribution in a case of voluntary stranding was adjudged not to depend on the ultimate fate of the ship, and the cargo was held liable to contribute to the loss, notwithstanding the loss of the ship(*a*).

Not defeated
by loss of
ship.

(*a*) *Col. Ins. Co. v. Ashley*, 13 Peters's R., 331 (13 Curtis's Decis. S. C., 176).

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It is a fundamental principle that to constitute a case of general average, it is absolutely necessary that the jettison or other form of sacrifice, whatever it may be, should be *voluntary*. But the application of this principle in the instance of stranding, had been found exceedingly perplexing. Where, for example, on the one hand, a ship is intentionally run on shore to escape capture by an enemy; or where, on the other hand, she is driven on shore by a tempest, in spite of all efforts to keep her off—no doubt can exist that the stranding in the first case is voluntary, and in the second involuntary. But suppose, that while the ship is irresistibly impelled towards the shore, so as to leave no choice except with respect to the particular spot where she shall strike, the master merely directs her course so as to avoid a rocky and highly dangerous part of the shore, upon which, if left to the winds and waves alone, she would undoubtedly be driven, and whence there would be no prospect of escape for ship, cargo or crew, would this be a voluntary stranding? This question was presented for decision in the Supreme Court of the United States, in the case of *Barnard et al. v. Adams et al.*(a), and received an affirmative answer.

Voluntary change of course sufficient, though the stranding be unavoidable.

The question was elaborately and ably argued on both sides. The counsel for the plaintiffs in error insisted with great earnestness, and it seems not unreasonable to believe with equal sincerity, that to call that voluntary which was conceded to be unavoidable, and to denominate that a sacrifice of the ship

(a) 10 Howard's R., 270 (18 Curtis's Decis. S. C., 393).

for the preservation of the cargo, which in reality was but a precaution pointed out by common sense, and enjoined by common prudence, irrespective of the cargo, and taken, not for the purpose of escaping the impending disaster, but in the hope of rendering it less destructive, would be simply absurd. The court, however, by an ingenious process of reasoning, in an elaborate and able opinion delivered by Mr. Justice GRIER, arrived, as already stated, at the opposite conclusion. The elements it deemed requisite to constitute a case of general average, are stated by the court in the following terms :

CHAP. 4.

Definition
of general
average.

“1st. A common danger ; a danger in which ship, cargo and crew all participate ; a danger imminent and apparently ‘inevitable,’ except by voluntarily incurring the loss of a portion of the whole to save the remainder.

“2d. There must be a voluntary jettison, *jactus*, or casting away of some portion of the joint concern, for the purpose of avoiding this imminent peril, *periculi imminentis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

“3d. This attempt to avoid the imminent peril must be successful.”

I am not aware that any just exception can be taken to this statement ; but whether the case before the court was properly adjudged to fall within the described conditions, will probably appear questionable to other minds as well as to that of Mr. Justice DANIELS, who felt constrained to declare his dissent from the judgment of the court.

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Quere, as to the reasonableness of so great extension in favor of ship-owners.

The principle of contribution for the reparation of marine disasters, seems to have been a favorite of the courts, and there has undoubtedly been too great a tendency to its extension, especially in favor of the ship. He who embarks in the business of a common carrier by water, voluntarily engages in a hazardous pursuit, and he exacts a correspondent remuneration. For the fulfilment of his contracts for the conveyance of merchandise, the law justly requires of him the exercise, at all times, of the requisite degree of skill and care to guard against all losses that are avoidable by consummate sagacity and vigilance. If, for the safety of his ship, he casts the goods of the merchant into the sea, it is eminently and obviously just that he should share the loss: but the obligation imposed on the merchant, to share the ill fortune of the ship-owner, except under very extraordinary circumstances, is, to say the least, not so readily discerned. It can rarely happen that the means best adapted, in case of extremity, to the preservation of the cargo, are not also those most likely to insure the safety of the crew of the ship, and those, moreover, which the master ought, and, it may be presumed, therefore, would consider himself bound to employ, in a like emergency, if he had no cargo on board. Take, for example, the stranding of the ship *Brutus*, which, in the above cited case of *Barnard v. Adams*, was held by the Supreme Court to entitle the owners to levy a contribution on the cargo: the acting master adopted the only expedient that afforded any promise of safety, either to the lives of himself and his crew, or to the ship, and had she been in

ballast instead of being laden, he would have been guilty of criminal negligence if he had suffered her to be driven, as she must soon have been, broadside upon shoals or rocks, where destruction would have been inevitable; when, by the simple act of slipping the chains and giving a proper direction to her course, by means of the helm, she could be, as she was, safely grounded.

The case of *The Hope*, in *Col. Ins. Co. v. Ashley*, the other case cited above, and nearly or quite every other reported case of stranding would furnish an example equally pertinent. May it not, then, without unpardonable arrogance, be asked, where is the justice or the expediency in such cases, of subjecting the freighter to the burden of contribution?

CONTRACTS FOR THE CONVEYANCE OF PERSONS.

For reasons of the like nature with those above assigned for abstaining from a comprehensive survey of the rules of law pertaining to the subject of average contributions, I shall speak still more sparingly of contracts for the conveyance of passengers. The only instance in which an admiralty suit founded on this contract, appears to have been brought under the revisory power of the Supreme Court, has already been cited as a conclusive authority for enumerating this among the subjects of admiralty jurisdiction (a).

One ground of defence in that case was, that the libellant, who had been severely injured by an

Carrier may be liable, though the conveyance be gratuitous.

(a) *The New World*, 16 Howard's R., 469, and *vide supra*, p. 26, note(a).

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 Carrier may
 be liable,
 though the
 conveyance
 be gratui-
 tous.

explosion of the boiler of the *New World*, being "a steamboat man," was, as such, in accordance with a general custom, carried gratuitously. In behalf of the respondents, it was argued that as no compensation had been exacted of the libellant, the law imposed no duty on them to carry him safely: that the master had no authority to assume such an obligation, and that none could result, therefore, from his act in receiving the libellant on board: that no benefit having been conferred on the respondents proceeding from the libellant, no duty on their part was implied, and he must be considered to have assumed the risk of his own transportation.

It was also further insisted that if the respondents were responsible at all, it could only be for gross negligence, which, it was asserted, had not been proved.

Upon all these points the decision of the court was in favor of the libellant. The custom to receive steamboat men being proved to be general, the owners must be supposed to have been aware of it, and not having forbidden the master to conform to it, they must be presumed to have acquiesced in it, as a privilege tending to facilitate their business, and beneficial to themselves. The master, therefore, had authority to act under this custom, and thereby to bind the owners.

In transpor-
 tation by
 steam, all
 negligence
 is gross.

The libellant must accordingly be deemed to have been lawfully on board, and that was sufficient. And with regard to the extent of the obligation imposed by law to convey the libellant safely, the court felt no hesitation in applying to the case before it, the

important and stringent doctrine laid down in *The Philadelphia and Reading R. R. Co. v. Derby*(a), which the court desired "to be understood to reaffirm, as resting, not only on public policy, but on sound principles of law." That doctrine is this: "Where carriers undertake to convey persons by the powerful and dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross."

The only remaining inquiry, then, was whether the defendants were chargeable with negligence at all; and this inquiry was simplified by the following provision contained in the act of Congress of July 7th, 1838(b): "in all suits and actions against proprietors of steamboats for injury arising to persons or property from the bursting of the boiler of any steamboat, or the collapse of a flue, or other dangerous escape of steam, the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *prima facie* evidence sufficient to charge the defendant or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment(c)."

Burden of proof on the carrier.

(a) 14 Howard's R., 468 (20 Curtis's Decis. S. C., 291).

(b) 6 Stat. at Large, p. 306, § 13.

(c) The principle of this enactment—that of casting the burden of proof on the carrier of passengers by land—had, however, been pre-

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This enactment was declared by the court to be directly applicable to the case; and the respondents having failed to exonerate themselves from the charge of negligence, the District Court (of the Northern District of California) awarding \$2500 damages to the libellant, was affirmed.

Theory of three degrees of negligence objectionable.

The interest and importance of this case are enhanced by the brief but forcible observations of Mr. Justice CURTIS, in delivering the opinion of the court, on what he denominates the "theory" of "three degrees of negligence, described by the terms, slight, ordinary and gross." This theory was transplanted into the common law from some of the commentators on the Roman law; but these commentators were divided in opinion respecting its utility; and by some of the ablest of them, as well as of the commentators on the civil code of France, it has been condemned and repudiated, "as unfounded in principles of natural justice, useless in practice, and presenting inextricable embarrassments and difficulties." "Recently," moreover, "the judges of several courts have expressed their disapprobation of these attempts to fix the degrees of diligence by legal definitions, and have complained of the impracticability of applying them."

In these expressions of disapprobation I understand the court cordially to concur.

In the above mentioned case, reported in 14 Howard, the injury complained of was caused by

viously asserted by the Supreme Court of the United States, as a principle of the common law, in the case of *Saltonstall v. Stokes*, 13 Peters's R., 181 (13 Curtis's Decis. S. C., 114).

collision on the defendants' railroad. The plaintiff, who was a stockholder, and the president of another railroad company, was passing over the road of the defendants at the invitation of their president, and on this ground he was held, like the libellant in *The New World*, to have been lawfully present, and entitled to the immunities of an ordinary passenger. The liabilities of a common carrier, by water and by land, are essentially the same.

CHAPTER V.

BOTTOMRY AND RESPONDENTIA BONDS.

ANOTHER species of contract, which, as we have seen, it is the business of courts of admiralty to enforce, is that of maritime loans secured by express hypothecation.

These loans have been in familiar use, as highly important auxiliaries to commercial enterprise, from a very early period. They were the subject of express regulation by the Roman law: they are recognized, and studiously provided for, in the maritime codes and ordinances of modern Europe: they have been copiously treated by the Continental jurists; and have been largely discussed in the British courts, and in those of the United States. But it is only within the last few years that some of the principles by which they are governed have been clearly defined, and some others for the first time adopted and explicitly declared, either in England or in this country.

Bottomry
bonds

In the form of express hypothecation most frequently resorted to, the instrument by which the hypothecation is effected is denominated a *bottomry bond*. It is a contract in the nature of a mortgage pledging the ship (or *bottom*); or the ship and freight; or the ship, freight and cargo; as a security

for the repayment of money loaned. Its conditions are, that if the voyage is performed in safety, the sum loaned, together with the stipulated interest, shall be paid, either upon the completion of the voyage, or at the expiration of some specified period; but that if the subject of the pledge is lost by a peril of the sea, the lender shall lose his money also.

Sometimes money is loaned, on the like conditions, to the owner of the cargo or some part of it, upon the pledge of that alone; and the bond in that case is called a *respondentia bond*, the borrower being always personally *responsible*(a). Indeed, the bond does not, in England at least, uniformly, in express terms, hypothecate the goods; and in such cases it is held, in the English courts, that no lien is implied(b). The form said to be in common use in this country, contains an express pledge, not only of the particular merchandise or *specie* then laden on board the ship, but of all such as shall be laden on board on account of the borrower at any time during the voyage; thus embracing the return cargo, obtained by means of the outward cargo(c).

Respondentia.

As the risk incurred by the bottomry or respondentia lender is greater than in ordinary cases, the rate of interest or premium, *pretium periculi*, is proportionally higher according to the circumstances

Rate of interest not governed by usury laws

(a) 2 Blackstone's Commentaries, 457.

(b) *Burk v. Fearon*, 4 East's R., 319.

(c) *Conrad v. The Atlantic Insurance Company*, 1 Peters's R., 386 (7 Curtis's Decis. S. C., 637); *Franklin Insurance Company v. Lord*, 4 Mason's R., 248.

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of the case, and the agreement of the parties ; and it has always been understood that these contracts are unaffected by municipal laws, regulating the rate of interest.

Analogous
to marine
insurance.

It will readily be seen, therefore, that maritime loans bear a strong analogy to contracts of marine insurance. The risks assumed by the insurer, and by the bottomry lender, are generally the same: the money advanced in the one case, corresponds with the sum agreed to be paid in the event of the loss in the other: and the analogy holds good with respect to the premium of insurance, and the maritime interest. It will be seen, also, as was tersely said by Mr. Justice THOMPSON(*a*), that “the essential difference between a bottomry bond and a simple loan is, that in the latter the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel.”

Difference
between it
and a com-
mon loan.

Form and
effect of the
contract.

There is no settled form of contract in use for the purpose of maritime hypothecation, and sometimes the instrument used is in the form of a bill of sale. But whatever be the form—the occasion of borrowing, the sum, the premium, the ship, the voyage, the risks to be borne by the lender, and the subjection of the ship itself as security for the payment, all usually are, and ought always to be expressed(*b*). The legitimate purpose and proper effect of a bot-

(*a*) Mr. Justice THOMPSON, in *The Mary*, 1 Paine's R., 671.

(*b*) Abbot on Shipping, Boston ed. of 1846, 205.

tomry or respondentia bond are to confer upon the lender, not a *jus in re*, but only a *jus ad rem*; not a right of property in the subject of the pledge, but a specific lien or privilege which he may enforce by the process of a court of admiralty, and by that means convert and appropriate the property to the satisfaction of his claim(*a*). The intention of the parties will therefore be presumed to have been in accordance with this principle, and the instrument, whatever may be its form, will receive a correspondent construction if its terms will admit of it: and for this purpose, stipulations not warranted by the maritime law, or inconsistent with the nature of the contract, may be disregarded; for it is a settled doctrine that a bottomry contract may be good in part and bad in part(*b*). And therefore where a bottomry bond, executed by the master, purported not only to bind the ship and freight, but to bind the owners personally also, which, according to the doctrine of the English admiralty, it could not do, the latter stipulation was rejected as vicious, and the bond was held valid as an instrument of hypothecation notwithstanding(*c*). So, if the bond has been taken for a larger amount than that which could properly be made the subject of such a loan, it is invalid only to the extent of the excess, and

May be
good in part
and bad in
part.

(*a*) *The Tobago*, 5 Robinson's R., 194, 197; *The Charles Carter*, 4 Cranch, 328 (2 Curtis's Decis. S. C., 125).

(*b*) *The Virgin*, 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208); *The Nelson*, 1 Haggard's Adm. R., 169, 176; *The Packet*, 3 Mason's R., 255; *The Atlas*, 2 Haggard's Adm. R., 48; *The Augusta*, 1 Dodson's R., 283; *The Hunter*, Ware's R., 249.

(*c*) *The Nelson*, 1 Haggard's Adm. R., 169.

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will be upheld as to the residue of the sum loaned(*a*). But there must necessarily be some limit to this sort of indulgence; and where the condition of the bond was that the sum loaned, together with the stipulated maritime interest, should be paid at the expiration of thirty days after the safe arrival of the ship; "or, in case of the loss of the ship, then within thirty days next after the account of such loss shall be received in Calcutta or London," the bond was held not to be a bottomry contract, but an absolute mortgage upon usurious interest, and void(*b*).

Rendered
void by
fraud.

This species of contract, like others, is rendered void by fraud, and where a bottomry bond was taken for more than the sum actually advanced for the purpose of enabling the owner of the vessel to recover the amount of the bond from the underwriters, the bond was adjudged void; and the lender was moreover held to have lost his lien upon the vessel for the sum which he had in fact loaned(*c*).

Their origin
and privi-
leged cha-
racter.

Maritime hypothecations had their origin in the necessities of commerce. They have been said to be "the creatures of necessity and distress(*d*)."
They are of a high and privileged nature, and are held in great sanctity by maritime courts. "They were intended," said Lord STOWELL, in a case before him, "for the purpose of procuring the necessary supplies

(*a*) *The Virgin*, 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208).

(*b*) *The Atlas*, 2 Haggard's R., 48.

(*c*) *Carrington v. Pratt*, 18 Howard's R., 63.

(*d*) *The Kennersley Castle*, 3 Haggard's R., 1, 7.

for ships which may happen to be in distress in foreign ports, where the master and the owners are without credit; and where, unless assistance could be secured by means of such instruments, the vessels and cargoes must perish. It is important, therefore, to the interests of commerce, that bonds of this kind should be upheld with a very strong hand(a).”

(a) *The Kennersley Castle*, 3 Haggard’s R., 1, 7.

There are many other cases, in which these securities are spoken of in similar terms: but, strong as they are, they are indefinite; and in a late case before Dr. LUSHINGTON, that learned and able judge took upon himself the useful task of defining them, and stated his apprehension of their practical import as follows: “Before, however, entering upon the discussion of circumstances peculiar to this case, it may not be unadvisable to consider what is meant by that *dictum* so often cited, and again urged in this cause, that bottomry bonds are of a high and sacred character. All legal engagements, all contracts sanctioned by the law, are sacred; that is, they are to be enforced by every court of law and equity. The expression, therefore, so often repeated, must, I think, have some other meaning more appropriate and peculiar to the subject itself, than merely to denote the character which a bottomry bond enjoys in common with other legal instruments. I may also observe, that this expression, so often quoted, cannot refer to priority of payment; for of that, where the bond is admitted to be valid, no doubt is ever entertained. The only meaning which, with satisfaction to my own mind, I can attach to this observation, is, that where once the transaction is proved to have been clearly and indisputably of a bottomry character, that is, where the distress is admitted or established, the want of personal credit beyond question, and the bond in all essentials apparently correct, then that under such circumstances the strong presumption of law is in favor of its validity, and it shall not be impugned save where there shall be clear and conclusive evidence of fraud; or where it shall be proved, beyond all doubt, that though purporting in form to be a bottomry transaction, the money was, in truth and in fact, advanced upon different considerations. And it appears to me that this view is confirmed by the very nature of bottomry transactions. There must be in all such transactions, the act of the master, the agent of the owner, evinced by the execution of the

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Commonly
made by
master.

Power of the
master to hy-
pothecate the
cargo.

These contracts are usually entered into by the master in virtue of his implied authority as such, and in discharge of his duty as the confidential agent of the owner. It is true he does not ordinarily represent the cargo, as he does the ship and freight; but in cases of accidental necessity, the law throws this character upon him(*a*); and it is now a settled doctrine, both in England and in this country, that in such cases of involuntary agency he has authority to hypothecate the cargo for necessary repairs and supplies(*b*).

bond; and the presumption is that he would perform his duty honorably, and not unnecessarily subject the property of his principal to heavy burthens. Again, the transaction taking place in distant countries, where it may be often difficult for the foreign merchant, who advances on bottomry, to furnish adequate proof as to all parts of the *res gesta*; this furnishes another reason for presumption in favor of a bond necessarily signed by the master. It is for the general advantage of the shipping interests of the world, that bottomry transactions should not be rendered too difficult; and in ordinary transactions of this kind there is less reason to complain, because the interest of the owner can never be affected, save, as I have already observed, by the act of his own selected agent; except, indeed, in the few cases of the original master no longer having the command." *The Vibilia*, 1 W. Robinson's R., 1.

(*a*) *The Gratitude*, 3 Robinson's R., 240.

(*b*) *Ibid.* *The Ship Packet*, 3 Mason's R., 255; 3 Kent's Comm., 173; 351. In the admirable judgment pronounced by Lord Stowell, in *The Gratitude*, where the power of the master to bind the cargo for supplies and repairs was for the first time expressly asserted, the authority is said to result from the same consideration that applies to the hypothecation of a ship, viz., the prospect of benefit to the proprietor; and that if the repairs produce no benefit, or prospect of benefit to the cargo, the master cannot bind it. He seems also to assume that this expedient could lawfully be employed only as a dernier resort, when the necessary funds cannot be obtained upon the security of the ship and freight alone.

But the master is not the owner of the property, so as to have a right to bind it at his own will and pleasure. Such a power would be liable to great abuse; for it might be used to the injury not only of the owner by unnecessarily subjecting his property to the charge of maritime interest, but to that of other creditors, by giving a priority of payment to one(*a*). Hypothecation, therefore, can be valid only when bottomed on necessity, and that necessity must be twofold: first, a necessity of obtaining repairs or supplies in order to prosecute the voyage; and secondly, a necessity of resorting to a bottomry bond, from inability to procure the required funds in any other way: for if the master has funds of the owner in his possession, or if he can procure them upon the credit either of the master or of the owners, or by advances on the freight, or by passage money, he is not at liberty to resort to a bottomry loan(*b*). "Necessity," said Lord STOWELL, in the case last cited, "is the vital principle of hypothecation bonds, and the absence of that necessity is their undoing; it is the destruction of the bond itself."

CHAP. 5.
Master's
power of
hypotheca-
tion limited
to cases of
necessity.

(*a*) *The Hersey*, 3 Haggard's Adm. R., 404, 407.

(*b*) *The Hersey*, 3 Haggard's Adm. R., 404, 407; *The Fortitude*, 3 Sumner's R., 228, 234; *The Nelson*, 1 Haggard's Adm. R., 169; *The Active*, 2 Washington's R., 226. The master is not, however, devoid of all discretionary power in the choice of means. The general principle is, that he is to supply the wants of the ship at as little sacrifice as practicable; and while this principle will, under some circumstances, warrant him in using money on board belonging to third persons, it also restrains him from doing so, when a greater sacrifice would be incurred thereby than by having resort to a bottomry loan. Thus, the use, on an outward voyage to China or the East Indies, of Spanish dollars, being the principal property on board, and shipped for the

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 Difficulty in
 the applica-
 tion of the
 rule.

This doctrine, as a general principle, is indisputable, and indeed has always been conceded; but the casualties and emergencies incident to maritime commerce are so diversified, as often to render the application of the principle a matter of no little difficulty. Conventional usage sanctions the use of the term "necessary" to express very different degrees of urgency. When employed in stating the principle in question, moreover, as frequently happens in other cases, it is often coupled with other qualifying words, and sometimes the rule is enunciated without employing this term at all. Thus it has been said that the giving of a bottomry bond is justifiable only in cases of "absolute necessity," of "urgent necessity," of "great extremity," and of "extreme pressure," etc. But notwithstanding the occasional use by judges, speaking in reference to the circumstances of particular cases, of these intensive forms of language, no one has ever thought of denying that the existence of the twofold *necessity* above mentioned was a sufficient warrant for a bottomry loan. For the purpose, therefore, of diminishing the practical difficulty attending the application of the rule, Mr. Justice STORY, in the case of *The Fortitude*(a), undertook, with even more than his wonted industry and self-devotion, the task of ascertaining, by an exhausting review of the authorities bearing upon the subject, the just import of the rule itself. He first addressed himself "to the consideration of

Just import
 of the rule.

purchase of a return cargo, might defeat the object of the voyage. *The Packet*, 3 Mason's R., 225.

(a) 3 Sumner's R., 228.

what, in the sense of the law, are *necessary* repairs, for which, when ordered by the master, the owner would be liable in case no bottomry bond has been given(a).” His conclusion was, that the authority of the master thus to bind the owner is not confined to such supplies and repairs as are *absolutely* or *indispensably* necessary; but that it extends to such supplies and repairs as are *reasonably fit and proper* for the ship and voyage. This conclusion, as we have already seen in a former chapter, is supported by the most ample authority. Such then being the rule with respect to ordinary debts incurred by the master for repairs and supplies, it remained to be determined whether the same rule was applicable also to loans for the like objects upon bottomry. Mr. Justice STORRY was clearly of opinion that it was. He admitted that there was a “manifest difference between that necessity which will justify repairs, and that superadded necessity which will justify the giving of a bottomry bond;” but he held this difference to consist not in the degree of the necessity under which the master might be placed, of obtaining funds by some means, but in his ability or inability to meet the exigencies of the case by other means than by resorting to a bottomry loan.

It must certainly be conceded that the doctrine of this case conflicts in some degree with the

(a) For money advanced for such repairs or supplies in a foreign port, the lender may maintain a suit *in personam* against the owner; and for materials or labor furnished, the *material-man* has a triple remedy: by suit, *in personam*, against the master; by a like suit against the owner; and by a suit *in rem*, in the admiralty, against the ship, to enforce the lien given him by the maritime law. *The Fortitude*, ubi supra.

VOL. 1. impressions which the language often employed as well by judges as by elementary writers, relative to these contracts, is adapted to convey. Indeed, Mr. Justice STORY admitted this to be so; but he nevertheless deemed his conclusions perfectly consistent with previous adjudications. The stronger terms usually applied to bottomry contracts, compared with those applied to ordinary debts contracted by the master for repairs and supplies, may probably be ascribed in a considerable degree to a recollection of the "superadded" necessity required in the former case; and in laying down the rule that the same degree of necessity which would justify the master in the one case as in the other, provided that in the case of a bottomry bond there was no other resource, the learned judge doubtless contemplated the exercise, by the courts, of that extraordinary degree of caution and scrutiny, in deciding upon the validity of bottomry contracts, which a resort by the master to so disadvantageous a means of obtaining funds is calculated to inspire. It has often been remarked, and the test seems to be unobjectionable, that the authority of the master to bind the owner, extends only to such supplies and repairs as a discreet owner might naturally be expected to order if present; but cases may be conceived where his decision would be likely to turn upon the question of his ability to obtain what might be reasonably fit and proper for the ship and voyage, without having recourse to a loan at an extraordinary rate of interest.

No conflict
between the
doctrines
held by Mr.

The case of *The Fortitude* was decided in 1838. Since that time additional volumes of reports of

decisions in the High Court of Admiralty of England have appeared, containing several cases involving the validity of bottomry bonds, in some of which the bonds were held to be invalid. In one of them (a) it is said by the court, that "before a master can exercise the extraordinary power of hypothecation, he must show that there is an absolute necessity for it, to secure the return of the ship;" and in another case (b), Sir JOHN NICHOLL speaks of the authority of the master as being limited to cases "of absolute necessity—strict necessity arising on the voyage." But I am unable to discover anything in the circumstances of any of these later cases, which were decided adversely to the bond-holder, that, in reality, required the application of a more rigid rule than that laid down in *The Fortitude* by Mr. Justice STORY. In *The Reliance*, the bond was adjudged void, not alone on the ground that there was no sufficient necessity for it, but because, if there was a necessity, it was occasioned by the lenders themselves; the ship having been freighted and insured from London to Calcutta and back, and the lenders, who resided in Calcutta, and had been employed by the master as agent, having, with a view to their own profit, induced the master to remain and undertake a series of voyages in that part of the world, in defiance of letters from his owners in England, directing him to return. In another case, the bond, given at the Mauritius only three days before the ship sailed, was pronounced

CHAP. 5.

Justice
STORY, and
that of re-
cent English
cases.(a) *The Reliance*, 3 Haggard's Adm. R., 66, 74.(b) *The Dunnegan Castle*, ib., 331.

VOL. 1, invalid, on the ground that it was given without necessity; the sum which it was pretended the master stood in need of being inconsiderable, he being part owner of the ship and proprietor of a valuable cargo, and there being therefore no sufficient reason for supposing that he could not have obtained credit from a house with which he had had extensive dealings; the loan being, moreover, for a larger sum than he had advertised for; and the lender having altogether omitted the usual precaution of inquiring into the circumstances of the case, for the purpose of ascertaining whether they were such as to justify the loan. The case also presented unfavorable features in other respects(*a*). In another case, the bond, executed at Hobart Town, had been given in part, at least, for the benefit of the owner's agent, on the day before the vessel sailed, in consequence of his threat to arrest the master and prevent the ship from sailing, for advances previously made on the credit of the master and owners; no bottomry bond having been contemplated, and the whole

(*a*) *The Orelia*, 3 Haggard's R., 75.

The practice of advertising for bottomry loans seems to be usual, and the omission of this precaution by the master, appears to be regarded in the English admiralty as ground for distrust (*The Hersey*, 3 Haggard's Adm. R., 404, 411). The advertisement referred to in the text, and which was published in the Mauritius Gazette, was as follows :

" *Saturday, 28th May, 1831.*

" Wanted, to defray the necessary disbursements in this port, a sum of about 3000 dollars, to be secured by bottomry on the ship and freight of the *Orelia*, burthen, 382 tons, W. Hudson commander, bound for London. Offers will be received by Thomson, Pasmore & Thomson, on Thursday next, 2d June, at 12 o'clock."

transaction being in fact "a mere contrivance to attain an advantageous mode of remittance to London without risk, and with a premium of twenty per cent(a)."

Two other cases, reported in the same volume(b), in which the bonds were not sustained, were decided upon special grounds, and shed little light upon the question of necessity. Nor do the other cases of bottomry reported by Mr. HAGGARD, or the still later ones reported by his successor, appear to militate against the doctrine laid down by Mr. Justice STORY. Indeed it is inferrible from the terms in which bottomry loans, in several of these instances, are spoken of by the court, that there is a tendency in the English admiralty to treat them even with greater favor than heretofore(c).

By the general maritime law, the master is precluded from entering into a bottomry contract in the place where the owners, or a majority of them, reside or are present; and for this purpose, the whole of England is considered as the residence of an Englishman(d). But although in the case last cited, it was conceded by Lord STOWELL that a bottomry bond could in general be lawfully given

Master not in general empowered to hypothecate in a home port.

(a) *The Hersey*, 8 Haggard's R., 404.

(b) *The Dunnegan Castle*, 3 Haggard's R., 331; *The Prince of Saxe Cobourg*, ib., 387.

(c) *The Kennersley Castle*, 3 Haggard's R., 1, 8; *The Calypso*, ib., 162, 165; *The St. Catharine*, ib., 250, 253; *The Vibia*, 1 W. Robinson's R., 1; *The Trident*, ib., 29; *The Heart of Oak*, ib., 204.

(d) Abbot on Shipping, Boston ed. of 1846, 198; *The Barbara*, 4 Robinson's R., 1; *The Radamanthe*, 1 Dodson's R., 201; 3 Kent's Comm., 171, 172; *The Randolph*, Gilpin's R., 457.

VOL. 1. by the master only in a foreign port, he refused to apply the doctrine to the case of a Spanish ship, hypothecated in a Spanish port remote from the place of the owner's residence; the ship being at the time in great distress while on her voyage to England, and all correspondence between the different ports of Spain being exposed to almost certain interruption. The law, he said, did not look to the mere locality of the transaction, but to the extreme difficulty of communicating with the owner. And in a late case, Dr. LUSHINGTON, the present distinguished judge of the High Court of Admiralty, went so far as to observe, that in his apprehension, the validity of bottomry bonds does not depend upon the mere locality of the residence of the owner, but upon the absolute necessity of the case; where the master is in such a condition, that it is impossible for him to meet the necessary disbursements, and he has no means of procuring money but upon the credit of the ship: and he accordingly upheld a bond given in Portsmouth in England, by the master of a ship, the owner of which resided in Scotland(a).

The question was elaborately examined and discussed by Chief Justice MARSHALL, in the case of *The Richmond*(b); and he held, that admitting the soundness of the English rule, which, however, is not in accordance with the general maritime law of Europe, still the several states of the Union ought,

American vessels may be hypothecated in any state except that of the owner's residence.

(a) *The Trident*, 1 W. Robinson's R., 29.

(b) 1 Brockenborough's R., 396.

for this purpose, to be regarded as foreign with respect to each other. CHAP. 5.

Although in general a person to whom the ship is consigned by the owner ought to make the necessary advances, without demanding maritime interest, and is not at liberty to act as agent of the owner, and at the same time to take upon himself the character and privilege of a stranger, yet Lord STOWELL was of opinion that cases might possibly arise in which an agent could lawfully take the security of a bottomry bond. "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 the credit of his employers beyond certain reasonable limits, he may then surely be at liberty to hold hard, and to say, 'I give up the character of agent,' and, as any other merchant might, to lend his money on bond to secure its payment, with maritime interest. If, in such a case, he gives fair notice that he will not make any further advances as agent, and affords the master an opportunity to get the money elsewhere, and the master is unable to do so, but is obliged to come back to him for a supply, then he is fairly at liberty, like any other merchant, to advance the money on a security that is more satisfactory to himself." His lordship added, moreover, that he would not say that "the case might not go further. If the agent had given credit for all the disbursements of the ship, and found, contrary to his expectations, that they amounted to more than he calculated, and went beyond any advances which he might reasonably be called upon to make on the

Right of an agent of owner to take a bottomry bond.

VOL. 1. mere personal credit of his employers, and if there was no time to look to other quarters for assistance, he might possibly be justified in resorting to this species of security, giving the earliest notice of the necessity under which he acted. Under such circumstances he might not, perhaps, be out of the reach of the protection which a bottomry bond would afford him(a).” Such a power, however, it is obvious, is peculiarly liable to perversion and abuse, and ought to be regarded with distrust, and very cautiously admitted(b).

A consignee of the cargo may make a bottomry loan;

It has been held, also, that a bottomry loan, otherwise unexceptionable, cannot be impeached on the ground that it was made by a consignee of the cargo; and that it is not the less valid because there was also a consignee of the ship at the same place, if he refuses to make the required advances on the credit of the ship-owner(c). But a bond executed by the master to one part owner, for money advanced by him for repairs, purporting to hypothecate the share belonging to another part owner, has been decided to be invalid(d).

But not a part owner.

Upon whom the *onus probandi* relative to necessity lies.

When the validity of the bond is contested on the ground of necessity, the burthen of proof, so far as the fitness and propriety of the repairs or other supplies are concerned, rests upon the lender(e);

(a) *The Hero*, 2 Dodson's R., 139, 144.

(b) *Rucher v. Conyngham*, 2 Peters's Adm. Dec., 295, 307.

(c) *The Alexander*, 1 Dodson's R., 278; *The Nelson*, 1 Haggard's Adm. R., 169; *The Rubicon*, 3 Hagg. Adm. R., 9; *The St. Catharine*, id., 250.

(d) *The Randolph*, Gilpin's R., 457.

(e) *The Aurora*, 1 Wheaton's R., 96 (3 Curtis's Decis. S. C., 477).

but when this necessity is once made out, if it is still objected that the master had other funds, or might have obtained them by other less disadvantageous means, the *onus probandi* lies on the owner(a).

But it is to be observed that, in deciding upon the existence of the first branch of the twofold necessity on which the validity of the bond depends, the inquiry is not limited to the mere fact of actual necessity; for while the court is bound to guard the rights and interests of the owner, it is no less its duty to protect those of the lender. If he shows, therefore, that there was no want of reasonable diligence on his part, for the purpose of ascertaining whether the repairs and supplies were necessary or not, and that so far as he was able, by due inquiry, to ascertain the facts, there was an *apparent* necessity for such repairs or supplies, the bond will be upheld, even though, upon a more thorough investigation of the facts at a subsequent period, it should be doubtful whether the repairs or supplies were really necessary(b).

Due diligence on the part of the lender, and existence of *apparent* necessity sufficient.

It is necessary to the validity of a bottomry bond, that the lender should have looked to it as his security for advancing his money; but it is not necessary that the money should have been advanced

The loan must have been made in contemplation of bottomry security.

(a) *The Virgin*, 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208); *The Fortitude*, 3 Sumner's R., 228.

(b) *The Fortitude*, 3 Sumner's R., 228; *The Virgin*, 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208). See, also, to precisely the same effect, the note, 3 Sumner, 228, of a case before the Judicial Committee of the Privy Council in England, reported in the English Monthly Magazine, February, 1839, and the recent cases of *The Vibilia*, 1 W. Robinson's R., 1, and *The Trident*, id., 29.

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Valid if
made to re-
deem ship
from actual
arrest.

at the time of the execution of the bond. If it was advanced on the faith and understanding that bottomry security was to be given, that is sufficient to uphold the bond(*a*). But though a preëxistent debt cannot be directly converted into a bottomry loan, yet if the ship is under actual arrest on account of debts contracted for repairs or supplies, and the master has no other means of obtaining her release, this is a sufficient necessity to justify such a loan(*b*); although a mere threat by the creditor to arrest the ship would not be sufficient; since it might be an idle threat which he would never execute, and, until executed, the peril would not act upon the ship(*c*).

Or to pay a
prior valid
bond.

A bottomry bond may also be lawfully given to pay off a former one; but in that case, the subsequent lenders are to be regarded virtually in the light of assignees of the preceding bondholders, claiming upon the same ground, and must therefore stand or fall with the first hypothecation(*d*).

Bond not
vitiated by
the accept-
ance of a
bill of ex-
change as
collateral
security.

It is not unusual for the master, at the time of executing a bottomry bond, also to give to the lender bills of exchange on the owner for the sum borrowed; a stipulation being inserted in the bond, that if the bills are paid, the bond shall be void: and this does not affect the validity of the bond, if, in fact, the lender relied on it mainly for security,

(*a*) *The Virgin*, 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208); *The Augusta*, 1 Dodson's R., 283; *The John and Alice*, 1 Washington's R., 293; *La Ysabel*, 1 Dodson's R., 273; *The Hunter*, Ware's R., 249; *The Hero*, 2 Dodson, 139.

(*b*) *The Aurora*, 1 Wheat. R., 96 (3 Curtis's Decis. S. C., 477).

(*c*) Ibid.

(*d*) Ibid.

and would not have advanced his money without it(a). CHAP. 5.

The lender may lawfully insure the sum loaned in a distinct contract on his own account, but he has no right to have the sum paid for insurance included in the bond. The master's power of hypothecation is limited to advances necessary for repairs and supplies, and maritime interest thereon allowed as a compensation for maritime risk; and he has no authority to take off that risk by other collateral engagements(b). Cannot include insurance on the money advanced.

It has already been incidentally stated that the maritime law of England does not enable the master, by a bottomry bond, to bind the owner personally, though it is otherwise by the maritime law of other countries(c). In the case of *The Tartar*(d), however, Lord Stowell said, "I apprehend that the owners are always bound to a certain extent—to the extent of their property in the ship." But this remark was understood by the Supreme Court of the United States to refer to cases in which the subject of the hypothecation had been abstracted or converted, and its proceeds appropriated by the owner; in which cases he would be held personally responsible for its value, by a proceeding against him, however, rather in the character of possessor Owners not personally bound,

Except to the extent of the fund pledged, which has come into their hands.

(a) *The Zephyr*, 3 Mason's R., 341; *The Hunter*, Ware's R., 249; *The Jane*, 1 Dodson's R., 461; *The Augusta*, 1 Dodson's R., 283; *The Tartar*, 1 Haggard's Adm. R., 1; *The Nelson*, ib., 169, 179.

(b) *The Boddington's*, 2 Haggard's Adm. R., 422; *The Radamanthe*, 1 Dodson's R., 201.

(c) *The Nelson*, 1 Haggard's Adm. R., 169; 3 Kent's Comm., 355.

(d) 1 Haggard's Adm. R., 1, 13.

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than as owner(a). And in the same case it is distinctly declared that, by the maritime law of this country, as well as by that of England, the personal liability of the owner extends no farther; and even though the terms of the bond should affect to bind him personally, that part of the bond would be inoperative.

Maritime
hypotheca-
tions by the
owner.

With the exception of the definition of maritime loans, and the summary statement of certain general principles pertaining to them, given at the commencement of the chapter, what has thus far been said upon the subject relates, as the reader will have observed, to bottomry contracts entered into by the *master*. But where the *owner* himself is the borrower, as he may be, and sometimes is, the transaction assumes, as will readily be seen, a more simple character; for the owner or part owner, to the extent of his interest, may not only pledge his property by a bottomry or respondentia contract, under the circumstances which warrant the master in entering into the like contract, but in *any case*, for the purpose of raising money for the outfit, repair, or other exigencies of his vessel, or for the purchase of a cargo(b). With respect to such contracts, therefore, no question can arise as to the power of the borrower: he acts, not as the master must, if at all, in virtue of an implied authority springing from necessity, but in virtue of his title as proprietor of the subject hypothecated, having dominion over it.

(a) *The Virgin*, 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208).

(b) *Abbot on Shipping*, Boston ed. of 1846, 193; *The Mary*, Paine's R., 671.

But the terms in which such contracts are spoken of by the elementary writers upon maritime law, seem to imply that in order to constitute a valid maritime hypothecation even by the owner, in the sense of the maritime law, and which may be enforced by admiralty process, it is necessary that the money should be lent for the purpose of being employed in the business of maritime commerce.

CHAP. 5.
For what purposes lawful.

It has already been remarked that these contracts have their origin in the exigencies of early commerce, and have been highly favored and vigorously upheld to the present day as auxiliary to its successful prosecution. The lender is not subject to laws against usury, and he is preferred to other creditors. There seems to be a cogent propriety, therefore, in confining these privileged contracts within the narrowest limits compatible with their essential character, and in restricting them to uses directly conducive, at least, to the general interests of commerce, if not absolutely indispensable to its prosperity.

But in the case of *The Brig Draco*(a), Mr. Justice STORRY took a different view of the subject. The bond in that case, purporting to be a bottomry bond, was given by the owner of the vessel in her home port, and after she had sailed, for a loan at maritime interest, of \$10,000, advanced, "not to fit out, or repair or supply the brig, or to purchase a cargo for her, or for any purpose connected with the voyage, or navigation of the brig, but for the general purposes of" the borrowers. The case was

The Draco,
2 Sumner's
R., 157.

Hypothecation by the owner for the security of money borrowed, not for the purposes of the ship or voyage.

(a) 2 Sumner's R., 157.

VOL. 1. very ably argued, and it was strenuously insisted by the counsel for the claimants, who were vendees without notice, that the instrument in question was not a bottomry bond in the sense of the maritime law; but that the libellants were no other than ordinary lenders of money, who had taken a mortgage of the vessel to secure their loan; and that whether they had any lien as against the claimants, must depend upon the principles governing mortgages, and not upon those relating to maritime hypothecations. It was denied, therefore, that this was a maritime contract; and as it is only of such contracts that a court of admiralty can take cognizance, it was insisted that the admiralty jurisdiction did not attach to the case before the court.

Mr. Justice STORY admitted that the objection was countenanced by "the language used in books of authority;" but he did not consider it certain that "the authors had in view any such qualification" as that which the counsel had labored to maintain: and upon an elaborate review of the authorities, his conclusion was that "there is not the slightest ground to uphold the doctrine, that, in order to constitute a bottomry bond, as such, in the sense of the maritime law, it is necessary that the money should be advanced for the necessities of the ship, or for the cargo, or for the voyage." And he added, "where it is given by the master, *virtute officii*, it must, in order to have validity, be for the ship's necessities; for the implied authority of the master extends no farther. But where it is given by the owner, as *dominus navis*, he may employ the money

as he pleases. It is sufficient if the money be lent on the bottom of the ship, at the risk of the lender, for the voyage. The true definition of a bottomry bond, in the sense of the general maritime law, and independent of the peculiar regulations of the positive codes of different commercial nations, is, that it is a contract for a loan of money on the bottom of the ship, at an extraordinary interest, upon maritime risks, to be borne by the lender for the voyage, or for a definite period." He therefore upheld the bond as a valid maritime hypothecation, and maintained the admiralty jurisdiction over it.

So far as the question depended upon the circumstance that the money was borrowed by the *owner* instead of the master, the decision is in accordance with the later decisions even of the English High Court of Admiralty(*a*), as well as with those of our own courts; and so far as the objection was founded upon the fact that the contract was made in the home port of the vessel, there was enough in the antecedent decisions of the Supreme Court of the United States to justify its repudiation.

But the denial of any distinction between a loan having no reference to maritime navigation or commerce, and advances made for the repair or outfit of the vessel, or the purchase of a cargo, seems to have been questionable, on the ground both of antecedent authority and of principle; and the decision is in direct conflict with what I infer was conceded by the counsel, and with what was

(*a*) *The Duke of Bedford*, 2 Haggard s Adm. R., 294.

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certainly assumed by the court as a settled and unquestionable principle, in the case of *The Duke of Bedford* just above cited. This case was decided a few years prior to the case of *The Draco*; but the report of it, though published in England, seems to have been unknown to the counsel, as it probably was to the court, in the case of *The Draco*.

In *The Duke of Bedford*, the bond was executed in a foreign port, by the owner, who went out in the vessel; and the question whether the owner alone, the master being present, was competent to hypothecate the vessel even for necessary supplies, was treated as one still open to controversy, and, as such, it was elaborately discussed by the court. The authority of the owner was maintained; but it being further objected that a part of the money for which the bond was given, was advanced to pay for sea stores, and other articles which it was insisted were not fit objects of bottomry, not being necessary for the service of the ship; "pour les dépens de la nef, s'il a besoin de vitualler" * * * "in causâ necessitatis, pro servanda nave et bonis," according to the general definition given of bottomry bonds by writers on maritime law, Sir CHRISTOPHER ROBINSON felt himself called upon to vindicate his decision overruling the objection, by likening the passengers to whose subsistence the stores were to be appropriated, to *cargo*, and the large payment made by them of passage money, to *freight*: and with regard to such parts of the supplies as might have been "furnished for daily consumption on land, and were never subjected to sea risk," he held them to be

distinguishable from the other supplies, and not proper objects of a bottomry bond.

It is true that the admiralty jurisdiction of the district courts is held to extend to all maritime contracts; while that of the English admiralty, in matters of contract, was virtually limited to seamen's wages and express hypothecations. It would have been sufficient, therefore, if the bond in the case of *The Draco* had been a maritime contract, although it might not have been valid as a bottomry bond. But if it was not a bottomry bond, it was clearly no maritime contract at all, because it purported to be nothing else; and the decision is accordingly placed upon no such ground.

It may not be easy to give a perfectly exact and unexceptionable definition of maritime contracts, in the sense requisite to bring them within the American admiralty jurisdiction. But whatever may be their distinctive character, it is obvious that there can be no valid bottomry contract of which this distinctive character does not form an element; because it is that which brings this species of contract within the admiralty jurisdiction.

Mr. Justice STORY, in his celebrated judgment in the case of *De Lovio v. Boit*, has defined maritime contracts to be those "which relate to the navigation, business or commerce of the sea(*a*);" and I should have supposed that this definition was intended to refer to the objects to be accomplished by the contract. From all that I have been able to learn

(*a*) 2 Gallison's R., 398, 475.

VOL. 1. upon the subject from other authorities, I should have supposed, also, as was assumed in *The Duke of Bedford*, that to constitute a bottomry or respondentia contract, cognizable in the admiralty, it was essential that the money lent should be advanced for the repair or outfit of the vessel, or for the purchase of the cargo, upon which it was lent, and thus be subjected to maritime risk; and my conclusion would have been, that as the bond in the case of *The Draco* was devoid of both of these constituent elements, it could not properly be regarded as a bottomry bond. Largely as I participate in the high respect universally entertained for the judicial opinions of the learned, able and eminently distinguished judge by whom the decision in the case of *The Draco* was pronounced, I cannot, therefore, but entertain some doubt of its soundness. It is true the same doctrine is substantially asserted with respect to respondentia loans, in the opinion of the Supreme Court delivered by Mr. Justice STORY, in the case of *Conrad v. The Atlantic Insurance Company(a)*: but I cannot see that the case called for its enunciation. In that case, the cargo had been expressly assigned to the lender by a separate instrument executed simultaneously with the bond. It was not an admiralty suit, but an action of trespass at common law, brought under a special agreement between the Secretary of the Treasury in behalf of the United States, and the plaintiffs; "in which the sole question to be tried and decided," was to be,

(a) 1 Peters's R., 386, 436, 437 (7 Curtis's Decis. S. C., 637).

“whether the United States, or the said Atlantic Insurance Company, are entitled to said goods and the proceeds thereof.” Mr. WEBSTER, one of the plaintiff’s counsel, apparently feeling the difficulty of upholding the bond as a valid maritime hypothecation, insisted that it was wholly immaterial whether it was a respondentia bond or not; because the claims of the plaintiffs were secure by the common law, in virtue of the assignment. Indeed, he expressly admitted that the bond created no *lien*; but the assignment, he contended, did more: it transferred the right of property in the goods. It was upon this ground that he relied; and I cannot but think it was the safer, if not indeed the only solid ground for the judgment of the court. In this case, as in that of *The Draco*, the bond was executed after the vessel had sailed; and it is true, also, that there is respectable authority, though opposed to the high authority of Emerigon, in support of the validity of bonds so taken; but it is only on the ground that the money may be presumed to have been usefully appropriated to *things put at risk*, or *in paying what was due on that account*, that their advocates have attempted their vindication(a).

Hypothecation after the voyage has been commenced.

It remains briefly to notice some additional principles affecting maritime loans, whether negotiated by the master or by the owner. One of these principles is, that the lender is not bound to see to the due application of the money loaned. If, therefore, the money was squandered, or applied to

Lender not responsible for misapplication of the money loaned.

(a) 3 Kent’s Comm., 361.

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purposes for which loans of this description cannot lawfully be made, the hypothecation will nevertheless remain valid, provided the lender has acted throughout in good faith, and had reasonable grounds for believing that the money was fairly borrowed(*a*).

Priority
over other
liens.

The right to priority of payment secured to the bottomry lender over other creditors, has already been incidentally mentioned. His lien supersedes all other liens, except the lien of seamen for wages(*b*). It is accordingly preferred to a prior mortgage(*c*); to the title of a vendee without notice(*d*); and is to be satisfied before any prior insurance(*e*). And, the ship-owner being *personally* liable for wages, if the bottomry lender has been obliged to discharge the seamen's lien on the vessel, he has a resulting right over for reimbursement against the owner to whom the ship has been delivered on stipulation or out of its proceeds(*f*). But the bond-holder is bound to be vigilant in the enforcement of his high privileges; for although statutes of limitation do not extend to suits in the admiralty, the court ought not, where the rights of third persons are concerned, to lend its functions to enforce claims which have been suffered to sleep for an unreasonable length of

Priority lost
by laches.

(*a*) *The Jane*, 1 Dodson's R., 461; *The Virgin*, 8 Peters's R., 538 (11 Curtis's Decis. S. C., 208).

(*b*) *The Charles Carter*, 4 Cranch's R., 328 (2 Curtis's Decis. S. C., 125); *The Hersey*, 3 Haggard's Adm. R., 404, 407.

(*c*) *The Duke of Bedford*, 2 Haggard's Adm. R., 102; *The Mary*, Paine's R., 671.

(*d*) *The Draco*, 2 Sumner's R., 157.

(*e*) 3 Kent's Comm., 358.

(*f*) *The Virgin*, *ubi supra*; 1 Hagg. Adm. R., 62.

time. "There is a principle of limitation in every system of jurisprudence, to be derived out of the nature of things, which entitles the court to avail itself of the universal maxim, '*Vigilantibus, non dormientibus, subserviunt leges.*' And in questions of bottomry, more especially, the court is bound to expect particular vigilance; because, although bonds of this kind are to be supported with a high hand, when clear and simple, they are, in many respects, things to be narrowly watched. Bottomry is a transaction which affords great opportunities of collusion; and therefore, on the very account of the importance given to these bonds, they are to be pursued with very active diligence, in order that the court may have the opportunity of considering them in their recent origin, with a view to all the circumstances on which their honest validity depends(a)." In accordance with these just principles, where the holder of a bottomry bond had voluntarily deferred his claims until the vessel had made several voyages, and had been taken in execution by a common law judgment creditor, the bottomry creditor was held to have lost his priority(b).

With respect to this species of security, the general legal maxim, *prior in tempore potior in jure*, is reversed; the last bond in the order of time being entitled to be first paid. This principle rests upon the same ground of necessity as that which entitles

Of several bonds, the last has priority over the former.

(a) Lord STOWELL, in *The Rebecca*, 5 Robinson's R., 94.

(b) *Blaine v. The Charles Carter*, 4 Cranch's R., 328 (2 Curtis's Decis. S. C., 128).

VOL. 1. the bottomry lender to preference over ordinary creditors; since without the subsidiary aid of the last bond, the property would be lost, both to the owners and to the former bond-holders(*a*). And this principle has been held to be applicable where two bonds were executed at the same port, and only five days intervened between the date of the former and that of the latter(*b*). But in a case where three several respondentia loans were made on the same invitation, for the same repairs, and on the same terms, by persons acting in concert, it was adjudged that they were entitled to payment *pro rata* without preference, although, from some unexplained and apparently accidental cause, they bore different dates(*c*).

The right to maritime interest commences with the voyage.

The right to exact maritime interest depends upon maritime risk; and therefore if the proposed voyage be abandoned before any such risk has been incurred, the contract is turned into a simple and absolute loan at ordinary legal interest(*d*). But the bond attaches by the sailing of the vessel; and though the voyage be broken up, whether by voluntary abandonment or otherwise, the lender is entitled to his principal and maritime interest(*e*). It has been decided, also, that in such cases the bond becomes presently due, without regard to the time of pay-

Bond becomes due by the breaking up of the voyage, or sale of the ship.

(*a*) *The Rhadamanthe*, 1 Dodson's R., 201; *The Eliza*, 3 Haggard's Adm. R., 87.

(*b*) *The Betsey*, 1 Dodson's R., 289.

(*c*) *The Exeter*, 1 Robinson's R., 173.

(*d*) 3 Kent's Comm., 356.

(*e*) *Id.*, 357; *The Draco*, 2 Sumner's R., 157, 193.

ment fixed by its terms(*a*); and the like consequence has been held to follow, by analogy to the law of insurance, from a transfer of the property(*b*).

A court of admiralty, within the sphere of its jurisdiction, is bound to act upon the principles of a court of equity, and to administer its remedies accordingly(*c*). It is restrained, moreover, by a principle common to all courts, from lending its aid to enforce contracts essentially vicious, or tainted with fraud by extortion; and although bottomry contracts have always been considered free from the restraints imposed by laws against usury, and have been held to depend chiefly on the agreement of the parties, yet the court will reduce an extortious or exorbitant premium(*d*). But this power ought to be sparingly and cautiously exercised. The money is generally advanced for persons unknown, and resident in a foreign country: it is advanced upon an adventure which may totally fail of success, and the money may be irrecoverably lost. The presumption, therefore, is in favor of the original contract; and the court should be inclined to take it as it stands, and should not disturb it upon light ground(*e*).

Premium
may be
reduced.

As the risk is terminated, the maritime interest also ceases, upon the safe arrival of the ship; but the better opinion is that the lender is thenceforth

Interest.

(*a*) *The Draco*, 2 Sumner's R., 157, 193.

(*b*) *Id.*, 194.

(*c*) *Franklin Insurance Company v. Lord*, 4 Mason's R., 248, 250.

(*d*) *The Cognac*, 2 Haggard's Adm., 377; *The Packet*, 3 Mason's R., 255; *The Hunter*, Ware's R., 249.

(*e*) *The Zodiac*, 1 Haggard's Adm. R., 320, 326.

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entitled to ordinary interest, not only on the principal sum advanced, but upon the maritime interest also, both being due, and forming one aggregate debt(*a*).

In case of deficiency, assets to be marshaled.

Where there are several bonds, and one is secured on the ship and freight only, and one upon the ship, freight and cargo, if the freight and the proceeds of the ship are insufficient to answer the several bonds, the court is bound to marshal the assets, and require the deficiency to be made up out of the cargo(*b*).

Owner personally liable, in case of loss by fraud or misconduct.

Although the right of the bottomry lender to repayment is made to depend upon the safety or loss of the subject of the hypothecation, his engagement to this effect is limited to what is denominated maritime risk, or, as it is denominated by the continental writers, "fortuitous events;" and does not extend, therefore, to losses occasioned by the default, misconduct, or fraud of the borrower or his agents. The lender is not to bear losses proceeding from unjustifiable deviation, or from want of seaworthiness of the ship, the inherent infirmity or unnecessary transshipment of the cargo(*c*).

In such cases, the wrong-doer is personally liable; and in accordance with this principle, it is, by the Rules of Practice in causes of admiralty and maritime jurisdiction lately prescribed by the Supreme Court, declared, that "in all suits in bottomry bonds, properly so called, the suit shall be *in rem* only against the property hypothecated, or the proceeds of the

(*a*) *The Packet*, 3 Mason's R., 255.

(*b*) *The Trident*, 1 W. Robinson's R., 29, 35.

(*c*) 3 Kent's Comm., 360.

property in whosoever hands the same may be found, unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property; or unless the owner has, by his own misconduct or wrong, lost or subtracted the property: in which latter cases, the suit may be *in personam* against the wrongdoer."

It is only by the entire loss of the property pledged, that the lender is subjected to the total loss of his money. His lien attaches to whatever is saved in case of disaster, and to its proceeds; subject, however, to the equitable claims of others for an average contribution, in cases of jettison, ransom, etc(*a*).

Lender entitled to payment out of effects saved.

When money is borrowed at respondentia, upon goods laden or to be laden on board a ship, and the goods are lost, if it appear that they were of less value than the sum advanced, the lender is entitled to recover the difference in amount, with ordinary interest, in a suit *in personam* against the borrower; but not the whole amount loaned, unless there is an express stipulation in the bond to this particular effect(*b*).

(*a*) 3 Kent's Commentaries, 360.

(*b*) *Franklin Insurance Company v. Lord*, 4 Mason's R., 248; 3 Kent's Comm., 357.

CHAPTER VI.

PILOTAGE.

Who are pilots.

“THE name of pilot, or steersman,” says Lord TENTERDEN, “is applied either to a particular officer, serving on board the ship during the course of the voyage, and having charge of the helm and of the ship’s route; or to a person taken on board at a particular place for the purpose of conducting a ship through a river, road or channel, or from or into port(*a*).” In England, and in this country, there is no provision by law for the designation or government of persons of the first description: but the appointment, duties, responsibilities and privileges of pilots of the second description are regulated, in England, by ancient charters of incorporation, empowering the corporators to enact by-laws; and in this country, by legislative acts.

The power conferred by the Constitution on Congress to regulate commerce with foreign nations and among the several states, comprises ample authority to prescribe regulations on the subject of pilotage. But laws for this purpose, having, when the Constitution was framed, been already enacted by the several maritime states of the Union, Congress

(*a*) Abbot on Shipping (Boston ed. of 1846), 265.

deemed it inexpedient to exercise this power, except by the simple enactment, "That all pilots in the bays, inlets, rivers, harbors and ports of the United States, shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be, or with such laws as states may hereafter enact for the purpose, until further legislative provision shall be made by Congress(a)." This act remained unaltered until 1837, when, for the purpose of guarding against a spirit of monopoly which began to manifest itself, tending to diminish the enterprise, vigilance and fidelity of pilots, it was enacted "That it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two states, to employ any pilot licensed or authorized by the laws of either of the states bounded on said waters, to pilot said vessel to and from said port; any law, usage or custom to the contrary notwithstanding(b)."

CHAP. 6.
Laws of the
states con-
cerning
pilots adopt-
ed by Con-
gress.

These two statutes, with the exception of an act exempting pilots from militia service(c), are the only laws touching the subject of pilotage, which have hitherto been passed by the national Legislature.

The legislation upon the subject in the State of New-York, commencing in 1784, and terminating in the act of April 12, 1837, by which all former acts inconsistent with it were repealed, has been

(a) Act of August 7, 1789, ch. 9, § 4; 1 Stat. at Large, 53.

(b) Act of March 2, 1837, ch. 22; 5 Stat. at Large, 271.

(c) Act of May 8, 1792, ch. 33, § 2; 1 Stat. at Large, 271.

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elaborate and minute. It is restricted, however, to vessels to and from the port of New-York, by way of Sandy Hook.

Constitutionality of the act of 1789.

The constitutionality of that provision of the act of 1789, which adopts prospectively the laws of the several states which might be thereafter enacted, has been doubted, on the ground that it was an unauthorized delegation of legislative power. This objection was insisted on at bar in the case of *Hobart v. Drogan*(a); but the court being of opinion that the case before them was one of salvage and not of pilotage, it was on that account unnecessary to decide the question, and its decision was expressly waived.

Suits for pilotage cognizable in the district courts.

It has been supposed also, inasmuch as Congress has not, by independent legislation, established a system of pilotage, and expressly given the district courts jurisdiction of cases arising under it, that the cognizance of cases of pilotage belongs exclusively to the state courts(b). But the admiralty and maritime jurisdiction of the courts of the United States over suits for pilotage on the high seas, and on waters navigable from the sea, as far as the tide ebbs and flows, has been expressly asserted by the Supreme Court, as it had long before been asserted and exercised in the District and Circuit Courts of the United States for the District of Massachusetts(c). "The jurisdiction of the District Courts of the United States," say the Supreme Court, "in cases

(a) 10 Peters's R., 108 (12 Curtis's Decis. S. C., 34).

(b) See 3 Kent's Comm., 3d ed., 176.

(c) *The Ann*, 1 Mason's R., 508.

of admiralty and maritime jurisdiction, is not ousted by the adoption of the state laws by the act of Congress. The only effect is to leave the jurisdiction concurrent in the state courts; and, if the party should sue in the admiralty, to limit his recovery to the same precise sum, to which he would be entitled under the state laws, adopted by Congress, if he should sue in the state courts. The service is strictly maritime, and falls within the principles already established by this court in the case of *The Thomas Jefferson*, 10 Wheaton's R., 428, and *Peyroux v. Howard*, 7 Pet. R., 324(a)."

The existence of this jurisdiction, both *in rem* and *in personam*, is moreover expressly recognized and virtually declared, in the Rules of Practice in cases of admiralty and maritime jurisdiction, lately promulgated by the Supreme Court, by which it is ordained that "In suits for pilotage, the libellants may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, *in personam*(b).

Indeed, the jurisdiction of the English High Court of Admiralty over suits of this description has never been questioned, and has been repeatedly exercised(c); and the mere fact that Congress, instead of legislating in detail upon the subject, has thought proper to adopt the pilotage regulations prescribed

(a) *Hobart v. Drogan*, 10 Peters's R., 108 (12 Curtis's Decis. S. C., 34).

(b) See Appendix, Rule xiv.

(c) *The Nelson*, 6 Robinson's R., 227; *The Benjamin Franklin*, id., 350; *The Bee*, 3 Dodson's R., 498; *The Ann*, ubi supra.

VOL. 1. by the several states, does not appear to furnish any valid ground for the denial of this jurisdiction to the American courts of admiralty.

Rate of compensation.

When the fees for the pilotage service are fixed by the state laws, these laws, as we have seen, are alone to be looked to for the measure of compensation. In cases to which the state regulations do not extend, as, for example, the piloting of a vessel through the East river into New-York, unless there was an express contract or established custom, the *quantum meruit* will govern.

There are but few reported decisions in the admiralty which properly belong to the subject of this chapter(a).

To make pilotage a lien on the ship, the contract must be made by the master or other person acting as the authorized agent of the owner.

In a case in the Circuit Court of the United States for the District of Massachusetts(b), the vessel had sailed from Cork with a large number of passengers ostensibly destined for Quebec; but on approaching the American coast, the passengers insisted on being carried to New-York or Philadelphia, alleging that they had contracted with the charterer to be landed at one of those ports. The master refusing to comply with their request, they rose upon him, drove him with threats and violence to the cabin, and having compelled the mate to take an oath that he would carry the vessel into one of the above

(a) For the decisions defining the rights of pilots to claim as salvors, see the chapter on Salvage. For a collection of the cases arising in the state courts, under the state pilot laws, see Abbot on Shipping, Boston edition of 1846, p. 266, note. For a full digest of the state laws on this subject, see Mr. BLUNT'S valuable work, entitled "The Shipmaster's Assistant and Commercial Digest."

(b) *The Ann*, 1 Mason's R., 508.

mentioned ports or into Boston, put him in command. One of the crew of a fishing vessel was afterwards engaged to pilot the schooner into Boston; and having performed this service, he instituted a suit in the admiralty against the schooner to recover compensation. His demand was resisted on the ground that he came on board the vessel at the request of the mate and passengers, who, it was insisted, had no authority to bind her, and that he must therefore look to them for remuneration: and so the court decided.

No suit can be maintained for piloting a foreign vessel into an enemy's port, it being a service performed in aiding the commerce and importation of the enemy(*a*).

No compensation recoverable for piloting a foreign vessel into an enemy's port.

Where a ship is detained with a pilot on board at an intermediate place of quarantine, he is not entitled to charge as *lay* days, the day on which the vessel enters and leaves the place of quarantine(*b*).

Lay days.

(*a*) *The Benjamin Franklin*, 6 Robinson's R., 350.

(*b*) *The Bee*, 1 Dodson's R., 408. This case, however, seems to have depended on the construction of the act of 52 George III.

CHAPTER VII.

WHARFAGE.

WHARFAGE, like pilotage, is, in this country, the subject of local regulations, and by these the rates of compensation to the wharfinger are prescribed.

Wharfinger
has an admiral-
ty lien.

It has been held in the courts of the United States, that in addition to the personal claim which the wharfinger has upon the master and owner of a ship for wharfage, he has also a lien on the ship which may be enforced by admiralty process *in rem*. In a case decided by Judge PETERS, he states it to have been his practice to allow wharfage out of proceeds, "as the wharfinger might detain the ship until payment(*a*);" and his example, in this respect, was followed in the same court by the late Judge HOPKINSON(*b*).

This jurisdiction was maintained, in an early case(*c*), by Mr. Justice STORY, who held it to be "fully supported in principle by the doctrines, as well of the common law, as of the civil law, and by the analogous cases of materials furnished and repairs

(*a*) *Gardiner v. The Ship New Jersey*, 1 Peters's Adm. Decisions, 223, 228.

(*b*) *Johnson v. The Schooner M'Donough*, Gilpin's R., 101.

(*c*) *Ex parte Lewis, &c.*, 2 Gallison's R., 483.

made upon the ship." "If it has been due," he added, "for a former voyage, or the wharfinger had parted with his possession, the case would have been entirely altered."

CHAP. 7.

The existence of this lien has also been asserted by the learned judge of the District of Maine(a).

Mr. Justice STORY also held, in the case above cited, that the lien for wharfage or dockage was a privileged lien, having a priority over the bottomry interest. In that case, the ship *Jerusalem* had been libelled on a bottomry bond, while lying at the petitioners' wharf, and had been sold by an interlocutory order of the court. The petitioners subsequently intervened, claiming payment, out of the proceeds of the sale, of the dockage of the ship. It appeared, however, that there had been a personal contract between the wharfingers and the ship-owner, for the payment of a specific rate of dockage, and an order drawn on the ship's agents for the payment thereof quarterly. The case presented the question, therefore, whether the petitioners had not parted with their lien; and upon this question the learned judge expressed himself as follows: "It did not strike me, that upon principle, such a contract could amount to a waiver of the lien; because it was in effect only ascertaining the rate of dockage, instead of leaving it in uncertainty, and upon the footing of a *quantum meruit*, or the usual rate of dockage. But there is a series of authorities directly in point, which decide, that where the parties enter into a

Lien of the wharfinger a privileged lien.

Whether the lien is waived by an express personal contract.

(a) *The Phebe*, Ware's R., 354.

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personal contract for a specific sum, it is a discharge of the implied lien resulting by operation of law; and I cannot find that these authorities have ever been doubted or denied. I am free to confess, that I am better satisfied with authorities, when I can perceive the reason of them; but sitting in a court of admiralty, and exercising an equitable relief against highly meritorious parties, I should not choose *collaterally* to overrule such explicit decisions. I must therefore dismiss the present petition; reserving, however, the right to reconsider these doctrines, when they shall come directly in judgment upon an original libel *in rem*."

Lien not lost by the removal of the vessel from the wharf, if brought back without fraud or force.

If a vessel is secretly or wrongfully removed from a wharf, and afterwards, without fraud or force, brought back, the lien of the wharfinger is revived. Thus, where a vessel which had been levied on by the marshal at the suit of the United States, but not by him retained in actual possession, was removed from the wharf without the knowledge of the wharfinger, and subsequently returned to the same wharf, the wharfinger was held to be entitled to the payment of the previous wharfage, out of the proceeds of the subsequent sale under the execution (*a*).

A wharfinger cannot detain a vessel, when in the custody of the law.

When a vessel is under arrest on admiralty process, the wharfinger cannot enforce his lien by a detention of the vessel, but must apply to the court for its allowance (*b*).

Nature of the wharfinger's lien.

The remark of Mr. Justice STORY in *Ex parte Lewis*, that if the wharfage had been claimed "for a

(*a*) *Johnson v. The Schooner M'Donough*, Gilpin's R., 101.

(*b*) *The Phebe*, Ware's R., 354.

former voyage, or the wharfinger had parted with his possession, the case would have been entirely altered ;” and the importance attached by Judge HOPKINSON to the fact and attendant circumstances of the departure and return of the vessel, in the case of *The M'Donough*, seem to infer an impression entertained by both these judges, that the lien was to be regarded rather as a common law lien depending on possession, than as an admiralty lien conferred by the maritime law, and existing independently of possession ; and yet, as we have seen, Mr. Justice STORY, in maintaining its existence, relied on its supposed analogy to the lien of material-men, which, in this country, is held to be given by the general maritime law, and may be enforced without regard to possession.

CHAPTER VIII.

AGREEMENTS OF CONSORTSHIP.

Nature of
the contract
of consort-
ship.

THE frequent occurrence of shipwrecks and other marine disasters on the coast of Florida and the small islands adjacent, has led to the regular employment of vessels, commanded and manned by bold, enterprising and hardy seamen, stimulated by the love of gain, and not insensible, it may be hoped, to the claims of humanity, for the purpose of rendering assistance to vessels in distress, and rescuing life and property from the perils of the sea. These vessels are called *wreckers*. The claims of their owners, masters and crews, for services rendered, are adjudicated in suits for salvage, in the District Court of the United States for the Southern District of Florida, sitting in admiralty.

It is not unusual for the owners of vessels employed in this business, with a view to prevent mischievous competitions and collisions in the performance of salvage services, to enter into stipulations with each other, that the vessels owned by them respectively shall act as *CONSORTS* with each other in these services, and share mutually with each other in the moneys awarded as salvage, whether earned by one vessel or by both.

The case of *Andrews v. Wall and Greiger*(a), had its origin in a compact of this description. The vessels concerned were the *Globe* and the *George Washington*. For assistance rendered by the *Globe* to the ship *Mississippi* and cargo, the sum of \$5522.49 was decreed as salvage by the Superior Court of the Southern District of Florida. Andrews, the appellant, was part owner of the *Globe*; and Wall and Greiger, the appellees, were part owners of the *George Washington*.

Wall and Greiger filed a petition in the court by which the salvage had been awarded, representing that they and J. A. Thouron were the owners of the *George Washington*; that she had, for some time past, been consorted with the *Globe* in the business of wrecking, and was so at the time of the salvage services rendered to the *Mississippi*, for which the sum above mentioned had been awarded as salvage: wherefore, they prayed that the portion thereof to which, by the terms of the alleged agreement of consortship, they were entitled, should be directed to be paid to them.

The answer of Andrews admitted that, previous to the salvage service in question, an agreement was entered into between him, being then master of the *Globe*, and ——— Russel, master of the *George Washington*, by which they were to divide their earnings between themselves, their crews and owners, in a certain proportion which the respondent specified: but he alleged that the contract was made for

(a) 3 Howard's R., 568 (15 Curtis's Decis. S. C., 555).

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an indefinite period; that it was, however, considered to be operative only so long as he and Russel should continue on board their respective vessels; and when the service was rendered, Thomas Green, who had before been mate of the *Globe*, was master. On this ground, the respondent insisted that the petitioners were not entitled to share in the salvage.

There was no evidence in support of the allegation in the answer, that the agreement was to cease on the change of masters; and the court made an order, directing the payment of \$2455.64 to the petitioners.

From this order or decree, the respondent appealed to the Court of Appeals of Florida, where the decree was affirmed; and he thereupon appealed to the Supreme Court of the United States.

On the argument, it was objected:

1. That the record shows no subsisting contract of consortship.
2. That a court of admiralty has no jurisdiction of the case.

Touching the first objection, the court was of opinion, that the original agreement, although made by the masters of the vessels, was to be deemed to have been made on behalf of the owners and crews, and to be obligatory on both sides until formally dissolved by the owners. The mere change of masters would not dissolve it, since in its nature it was not a contract for the personal benefit of themselves, or for any peculiar personal services. It fell precisely within the same rule as to its obligatory force, as the contract of the master of a ship for seamen's wages, or for a charter-party for the voyage,

Not dissolved by change of master.

which, within the scope of the master's authority, binds the owner, and is not dissolved by the death or removal of the master. Besides, the agreement or stipulation for consortship, being for an indefinite period, could be broken up or dissolved only upon due notice to the adverse party; and the mere removal of the master of one of the vessels, by the owner thereof, for his own benefit or at his own option, could in no manner operate, without such notice, to the injury of the other.

Upon the question of jurisdiction, Mr. Justice STORY, in delivering the unanimous opinion of the court, observed:

"The material and important question, therefore, is, whether the agreement or stipulation of consortship is a contract capable of being enforced in the admiralty against property or proceeds in custody of the court. We are of opinion that it is a case within the jurisdiction of the court. It is a maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein. Over maritime contracts the admiralty possesses a clear and established jurisdiction, capable of being enforced *in personam* as well as *in rem*; as is familiarly seen in cases of mariners' wages, bottomry bonds, pilotage services, supplies by material-men to foreign ships, and other cases of a kindred nature, which it is not necessary here to enumerate. The case of *Ramsay v. Allegre*, 12 Wheat., 611, contains no doctrine, sanctioned by the court, to the contrary. It is within my personal knowledge, having been present at the decision thereof, that all the

CHAP. 8.

Cognizable
in the admi-
ralty.

VOL. 1. judges of the court, except one, concurred in the opinion that the case was one of a maritime nature, within the jurisdiction of the admiralty; but that the claim was extinguished by a promissory note having been given for the amount, which note was still outstanding and unsurrendered. It became, therefore, unnecessary to decide the other point.

The general doctrine had been previously asserted in the case of *The General Smith*, 4 Wheat., 438; and it was subsequently fully recognized and acted upon by this court, in *Peyroux v. Howard*, 7 Peters, 324.

Both objections were therefore overruled, and the judgment of the Florida courts affirmed.

This is believed to be the only reported case relating to consortship; and its importance and interest, enhanced by the novelty of the subject, seemed to demand something more than a mere abstract of the points decided.

CHAPTER IX.

SURVEY AND SALE OF DAMAGED SHIPS.

By the laws of most maritime nations, the master is authorized, in case of urgent necessity, to sell his ship. This doctrine is now firmly established in this country, and, at length, after much doubt and protracted discussion, in England also. The principle is, that the master will be justified in the exercise of this authority, when he finds his ship in such a condition, from any cause or combination of causes, as from recent damage, imperfect construction, bad material, old age and decay, that she cannot safely proceed on her voyage without repairs, which he has not the means of obtaining, or only at a cost exceeding the amount which, looking at her probable value after their completion, a prudent and discreet owner would think it right to incur^(a).

The master has power to sell his ship in case of necessity.

(a) Abbot on Shipping (Boston ed. of 1846), 9-21; *The Sarah Ann*, 13 Peters's R., 387 (13 Curtis's Decis. S. C., 215); *The Petapsco Insurance Company v. Southgate*, 5 Peters's R., 604 (9 Curtis's Decis. S. C., 490); *The Triton*, 5 Mason's R., 465; *Sarah Ann*, 2 Sumner's R., 206; *Robinson v. The Commonwealth Insurance Company*, 3 Sumner's R., 220; 3 Kent's Comm., 3d ed., 132; *Johnson v. Shippen*, 2 Lord Raymond, 982, 984; *Reid v. Darby*, 10 East., 143; *Hayward v. Moulton*, 5 Esp. N. P. C., 65; *The Funny and Elmira*, Edwards's R., 118; *Macburn v. Leckie*, 1 Bingham, 343; *Soames v. Sugrue*, 4 Car. & P., 282; *Gardiner v. Salvador*, 1 M. & R., 116; *Reid v. Bonham*, 3 Broad. & Bing., 147; *Robertson v. Clarke*, 1 Bing., 445;

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Previous
judicial sen-
tence of con-
demnation
required in
some coun-
tries.

Validity of
proceedings
for this pur-
pose denied
by the Eng-
lish common
law courts.

But the master is bound, before resorting to this power, seriously and deliberately to try every other expedient. It is a trust of great delicacy and high responsibility, and, on account of its liability to abuse, and with a view to the protection of all parties concerned, it is usually exercised in some countries, under the superintendence and sanction of some court or judge having jurisdiction of maritime affairs; and a previous sentence of condemnation and sale of the ship as unfit for service, is obtained by the master. In France such condemnation is required, and is deemed sufficient to protect the title of a *bona fide* purchaser, even when obtained by the fraud of the master; the owners being left to seek their remedy against him. No such jurisdiction is, however, recognized by the common law courts of England; and condemnations thus made abroad, on the voluntary application of the master, are not admitted to have any binding force in any subsequent

Royal Exchange Assurance Company v. Idle, 3 Broad. & Bing., 151, S. C., 8 Taunt., 755.

In the case of *Scull v. Biddle* (2 Wash. C. C. R., 150), Mr. Justice WASHINGTON held the power of the master to sell his ship, to be limited to cases of necessity *occurring in a foreign country*. In the case of *The Sarah Ann*, above cited, Mr. Justice STORY expressed his dissent from this doctrine; holding that "if such an urgent necessity does exist, 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 he at a distance." On appeal, the opinion of Mr. Justice STORY on this point was expressly affirmed by the Supreme Court. It was decided, also, that the power of the master to sell the hull of his stranded vessel extends likewise to her rigging and sails stripped from her, after unsuccessful efforts to get her afloat. *The Sarah Ann*, 13 Peters, 387.

litigation respecting the facts upon which they profess to be founded(a). This practice, notwithstanding, has for a long period prevailed even in the British West India islands; and Lord STOWELL, in the case of *The Fanny and Elmira*(b), speaks of it thus: "There is a very convenient practice, which obtains in the vice-admiralty in the West Indies, where, the fact of distress being proved, the transaction is not left to the master, but a sale is ordered under the superintendence of the court itself. The legal validity of such transfers has, however, been contested in the courts of this country, and they were not held to be good; though the learned lord who presided in the court where the decision took place, might perhaps incline to consider it a defect in the law of this country, that a practice so conducive to the public utility could not legally be maintained."

In a subsequent case(c), a cause of possession in which he refused to restore to the original owner a ship, which, after ineffectual attempts to obtain money for the necessary repairs, was sold by the master under the order of the vice-admiralty court of the Mauritius, Lord STOWELL observed: "What then is the captain to do? Common sense, as well as the law, points out that he should in the first place apply to the agent of the owner, which it appears that he did. If the agent cannot or will not assist,

(a) Abbot on Shipping, Boston edition of 1846, p. 23; *Hayward v. Moulton*, 5 Espinasse's N. P. C., 65.

(b) Edwards's R., 118.

(c) *The Warrior*, 2 Dodson's R., 288, 294.

VOL. 1. and if himself and his owner are without any other friends who are ready to come forward and furnish him with the necessary supplies, what can he do better than to make application to the court of admiralty? In some parts of the world the authority of such courts is deemed conclusive, though it certainly has been otherwise held by courts which possess the controlling power within the British territories. But the want of such jurisdiction I have heard greatly regretted by some of the eminent persons who now preside in these courts."

Power of the American courts of admiralty asserted by Mr. Justice STORY.

With respect to the authority of the American courts of admiralty to exercise this jurisdiction, we have already seen in the first chapter of this work, that Mr. Justice STORY, in his Commentaries on the Constitution, has not hesitated to include "surveys of vessels damaged by the perils of the seas," within his cautious enumeration of the subjects of the admiralty jurisdiction of the courts of the United States; referring to the case of *Janney v. The Columbian Insurance Company* (10 Wheat. R., 412, 415, 418), as an authority for so doing. That was an action at common law upon a policy of insurance containing a clause declaring that if the vessel, "after a regular survey, should be condemned for being unsound or rotten, the insurers shall not be bound to pay the sum hereby insured, nor any part thereof." The vessel having sustained injuries in her voyage from Alexandria to New Orleans, the master called a survey upon her state and condition, on his arrival at that port, under the laws of the State of Louisiana, by the master and wardens of

the port, by whom she was condemned as unworthy of repairs, and ordered to be sold by auction.

The court entertained no doubt of the regularity of the *survey*, as within the exception of the policy; but inasmuch as the state law did not expressly confer the power upon the port-wardens to "condemn" vessels so circumstanced, it became a question whether the *casus fœderis* had, in this particular, been made out. Mr. Justice JOHNSON, in delivering the judgment of the court, observed that it appeared to be exercised in Louisiana as an incident to the surveying power; that in other parts of the world, it was very generally exercised as an incident to the admiralty power; but that under our system, the admiralty jurisdiction could only be exercised under the laws of the United States. The court, however, disclaimed any intention "to intimate that the power is one which cannot be exercised under municipal regulations. On the contrary," it was added, "there are many reasons for maintaining that it may be so exercised until Congress may think proper to establish some general rule upon the subject, either as appertaining to commerce, or within the admiralty jurisdiction." This case was decided in 1825.

In the case of *The Tilton(a)*, decided in 1830, Mr. Justice STORY, speaking of the doctrine of the English common law courts, as to the want of this jurisdiction in admiralty courts, took occasion pointedly to declare his dissent from that doctrine. "I

(a) 5 Mason's R., 465, 474.

VOL. 1. agree," he adds, "that in such a case the decree of sale is not conclusive upon the owner, or upon third persons; because it is made upon the application of the master, not in an adverse proceeding. But I cannot but consider it as strictly within the admiralty jurisdiction. It is *prima facie* evidence of a rightful exercise of authority, but no more. The proceeding being *ex parte*, cannot be deemed conclusive in favor of the party promoting it. Upon a question of this sort, I should incline to follow other authorities, and to repose with more confidence upon those who are accustomed to administer the maritime law in admiralty courts. It does not appear to me that Lord STOWELL, with all his habitual caution in entertaining jurisdiction, has considered such a sale an absolute excess of judicial authority. Looking to the language used by him in the cases of *The Fanny and Elmira* (Edw. R., 117), and *The Warrior* (2 Dods. R., 288, 293, 295), I should draw the conclusion, that but for the controlling authority of the courts, which he was bound to obey, he would have affirmed the jurisdiction. The doctrine of the Supreme Court of the United States, as I gather it from the case of *Janney v. The Columbian Insurance Company* (10 Wheat. R., 411, 418), is, that this is properly a part of the admiralty jurisdiction."

The mode of instituting and conducting the proceeding in question in the admiralty, is as follows:

Form of proceeding for the sale of ships.

The master prefers his petition to the court, setting forth the facts and circumstances of the case, and praying that a warrant may issue for the

survey and examination of the ship, by persons duly competent in that behalf, who are to report as to the true state and condition of the ship. If they report her unfit to go to sea, and unworthy of repair, a second petition, or "libel of information," is preferred to the court, praying that the ship may, by a decree of the court, be condemned as unfit for further service, and, together with her boats, tackle, apparel and furniture, be ordered to be sold by the marshal of the court: whereupon a monition issues, to show cause why this should not be done; and no person appearing in opposition, or no sufficient cause being shown, it is adjudged and decreed accordingly(a).

CHAP. 9.

The exemplification of the record of condemnation and sale in a foreign court of admiralty, is the proper if not the only admissible evidence of the proceeding(b).

Evidence of
decree of
sale.

(a) See *Dorr v. The Pacific Insurance Company*, 7 Wheat., 581 (5 Curtis's Decis. S. C., 338).

(b) *Ibid.* The authority conferred by the third section of the "Act for the government and regulation of seamen in the merchant service," on the judge of the district court, on the application of the master acting upon the requisition of the mate and a majority of the crew, "to issue his precept" to three competent persons, requiring them to examine the vessel, and report to him as to her fitness to proceed on her voyage, can hardly be considered as pertaining to the admiralty jurisdiction of the district court. The act, in terms, embraces only vessels setting out on a foreign voyage, and not having yet left the land; but similar examinations, upon the like requisition, are also made in foreign ports. See *The William Harris*, Ware's R., 367.

CHAPTER X.

DISPUTES BETWEEN PART-OWNERS.

Suits for the adjustment of disputes between part-owners, relative to the possession and employment of ships, constitute the subject of another branch of the acknowledged jurisdiction of the admiralty. The rights, powers, duties, obligations and liabilities of part-owners, as such, as well *inter sese* as in respect to third persons, form an interesting subject of inquiry which has given rise to much discussion. But it will best accord with the design of this work, to treat of the subject only so far as it falls within the scope of the admiralty jurisdiction(*a*).

Property in a ship may be acquired by two or more persons, either by building it at their own expense, or by purchase of a part thereof of the sole owner, or by the joint purchase of the whole of another person. But in whatever way the title may be acquired; and whether it be acquired at one and the same time, in virtue of one and the same instrument, or at different times, and under different instruments, the parties, in the absence of

(*a*) It is discussed at large by Mr. Justice STORY in his Commentaries on the Law of Partnership, § 415 - 439.

all positive stipulations to the contrary, become entitled thereto, as tenants in common and not as joint tenants.

CHAP. 10.
Tenants in
common,
and not joint
tenants.

This is in accordance with the doctrine that the *jus accrescendi* has no existence among merchants, or in the business of commerce and navigation; and it accordingly follows that each part-owner of a ship can sell only his own proper share thereof, and that upon the death of one part-owner, his executors and administrators become tenants in common of the ship with the survivors^(a).

A personal chattel belonging to several persons cannot be advantageously enjoyed by all the proprietors, without their common consent and agreement; and as the best means of inducing such common consent and agreement, the law in general declines to interfere in their disputes, leaving it to themselves, either to enjoy their common property by agreement, or to suffer it to remain unenjoyed, or perish by their dissension. But ships "are built to plough the sea, and not to lie by the walls;" and commercial nations consider their actual employment as a matter, not merely of private advantage to their owners, but also of public benefit to the state, and therefore have laid down certain positive rules in

(a) See Story on Partnership, § 415 - 417, and the authorities there cited. But there *may* be a partnership, as well as a co-tenancy in a vessel; and a partner, acting in that character, may sell the whole vessel; and the vendee, in a case free from fraud, will acquire an indefeasible title to the whole ship. The relation of co-tenants being, however, the general relation between ship-owners, and that of partners being the exception, the latter relation requires to be specially shown. 3 Kent's Comm., 3d ed., pp. 154, 155.

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order to favor this employment, and to prevent the obstinacy of some of the part-owners from condemning the ships to rot in idleness. It sometimes, indeed, happens that several persons become part-owners of a ship, under an express agreement among themselves, defining the mode of its employment; or, that they unite in the appointment of an agent, to whom they delegate the management of their common concern, and who, by a very intelligible figure of speech, is called the ship's husband(*a*). In such cases, the mutual rights and obligations of the parties are to be determined by resort to the compact and agreement between them, and are to be enforced accordingly. But when the enjoyment of the property has not been thus settled by the parties, then it is that the law interposes to regulate it.

(*a*) Abbot on Shipping, Boston ed. of 1846, 125.

Mr. COLLYER thus describes the proper functions and powers of a *ship's husband*: "In order to administer the affairs of the ship with unanimity, it is usual to appoint a ship's husband. He is either a part-owner or a stranger, and may be appointed by writing or parol. His duties are to see to the proper outfit of the vessel; to have a proper master, mate and crew; to see to the furnishing of provisions and stores; to see to the regularity of all the clearances from the custom-house; to settle the contracts; to enter into proper charter-parties, or engage the vessel for general freight; to settle for freight, and adjust arrearages with the merchant; to preserve proper certificates and documents, in case of future disputes with insurers and freighters, and to keep regular books of the ship. But without special powers, he cannot borrow money generally for the use of the ship, though he may settle accounts and grant bills for them, which will form debts against the concern. Nor can he, without special authority, insure the ship." Collyer on Partnership, B. 5, ch. 4, § 4, 2d ed.

The ordinances upon this subject of the several commercial nations of continental Europe are different, and all of them differ from the law of England, which possesses this important advantage over them—that while, in common with them, it authorizes the majority in value to employ the ship “upon any probable design,” it takes care, at the same time, to secure the interest of the dissentient minority from being lost in the employment of which they disapprove, by exacting security for her safe return(*a*). But on the other hand, the minority cannot derive the slightest advantage from the employment of the ship, and are not entitled to any compensation for her diminished value occasioned by the natural wear and tear of the voyage; whereas the foreign laws and ordinances, while they give to the majority the right to impose the burthen of sharing the expenses upon the minority, entitle the latter, at the same time, to share fully in the profits of the voyage or adventure. This has led Mr. Justice STORY to express a doubt of the supposed superiority of the common law rule(*b*).

CHAP. 10.

Disagree-
ment among
part-owners,
how adjust-
ed. Juris-
diction of
the admiral-
ty.

The usual and most effectual mode of enforcing the rights of the minority in this respect, in England, is by application to the Court of Admiralty for a warrant to arrest the ship, and to detain her in custody until those who desire to send her on a voyage give a stipulation in a sum equal to the value of the shares of those who disapprove of the adventure, either to

Remedy of
minority.

(*a*) Abbot on Shipping, 127.

(*b*) Story on Partnership, § 431.

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bring back and restore to them the ship, or pay them the value of their shares. When this is done, the dissentient part-owners bear no portion of the expenses of the outfit, and are not entitled to share in the profits of the undertaking; but the ship sails wholly at the charge and risk, and for the profit of the other owners(*a*).

Remedy of majority

But, subject to the condition of giving such security, the authority of the majority in value to regulate the concerns of the ship is absolute; and, therefore, when the minority happen to be in possession, and refuse to employ it, the majority are entitled to a similar warrant to obtain possession of the ship, and of her certificate of registry, and send her to sea, upon giving the required stipulation(*b*).

Remedy in case of disagreement between equal part-owners, whether or not the ship shall be employed.

When the part-owners are equally divided in opinion upon the question whether the ship shall be employed in any voyage or adventure whatsoever, the law, looking to the considerations of commercial policy already mentioned, gives effect, through the like admiralty process, and upon the like condition, to the will of those who are in favor of her employment(*c*).

Right of the minority to employ the ship, against the will of the majority.

A majority of the foreign jurists maintain that even the opinion of the minority ought to prevail, when in favor of employing the ship; and this doctrine, though not the point in judgment, was

(*a*) *The Peggy*, 4 Robinson's R., 304; *The Apollo*, 1 Haggard's R., 306, 312; Abbot on Shipping, 127.

(*b*) See last note, and Marriott's Formulary, 337.

(*c*) Abbot on Shipping, 131; Story on Partnership, § 435; 3 Kent's Comm., 3d ed., 153, 156.

asserted by the Supreme Court of the United States in *The Steamboat New Orleans v. Phœbus*(a), and is reiterated by Mr. Justice STORY in his Commentaries on Partnership(b). I cannot find that this doctrine has been adopted in the English admiralty; but with this exception, the principles above stated have long been firmly established in that court; and they have been uniformly approved, and to some extent acted upon, in the courts of the United States(c).

But it sometimes also happens in the case of equal part-owners, that the owner of each moiety is equally willing to have the ship employed in some voyage or adventure, but they differ as to the voyage; or, that each is ready to take the whole ship for a voyage to be planned by himself, but he will not engage with the other in any voyage whatsoever. What is to be done in such cases? In point of private right, they stand upon a footing of perfect equality; and their respective views and wishes are alike in accordance with the requirements of public policy. There is no ground, therefore, upon which the claims of the one party can justly be preferred to those of the other; but to leave the ship to rot

Jurisdiction
of the admir-
alty to order
a sale.

(a) 11 Peters's R., 175 (12 Curtis's Decis. S. C., 391).

(b) Story on Partnership, § 428. But see *ib.*, § 434, which seems scarcely reconcilable with what is said in § 428.

(c) *The Sisters*, 4 Robinson's R., 257; *The New Draper*, *ib.*, 287; *The Experiment*, 2 Dodson's R., 38; *The Apollo*, 1 Haggard's R., 306; *The Pitt*, *ib.*, 240; *The John of London*, *ib.*, 342; *The Margaret*, 2 Haggard's R., 276; *The Petrel*, 3 Haggard's R., 299; *The Logan*, otherwise *Mimax*, *ib.*, 418; *Willings et al. v. Blight*, 2 Peters's Adm. Decis., 286.

VOL. 1. at the wharf, would be consonant neither with the interests of the parties, nor with the general interests of commerce and navigation. A sale of the ship, and a division of the proceeds among the owners, under a decree of the proper court, at the instance of either of the dissentient parties, seems therefore to be the only remedy adapted to the case. This is the remedy provided by the Ordinance of France of 1681, and some of the continental writers seem to consider it a principle of the general maritime law.

But although according to the terms of the commission granted to the judge of the English Court of Admiralty, the jurisdiction of that court extends to all matters which concern owners and proprietors of ships, as such, it was asserted by the Court of King's Bench in the reign of George the Second, that the Court of Admiralty has no authority to compel a sale in any case of disagreement whatever between part-owners; and as that court possessed the power to enforce its opinions by prohibition, the Court of Admiralty, without, however, otherwise disclaiming this authority, has declined to exercise it(*a*).

In this country this power has been asserted, and in two reported cases, at least, has been exercised by the courts. In the early case of *Skinner v. The Sloop Hope*(*b*), in the District Court of the United States for the District of South Carolina, Judge BEE decreed a sale, on the petition of the owner of one moiety, against the owner of the other moiety of the vessel. And in the case of

(*a*) See Story on Partnership, §§ 435, 438.

(*b*) Bee's Adm. R., p. 2.

Davis and Brooks v. The Brig Seneca, where the owners were equally divided in opinion, each wishing to employ the brig upon a distinct voyage, the learned judge of the District Court of the United States for the Eastern District of Pennsylvania, having, in an elaborate opinion, decided against the jurisdiction(*a*), his judgment was reversed by Mr. Justice WASHINGTON on appeal to the circuit court. The case was fully and ably discussed at the bar; and Mr. Justice WASHINGTON, at the conclusion of his judgment, frankly acknowledged that his opinion was very different when the cause was opened; for that he "had read that which was pronounced in the district court by the learned judge of that court, with an entire conviction of its correctness." But the argument before him, and his own more mature reflections upon the subject, had led him to the clear conviction that the Ordinance of Louis XIV was to be regarded not as a mere matter of positive regulation, but, "as constituting a part of the maritime law of nations; that it is in itself a wise and equitable provision; that it is not inconsistent with the commercial state of this country, or with any law which should govern the court;" and he accordingly felt himself "not only at liberty, but bound to adopt and apply it to the case" before him. He therefore reversed the decision of the district court, and decreed a sale of the vessel(*b*).

(*a*) Gilpin's R., p. 10.

(*b*) *Davis and Brooks v. The Brig Seneca*, 18 American Jurist, for January, 1838, p. 486. The opinion of Mr. Justice WASHINGTON is

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Mr. Justice STORY strenuously maintains the soundness, expediency and even necessity of this doctrine. He considers it as falling clearly within the constitutional grant of judicial power over "all cases of admiralty and maritime jurisdiction;" and as sustained by reasoning which it is difficult to overturn, unless "by disregarding the common usages which have prevailed among maritime nations from an early period, and which constitute the basis of the general maritime law, as well as of positive codes, which affirm and enforce it. The right" he adds, "to order a sale of property subjected to its jurisdiction, is clearly a matter within the competency of a court of admiralty, and, indeed, is familiar in practice, in order to prevent irreparable mischiefs or impending losses. Analogy, therefore, is clearly in its favor; and unless some limitation or exception can be asserted to exist, either in the origin, or constitution, or practice of the court itself, it will not be a very satisfactory mode of disposing of the question, for a court of common law to assert, upon its own mere *dictum*, without any reasoning in support of it, that the Court of Admiralty has a right in cases of disputes between part-owners of ships, to take a stipulation, but not to order a sale. Such language would seem more like an edict than a judgment, and to promulgate an arbitrary distinction, rather than a rational interpretation of the jurisdiction of another court."

quoted, *in extenso*, in a note to § 439 of Mr. Justice STORY's excellent work on Partnership.

The inconvenience arising in England from the denial to the High Court of Admiralty of any power to direct the sale of a ship, as a means of preventing ruinous dissensions between equal part-owners, is well illustrated by a recent case, in which that court refused to change the possession of a ship at the petition of the owners of a moiety thereof, although the owners of the remaining moiety had refused to give security for the safe return of the vessel, and persisted in leaving her in a situation where she was becoming daily deteriorated. The learned judge considered himself bound by antecedent decisions; and he observed, also, that in forming his opinion, he could not leave out of the consideration the consequences that might ensue, if he assumed the power to decree the possession of the vessel to be given up as prayed. If, in the case before him, he acceded to the application of a moiety of the interests in the ship, he could not refuse, upon any subsequent application, to grant possession to the owners of interests less than a moiety. The same principle, as it appeared, would equally apply in both cases. Another consequence would be, that in each case the court would have to consider the grounds upon which the particular motion in each case was founded, and to determine what course was most beneficial for the employment of the vessel(a).

The form of remedy in cases of controversy between part-owners, is by a warrant of arrest

(a) *The Elizabeth and Jane*, 1 W. Robinson's R., 278.

VOL. 1. against the ship, and a monition to the adverse party. When the proceeding is instituted by the majority of the owners, for the purpose of obtaining the possession and control of the ship, there is, if they appear to be entitled to it, a decree of possession in their favor, provided they enter into a stipulation with one or more sufficient sureties, in a sum equal to the value of the shares of the dissentient owners, for the safe return of the ship.

When the minority institute a suit for the purpose of obtaining security, the ship is held in custody under the warrant, until the required bail is given; whereupon the warrant is simply superseded, and the ship released.

The stipulation should be for the true value; for it is a substitution for the property itself, and contemplates no other object than the return of the ship, or, in default thereof, the payment of the stipulated sum at all events. Regarding it in this light, Lord STOWELL refused to entertain a claim for a deduction after the loss of the vessel, on the ground that, as it was alleged, the dissentient owner, after obtaining security, had subjected his co-owners to losses by vexatious proceedings and malicious representations concerning the ship^(a).

The amount of the bail is generally agreed upon by the parties. When this is not done, appraisers are appointed by the court to estimate the value of the shares on account of which the bail is to be given.

(a) *The Apollo*, 1 Haggard's R., 306.

Suits by the majority of the part-owners to obtain possession of the ship, are denominated causes of possession, or possessory suits; a name, however, not restricted to these suits, as we shall see in the next chapter, where the distinction between possessory and what are, or formerly were denominated *petitory* suits, will be explained.

It sometimes happens that the master is a minor part-owner, and that the owners of the remaining shares wish to remove him from his command of the ship, although there may be no disagreement between him and them concerning her employment, or as to the particular service in which she shall be employed. It has been held that in such cases some special reason must be shown for the interposition of the court, as that "the master is irregular in his accounts with his owners," the common law upon general principles being inclined to maintain the possession of a proprietor in the vessel (*a*). But where the master is not a proprietor, all that the court requires is, that the majority of the owners should declare their disinclination to continue him in possession (*b*). In such cases, the master, in refusing to surrender the possession of the vessel to her lawful owners, is regarded simply as a wrong-doer (*c*). The form of the remedy in either case, is a warrant of arrest and monition as above stated.

Dispossession of the master.

(*a*) *The New Draper*, 4 Robinson's R., 235.

(*b*) *The New Draper*, ubi supra.

(*c*) Cases of this latter description belong, therefore, to the class of cases treated of in the next chapter.

CHAPTER XI.

SUITS TO ENFORCE THE RIGHT OF POSSESSION OR OF PROPERTY
IN A SHIP, AGAINST AN ADVERSE HOLDER.

Petitory as well as possessory suits formerly cognizable in the English admiralty.

FORMERLY, and until no very distant period, the High Court of Admiralty of England exercised an undisputed jurisdiction of controversies respecting ships, depending as well upon mere questions of disputed title, as upon the right of possession when the title was undisputed, or was otherwise clear. "It is certainly true," said Lord STOWELL, in the case of *The Warrior*(a), "that this court did formerly entertain questions of title to a much greater extent than it has lately been in the habit of doing. In former times, indeed, it decided without reserve upon all questions of disputed title, which the parties thought proper to bring before it for adjudication. After the restoration, however, it was informed by other courts, that such matters were not properly cognizable here; and since that time it has been very abstemious in the interposition of its authority. The jurisdiction over causes of possession was still retained; and although the highest tribunals of the country denied the right of

Its jurisdiction restricted to cause of possession, by prohibitions.

(a) 2 Dodson's R., 288. See, also, *The Aurora*, 3 Robinson's R., 135, to the same effect.

this court to interfere in mere questions of disputed title, no intimation was ever given by them that the court must abandon its jurisdiction over causes of possession.” CHAP. 11.

The efforts which the court, under these circumstances, was constrained to make, on the one hand, so to execute the jurisdiction which remained to it as to render it effective and beneficial, and, on the other, by no means to transcend the limits which the common law courts had thought proper to prescribe, were attended, as, indeed, they could not fail to be, with great embarrassments and unavoidably led to unsatisfactory results. What was anciently understood to constitute the precise boundary line between causes of possession and *petitory* suits (as those which concerned the question of title were termed), it is probably impossible at this day exactly to ascertain. It is probable, also, that it was at no time very clearly defined. From the nature of the case, it could hardly have been otherwise; and the supposition that it was not, is, moreover, strengthened by the accounts which we have of these two forms of proceeding. “If,” says BROWN, “the party in a possessory cause perceived, from the inspection of the proofs therein, that he had no prospect of success in the question of property, he might decline the contest; but his adversary, for the better confirmation of his title, might proceed in the petitory, and obtain final sentence therein. But if he did, he must libel anew, and produce fresh proof, unless the evidence of the witness produced in the possessory had extended to a proof of property. On

VOL. 1. the other hand, the party defeated in the possessory cause might proceed possibly with success in the petitory, in which the proceedings were similar to those in other maritime causes; and sureties were to be given by the successful party in the possessory, for restoring the goods, if there should be a decree entered against him in the petitory, at least if the defeated entered a protest that he intended so to proceed."

In deciding beforehand between the two forms of action, the suitor probably had to encounter a difficulty no less insuperable than that which, to the cost of so many suitors, and to the opprobrium of the common law, has been experienced in deciding between the action of trespass, and that of trespass on the case. Lord STOWELL, himself, with all his remarkable perspicacity, and after repeated trials, seems scarcely to have succeeded, even to his own satisfaction, in laying down any precise rule by which the particular nature of controversies of the sort under consideration could be certainly determined; and a critical review of the cases decided by him would show, to say the least, a want of entire consistency in the application of the principles by which he professed to be governed. What these principles were, will most satisfactorily be shown by a brief extract from his judgment in one of the last cases of this description which came before him. The ship had been chartered by the owners in London, to the master, to carry a cargo of wine (to be taken in at the island of Madeira) to the West Indies. On her arrival at St. Christopher's,

whither she had sailed from Madeira, she encountered a storm, and was stranded on the beach. A correspondence ensued between the master and the owners, relative to the disaster, and to the measures to be taken in respect to the ship; and she was eventually sold by the master to a merchant of St. Christopher's, to whom, "acting as agent for his owners and underwriters," he executed a bill of sale of the ship. After the lapse of two years she *returned* to Liverpool in the service of the purchaser, with a load of lumber, and was there arrested in a cause of possession at the suit of her former owners, who insisted that the sale by the master at St. Kitt's was unauthorized, fraudulent and void.

Lord STOWELL, after stating the facts and circumstances of the case as they appeared before him, said: "The case then is, in reality, an inquiry into the title of the present asserted proprietor to hold the ship; and the first, I had almost said the only question is, how far this court is authorized to make this inquiry, and provided with due powers to make it with effect. The court is, certainly, in the habit of transferring possession from the actual holder, sometimes by his own movement, sometimes at the instance of other courts, which have no direct power for that purpose; but it considers itself, and is bound to consider itself, as moving within very narrow limits, if it proceeds at all originally upon a question of title. It, undoubtedly, would not be inclined, in any case, to transfer a possession without regarding the title of the party who claims the transfer; it must be satisfied that

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he is *potior in jure*; and it must be in cases extremely simple that it acts on a merely preferable title, to be reached by his own judgment. Where the possession is gained by force and violence, or by fraud manifest upon the very face of the transaction; or where the party in possession is avowedly entitled only as a minor owner in opposition to the majority of interests, there the court feels no hesitation; but where a course of transactions involving fraud is objected, it declines entering into the question, and leaves it to be determined by the inquiry of courts, which have ampler means of arriving at the real truth, and the real justice of the case; for there may be some incidental matters, such as repairs, and other expenses, requiring the application of equitable principles which this court may not feel itself competent to administer. I may, therefore, lay it down as a rule for the conduct of this court, that it is only in simple cases, in cases speaking for themselves, that it can act with effect; but in those which, being complex, require a long and minute investigation, it cannot proceed with safety.

“To which of these classes does the present case belong? I have no hesitation in saying, to the latter class. Here is a series of transactions, charged on the one side to be fraudulent, and on the other, denied to have the slightest intermixture of fraud in them. Many documents are produced, and some are not forthcoming, which, upon such a question, ought to be produced. It is not, then, for this court, under these circumstances, to proceed the

length of a judicial determination; but if I am called upon for an opinion, which, after what I have said, must be considered rather extra-judicial, I can say confidently, that I see nothing that impeaches the title of the purchaser. It appears that there was ample authority to the captain to sell, both by the conduct of the parties at home, and by the circumstances in which the property was placed. It appears also to me, that in the sale, all due caution was used, and all due attention shown to the interest of the former owners, and that the previous authority of the master was fully confirmed by subsequent recognitions and approvals. This is my general view of the case. Another court may, on further evidence, determine my opinion is incorrect; but under the conviction of my mind, it is proper for me to hold my hand, and to desist from ulterior measures. I shall not disturb the possession.

“In this state of the case, I shall not say anything upon the matter of costs. I will allow a time for the former owners to go into another court; and if that court should be of opinion with me, that this is an unjust molestation, I shall think that the present possessor will be entitled to his full expenses, and to demurrage. If, on the other hand, it should appear, what I do not think it can upon this evidence, that he is a tortious possessor, then the original owners must be indemnified. I will suffer the cause to stand over for the space of one fortnight, for the purpose of ascertaining whether any proceedings are instituted in any other tribunal.”

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The reporter adds, in a note, that no further application was made to the court in the cause, and the warrant of arrest was ultimately superseded(*a*). The principles here enunciated by Lord STOWELL were expressly adopted and implicitly followed by his immediate successor, Sir CHRISTOPHER ROBINSON, in two reported cases of which he declined to entertain jurisdiction, leaving the possession undisturbed, on the ground that they involved questions of adverse title(*b*).

It will be remarked that Lord STOWELL, not content with demonstrating the actual want of jurisdiction in the case before him, took occasion also, in justification of his habitual "abstemiousness," to refer to the want in the High Court of Admiralty of those "ampler means of arriving at the real truth, and the real justice of the case," possessed by other courts. But within the last few years the former jurisdiction of the court has been restored, and these means have been supplied by an act of parliament. By the 3d & 4th Victoria, chap. 65, entitled "An act to improve the practice and extend the jurisdiction of the High Court of Admiralty of England," it is enacted (section 4) "That the said Court of Admiralty shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages or bottomry, which shall be instituted in the said court after the passing of this act."

Former
jurisdiction
restored
by act of
parliament.

(*a*) *The Pitt*, 1 Haggard's R., 340.

(*b*) *The John*, 2 Haggard's R., 305 ; *The Fruit Preserver*, id., 181.

This enactment, it is presumed, was designed CHAP. 11.
 virtually to abolish the distinction between possessory and petitory actions, and to empower the court to entertain jurisdiction, under the form of a "cause of possession," of all suits instituted by the rightful owner or person claiming to be such, for the purpose of obtaining possession of a ship alleged to be unlawfully withheld from him, whatever might be the nature of the defence set up to the action. But the act, in restoring to the Court of Admiralty jurisdiction over questions of adverse title to vessels, removed also the other impediment stated by Lord STOWELL, to the exercise of that jurisdiction, by providing the means possessed by the courts of common law and equity, of arriving at the truth and enforcing justice. It empowers the court, in its discretion, to summon before it, and examine witnesses by word of mouth, whether their previous examination by deposition has been taken or not. Notes of evidence taken *viva voce* are required to be taken down in writing, for the purpose, in case of appeal, of being certified to the appellate tribunal, and are declared to be admissible as evidence on the hearing of the appeal. Instead of the previous mode of examining witnesses before a commissioner, on written interrogatories, the act empowers the commissioner (who is to be an advocate of the High Court of Admiralty, or a barrister-at-law, of not less than seven years' standing) to take evidence by word of mouth (the oath being administered by himself, instead of being administered in court, as formerly); the parties, their counsel, proctors or

Powers of
the court
enlarged
in other
respects.

VOL. 1. agents being allowed to be present and to examine and cross-examine the witnesses. The judge and the commissioner are authorized to require the attendance of witnesses and the production of papers and books, by writ in the form of a *subpœna ad testificandum* or of *subpœna duces tecum*. All the provisions of the act of 3 & 4 William IV., "For the further amendment of the law, and better administration of justice," with respect to the admissibility of the evidence of interested witnesses, are also extended to suits in the Court of Admiralty. The court is, moreover, empowered to award issues on questions of fact to be tried before the superior courts of common law at *nisi prius*, and to direct new trials. And the act also invests the judge with authority from time to time to make such rules, orders and regulations respecting the practice and mode of proceeding of the court, and the conduct and duties of the officers and practitioners therein, as to him shall seem fit, subject, however, to the approval or disapproval of Her Majesty in council(a).

(a) The constitution of the High Court of Admiralty has, by these enactments, been strongly assimilated to that of the American courts. The power conferred upon the English court, of directing issues of fact to be tried by a jury, is not understood, however, to belong to our courts; but, on the other hand, they are empowered, by one of the Rules of Practice lately prescribed by the Supreme Court, to "refer any matters arising in the progress of the suit, to one or more commissioners to be appointed by the court, to hear the parties, and make report therein." And such commissioner or commissioners are invested with "all the powers in the premises which are usually given to, or exercised by, masters in chancery, in references to them, including the power to administer oaths to, and examine the parties

To what extent, precisely, the High Court of Admiralty considers its jurisdiction enlarged by this act, in respect to questions of contested title to ships, we have not the means of determining. It seems to have been a settled principle in the court, previous to the passage of the act, that it was "bound down to decide on the legal title, without taking notice of equitable claims," whether the equitable title was set up as a ground for the active interposition of the court against the legal owner in possession, or by way of defence(*a*); and it appears, by a case since decided, that this principle is still adhered to by the court, notwithstanding its enlarged powers and modified constitution(*b*).

Equitable title disregarded.

and witnesses touching the premises." It will be perceived, therefore, that the American courts are provided with all the means of investigation possessed by courts of equity.

(*a*) *The Sisters*, 5 Robinson's R., 155. The following, in addition to those already cited, are the reported cases arising in the English admiralty, before the passage of the late act, under this branch of jurisdiction: *The Guardian*, 3 Robinson's R., 93; *The Aurora*, *ib.*, 133; *The New Draper*, 4 Robinson's R., 235; *The Peggy*, *ib.*, 304; *The Johan Sigismund*, Edwards's R., 242. This case decides that the court will not interpose, in the case of a foreign ship, between foreigners. See *Reuter*, 1 Dodson's R., 22: This was also a foreign ship; but it being shown that a decree of possession had already been made by the judiciary of the country to which the ship belonged, jurisdiction was entertained, and possession decreed. *The Experimento*, 2 Dods. R., 38: This was likewise a foreign vessel; but the libellants being British subjects, jurisdiction over the case was asserted on that ground; Lord STOWELL saying, moreover, that in such a case he felt warranted in examining "a little" even into the question of title. The decision, however, was adverse to the libellants. *The Partridge*, 1 Haggard's R., 81; *The Logan*, 2 Hagg. R., 418.

(*b*) *The Valiant*, 1 W. Robinson's R., 64.

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Jurisdiction
of the courts
of the United
States.

This brief exposition of the footing on which the admiralty jurisdiction over controversies relative to the possession and ownership of ships rests in England, I have deemed necessary for the purpose of elucidating the footing on which it stands in this country. And I shall conclude my observations upon the subject by a brief extract from the able and learned judgment pronounced by Mr. Justice STORY in the only reported case, as far as I know, falling within this branch of jurisdiction which has been decided in our courts. It will be seen that it really turned upon a question of adverse title, and that had the suit been instituted in the High Court of Admiralty of England, jurisdiction of the case would probably have been declined upon that ground. The schooner had sailed from New-York in ballast, bound to Conwayborough in the State of North Carolina, and was stranded on the beach near the banks of Chickamacomico. While lying on the beach, she was advertised and sold by order of the master. She was afterwards sent with a cargo to Boston, and was there arrested by the former owners, on the ground that the sale was unnecessary, illegal and collusive, and that they had not therefore been divested of their title and right of possession.

Judge STORY, after referring to the general views expressed by him in the case of *De Lovio v. Boit*, relative to the extent of the admiralty jurisdiction in this country, and to the course of decision in the English admiralty respecting this particular class of cases, expressed himself as follows: "I am not aware that this distinction between petitory and possessory

suits (somewhat analogous to the distinction in actions respecting the realty, between droitual and possessory suits), has, in point of jurisdiction, ever been admitted in the actual practice of the courts of the United States, sitting in admiralty. It stands, as far as I have been able to trace it, upon no principle, unless it be that titles derived from the common law shall be nowhere litigated, except in courts of common law; a proposition that, carried to its full extent, would prostrate the entire jurisdiction of the admiralty in instance causes. Indeed, the titles to ships principally depend upon the maritime law, as recognized and enforced in the common law; and the admiralty does little more in instance cases, than to carry into effect the declarations of the maritime law, so recognized and enforced. No doubt exists, that the admiralty possesses authority to decree restitution of ships wrongfully withheld from the owners;¹ and if so, it ought to possess plenary jurisdiction over all the incidents. That was the clear opinion of Lord HALE, in *Radley v. Eggesfield* (1 Vent., 173, 308), which was afterwards confirmed by the whole court; and it was there said, that when the admiralty hath original cognizance of the principal matter, it hath also cognizance of the incidents thereto. The same case is reported in other books, and particularly in 2 Saund. R., 260, and in Lev., 26, where the doctrine is stated at large. It had been decided in the same way in the reign of Queen Elizabeth (Anon. Cro. Eliz., 685); and the

¹ *Ex parte Blanshard*, 2 Barn. & Cresw., 244.

VOL. 1. doctrine is so reasonable in itself, that the difficulty is to conceive how it ever could have been questioned. In the exercise of the prize jurisdiction, it has been constantly admitted to the largest extent.

“In cases not strictly of prise, but partaking of their nature, as in cases of illegal captures in violation of our neutrality, the courts of the United States have never hesitated to inquire into and decide the title, however complicated.¹ In cases of salvage and bottomry, a like course has been adopted,² as well as in cases of seizure for forfeitures.³ But what is still more directly applicable, in case of marine torts, the Supreme Court has gone at large into the question of proprietary interest, and has moulded its final decree according to the ultimate rights established by the parties. *Rose v. Himely* (4 Cranch, 241) is an instance full of intricate and perplexing inquiries on this very point of title.

“For myself, meaning to speak with all due deference for the judgment of others, I feel bound to confess my inability to perceive any sound distinction, as to the point of jurisdiction, between petitory and possessory suits. If there were a series of American decisions on the subject, which in

¹ See *Talbot v. Janson*, 3 Dall., 133; *Del Col v. Arnold*, 3 Dal., 383; *L'Invincible*, 1 Wheat. R., 257; *The Alerta*, 9 Cranch, 359; *The Nuestra Senora de la Caridad*, 4 Wheat. R., 497; *The Antelope*, 10 Wheat. R., 66; *The Santa Maria*, 7 Wheat. R., 490.

² *The Mary Ford*, 3 Dall., 188; *The Adventure*, 8 Cranch, 221; *The Blaireau*, 2 Cranch, 240.

³ *The Mars*, 8 Cranch, 417; *The Plattsburgh*, 10 Wheat. R., 133; *The Antelope*, 10 Wheat. R., 66; 11 Wheat. R., 413; 12 Wheat. R., 546.

point of authority ought to control my judgment, I should cheerfully bow to them. One cannot, indeed, but feel the truth of the language of Lord TENTERDEN, that this jurisdiction of the Court of Admiralty is a most useful part of the jurisprudence of the country.¹ As such, I cannot but think that it ought not to be surrendered but upon principles too clear to admit of judicial doubt(a).”

The admiralty jurisdiction of petitory as well as of possessory suits is recognized, and, by implication affirmed by the Rules of the Supreme Court, regulating admiralty proceedings(b), and has at length been expressly and unequivocally asserted in a formal judgment of that court, referring with approbation to the decision and adopting the reasoning of Mr. Justice STORY in *The Tilton*(c).

The question may now therefore be regarded as definitely settled.

¹ In *Ex parte Blanshard*, 2 Barn. & Cresw., 244.”

(a) *The Tilton*, 5 Mason’s R., 465.

(b) See Appendix, Rule xx.

(c) *Ward v. Peck*, 18 Howard’s R., 267.

CHAPTER XII.

SALVAGE.

SALVAGE constitutes an important subject of the admiralty jurisdiction; and this jurisdiction may be exercised as well *in personam*, as *in rem*(a).

Suits in admiralty for salvage have been of frequent occurrence in this country, as well as in England; and the general principles pertaining to the subject having thus been repeatedly brought under discussion in our courts, may now be considered as settled. These principles may be conveniently arranged under the following heads: 1. Who may become salvors; 2. What constitutes a salvage service; 3. The amount of salvage to be allowed, and the manner of its distribution; 4. By what acts of the salvor his claim to salvage is forfeited.

(a) *The Hope*, 3 Robinson's R., 215; *The Trelawney*, id., note; *The Schooner Boston*, 1 Sumner's R., 328, 341; *Brevoort v. The Fair American*, 1 Peters's Adm. Decis., 87, 94; Rule XIX of the new Rules of Practice in causes of admiralty and maritime jurisdiction, by which it is declared, that "In suits for salvage, the suit may be *in rem*, against the property saved, or the proceeds thereof; or *in personam*, against the party, at whose request and for whose benefit the salvage service has been performed."

1. WHO MAY BECOME SALVORS.

Lord STOWELL has defined a salvor to be "a person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a voluntary adventurer, without any preëxisting covenant that connected him with the duty of employing himself for the preservation of that ship(a)." This definition, it will be seen, excludes all persons who are under any legal obligation, expressed or implied, to render assistance(b). And it has accordingly been uniformly held that the officers and crew of the ship, whatever may have been the perils or hardships or gallantry of their services, are not, under ordinary circumstances, entitled to claim as salvors; for they are bound by their contract to exert themselves to the utmost for the safety of the ship and cargo. But it has been decided in this country that if, before the service was rendered, the connection of the seamen with the ship had been *de facto*, or by operation of law dissolved(c), or, it

Seamen.

(a) *The Neptune*, 1 Haggard's R., 227, 236.

(b) It is true that the contract of seamen is not dissolved by shipwreck, and that they are entitled to compensation out of the fragments of the ship or cargo which they have contributed by their exertions to save, though no freight has been earned. But though this compensation has sometimes been denominated salvage, it has come at length to be regarded strictly as wages, and as constituting a mere exception to the general rule that wages are dependent on freight. *Vide supra*, page 105.

(c) *Mason v. The Blaireau*, 2 Cranch's R., 240 (1 Curtis's Decis. S. C., 479).

VOL. 1. seems, if the services exceed the proper duty of a seaman(*a*), he may be permitted to claim as a legal salvor. Thus, where a ship was abandoned in despair, on the ocean, by the master and the crew, with the exception of one seaman who was left on board either by accident or design, and who coöperated with others, by whom the ship was afterwards found, in bringing her into port, he was allowed by the court to share in the salvage(*b*).

Pilots. The same principles are applicable to pilots, who cannot entitle themselves to salvage for services rendered, however meritorious, while acting in the strict line of their duties; but if they perform salvage services beyond the line of their appropriate duties, or under circumstances to which those duties do not justly attach, they are to be regarded as standing in the same relation to the property as any other salvor. Thus, in the case of *Hobart v. Drogan*, just cited, the brig *Hope*, bound from Havana, to Mobile, with a valuable cargo, on her arrival, in the month of January, off Mobile Point in the Gulf of Mexico, took a pilot on board, by whom she was safely conducted in the evening to a place within the harbor where pilots are usually discharged, and where the pilot left her. Having proceeded some distance

(*a*) *Hobart v. Drogan*, 10 Pet. R., 108 (12 Curtis's Decis. S. C., 34); *Hand v. The Schooner Elvira*, Gilpin's R., 60.

(*b*) *Mason v. The Blaireau*, ubi supra. In the English admiralty the opposite doctrine prevails. The mariner is held entitled to *wages*, but not to salvage. *The Neptune*, 1 Haggard's R., 227; *The Reliance*, 2 W. Robinson's R., 119; *The Star* (before the Hon. Alexander Stewart, in Vice-Admiralty Court of Nova Scotia), 14 Law Rep., (4 N. S.), 487.

up the bay, she there came to anchor, about six miles within the Point. In the night the wind rose to a violent gale, in the course of which the Hope parted her cables, and was driven back by the force of the winds and waves, below the Point, where she grounded among breakers. The gale increased, and the brig being thrown upon her beam ends, the masts and bowsprit were cut away. The master and crew, to save their lives, took to the long boat, and made their escape to the shore, leaving the Hope and her cargo at the mercy of the winds and waves. Two days afterwards, the libellants, all of whom were pilots of the outer harbor of Mobile, having in the meantime made unsuccessful efforts to board the Hope, at length succeeded in doing so, and were the means of saving the vessel and cargo. The value of the brig and cargo was about \$15,000; and the district court decreed one-third of the value to the libellants as salvage. On an appeal to the Supreme Court, it was contended that the libellants, being pilots, were not entitled to salvage; but the court overruled the objection, and affirmed the decree of the district court, considering the exertions made by the libellants as an enterprise strictly of salvage, and not of pilotage. The proper duty of a pilot consists in navigating the ship over his pilotage ground. It therefore necessarily presupposes that the ship is capable, in point of crew, equipments and situation, of being navigated, although she may, perchance, be in distress, or laboring under difficulties. To go to the rescue of a wrecked vessel, and undertake the task of saving her or her cargo, when she is wholly

VOL. 1. innavigable, is no more the duty of pilots than of other persons. In such cases, pilots, as such, have no official connection with the vessel, and are under no obligation to hazard their lives and property, and apply their labor for her deliverance. If they do so, it is clearly a salvage, and in no just sense a pilotage service. The rights with respect to salvage of all other persons standing in any official relation to the property saved, are regulated by the same principles which govern the right of pilots(a).

Passengers.

Neither is a passenger, in general, to be allowed salvage for any assistance he may afford to a vessel in distress; it being the duty, as well as the interest, of all persons on board to contribute their aid on such an occasion. But a passenger is not bound to remain on board the ship in the hour of danger, but may quit it, if he has an opportunity to do so; much less is he required to take upon himself any responsibility as to the conduct of the ship. And, therefore, when a ship bound to the West Indies, having struck upon the shoals of Chichester, in a gale of wind, was deserted by the master, who took with him part of the crew; and a person on board as passenger, who had commanded vessels in the same trade, took command of the ship by the desire of the passengers, and with the consent of the mate and the remainder of the crew, and carried her back in safety to Ramsgate harbor, he was permitted to

(a) *Le Tigre*, 3 Wash. R., 565; *The Aquila*, 1 Robinson's R., 39; *The Frederick*, 1 W. Robinson's R., 17; *The Belle*, Edwards's R., 66.

recover a considerable sum for extraordinary services performed, and responsibility incurred(*a*). CHAP. 12.

When salvage services are performed by an apprentice to the owner of the vessel, the salvage due for such services is to be awarded, not to the master, but to the apprentice(*b*). But salvage earned by a slave, belongs to his master(*c*). Apprentices.
Slaves.

If salvors, in prosecuting their enterprise, themselves fall into distress, and are relieved by other salvors, they do not lose their original right to salvage; but the second set of salvors partake in the salvage only according to their merit. Nor can second salvors lawfully make it a condition of giving assistance, that the original salvors shall abandon all claims to salvage(*d*). And if property, abandoned by the master and crew, be taken possession of by one set of salvors, a second set have no right to interfere with them, and become participators in the salvage, unless it appears that the first would not have been able to effect the salvage without their aid; a salvor in possession, in the act of effecting a salvage, and with sufficient means, having a lien or a qualified property in the thing saved(*e*). But Second salvors.

(*a*) *The Two Friends*, 1 Robinson's R., 272; *Newman v. Walters*, 3 Boss. & Pull., 613. See, also, *Bond v. The Brig Cora*, 2 Washington's R., 80, 87; *The Branston*, 2 Haggard's R., 3; Abbot on Shipping, Boston ed., 1846, 666.

(*b*) *Mason v. The Blaireau*, 2 Cranch's R., 240 (1 Curtis's Decis. S. C., 479).

(*c*) *Ibid.*

(*d*) *The Henry Ewebank and Cargo*, 1 Sumner's R., 400.

(*e*) *The Schooner Elvira*, Gilpin's R., 60; *The Maria*, Edwards's R., 175; *The Charlotte*, 2 Haggard's R., 361; *Dantzic Packet*, 3 Haggard's R., 383.

VOL. 1. prior salvors have no right, while the master is in command, to interfere in respect to further assistance, or attempt to exclude subsequent salvors; and such misconduct impairs their title to salvage(a).

2. WHAT CONSTITUTES A SALVAGE SERVICE.

Salvage has been defined to be "the compensation allowed to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss(b).

It must be maritime.

But to constitute a case of salvage within the admiralty jurisdiction, the service must be a maritime service; that is to say, it must have been rendered in saving property on the sea, or wrecked on the coast of the sea, including, however, waters navigable from the sea and within the ebb and flow of tide(c). This definition, it will be seen, admits of great diversity in the actual predicaments of the property in relation to which salvage services may be rendered. It matters not whether the vessel, when met with at sea, has been deserted by her officers and crew; or whether they still remain on board, in peril or distress. And in cases occurring on the coast, it matters not whether the vessel be irretrievably stranded, or only aground; or whether she be sunk or afloat. If the case be one demanding assistance, and it be effectually rendered, in saving the vessel

(a) *Dantzic Packet*, 3 Haggard's R., 383.

(b) Abbot on Shipping, Boston ed. of 1846, 659.

(c) *The Schooner Emulous*, 1 Summer's R., 207, 210; *The Brig Healy*, 4 Washington's R., 651; *Waring v. Clarke*, 5 Howard, 431.

or cargo, or any part of either, from impending destruction or loss, that is sufficient. Neither is it important in either case, whether the service was rendered spontaneously or by request; or whether with or without a previous contract between the owner or his agent, and the salvors; or whether, in case of a previous contract, the rate or amount of compensation for the labor and services to be performed was agreed upon, or left to be determined by the *quantum meruerunt*. The service, whether rendered spontaneously or by request, is a salvage service; and the contract, if there is one, is a salvage contract, and the compensation a salvage compensation(a).

(a) *The Emulous*, 1 Sum. R., 208, 210; *Peisch v. Ware*, 1 Cranch's R., 447 (2 Curtis's Decis. S. C., 145); *Stratton v. Jarvis*, 8 Peters's R., 4 (11 Curtis's Decis. S. C., 3); *Hobart v. The Hope*, 10 Peters's R., 108 (12 Curtis's Decis. S. C., 34); *Houseman v. The North Carolina*, 15 Peters's R., 41 (14 Curtis's Decis. S. C., 10); *The United States v. The Amistad*, id., 518 (14 Curtis's Decis. S. C., 156); *Rowe v. The Brig* —, 1 Mason's R., 372; *The Ewebank*, 1 Sumner's R., 400; *Clarke v. The Brig Healy*, 4 Washington's R., 651; *Stevens v. The Argus*, Bee's R., 170; *Booth v. The Schooner L'Esperance*, id., 92; *Crowel v. The Brothers*, id., 136; *Schultz v. The Nancy*, id., 139; *Taylor v. The Friendship*, id., 175; 1 Adm. Decisions, 31-103; 2 id., 278-287, 356-383, 424. The cases, except the first, are here cited without much regard to order, chiefly for the purpose of illustrating the diversities of character of which salvage cases are susceptible, or rather as specimens of the various descriptions of cases in which salvage has been or may be awarded. It would be easy to extend the list from the reports of decisions in our own courts, and especially from the very valuable reports, with which it may be presumed most lawyers are familiar, by GALLISON, MASON, SUMNER and STORY, of cases decided in the First Circuit by Mr. Justice STORY. Those who are disposed to pursue the subject, will naturally resort also to Robinson's, Edwards's, Dodson's, Haggard's, and W. Robinson's Reports of Cases decided in the English Court of Admiralty.

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Express con-
tracts not
binding,
unless, etc.

Contracts of this nature, however, are not held obligatory by courts of admiralty upon the owners of the property saved, unless it clearly appears that no advantage was taken of their situation, and that the rate of compensation is just and reasonable. In that case, the stipulated rate of allowance will generally be adopted and enforced by the court, as just and conscientious(a).

The service
must have
been effec-
tive.

But salvage is a compensation for actual services rendered, and is allowed in consideration of a benefit conferred on the person whose property is saved. Unless, therefore, the property was in fact saved by being brought into some port of safety, by those who claim as salvors, or by their aid, however meritorious may have been their intentions, and however heroic or perilous may have been their conduct, salvage will not be allowed(b). And in case of a vessel imbedded in a field of ice which was afloat and rapidly drifting in Delaware bay, which had with difficulty been boarded by the libellants, who continued on board two days at the peril of their lives, making great exertions to extricate the vessel, the claim of salvage was accordingly rejected, on the ground that her ultimate escape was providential, and not in any degree fairly attributable to the exertions of the libellants.

Where a salvage has been effected by a part of a

(a) *The Emulous*, 1 Sumn. R., 207; *Bearse v. 340 Pigs of Copper*, 1 Story's R., 314.

(b) *Talbot v. Seeman*, 1 Cranch's R., 1 (1 Curtis's Decis. S. C., 331); *The Henry Ewebank*, 1 Sumner's R., 400, 416, 417; *Clarke v. The Brig Healy*, 4 Washington's R., 651.

ship's crew, the rest remaining on board the salvor ship; if the latter were equally ready to engage in the service, they are entitled to share equally with the others in the reward(*a*).

OHAP. 12.
When performed by part of a crew, the rest to share.

To warrant a claim for salvage, the danger to the property saved must be real and imminent. Mere speculative danger is insufficient; but it need not be such that escape from it by other means was impossible(*b*).

The danger must be imminent.

3. THE AMOUNT OF SALVAGE TO BE ALLOWED, AND THE MANNER AND RATIO OF ITS DISTRIBUTION.

In cases of recapture from a public enemy, the proportion of the recaptured property to be adjudged to the recaptors as salvage, is prescribed by the statute law of the United States(*c*). In all other cases, the amount of compensation is to be determined by the sound discretion of the court, under all the circumstances of the case(*d*). This discretionary authority is, however, to be exercised in subordination to certain general principles founded in public policy, and under the guidance of judicial precedents. The service is of a highly meritorious character: it consists in saving life and property

Amount allowed in case of recapture.

In other cases discretionary:

General principles by which the discretion of the court is regulated.

(*a*) *The Baltimore*, 2 Dodson's R., 132; *Bond v. The Brig Cora*, 2 Washington's R., 80; *Mason et al. v. The Blaireau*, 2 Cranch's R., 240 (1 Curtis's Decis. S. C., 479).

(*b*) *Talbot v. Seeman*, 1 Cranch's R., 1 (1 Curtis's Decis. S. C., 331).

(*c*) Act of March 3, 1800; 2 Stat. at Large, ch. 14.

(*d*) *Talbot v. Seeman*, 1 Cranch's R., 1 (1 Curtis's Decis. S. C., 331); 3 Kent's Comm., 3d ed., 245; Abbot on Shipping, Boston ed. of 1846, 664.

VOL. 1. about to perish at sea, often at the imminent peril of the salvor. The interests of society, therefore, require that the strongest inducements should be held forth for its performance; and it is accordingly a settled principle that it is to be liberally rewarded. The reward should be such as not only to afford an ample remuneration to the salvor for the risk of life and property, and for the labor, privations and hardships encountered, but so liberal as to furnish a sufficient incentive to similar exertions by others(a). "The principles on which the Court of Admiralty proceeds," said Sir WILLIAM SCOTT, in the case of *The William Beckford*(b), "lead to liberal remuneration in salvage cases; for they look not merely to the exact *quantum* of service performed in the case itself, but to the general interests of the navigation and commerce of the country, which are greatly promoted by exertions of this nature. The fatigues, the anxiety, the determination to encounter danger if necessary, the spirit of adventure, the skill and dexterity which are acquired by the exercise of that spirit, all require to be taken into consideration.

"What enhances the pretensions of salvors most, is the actual danger which they have incurred: the value of human life is that which is, and ought to be principally considered in the preservation of other men's property; and if this is shown to have been

(a) *Mason v. The Blaireau*, 2 Oranoh's R., 240 (1 Curtis's Decis. S. C., 479); *The Ewebank*, 1 Sumner's R., 400, 413; *Tyson v. Prior*, 1 Gallison's R., 133; *Bond v. The Brig Cora*, 2 Washington's R., 80; *The William Beckford*, 3 Robinson's R., 355 (Phila. ed. 1804, 286).

(b) 3 Robinson's R., 355.

hazarded, it is most highly estimated." But, on the other hand, it is not to be forgotten that the title of the owner is not divested by his misfortunes; and that after the claims of private justice, and the demands of public policy and humanity are satisfied, he is entitled to what remains of his property. It is not less a settled principle, therefore, that the allowance for salvage is not to be unreasonably large. Within the limits imposed by these general principles, the amount of salvage to be awarded is the just result of a combination of considerations. The value of the property saved, the degree of hazard in which it was placed, the promptitude, intrepidity and address displayed, the danger to life and health incurred, and the amount of labor actually performed by the salvors, are the chief elements of this combination, and, among them, the hazard to life is the most important. If the property saved is of great value; or, if it was in a condition apparently hopeless but for the interposition of the salvors; or, if the service was undertaken with alacrity, and executed with a high degree of energy and skill; or, if it involved extraordinary peril, or required severe and exhausting labor, the retribution ought to be proportionally liberal. The opposite of either of these circumstances ought, consequently, to produce the opposite effect(*a*). And although the court has no power to remunerate the mere preservation of

(*a*) *Talbot v. Seeman*, 1 Cranch's R., 1 (1 Curtis's Decis. S. C., 321); *Tyson v. Prior*, 1 Gallison's R., 133; *Bond v. The Brig Cora*, 2 Washington's R., 80; *The William Beckford*, 3 Robinson's R., 355 (Phila. ed. of 1802, 286).

VOL. 1. life, yet, if it is accompanied by the preservation of property also, it may be taken into consideration in determining the amount of remuneration for the latter service(*a*).

Amount
allowed in
cases of
derelict.

It seems to have been a rule of the maritime law, in cases of derelict, to allow one-half to the salvors; although Lord STOWELL appears to have entertained considerable doubt upon this point, and expressly asserts that if such a rule ever existed, it had become obsolete(*b*). Mr. Justice STORY, in one case, speaks of the ancient existence of the rule and its continuance to the close of the reign of Charles II., as unquestionable; and he even considered it as still subsisting. As a limit upon judicial discretion in ordinary cases, he thought it a safe and salutary rule. He admitted however that it had become a flexible rule, but he denied that it ought to bend to slight circumstances(*c*). In another case, fifteen years afterwards, he refers to it as the well-known and favored rule in cases of derelict, which, although not inflexible, was rarely deviated from, except in cases of very extraordinary value, or of very slight hazard(*d*); and he has reasserted it in strong terms, in two subsequent cases(*e*). Independently of the great authority of Mr. Justice STORY himself, it appears to be somewhat questionable whether there is any sufficient warrant

(*a*) *The Aid*, 1 Haggard's R., 83.

(*b*) *The Aquila*, 1 Robinson's R., 37, 45.

(*c*) 1 Mason's R., 372; *Rowe v. The Brig ——— and Cargo*, 1 Mason's R., 272.

(*d*) *The Boston and Cargo*, 1 Sumner's R., 328.

(*e*) *The Henry Ewebank*, 1 Sumner's R., 400, 411; *Sprague v. 140 Barrels of Flour*, 2 Story's R., 195.

for the positive language in which he has asserted and defined the supposed rule. Lord STOWELL, as we have seen, declared it to be obsolete, if it ever existed. In a case of derelict in the Supreme Court of the United States, no reference is made to any such rule, and the rate of compensation awarded in the court below, was reduced from three-fifths to two-fifths(*a*). In a meritorious case of unquestionable derelict, Mr. Justice WASHINGTON seems not to have been aware of the existence of such a rule(*b*); and in a case of this nature before Judge BEE, he awarded one-third of the net proceeds of the property as salvage, remarking that in other cases of derelict, attended with greater danger and exertion, he had sometimes given one-half, but added, nevertheless, that this was no *general rule*, and that every case must be judged of according to circumstances(*c*). On the other hand, an impression seems always to have prevailed to a considerable extent, both in England and in this country, not, certainly, that in cases of derelict, the salvors were entitled, *de jure*, to one-half, but that cases of this description were to be regarded as a distinct class, in which the salvors were entitled to a more liberal remuneration than in other cases of equal pretensions in other respects; and that *prima facie*, a moiety was to be considered as the proper allowance. Thus, Judge BEE, in another case(*d*), says: "I have always considered

(*a*) *The Blaireau*, 2 Cranch's R., 240 (1 Curtis's Decis. S. C., 479).

(*b*) *The Cora*, 2 Washington's R., 8.

(*c*) *The Leander*, Bee's R., 260.

(*d*) *Cross v. The Bellona*, Bee's R., 139.

VOL. 1. cases of derelict as different from other claims for salvage, and have invariably decreed one-half by way of compensation. Circumstances may induce me, on future occasions, to give *less*: I would not, therefore, be understood as laying this proposition down *universally*."

Neither is it to be inferred from the distinct assertion by Mr. Justice STORY of the existence of this rule, and the commendation bestowed on it by him, that he was in the practice of applying it without a thorough examination and mature consideration of the circumstances of the case before him. No judge ever inquired more earnestly and patiently, or discriminated more nicely. In the very case above referred to (*a*), in which he expressed himself most strongly in favor of the rule, and which, if not technically a case of derelict, he considered to be, at least, a case of *quasi* derelict, he affirmed the decree of the district court, adjudging only two-fifths to the salvors. In another of the cases above cited (*b*), he says: "Cases may occur of such extraordinary peril and difficulty, of such exalted virtue and enterprise, that a moiety, even of a very valuable property, might be too small a proportion; and on the other hand, there may be cases, where the service is attended with so little difficulty and peril, that it would entitle the parties to little more than a *quantum meruit* for work and labor. These are exceptions (and others might be stated)

(*a*) *The Boston and Cargo*, 1 Sumner's R., 328.

(*b*) *Rowe v. The Brig ——— and Cargo*, 1 Mason's R., 372, 378.

to the operation of the rule, which may perfectly consist with its general obligatory force." He considered the rule, therefore, to be a flexible one as well in favor of the salvor as against him; and in the case of *Sprague v. 140 Barrels of Flour*(a), the remaining case decided by him, and above cited, he adjudged a moiety of the gross proceeds, charging the costs and expenses exclusively on the other moiety. This is said to be the highest salvage compensation ever given in the English admiralty in cases of derelict(b). There is, however, one reported case in which two-thirds was given, the value of the property saved being £3400; but there were in that case two successive sets of salvors, and the ship had sunk in the mean time. No allusion was, however, made to this circumstance by Lord STOWELL, as one of the grounds of this extraordinary liberality(c); and even in a case of money found derelict, no owner appearing, one-half was adjudged, in the English admiralty, to the salvor(d). In a case involving no great danger, Lord STOWELL gave three-fifths, the total value of the ship and cargo being £1900. It was a case of derelict, and Lord STOWELL said that if there had been considerable danger, he should have given what the court was in the habit of giving in cases of derelict, an entire moiety(e). Under this state of the law, it

(a) 2 Story's R., 195.

(b) *The Frances Mary*, 2 Haggard's R., 89.

(c) *The Jonge Bastian*, 5 Robinson's R., 322.

(d) *The King v. Property Derelict*, 1 Haggard's R., 383.

(e) *The Fortuna*, 4 Robinson's R., 193.

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becomes important to ascertain what constitutes a case of derelict in the sense of the maritime law.

What constitutes derelict.

It has been said by Lord STOWELL to be "by no means necessary to constitute derelict, that no owner should afterwards appear. It is sufficient that there has been an abandonment at sea by the master and crew, without hope of recovery; without hope of recovery, because a mere quitting of the ship for the purpose of procuring assistance from the shore, or with the intention of returning to her again is not an abandonment;" and he quotes, apparently with approbation, the definition of Sir LEOLINE JENKINS: "Boats, or other vessels forsaken or found on the seas without any person in them(a)." Mr. Justice STORY affirms that "it is insufficient to constitute derelict, that the vessel should be abandoned; but the abandonment should be without the hope of recovery, and without the intention of returning to the vessel(b)." In a subsequent case, which was simply that of a vessel found at sea without any person on board, the same eminent judge held it to be clearly a case of derelict in the sense of the maritime law; and he adopted the definition of Sir LEOLINE JENKINS, above quoted, as "the true definition in its broad and accurate sense." Referring to the language of Sir WILLIAM SCOTT, in the case of *The Aquila*, he remarked, that instead of the words "without hope of recovery," as used by him to distinguish a temporary

(a) *The Aquila*, 1 Robinson's R., 37.

(b) *Tyson v. Prior*, 1 Gallison's R., 133.

absence from a permanent abandonment, it might have been more accurate to say, "without any intention to return;" since the *spes recuperandi* might exist, even though the abandonment was without such intention(a).

In another case before Mr. Justice STORY, the schooner Boston, being on a voyage from Baltimore to Portland, was run down in the night by another vessel, which kept on her way. The Boston filled with water, and being supposed to be in a sinking condition by the master and crew, seven in number, they took to the long boat in haste, and were picked up by the schooner Magnolia, about an hour afterwards, and at the distance of about three miles from the Boston. At the suggestion of her master, the master of the Magnolia continued to lie to until daybreak, for the purpose of looking out for the Boston, which was then descried from mast-head, about eight miles distant, and was with difficulty towed into harbor in the course of the next three days. Mr. Justice STORY was of opinion that this might be considered as a case of derelict, or if not technically such, as a case of *quasi* derelict equally meritorious; and he affirmed the decree of the district court, adjudging two-fifths of the value of the vessel and cargo to the salvors(b).

From the foregoing definitions and illustrations, it may be inferred, that a vessel found deserted at sea, is to be deemed, *prima facie*, derelict; and if no claimant appears, or if there is no proof that the

Vessels
deserted, to
be deemed,
prima facie,
derelict.

(a) *Rowe v. The Brig ——— and Cargo*, 1 Mason's R. 272.

(b) *The Boston and Cargo*, 1 Sumner's R., 328.

VOL. 1. master and crew had left her in quest of succor, or with the intention of returning, she is to be so adjudged.

Amount of salvage in cases of distress, shipwreck, etc.

In cases other than of derelict, and which are not characterized by very extraordinary features, the amount of salvage allowed may be said to have fluctuated between one-eighth and one-half; and it may be added that one-third seems to have been the amount most frequently adjudged(*a*). When the property saved is of very small bulk in proportion to its value, as money or precious stones, *cæteris paribus*, a less proportion is awarded. Thus in a case of shipwreck on the coast, where the libellants, four in number, at great peril, boarded the wreck, in a boat, and took off the passengers and crew, together with \$25,000 in money, one-fifth was allowed as salvage(*b*).

In some instances a gross sum has been allowed, bearing no declared proportionate relation to the value of the property saved. Thus in the case of the *William Beckford*(*c*), in which the ship and cargo were valued at £17,640, £1000 was adjudged to the active salvors, and £50 to the owners of the boats and small vessels employed in the service; and in the case of the *Emulous*(*d*), \$850, being a little more than one-seventh, was allowed. So in the case of *The Nancy*(*e*) (in the report of which, however, the value of the property saved is not mentioned),

(*a*) *The Emulous*, 1 Sumner's R., 207, 213; and see the Reports of cases determined in the admiralty in England and in the United States, *passim*.

(*b*) *The Friendship*, Bee's R., 175.

(*c*) 3 Robinson's R., 355 (Phila. ed. of 1802, 286).

(*d*) 1 Sumner's R., 208,

(*e*) Bee's R., 139.

\$1000 was given. The amount of salvage, it has been said, is to be determined with exclusive reference to the circumstances existing at the time when the service is rendered; and ought not, therefore, to be affected by subsequent events not foreseen or anticipated, tending to show that the real danger to the property saved was either greater or less than the apparent danger(*a*).

It is the established usage of the High Court of Admiralty of England to take the value of the ship and cargo, and assess the amount of the remuneration upon the whole, each paying in due proportion. The parties are not permitted, therefore, to aver that the services were of greater importance to the ship than they were to the cargo, and therefore that the ship should bear the greater burthen, or *vice versa*. Such a distinction, if acknowledged, would, in many cases, lead to questions of great nicety, which it would be difficult for the court to adjust. Silver and bullion, however, are excepted from this rule, upon the consideration that these are more easily rescued and preserved than more bulky articles of merchandise(*b*). In limiting the statement of the exception to silver and bullion, I have adhered to the authority cited, such being the language of Dr. LUSHINGTON. It is presumed, however, that the exception would be extended to other articles of small bulk and great comparative value, as precious stones, jewelry, etc.

The apportionment of salvage among the several

CHAP. 12.
Amount of salvage not affected by subsequent events.

Burthen of salvage to be borne in equal proportions by ship and cargo.

Except in the case of silver or bullion.

(*a*) *The Emulous*, 1 Sumner's R., 215.

(*b*) *The Emma*, 2 W. Robinson's R., 315.

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Distribution
of salvage
compensa-
tion.

parties entitled to share in it, is often an embarrassing as well as delicate and responsible task. Like the determination of the gross amount to be allowed, it may be said in general to rest, within certain limits founded in considerations of public policy and sanctioned by usage, in the sound discretion of the court. The subject has been examined and discussed by Mr. Justice STORY, both upon principle and authority, with his accustomed fullness, learning and ability. The circumstances of the case before him were such as to invite, and indeed to require, a comprehensive survey of the subject, and it may safely be asserted that all the light of which it appears to be susceptible is shed upon it by his judgment(*a*).

Owners of
salvor ship
entitled to
share.

When, as is generally the case, salvage is effected by the instrumentality of one or more vessels, the owners, though they cannot properly be denominated salvors, are entitled to a share of the salvage on account of the exposure of their property to danger and loss. Stoppage on the ocean to save the property of another, is a deviation from the voyage, which discharges the underwriters(*b*); and for this

(*a*) *The Henry Ewebank*, 1 Sumner's R. 400.

(*b*) *Ibid.*, 336, 425; *Bond v. The Cora*, 2 Washington's R., 80. But the maritime law, looking to the general interests of commerce, does not prohibit the master from deviating to save property in distress, if, in the exercise of a sound discretion, he deems it fit to do so: as between himself and the owners, the usage of the world has clothed him with this authority. (*Ibid.*) A stoppage for the purpose of saving life, is a high moral and christian duty, and is not a deviation which will exonerate the underwriters. (*Ibid.*) See, also, *The Nathaniel Hooper*, 3 Sumner's R., 542, 578, 579.

risk incurred, the owner is entitled to be indemnified. "But the law does not stop short with a mere allowance to the owner of an adequate indemnity for the risk so taken. It has a more enlarged policy and a higher aim. It looks to the common safety and interest of the whole commercial world in cases of this nature; and it bestows upon the owner a liberal bounty and reward, to stimulate him to a just zeal in the common cause, and not to clog his voyages with narrow instructions, which should interdict his master from any salvage service. The law has a wise regard to considerations of this nature; and it offers, not a premium of indemnity only, but an ample reward, measured by an enlightened liberality and forecast(*a*).” This view of the subject is in accordance with that taken by Chief Justice MARSHALL, in delivering the opinion of the Supreme Court, in a case where he observes that the same policy which awards a liberal remuneration to captains and crews, ought to extend to all owners the same rewards, for a service which deserves to be encouraged; and it is surely no reward to a man, made his own insurer without his own consent, to return him very little more than the premium he had advanced(*b*). Mr. Justice STORY also suggests that the extension to owners of the same principles of remuneration that are applied to officers and seamen, is further recommended by the strong inducement it furnishes to the latter “not to desert

(*a*) *The Henry Ewebank*, 1 Sumner's R., 400, 425.

(*b*) *The Blaireau*, 2 Cranch's R., 240 (1 Curtis's Decis. S. C., 479).

VOL. 1. their own proper duty to their owner, and his interests, for selfish purposes, by making them share only in subordination to, and in connection with, those interests."

In the case of *The Blaireau*, the Supreme Court adjudged to the owners of the salvor ship one-third of the amount of salvage allowed.

In the case above cited, decided by Mr. Justice WASHINGTON, after grave consideration, he awarded to the owner the same proportion; and it was adopted by Mr. Justice STORY in the case before him, not only as suitable to the circumstances of that particular case, but as, in his opinion, constituting the true general rule of remuneration: not a rule absolutely inflexible, and not to yield to any extraordinary merits, or perils, or losses on the part of owners; for cases may exist in which one-half might with propriety be allowed to the owner, as had sometimes been done.

Allowance
to the master
and mate.

As between the master and the other officers, the usual course has been to allow the master a larger proportion than the mate, and this even when the mate has been put in command of the salvaged ship. Under ordinary circumstances, the proportion commonly allowed to the master has been double that of the mate. This is deemed to be just, on the ground that the master, in permitting the salvage enterprise, takes upon himself a great responsibility to his owners, and also to the shippers of the cargo. But here again the rule is not inflexible; and in case of great perils, sacrifices and hardships incurred by the mate, as commander of the actual salvors,

his proportion is permitted to approach nearer to that of the master(*a*). Upon this principle, a larger share, amounting to about two-thirds of the amount awarded to the master, was, by the Supreme Court in one case(*b*), and by Mr. Justice WASHINGTON in another(*c*), allowed to the mate.

CHAP. 12.

As between the master and the crew, the usual practice has been to allow to the former about one-fourth of the salvage, after deducting the proportion adjudged to the owner. This was done in the two cases last cited.

To the crew collectively.

Where the pretensions of the seamen composing the crew are very unequal, it is usual to discriminate between them. But it is against the policy of the maritime law to make what may be felt to be invidious distinctions in this respect upon light grounds; and the amount allowed as salvage is deemed to be much more important than the ratio of apportionment. This principle is applicable to cases in which several vessels and crews are concerned in the salvage service(*d*).

Distribution among the crew.

The freighter of the salvor ship is not entitled to salvage, unless, being on board at the time of the salvage enterprise, he consented to it, and thus discharged the owner from the responsibility incurred by deviating from the voyage(*e*).

Freighter not entitled to salvage, unless, etc.

(*a*) *The Henry Ewebank*, 1 Sumner's R., 400, 429.

(*b*) *The Blaireau*, ubi supra.

(*c*) *The Cora*, 2 Washington's R., 80, 87.

(*d*) *The Henry Ewebank*, 4 Sumner's R., 400, 433; *The Cora*, 2 Washington's R., 88; *The Jonge Bastian*, 5 Robinson's R., 322.

(*e*) *The Cora*, 2 Washington's R., 80; *The Nathaniel Hooper*, 3 Sumner's R., 542, 577-581; *The Blaireau*, ubi supra.

4. BY WHAT ACTS OF THE SALVOR HIS RIGHT TO SALVAGE IS FORFEITED.

It is an important and well settled principle that a salvor forfeits all claim to compensation by the embezzlement of any part of the property saved, and this principle has been distinctly affirmed by the Supreme Court of the United States(*a*); and it matters not whether the act of embezzlement was committed at sea, or after the property has been brought into port, or even while it was in the custody of the officers of the court(*b*). Salvage may also be forfeited by other aggravated misconduct on the part of the salvor, such as spoliation, smuggling, or gross neglect(*c*).

Officers and crews of ships concerned, competent witnesses.

In a cause of salvage, the officers and crews of the vessels concerned, on both sides, are admitted, *ex necessitate*, to testify to facts occurring at the time of the service, and which, from the nature of the case, are not susceptible of distinct and independent proof; and in our courts, salvors have been deemed competent, although parties to the suit, and without releasing their interest. Their evidence is, however, to be received with caution and distrust(*d*). In a case in the English admiralty, decided in 1790, the testimony of the master, the mate, and some of the crew of the salvor ship, although parties, was also

(*a*) *The Blaireau*, ubi supra.

(*b*) *The Blaireau*, ubi supra; *The Boston and Cargo*, 1 Sumner's R., 328.

(*c*) *The Bello Corunnes*, 6 Wheaton's R., 152 (5 Cond. R.,).

(*d*) *The Boston and Cargo*, 1 Sumner's R., 328, 343; *The Ewebank*, ib., 400, 432.

received(a). But in another case, which occurred a year later, there was a petition to dismiss two of the plaintiffs, composing a part of the crew of the ship, and who, it is stated, had also executed releases of their claim to any share of salvage(b). The suit of the salvor may be *in rem* against the property saved, or the proceeds thereof; or *in personam* against the party at whose request and for whose benefit the salvage service has been performed(c).

CHAP. 12.

Claim, how enforced.

All those who are entitled to share in the salvage ought to be made parties to the suit; and the proper course is to make them so by name in the libel, in order to avoid the inconvenience of subsequently bringing their names properly before the court to enable it to make a just distribution. The libel may, however, be filed by the master, or owner, or both, in behalf of themselves and of the officers and crew of the salvor ship. When, however, the crew are not thus made parties, either by name or by description, they may file a supplemental libel or petition referring to the original libel, and asserting their rights as co-salvors. But although there should be but one libel of co-salvors, if there are several sets of salvors, as the officers and crew, of different vessels, by whom distinct salvage services have been rendered, it is proper that their respective claims to remuneration should be asserted in distinct suits(d).

Co-salvors all to be made parties.

(a) *The Sara Barnardina*, 2 Haggard's R., 151, n.

(b) *The Pitt*, 2 Haggard's R., 149, n.

(c) See Appendix, Rule XIX. of the Rules of Practice in cases of admiralty and maritime jurisdiction.

(d) *The Boston and Cargo*, 1 Sumner's R., 328; *The Ship Henry Ewebank*, 1 Sumner's R., 400, 408.

CHAPTER XIII.

COLLISION.

THE law exacts of the master and crew of every vessel, whether at sea or in port, constant care and vigilance to avoid collision with other vessels; and any degree of negligence in this respect, which becomes, however unintentionally, the cause of damage to others, the maritime law considers as a dereliction of bounden duty, entitling the sufferer to reparation in damages. For injuries of this description, the common law courts afford a remedy by a personal action against the master and the owner; but the more usual and effectual form of redress is by a proceeding in the instance court of admiralty, technically called a cause of damage, civil and maritime, against the guilty ship(*a*).

(*a*) By the fifteenth rule of the Rules of Admiralty Practice, it is declared that "In all suits for damage by collision, the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, *in personam*."

These remedies must not be understood to be confined to cases where the injury is inflicted while one or both of the vessels is under headway. A collision, in the legal sense, may occur while both are moored. Thus, if a vessel enter a dock at high tide and be imprudently moored outside of a smaller vessel, and at ebb tide, for want of sufficient water to keep her erect, careens over and crushes the smaller vessel, this is an injury by collision, for which a remedy may be sought in a court of admiralty. - *The Lake*, 14 Law Rep. (4 N. S.), 669, decided in the C. C. for the District of Pennsylvania.

In the case of *The Woodrop* Lord STOWELL classifies cases of collision, and lays down the rules, with respect to the parties by whom the loss is to be borne, as follows: "In the first place, it may happen without blame being imputable to either party, as where the loss is occasioned by a storm or other *vis major*. In that case the loss must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise, where both parties are to blame, where there has been a want of diligence on both sides; in such case the rule of law is, that the loss must be apportioned between them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and in this case the innocent party would be entitled to an entire compensation from the other(a)."

Each of these several descriptions of cases requires a brief commentary, and I propose to notice them in the inverse order of their enumeration above.

When the collision is attributed exclusively to the fault of the ship that ran the other down, according to the general maritime law, and formerly by the law of England, the injured party is entitled to full compensation *out of all the property of the owners* as well as of the master of the guilty ship, on the ground that they are answerable for the conduct of

I. Collision proceeding from fault on the part of the colliding vessel alone.

(a) Dodson's Ad. R., 83.

VOL. 1. the persons employed by themselves, and over whom the suffering party had no control. But Holland having innovated upon this rule by exempting persons interested in the navigation of that country from liability beyond the value of their own property put at hazard, viz., their ship, freight, apparel and furniture, England followed her example(*a*), and it has since been adopted also in our own country(*b*).

The English statute exempts the ship-owner from liability for injuries done to other vessels without his fault, beyond his property in the ship, freight, apparel and furniture; and it has been held in the English Court of Admiralty that *fishing stores* of a Greenland ship are liable for damage done by collision, as appurtenances to a ship of that description(*c*). By the American act, the liability of the ship-owner for loss or damage occasioned by collision, &c., "without the privity or knowledge of such owner," is limited to "the amount or value of the interest of such owner in such ship or vessel, and her freight then pending." The language of the two acts respectively seems to be essentially equivalent in import, and not likely therefore to lead to any diversity of construction with respect to their scope. The above mentioned decision relative to the stores of a ship employed in the whale fishery, it will be seen, did not, strictly speaking, turn on the language of the statute, the question being whether these stores, which were neither "freight, apparel or

(*a*) 53 Geo. III., ch. 159.

(*b*) Act of March 3, 1851, ch. 43, §§ 3, 4; 9 Stat. at Large, 635.

(*c*) *The Dundee*, 1 Hagg. Adm. R., 109.

furniture," were not virtually a part of the ship, as appurtenant thereto.

CHAP. 18.

To sustain a claim to full indemnity for injury by collision, two things must concur: the collision must have been caused by the fault of the opposite party, and there must have been no want of ordinary care to avoid it on the part of the complainant. "The established rules of nautical practice, as explained by professional men, the usages and regulations of particular ports and rivers, the state of the wind, the tide, and the light, the degree of vigilance of the masters and crews, and all other circumstances bearing upon the conduct and management of both vessels," are to be considered in deciding upon these points. But, although there are certain rules respecting the management of vessels, which have been adopted by courts as positive rules of law, the neglect of them by one party will not dispense with the exercise of ordinary care and caution by the other(a).

Ordinary care to escape collision, required.

This principle extends, also, to the conduct of the suffering party after the collision; and if by wilful negligence or supineness, losses are incurred, which, by seasonable exertions might easily have been avoided, no compensation for such losses is allowed. Thus, where a vessel lying at anchor in the Thames, had a piece knocked out of her side by the anchor, standing "a-cock-bill," of a descending vessel, and was immediately run ashore in consequence of her leaking; no effort having been made, during two

Suffering party not entitled to compensation for consequential damages arising from his own negligence.

(a) Abbot on Shipping, Boston ed., 311, 312.

VOL. 1. tides, to stop the leak, which the court was of opinion might easily have been done; a claim for damage done to the cargo, in consequence, was rejected on this ground, as well as because the damage occurred on the land(*a*).

II. From fault of sufferer alone.

Where the collision has been caused by negligence or want of skill on the part of the libellant's vessel, subsequent misconduct on the part of the opposite party, in not having attempted to ascertain whether some assistance might not have been rendered towards saving the disabled vessel, will not bring the case within the rule of apportionment. But in a case of this kind, where the conduct of the master of the ship proceeded against had been clearly reprehensible, Sir JOHN NICHOLL condemned her owner and his bail in all the costs and expenses of the suit(*b*).

III. Collision from fault on both sides.

Where there has been a want of diligence or skill on both sides, it is the settled rule of the general maritime law of Europe to apportion the loss between the two culpable ships, and this, not *pro rata* according to their respective values, but in equal moieties. In the case of *The Woodrop*, as we have seen, it was declared by Lord STOWELL to be also the rule of the English Court of Admiralty, and it was unequivocally recognized by the House of Lords in *Hay v. Le Nerve*, on appeal from the judgment of the Court of Session in Scotland. It was further adjudged that each party should pay

(*a*) *The Eolides*, 3 Haggard's R., 367.

(*b*) *The Celt*, 3 Haggard's R., 321, 327.

his own costs(*a*). It is laid down as unquestionable by Chancellor KENT(*b*), and by Mr. Justice STORY(*c*), and in a very recent case it has at length been expressly declared and adopted by the Supreme Court of the United States, as the rule "the most just and equitable, and as best tending to induce care and vigilance on both sides, in navigation(*d*)."

The justice of this rule of *equal* apportionment between two culpable vessels, has been severely questioned; and considering the great disparity in the degree of culpability which may well happen to be, and often is attributable to the respective parties, the rule must be conceded to be extremely defective, as a means for the attainment of particular justice. But its expediency and substantial equity, as a general rule, though it has been aptly called a *rusticum judicium*, have been vindicated and maintained by very able writers, and by the highest judicial authorities, on account of the difficulty of determining the comparative measure of blame chargeable upon each party, and the tendency of the rule to insure vigilance on the part of those

(*a*) 2 Shaw's Scotch Appeal Cases, 395; a full abstract of this case is given in Abbot on Shipping, 303 *et seq.* That the rule in question requires an *equal* apportionment seems to be clear. It was unquestionably so understood by Lord STOWELL in *The Woodrop*, and by the House of Lords in the case of *Hay v. Le Nerve*.

(*b*) 3 Kent's Comm., 3d ed., 231.

(*c*) Story on Bailments, § 608.

(*d*) *The Catharine*, 17 Howard's R., 170 (21 Curtis's Decis. S. C., 434, 439). The fault imputed to the libellant's vessel (the *San Louis*) was that, being close-hauled, she luffed instead of keeping her course; that imputed to the respondent's vessel, having the wind free, was, that she had no sufficient look-out.

VOL. 1. who have the charge both of large and small vessels(*a*).

The common law rule is, that if the plaintiff, in a suit to recover damages arising from collision, is shown to have been in any degree in fault, he is entitled to no remuneration. This state of the law leads, it will be observed, both in this country and in England, to this remarkable result: that what in one court is regarded as an injury entitling the sufferer to redress, is held by another court of the same country, possessing a concurrent jurisdiction, to furnish no title to reparation.

IV. From
unavoidable
accident.

We have seen that by the law of England, as expounded by Lord STOWELL, where the collision is purely fortuitous, no right of action accrues from it in favor of either party. But by the law of most of the maritime states of Europe, as understood and interpreted by Lord TENTERDEN, differing in this particular from the Roman law, the rule of mutual contribution is applied also to this class of cases now under consideration(*b*). It cannot have escaped the observation of any intelligent reader who has attentively perused the first chapter of this work, that the controversy which long agitated the Supreme Court touching the extent of the constitutional grant of admiralty jurisdiction, has finally resulted in the conclusion that the framers of the Constitution had no exclusive reference to the

(*a*) See Abbot on Shipping, Boston ed. of 1846, pp. 304, 305, 306; 3 Kent's Commentaries, 231.

(*b*) Abbot on Shipping, Boston ed., 1846.

jurisprudence either of England or of the maritime states of the continent of Europe, but that in deciding upon the limits of this branch of their jurisdiction, and also in determining the principles and rules which should regulate its exercise, the courts of the United States might rightfully resort indiscriminately to either of these sources for guidance, being responsible only for a considerate and discreet exercise of this discretionary authority.

Assuming that the rule of contribution prevailed on the continent of Europe, to a greater or less extent, with respect to the description of cases under consideration, it follows, therefore, that the American courts were at liberty to adopt either that or the English rule, according as the one or the other should, on mature consideration, appear to be the more eligible. In the exercise of this discretion, the Supreme Court has lately pronounced in favor of the English rule of leaving the loss resulting from collision, imputable to no fault on either side, finally to rest where it happens to light, as being, in the judgment of that court, "more just and equitable, and more consistent with sound principles" than the opposite rule(*a*). Such, therefore, is now the established rule of the maritime law of the United States, which, with respect to each of the four species of collision enumerated by Lord STOWELL, is thus rendered accordant with that of England(*b*).

(*a*) *Stainback v. Rae*, 14 Howard's R., 532, 538 (20 Curtis's Decis. S. C., 321, 325).

(*b*) This is the rule also prescribed by the Commercial Code of France. Its language is "En cas d'abordage de navires, si l'événement

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From
inseparable
fault.

But the continental codes and jurists recognize a fifth description of cases, which seems never to have been thought of in the English Court of Admiralty, as a distinct class in which the sufferer could, by possibility, be entitled to reparation in any form. It is that in which the collision was the result of mismanagement on the part of one or both of the parties concerned, and might therefore have been avoided; yet, it is nevertheless impossible to learn to whose fault it is imputable. In this case, also, the loss is, by these codes, equally apportioned between the parties. This class of cases, it is true, is noticed by Mr. BELL in his Commentaries on Commercial Law, and he intimates his approbation of the rule applied to it, as one founded in justice and sound policy (*a*). But the observations of Sir CHRISTOPHER ROBINSON in *The Catharine of Dover*, which arose subsequently, clearly infer that this rule had acquired no foothold in the English admiralty (*b*), and in the recent case of *The Maid of Auckland*, the language of Dr. LUSHINGTON to the like effect is perfectly explicit. Cross actions had been brought; and in asking the opinion of the masters of the Trinity House upon the controversy, he observed: "If you say that the blame attaches to both, then the damage must be divided; but if you say that you cannot tell which is to blame, then I must dismiss both." In pronouncing his judgment he accordingly said: "the court cannot come to a

a été purement fortuit, le damage est supporté, sans repetition, par celui des navires qui l'a éprouvé." Code de Commerce, art. 407.

(a) 1 Bell's Comm., 579, 581. (b) 2 Haggard's R., 145, 154.

satisfactory conclusion as to which was to blame, and *this leaves open to me only one* course, namely, to dismiss both actions(a).”

The question has not yet been brought to the consideration of the Supreme Court of the United States, and has not therefore, in this country, been definitively determined. But it has lately occupied the attention of several of the district judges and American writers; and in one instance, occurring in the District of Ohio, the judge of that district deemed it necessary explicitly to decide it. The earliest expression of judicial opinion I have met with relative to it is that of Judge WARE, in *The Scioto* just above cited, in which he spoke of the rule of apportionment as applicable as well to the case of inscrutable fault as to that of inevitable accident. Mr. Justice STORY, referring to the observations of Mr. BELL upon it, and prior to the case of *The Maid of Auckland*, expresses the opinion that “If the question is still open to controversy, there is great cogency in the reasoning of Mr. BELL in favor of adopting the rule of apportioning the loss between the parties. Many learned jurists support the justice and equity of such a rule; and it has the strong aid of Pothier and Emerigon;” citing Pothier, *Avaries*, n. 155; 1 *Emerig. Assur.* ch. 12, 314(b). Chancellor KENT, in terms somewhat too strong, speaks of it as a rule “universally declared by all the foreign ordinances and jurists.” In *Wells v. The Bay State*, Judge BERTS is reported to have referred to the rule

(a) 6 Notes of Cases, 240.

(b) Story on Bailments, § 609.

VOL. 1. of apportionment in cases of inscrutable blame as one of the established rules of decision in the District Court for the Southern District of New-York, and he, on that occasion, it seems, for the first time, applied this rule to the case of mutual fault(*a*). Under this state of authority, Mr. Flanders states this to be the American rule(*b*). More recently it has, upon full consideration, been held to be so by Judge LEAVITT, of the District Court for the District of Ohio(*c*); and in a very late case, the able and learned judge of the Northern District of New-York did not hesitate to declare the rule of apportionment to be applicable alike to the case of inscrutable and of mutual fault(*d*).

Should the question be carried for decision to the Supreme Court, it will be for that tribunal finally to determine whether in the case in question the rule of apportionment prevalent on the continent of Europe shall be adopted in this country, or, as in the case of unavoidable collision, and in accordance with all the analogies of our jurisprudence, the English rule shall be preferred. It is not at all surprising that in England where the preponderance of the common law is so decided, that even the Court of Admiralty should never have thought it worth while to consider whether, with respect to a species of controversy of which the courts of common law,

(*a*) 6 New-York Legal Observer, 201.

(*b*) Flanders's Mar. Law, §§ 357, 358.

(*c*) *Lucas v. The Thomas Swan*, 3 Amer. Law Rep., 569.

(*d*) *Jarvis v. The State of Maine*, reported in the New-York Tribune.

possess a concurrent jurisdiction, it was expedient to adopt from foreign codes a particular rule at open war with that universal principle of the common law which forbids the award of damages to a suitor who fails to establish the truth of his allegations against his adversary. But, anomalous as the rule must be admitted to be, it ought not to be hastily condemned. It is in reality less objectionable than to a mind imbued with the principles of the common law it is likely, at first blush, to appear. This class of cases is understood to embrace all those in which, while from their overt aspect it is palpable that by reasonable diligence and ordinary skill on both sides, the catastrophe might have been avoided, yet, from the lack of explanatory evidence, or from its contradictory import, it is impossible to ascertain the particular nature of the fault committed, or else, when this is done, to determine at whose door it lies. And it must be conceded that of the great multitude of actions for damages suffered by collision that of late have been prosecuted in our courts, a considerable proportion have assumed a shape so questionable and perplexing as to render them incapable of satisfactory solution, and any judgment pronounced in favor of either party little better than a random guess. It is true this uncertainty sometimes attends other forms of action, and that in the courts of common law the verdicts which jurors are required to find are sometimes of this character. But there are reasons, founded both in the inherent nature of the controversies in question, and, to some extent,

VOL. 1. also in the character of the witnesses upon whom reliance must chiefly be placed, that distinguish these controversies, in this respect, from all others, and have rendered them proverbial for contradictory testimony.

Exactly of the kind I have described was the case above cited of *The Maid of Auckland* in the English Court of Admiralty, in which neither the master of the Trinity House nor the distinguished judge could "come to a satisfactory conclusion as to which was to blame," and he accordingly dismissed the action; just as a jury in a like case, in a court of law, would have been obliged to pronounce in favor of the defendant, on the ground that the plaintiff, holding the affirmative of the issue, had failed to establish his right of remedy by preponderant evidence. Now, it is clear that in the opinion of Dr. LUSHINGTON it was as probable that either one of the parties was to blame as the other, and that both might have been in fault. They stood before the court, therefore, morally, upon a footing of perfect equality, and had the judge considered himself at liberty to enforce this equality by decreeing an equal contribution to repair the damages sustained, he would probably have gladly exercised the power, for it must be conceded that there is something in the rude equity of such a judgment that accords with our sense of justice.

The burthen
of proof lies
on the libel-
lant.

In a cause of damage for injury sustained by collision, the burthen of proof to establish the charge of negligence or want of skill, rests in general upon the libellant. In other words, in

order to entitle him to reparation, there must be a preponderance of evidence in his favor(a). But where it is shown that the vessel charged as the wrong-doer omitted an ordinary and proper measure of prevention, the burthen is on her to show that the collision was not owing to her neglect, but would have happened, nevertheless, if the precaution had been taken. Thus, where the respondent's vessel was intentionally left at her moorings in a harbor, to encounter an approaching gale, *without any person on board*, and during the night she dragged her anchors, and ran foul of the libellant's vessel, it was held to be incumbent on the respondents to show that the misfortune was not attributable to this cause(b).

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Proof of the omission of proper precautions is, however, *prima facie* sufficient.

A like principle has recently been asserted by the Supreme Court of the United States in very emphatic terms, with respect to the non-observance of the precautions against collision enjoined by the act of Congress of July 7, 1838, "to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam."

In the case before the court, which was that of a collision between two steamboats on the Mississippi river, about ninety-five miles above the port of New Orleans, the respondent's vessel had omitted to carry the lights required by this act, and the court decided that this alone was sufficient to cast upon the respon-

(a) *The Catharine of Dover*, 2 Haggard's R., 145, 153.

(b) *Clapp v. Young et al.*, decided in the District Court of the United States for the District of Massachusetts, Feb., 1843 (6 Law Reporter, 111). This, it will be observed, was an action *in personam*.

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dents the burthen of proof to show that the injury done by their steamer was not the consequence of the omission(*a*).

Crews admitted as witnesses.

In causes of collision, as in those of salvage, the persons composing the crew of the vessels concerned are admitted, *ex necessitate*, as witnesses(*b*).

The rights of the parties depend on the laws of the country where the collision occurs.

When a collision occurs in a port of a foreign country, the rights and responsibilities of the parties are to be determined according to the laws of that country as interpreted by its courts. On a writ of error, in a suit at common law, to the Circuit Court of the United States for the District of Columbia, the defendants were accordingly held by the Supreme Court to be exempt from liability for the damage done to the plaintiffs' vessel in the port of Liverpool, on the ground that the collision was attributable to the fault of a licensed pilot on board, and having the charge of the defendants' vessel(*c*). The case just cited adjudicates, also, another important principle, viz., that the actual damage sustained

Injured party held not entitled to damages for loss of probable profits.

(*a*) *Waring v. Clark*, 5 Howard's R., 441 (16 Curtis's Decis. S. C., 456). Mr. Justice WAYNE, in delivering the opinion of the court, took occasion, also, to say that "the act of 1838, in all its provisions, is obligatory upon the owners and masters of steamers navigating the waters of the United States, whether on waters within a state or between states, or waters running from one state into another state, or on the coast of the United States, between the ports of the same or different states." The provisions of this act, and also of an act passed August 30, 1852, designed to prevent collisions of vessels, will be noticed in the sequel.

(*b*) *The Catharine of Dover*, 2 Haggard's R., 145; *The Celt*, 3 Haggard's R., 321, 325; and such is the established practice in the courts of the United States.

(*c*) *Smith v. Condry*, 1 Howard's R., 28 (14 Curtis's Decis. S. C., 487).

at the time and place of the injury, and not the profits which might probably have been realized if the collision had not occurred, constitutes the just measure of damages to be awarded to the injured party. CHAP. 13.

In a subsequent case, however, this rule seems to have been unsatisfactory to a majority of the court, and to have been greatly qualified and impaired, if not altogether subverted. It was an action on the case (the admiralty jurisdiction not having then been declared to extend beyond tide waters), for damage done by collision between the steamers of the respective parties on the River Ohio. The plaintiffs' vessel was sunk, but was afterwards raised and repaired; and it was held, Chief Justice TANEY and Justices CATRON and DANIEL dissenting, that the plaintiffs were entitled to recover a sum sufficient, not only to defray the expenses of raising and repairing their vessel, without any deduction of new materials in place of old, as in cases of insurance, but to compensate them also for *the loss of her probable earnings* in the meantime. *Williamson and al. v. Barrett et al.*, 13 Howard's R., 101. See, also, *The Betsey Caines* (2 Haggard's Ad. R., 18), a case in which a vessel having been run down while engaged in a salvage service, which she was thereby rendered unable to complete, damages were awarded to her owners on this account; Lord STOWELL not assenting to the objection that the court could not inquire into the consequential damages, but adding also, that in the case before him, the claim, in fact, was not a mere claim for consequential and probable advantage This rule qualified.

VOL. 1. only, for the vessel was actually in the pursuit of earning that which it had been stipulated she should receive. So, also, where a fishing smack having been disabled by collision from pursuing her voyage from London to Norway to receive a cargo of lobsters, in consequence whereof her owners were obliged to hire another smack for that purpose, damages were decreed for the amount of freight paid for the vessel substituted(*a*).

It will be noticed that in neither of the English cases were the damages merely conjectural, as in the American case just above cited, and that there is therefore a marked difference between the latter and the two former.

Rules of
the sea.

The frequent occurrence of collisions, so often destructive to life as well as property, among the vessels composing the vast merchant marine of Great Britain, naturally led to the early adoption of certain general rules of the sea, for the management of vessels, adapted to prevent these disasters. These rules were few in number and simple in their requirements, and, as it was only by their strict observance that they could be rendered efficacious, they have at all times been firmly upheld and rigorously enforced by the British courts as rules of law. Being in themselves well suited to their purpose and unobjectionable, and it being of great importance, moreover, that there should be uniformity, where, on account of the intimate commercial relations between the two countries, contrariety would be so hurtful, they have, from time to time,

(*a*) *The Yorkshireman*, 2 Haggrrd's Ad. R., 30, note.

been recognized and enforced as obligatory also in this country. Until the introduction of steam navigation these rules were of course designed exclusively for the management of vessels propelled by wind. Those of a technical character were in fact but conventional nautical usages; and not having been authoritatively reduced to precise terms, they have been variously expressed by different judges and elementary writers, insomuch that, as experience has demonstrated, a person having but a shadowy and ill defined apprehension of their real import, on meeting, in books, with the same rule enunciated in different language, may mistake each repetition for an additional rule. The rest being general principles deducible from the nature of the subject and excogitated by judges, may be called judicial rules. The following enumeration embraces the more important of the rules to which I have referred.

It will of course be understood that they are applicable only when, without their observance, there would be danger of collision; and it is accordingly unnecessary thus severally to qualify the statement of them.

1. A vessel having the wind free is bound to take all proper measures to get out of the way of a vessel that is close-hauled; or, as the rule is expressed in a recital preceding certain rules promulgated in 1840 by the Corporation of Trinity House respecting steamers, "A vessel having the wind fair shall give way to one on the wind." It imposes a general obligation, without prescribing any particular means by which the object is to be accomplished.

VOL. 1. It follows, therefore, that the choice of means is left to the party charged with the duty and responsible for its skilful performance. He is to determine for himself, from a careful consideration of all the circumstances, on which side of a close-hauled vessel he will pass, and such is the judicial interpretation of the rule(a). He is bound to decide seasonably

(a) *The Gazelle*, 5 Notes of Cases, 101; *The Osprey*, 17 (7 N. S.) Law Reporter, 384; 18 id., 181.

I am aware that in one of the reported judgments of the Supreme Court of the United States, which will be noticed in the sequel, there is a dictum which seems to assert it to be the duty of the vessel having the wind free, on meeting a close-hauled vessel, to avoid her by diverging to the right, and that she will be held in fault if she does not.

Such an interpretation of the rule, it will be seen, is very far from being in accordance with its language, which is not only silent with respect to the mode of fulfilling the duty enjoined, but, by its generality, infers an unlimited option with respect to the means to be employed. It is a rule of long standing, that has very often been mentioned in judicial tribunals, and, as we shall see, was a few years ago formally and solemnly reasserted by the English Trinity House Corporation. It would be strange, therefore, if it was really designed to convey the meaning ascribed to it in the case to which I have alluded, that it should never have been stated in language adapted to convey that meaning; and still more strange would it be that in no one of the multitude of cases in which it has been applied in the English Court of Admiralty has such an interpretation been given to it. On the contrary, the construction unequivocally put upon it in that court is that which I have ascribed to it. In *The Gazelle*, above cited, Dr. LUSHINGTON (addressing the elder brethren of the Trinity House), speaking of "the rules which have been laid down for the navigation of vessels, by the Trinity House Board," said: "The first regulation is, that sailing vessels having the wind free shall give way to those on the wind. By the term giving way is meant, I apprehend, they shall get out of the way by whatever measures are proper for the purpose, either by porting or starboarding the helm, as the occasion may require." But the case before the court was that of a *steamer* meet-

as well as wisely; and so strict is the accountability to which he is held by law for any injury he may

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ing a close-hauled vessel. Dr. LUSHINGTON therefore proceeded to speak of the correspondent rule which had been laid down by the Trinity Masters with respect to steamers, which, as we shall see, is expressed in the same language as that relative to sailing vessels. "What, then," he said, "is the meaning of the term giving way? I have already stated my own impression, that it means getting out of the way by any measures that the occasion may require; and I am not aware of any expression that has fallen from any of the gentlemen by whom I have so often been assisted in these cases, that it means putting the helm to port under all circumstances." The *Gazelle* on seeing the sailing vessel (a schooner) immediately ported her helm; and the persons in charge of her were pronounced by the Trinity Masters to be in fault for so doing under the circumstances, and it was so adjudged by the court. Nothing could be more explicit than this; and Judge SPRAGUE, whose masterly analysis of the cardinal nautical rules in *The Osprey* evinces at once his well known perspicacity and his great familiarity with the subject, in noticing a review of this case in the *London Law Magazine*, assumes it to be indubitable that "The vessel close-hauled must keep on (whichever tack she may be on), and the vessel free must avoid her; and in performing this duty, she may go to either side, or take any measures that are expedient." The dictum in question does not appear to have had any influence upon the decision of any subsequent case in the Supreme Court; nor has it been repeated by any judge of that court, unless the comprehensive language of Mr. Justice McLEAN in *The Oregon v. Rocca*, 18 Howard's R., 570, and again in *Ward v. Chamberlin*, very lately decided by him on appeal in the Circuit Court for the Southern District of Ohio, is an exception. I have met with no evidence, moreover, of any actual nautical usage conformable to this dictum. It appears, therefore, to have originated simply in misapprehension, and the adoption and enforcement of it by a judicial tribunal would be simply an act of arbitrary judicial legislation. It may be presumed, therefore, that no such innovation will receive the deliberate sanction of the Supreme Court until it shall have been legalized by Congress. Indeed, with respect to steamers, which by the decisions both of that court, and of the High Court of Admiralty of England, are placed, in most respects, on the same footing as sailing vessels going free, the option I have awarded to sailing vessels has been repeatedly conceded.

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Vessel with
free wind
prima facie
answerable.Vessel close-
hailed to
keep her
course.

do to the other vessel, that in an action therefor he is required, contrary to the general rule, to show affirmatively that all possible skill was used on his part to prevent the collision. But, on the other hand, the opposite party is bound to abstain from doing anything that may increase the difficulty of passing safely, and must therefore keep his course(*a*).

In the last of the cases just cited the rule was applied against a vessel coming down before the wind, at sea, to speak a close-hauled vessel, and it was held that the entire duty of so maneuvering as to avoid a collision, devolved on the former, it being the duty of the latter to keep her course.

2. When both vessels are going by the wind, the vessel on the starboard tack(*b*) shall keep her wind(*c*), and the one on the larboard tack(*d*) bear up, by putting her helm to port, thereby passing each other on the larboard hand.

(*a*) *The Catharine*, 17 Howard's R., 170 (21 Curtis's Decis. S. C., 434). This case, while it distinctly recognizes the duty imposed by the rule on the vessel going free, asserts, also, very explicitly, the correlative obligation on the part of the close-hauled vessel to keep her course, and that she is to be held responsible for the consequences if this is not done. *The Gazelle*, 5 Notes of Cases, 101; *The George*, id., 368; *The City of London*, 4 id., 40. In here citing English decisions relative to steamers, it is proper to advertise the reader that steamers are placed, by the English Court of Admiralty, on precisely the same footing, with respect to the rule now in question, as sailing vessels. Indeed, so far as this rule is concerned, I am not aware of any discrimination between them by the American courts. *The Osprey*, 17 Law Reporter (7 N. S.), 384; *The Clara M. Porter*, 18 Law Reporter (8 N. S.), 678.

(*b*) That is to say, having the wind on her starboard or right side.

(*c*) Persevere in her course.

(*d*) Having the wind on her larboard or left side.

This rule, unlike the first, relates to vessels meeting on a footing of equality. As from the nature of the case, neither can alter her course except to leeward, and as such an alteration would unavoidably occasion a loss of time, there would be great danger, if there were no rule designating the party of whom this sacrifice should be required, that each would persevere in the hope that the other would give way, or else that both would give way, and in either event, that they would be brought into contact. Originally it was a matter of pure indifference on which party the duty should be devolved; but it was of infinite importance that the party should be designated by a rule, universally known, and in the highest degree obligatory. This has been done by the rule under consideration, and by the constant and rigorous enforcement of it by judicial tribunals, it is theoretically perfect. It contemplates two vessels moving abreast, or nearly so, on converging lines; and it is self-evident that a seasonable observance of the rule in such a case, could not fail to be effectual. And yet, collisions between vessels thus circumstanced, sometimes happen.

In the darkness of night the parties may fail to descry each other at all, or one or both of them may mistake the other's course until it is too late. The best safeguard against this is proper and sufficient lights, and a constant and vigilant look-out.

It was found by experience also that the obligations imposed by the strict terms of the rule were sometimes rendered perplexing and nugatory by the difficulty of seasonably discovering whether the

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 In doubtful
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approaching vessel was or was not, in fact, close-hauled. For the purpose of diminishing the danger arising from this cause, it was adjudged in the English Court of Admiralty that a close-hauled vessel on the larboard tack, laboring under this difficulty when there was reason to apprehend a collision, ought to give way to a vessel on the starboard tack, and was to be held blamable for not doing so, although the latter might at the time be sailing with the wind free^(a). This, it will be seen, though commonly called an exception, is, in reality, an extension and virtually a modification of the rule, for it results in this: that a close-hauled vessel on the larboard tack is bound to give way to an approaching vessel on the opposite tack, which, for aught that can be seasonably discerned, *may be* also close-hauled. This modification, however, was by no means designed as a relaxation of the first rule, requiring a vessel having the wind free to avoid a vessel on either tack that is close-hauled. Those in charge of her can be under no mistake as to her predicament, and must take care to fulfil the obligation it imposes. Nor is it to be inferred that this modification in any degree absolves the vessel on the larboard tack from endeavoring, by all means in her power, to ascertain whether the approaching vessel is also close-hauled; for if she should be going at large, it would be far safer for the former to keep her course, lest by giving way, she might only increase the danger of collision, should the former

(a) *The Ann & Mary*, 2 Wm. Robinson's R., 189.

endeavor to pass, as she would have a right, under the first rule, to do, on the starboard hand. In view of the source of danger here indicated, I cannot refrain from observing that however just and proper it may be to leave the persons in charge of the vessels having the wind, free to decide for themselves on which side of a vessel on the wind they will pass, it is certainly advisable that, as a general rule, they should go to the right as in passing another vessel going at large.

It was found, also, that the vessel on the larboard tack sometimes improperly omitted to give way because the approaching vessel appeared to be so leeward as to inspire the hope that this precaution might prove unnecessary. In analogy to the principle just mentioned, it was therefore, with unquestionable propriety, held to be the duty of the vessel on the larboard tack to give way to a vessel on the starboard tack at once, without considering whether she is one or more points to leeward (*a*).

3. When both vessels have the wind large or abeam, they shall pass each other on the larboard hand, and for this purpose each shall put her helm to port (*b*).

This rule, like the second, applies to vessels meeting on terms of equality; but for obvious reasons

(*a*) *The Traveller*, 2 Wm. Robinson's R., 197.

(*b*) Wm. Robinson's R., 488. The propriety and great utility of this rule has never been doubted in the American courts. As we shall see in the sequel, it has, both in this country and in England, been applied to steamers in passing each other. Indeed, it was expressly enjoined thirty years ago by an act of the Legislature of the State of New-York.

VOL. 1. of justice and expediency it casts the duty of guarding against collision, not arbitrarily on one of them, but equally on both. The course of each may conveniently be varied, and by requiring this to be done in opposite directions — each turning to the right,—the inconvenience is equally shared, and the object is more certainly attained.

4. A vessel in motion is bound, if possible, to steer clear of a vessel at anchor(*a*).

This rule is stringently enforced in the English Admiralty. In the case just cited, Sir JOHN NICHOLL, speaking of a case falling within this rule, said, “nothing can in such a case excuse her (the vessel in motion) from making compensation but unavoidable accident, nothing but that *vis major*, which no human skill or precaution could have guarded against or prevented.” It is unsparingly applied also in this country(*b*). In the last of the cases just cited, it is said that when a steamer(*c*) is about to enter a harbor, great caution is required. Ordinary care, under such circumstances, will not excuse a steamer for the wrong done. A vessel running foul of another at anchor, is *prima facie* answerable, and the judgment of the court in an action for damages will depend on the sufficiency of the excuse, if any, offered for so doing(*d*). But

Vessel running foul of another at anchor, *prima facie* answerable.

(*a*) *The Giralmo*, 3 Haggard’s R., 199.

(*b*) *McCready v. Goldsmith*, 18 Howard’s R., 89; *The New-York v. Rea*, id., 223; *Culbertson v. Shaw*, id., 584.

(*c*) In all the cases cited in the last note the injury was done by a steamer; but the rule is the same, and is to be applied with equal rigor against sailing vessels.

(*d*) *Lincoln v. Hallock*, 14 Law Reporter (4 N. S.), 555.

where a schooner came to anchor in the River St. Clair in a rapid current, and all hands went to sleep below, a descending scow was held excusable for running foul of her, it appearing that there was no want of proper effort on the part of the scow to avoid the schooner(*a*).

In a case promoted a few years ago in the English Court of Admiralty by the owner of a vessel that had been run down while lying at anchor by another sailing vessel, it became necessary to decide whether the former was not in fault for not exhibiting a light. She had cast anchor in a track frequented by ships, in a dark night and at a stormy season of the year. Dr. LUSHINGTON said the question had often been discussed in the court, and upon consideration he decided that there was no general rule requiring vessels at anchor to exhibit a light, but that under the circumstances of the case before him this ought to have been done, and he held the omission to be inexcusable. But it appearing also that the colliding vessel was at the time running under a full press of canvass about six knots an hour, he adjudged her also to be in fault, and divided the damage(*b*).

When vessel at anchor, bound to exhibit a light.

The introduction of vessels propelled by steam constituted a new and important era in navigation, and rendered it necessary to consider and determine whether, and if so, to what extent, and with what modifications, the foregoing rules were properly applicable to them. The question was twofold:

Steamers.

(*a*) *The Petrel*, 18 Law Reporter (8 N. S.), 185.

(*b*) *The Victoria*, 3 W. Robinson's R., 49.

- VOL. 1. 1. In what manner steamers ought to be required to demean themselves towards sail vessels ; and 2. By what rules they ought to be governed with respect to each other.

Their obvious superiority over vessels deriving their impetus from sails, in point of navigability and power, led to the judicial establishment of the following principle, which it will be seen is but an extension of the spirit of the first of the preceding rules :

5. Vessels propelled by steam are required to take all possible care, by the use, if necessary, of all the means which they possess, to keep clear of sailing vessels(*a*).

In a case adjudicated many years ago in the English Court of Admiralty, Sir JOHN NICHOLL took occasion to state the considerations and prin-

(*a*) I have not hesitated to state the rule thus broadly because it appears to be clearly deducible from numerous judicial decisions of the highest authority in England as well as in this country, and because the principle it asserts, as it is understood and enforced in this country, could not be adequately defined by language less comprehensive. Like the first rule enumerated above, it imposes a general duty without indicating the manner in which it is to be performed, and like that rule, it infers, therefore, a right to choose the means to be employed ; and as, by the terms in which it is expressed, it makes no discrimination between vessels on the wind and those having the wind free, it embraces literally the latter as well as the former. In the United States, such we shall see is its actual interpretation and effect. In England, however, as the rule was ultimately settled by judicial decisions, while steamers were permitted to choose on which side they would pass a close-hauled sailing vessel, the latter being bound to keep her course, they were required, on meeting a vessel going at large, to put the helm to port, the latter being required to do the same, thus passing each other larboard and larboard, after the manner of two sailing vessels both going at large.

principles by which, in his opinion, courts ought to be governed in deciding upon the responsibility of steamers for injuries done to sailing vessels by collision, to the effect following: He thought the owners of sailing vessels had a right to expect that steamers will take every possible precaution, and that they were in his opinion bound to use the utmost care. Steamers, he observed, were a new species of vessels, and called forth new rules and considerations: they were of vast power, liable to inflict great injury,—and particularly dangerous to coasters,—if not carefully managed; yet they might at the same time, with due vigilance, easily avoid doing damage; for they are much under command, both by altering the helm, and by stopping the engines. In the case before him, the steamer Perth ran foul of the libellant's brig, while running at the rate of twelve miles an hour, in a dense fog, and in a track frequented by coasters. The Perth did not see the brig, until she was close upon her, when the crew of the latter shouted "keep your helm hard a-port." This order was given on board the Perth, and had the beneficial effect of preventing her from striking the brig a-midships, though not of preventing the collision. But no order was shown to have been given to stop the engines. Sir JOHN NICHOLL, after summarily stating the facts, and the principles of law which in his apprehension ought to govern the decision, requested the opinion of the two Elder Brethren of the Trinity House who were in attendance, whether the steamer was answerable for the damage, or whether she was completely exonerated,

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as having done all in her power to avoid the collision? The Senior Trinity Master replied, that they were of opinion that, considering the fog and other circumstances, the steamer ought to have reduced her speed one-half: such precaution was due to the safety of other vessels; and as soon also as the shouting was heard, the engines should have been stopped. By their own experience, they knew that a steamer could be stopped in nearly her own length; and had the engines of the Perth been stopped, the force of the blow would at least have been much weakened. In accordance with this opinion, the court condemned the Perth in the damages and costs(a).

And in another case, where the British Union, a sail vessel, had been run down by the steamboat Shannon, there being some conflicting evidence relative to the course of the wind at the time of the collision, the Trinity Masters, by whom the court was assisted, observed, "that the state of the wind was of no great importance, as the Shannon, not receiving her impetus from sails, but from steam, should have been under command; that steamboats, from their greater power, should always give way; that they were satisfied the Shannon had seen the British Union, and that the Shannon was to blame; and the court decided accordingly(b).

These views of the obligations and liabilities of steamers have ever since prevailed in the English Court of Admiralty, and have been in this country fully sanctioned and repeatedly applied by the

(a) *The Perth*, 3 Haggard's R., 414.

(b) *The Shannon*, 2 Haggard's R., 173.

Supreme Court of the United States^(a). In *The Oregon v. Rocca* (one of the cases just cited), it is said: "The rule of this court is, when a steamer approaches a sailing vessel, the steamer is required to exercise the necessary precaution to avoid a collision; and if this be not done, *prima facie*, the steamer is chargeable with the fault." In accordance with this principle, it has been held that a steamer is censurable for unnecessarily coming into dangerous proximity to another vessel, and if a collision ensue in consequence, is answerable for the damages arising therefrom without any other fault on her part. Thus, where a steamer had, without necessity, run so near to a flat-boat, that by an unexpected sheer of the latter, caused by an eddy, it was brought into contact with the former, the steamer was adjudged to be accountable for the damage^(b). And where a steamer thus culpably puts a sailing vessel in imminent peril, and a collision ensues, she will be held wholly accountable, even though it be shown that the master of the sailing vessel, in the

Steamer to blame for coming into dangerous proximity to sailing vessel.

(a) *Newton v. Stebbins*, 17 Howard's R., 86 (21 Curtis's Decis. S. C., 510); *Propeller Monticello v. Mollison*, 17 Howard's R., 152 (21 Curtis's Decis. S. C., 423); *Peck v. Sanderson*, 17 Howard's R., 178 (21 Curtis's Decis. S. C., 439); *Fretz v. Bull*, 12 Howard's R., 466 (19 Curtis's Decis. S. C., 249); *Propeller Genesee Chief v. Fitzhugh*, 12 Howard's R., 443 (19 Curtis's Decis. S. C., 233); *McCready v. Goldsmith*, 18 Howard's R., 89; *Steamer New-York v. Rea*, id., 223; *Steamer Oregon v. Rocca*, id., 570; *Crocket v. Newton*, id., 581; *Cuthbertson v. Shaw*, id., 584; *The Northern Indiana*, 16 Law Reporter, 433.

(b) *Fretz v. Bull*, 12 Howard's R., 466 (19 Curtis's Decis. S. C., 249).

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 Not exonerated by involuntary error at the last moment on the part of sailing vessel.

alarm of the moment, failed to give an order which might have prevented the collision. In the case before the Supreme Court, in which this point was adjudicated, Ch. J. TANEY observed: "Nor do we deem it material to inquire whether the order of the captain at the moment of the collision, was judicious or not. He saw the steamer coming directly upon him—her speed not diminished, nor any means taken to avoid a collision. And if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the propeller to have placed him in a situation where there was no time for thought, and she is responsible for the consequences. She had the power to pass at a safer distance, and had no right to place the schooner in such jeopardy, that an error of a moment might cause her destruction and endanger the lives of those on board. And if an error was committed under such circumstances, it was not a fault(a).

Obligation of steamers to regulate their speed &c.

We have seen that in the English Court of Admiralty, steamers are held responsible for damages done by collision on the ground alone that they were at the time running at a high rate of speed in a dense fog, or dark night, and in a track frequented by coasters. "It may be a matter of convenience," said Dr. LUSHINGTON, in *The Rose*, "that steam vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity if the property and lives

(a) *Propeller Genesee Chief v. Fitzhue*, 12 Howard's R., 443 (19 Curtis's Decis. S. C., 233).

of other persons are thereby endangered(a).” This is the rule also in the courts of this country, and in *Newton v. Stebbins*(b), the observation of Dr. LUSHINGTON just recited was expressly adopted by the Supreme Court as expressive of what it deemed to be the true doctrine on the subject. In several later cases it has accordingly been enforced by that court, in an important and instructive case in the Northern District of New-York(c). An attempt has also been made by Congress, as we shall see in the sequel, to fortify it by legislation.

The power belonging to steamers, of retarding, arresting and even reversing their motion, imposes on them a persistent obligation to use this power whenever it may be rendered effective for the purpose of avoiding or mitigating a collision with other vessels.

The cases already cited afford various illustrations of this, and there are other reported cases to the like effect. Thus, where a steamer in descending the River Thames in the night, on descrying a sailing vessel beating up the river, immediately put her helm to port, while yet in doubt as to the course of the approaching vessel, and a collision ensued, she was held to be in fault for not having eased her engines and slackened her speed for the purpose of ascertaining the course of the sailing vessel and then being governed by circumstances. “True it

(a) *Wm. Robinson's R.*, 3.

(b) 10 *Howard's R.*, 586 (18 *Curtis's Decis.*, S. C. 510).

(c) *McCready v. Goldsmith*, 18 *Howard's R.*, 89; *The New-York*, id., 223; *The Northern Indiana*, 16 *Law Reporter* (6 N. S.), 433.

VOL. 1. is," observed Dr. LUSHINGTON, "that when two steamers are approaching each other, it has been ruled over and over again that they are to pass larboard and larboard; but I never yet heard it laid down that where a steam vessel is going down the river and discovers a sailing vessel coming up with an adverse wind, the steamer is immediately to port her helm, before she discovers what course such vessel is upon(a).

Rules pre-
scribed by
the Trinity
House rela-
tive to
steamers.

While it had long been a settled rule in England that upon the meeting of a steamer and a sailing vessel close-hauled on either tack, the latter was ordinarily to keep her course and the former take the requisite measures to pass her safely, and for this purpose might change her course either to the right or to the left, according to circumstances,—so lately as the year 1848, there was no fixed rule for the management of steamers and sailing vessels going at large in passing each other under circumstances requiring precaution for the purpose of avoiding collisions, nor was there any rule for the guidance of steamers in passing each other under like circumstances. But in the year above mentioned the elder brethren of the Trinity House(b) saw fit

(a) *The James Watt*, 2 Robinson's R., 270. See also *The Birkenhead*, where the same principle was applied in the case of a collision at sea, the steamer being a steam frigate.

(b) An ancient corporation composed of ship masters, having authority to prescribe regulations for the management of merchant vessels, for the purpose of avoiding collisions, and some of whom generally, if not always, give their attendance in the High Court of Admiralty, on the hearing of actions for collisions, to assist the judge, when required, in the decision of questions demanding professional skill.

to take the subject into consideration for the purpose, as they state, of providing "a rule for the observance" of steamers "*when meeting other steamers, or sailing vessels going at large,*" and they devised and promulgated the following, viz:

"When STEAM VESSELS on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be risk of coming in collision, each vessel shall put her HELM TO PORT, so as always to pass on the LARBOARD side of *each other*.

"A steam vessel passing another in a narrow channel, must always leave the vessel she is passing on her *larboard* hand(*a*)."

(*a*) 1 Wm. Robinson's R., 488. As this instrument contains a recital of the cardinal rules previously in force respecting sailing vessels, and is often referred to in the discussion of nautical questions, it seems not amiss to copy it entire as it appears in Robinson, though it is by no means calculated to give a favorable impression of the intelligence of its authors. It is as follows:

NAVIGATION OF STEAM VESSELS.

TRINITY HOUSE, LONDON, }
30 October, 1840. }

The attention of this corporation having been directed to numerous, severe, and in some instances fatal accidents, which have resulted from the collision of vessels navigated by STEAM, and it appearing to be indispensably necessary, in order to guard against the occurrence of similar calamities, that a regulation should be established for the guidance and government of persons entrusted with the charge of such vessels; and,

Whereas, the recognized rule for sailing vessels, that those having the wind fair shall give way to those on the wind;—

That when both are going by the wind, the vessel on the starboard tack shall keep her wind, and the one on the larboard tack bear up, thereby passing each other on the larboard hand;—

That when both vessels have the wind large or abeam, and meet,

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After so formal and explicit a preamble it seems not a little extraordinary that its authors should have come so far short of the promise it held out. With respect to one of its specified objects, that of providing for the case of the meeting of steamers, the rule is sufficiently intelligible and exact; but if it was really designed to provide a rule for the meeting of a steamer and a sailing vessel going at large, its language, to say the least, is most unfortunate. Such, indeed, is the view taken of it by Dr. LUSHINGTON in *The Friends*(a), which occurred soon afterwards; though he courteously and very ingeniously sought to supply the deficiency by construction, it is obvious that he felt himself under the necessity of devising a rule from analogy adapted to the case in question; and in *The City of London*

they shall pass each other in the same way on the larboard hand, to effect which two last mentioned objects, the helm must be put to port; —

And as steam vessels may be considered in the light of vessels navigating with a fair wind, and should give way to sailing vessels on the wind on either tack, it becomes only necessary to provide a rule for their observance, when meeting other steamers or sailing vessels going at large.

Under these considerations and with the object before stated, this board has deemed it right to frame and promulgate the following rule, which, on communication with the Lords Commissioners of the Admiralty, the elder brethren find has been already adopted in respect of vessels in her majesty's service, and they desire earnestly to impress upon the minds of all persons having charge of steam vessels the propriety and urgent necessity of a strict adherence thereto, viz:

[Here follows the rule given in the text.]

By Order,

J. HERBERT, *Secretary.*

(a) 1 Wm. Robinson's R., 478.

(4 Notes of Cases, 40), he subsequently stated explicitly, that the rule contained no direction at all with respect to sailing vessels. In former cases steamers had been repeatedly compared, in general terms, by his predecessors and by the Trinity Masters, to sailing vessels going at large. It was obvious that steamers ought not, when meeting sailing vessels with the wind free, to be placed on a *more* advantageous footing than they, and the English judges do not appear to have seriously considered whether it was expedient to place them on a footing *less* advantageous, by requiring the sailing vessel to keep her course, and casting upon the steamer exclusively the requisite precaution to avoid collision; and it was accordingly held that each should put her helm to port, and pass the other on the larboard hand, according to the long established rule with respect to sailing vessels going at large^(a). Under this state of the law in England, and before any explicit judicial decision had been made upon the point in this country, a case arose in the District Court for the District of Massachusetts, which, in the opinion of the able and learned judge of that court, required him to determine it; and after a very lucid analysis of the principles pertaining to the subject, his conclusion was that it was the duty of a steamer meeting a sailing vessel going at large to keep out of her way by a resort to all necessary and practicable means, being restricted to going neither to the right or left, or to any other particular measure; and he

CHAP. 18.

Sailing vessels going free required by the law of England on meeting steamers to port the helm.

By the law of this country to keep their course.

(a) *The City of London*, 4 Notes of Cases, 40.

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accordingly held that a steamer descending Boston harbor and meeting an ascending brig with a free wind, had a right to put her helm to starboard for the purpose of passing, and that the brig was wrong in putting her helm to port, it being her duty to keep her course, and allow the steamer to pass on either side as she might see fit. He was of opinion, moreover, that such was in fact the general usage on the American coast(*a*). Since this decision, pronounced

(*a*) 17 Law Reporter (7 N. S.), 384. "All cases," said Judge SPRAGUE, "may be comprised in two classes: *first*, when vessels meet on terms of equality; *second*, when they meet on terms of inequality. The first comprises three cases, namely:

1. Two sailing vessels, both going free.
2. Two steamers.
3. Two sailing vessels, both close-hauled.

To all these cases one simple rule may be applied, namely, both go to the right. This rule is partly arbitrary and partly founded in substantial reasons. It is arbitrary so far as it directs to the right rather than to the left; but in requiring both parties to take measures, as far as practicable, to get out of the way, it is founded in principle."

* * * * *

The second class above mentioned, viz., where vessels meet on terms of inequality, embraces two cases at least, viz:

1. Two sailing vessels, one free and the other close-hauled.
2. A steamer and a sailing vessel, the latter being close-hauled.

Here the rule is, that the vessel having the advantage must keep out of the way, and the other must keep her course.

Judge SPRAGUE next proceeded to examine the case before him — that of a sailing vessel going free meeting a steamer — for the purpose of determining to which of these two classes it belonged, and he very clearly demonstrated that the steamer had a decided advantage over the sailing vessel. "A steamer," he observed, "can oftentimes turn in a shorter time and space, and check, stop or reverse her motion, in a manner which the sailing vessel cannot. The motive power of the one is under human control, and at all times available; that of the other is not." The case then being, in fact, one of inequality, Judge SPRAGUE was of opinion that the general principle applicable to such cases ought to apply.

in 1854, the rule it asserts has, in several cases, been expressly sanctioned by the Supreme Court and may now be regarded as the settled law of this country(*a*). The rule adopted by the High Court of Admiralty, on the other hand, has been affirmed and established as a rule of law by act of Parliament(*b*). This conflict is to be regretted. What-

(*a*) *Peck v. Sanderson*, 17 Howard's R., 178 (21 Curtis's Decis. S. C., 439); *The Monticello*, 17 Howard's R., 152 (21 Curtis's Decis. S. C., 423); *Crocket v. Rocca*, 18 Howard's R., 581; *The Monticello*, 17 Howard's R., 152 (21 Curtis's Decis. S. C., 423).

(*b*) The Merchant Shipping Act, 17 and 18 Vic., ch. 104, § 296, requires all vessels, whether steamers or sailing vessels, whether on the larboard (or as the act expresses it, on the *port*) or on the starboard tack, and whether close-hauled or not, when meeting under circumstances involving danger of collision, to put the helm to port so as to pass on the larboard ("port") side of each other, "unless the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to the proviso that due regard shall be had to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the necessity of keeping such ships under command." The only innovation of importance introduced by the act upon the rules previously enforced in the English Court of Admiralty, the learned reader will perceive consists in this: that it preemptorily directs steamers and sailing vessels with a free wind, when meeting a sailing vessel close-hauled, to turn to the right, unless there be special and cogent reasons for diverging in the opposite direction, instead of leaving them at liberty in all such instances to decide for themselves, *ad libitum*, on which hand they would pass. It is true the act in terms also directs that when two close-hauled vessels meet, the helm of that on the starboard as well as that on the larboard tack shall be put to port. But this injunction subject to that of the proviso enjoining it upon those in charge of the vessel on the starboard tack not to lose command of her, can have been intended to signify little more than the former rule required, viz., that the vessel on the starboard tack should keep her course, or, in other words, *keep* her helm to port, where it must necessarily have previously been put to enable her to maintain

VOL. 1. ever may be thought of the comparative merit of the American and English rule, it must be conceded that the latter is hardly reconcilable with the original, and, for many years, the only general rule established in the High Court of Admiralty, requiring steamers by all practicable means to keep out of the way of *sailing vessels*, for in effect it limits the previous rule, except as the expression of a general obligation resting at times upon all vessels alike, to vessels that are *close-hauled*. Nor does it seem altogether consistent with some of the previous applications of this rule in the English Court of Admiralty, or, especially with the strong language used by that court in several of the earlier cases, when defining the obligations and responsibilities of steamers.

In this country the original rule remains unimpaired. Care must be taken, however, by persons entrusted with the management of sailing vessels, not to overrate the responsibilities of steamers. They are not required to perform impossibilities, and are by no means answerable, of course, for the consequences of every collision that may occur between them and sailing vessels, notwithstanding the compliance of the latter with the rule requiring them to keep their course. For example: where a steamer failed, from no fault on her part, to see a sailing vessel till they were too near to allow the steamer to change her course, and as soon as the

her course. The clearly expressed regulations prescribed by the act have the inestimable merit of the greatest attainable simplicity, where complexity must be unavoidably mischievous, and well deserve the careful consideration of the American Congress.

sailing vessel was discovered, stopped, and was in the act of backing when the collision took place, she was held not to be responsible(a). CHAP. 18.

Experience has demonstrated that a large proportion of the collisions that occur proceed from the want of a sufficient watch or look-out on deck, and this precaution is accordingly rigorously exacted of all vessels, insomuch that the want of it is *prima facie* evidence that a collision in the night was occasioned thereby(b). It has been adjudged, also, that in a place much frequented by vessels, it is not an excuse for the want of a proper look-out, that all hands were employed in reefing, there being no unusual emergency(c). The importance which the law justly attaches to the observance of this precaution, renders it highly desirable that no misapprehension should prevail with respect to what it is that constitutes a proper look-out. On this point the court took occasion, in *The Genesee Chief*, to lay down what it deemed to be the true rule, as follows: "By a proper look-out, we do not mean merely persons on the deck who look at the light, but some one in a favorable position to see, stationed near enough to the helmsman to communicate with him and receive communications from him, and exclusively employed in watching the movements of vessels which they are meeting or about to pass." Look-out
required by
law.

When suffi-
cient.

(a) *Peck v. Sanderson*, 17 Howard's R., 173 (21 Curtis's Decis. S. C., 439).

(b) See the case last cited.

(c) *The Catharine v. Dickinson*, 17 Howard's R., 152 (21 Curtis's Decis. S. C., 423); *The Northern Indiana*, 16 Legal Reporter (6 N. S.), 433.

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And in *The Northern Indiana*, the case last above cited, it was held by Judge HALL that the mate of a large steamer carrying passengers was not a proper person to be employed, or to take it upon himself to act as a look-out, he being charged by his office as mate with a multiplicity of other duties; and also that the interior of the pilot-house is not a proper station for a look-out. Judge HALL further held that a contract entered into by the owners of a steamer with the post-office department, for the transportation of the mail, furnishes no apology for proceeding at a rate of speed which would otherwise have been inadmissible.

Universality
of the obli-
gation to
avoid col-
lision.

There is one great pervading principle to which, before concluding this summary review of the nautical rules devised to prevent the collision of ships, it is necessary explicitly to state. It is this: That it is the duty of persons entrusted with the navigation of vessels, of whatever description—a duty enjoined by law as well as humanity, to avoid a collision with other vessels, if possible. It follows, as a corollary from this obligation, that no navigator is bound or has a right pertinaciously to adhere to a rule of the sea, when he would incur the danger or increase the probability of a collision by so doing. If he clearly foresees that disastrous consequences are likely to ensue from such a course, having power to avoid them, he is bound to exert this power. This principle is forcibly illustrated in a case of collision decided a few years since in the English Court of Admiralty, in which it appeared that upon the meeting of a close-hauled vessel on the larboard

tack, and a vessel going free on the starboard tack, both vessels persevered, and a collision having ensued in consequence, both were adjudged to be in fault, and the damages were equally apportioned between them(*a*). It will be seen by this decision that no fault, however gross on the part of one vessel, was supposed to absolve the other from the paramount obligation under consideration. Dr. LUSHINGTON, in a previous case, after laying down this principle, illustrated it as follows: "If a steam vessel, for instance, should be nearing another sailing vessel, and such vessel should be steered erroneously, if the master of the steamer should wilfully say, "this vessel is steering wrong, but we will keep our course," and a collision should ensue in consequence, I should undoubtedly hold that the steam vessel was to blame(*b*).

The reasonableness and necessity of this principle as an additional safeguard against the repetition of those appalling calamities by which, especially of late, the sensibilities of the public have been so frequently and so severely shocked, cannot but be readily conceded, and the man who, confiding in the superior strength of his vessel or reckless of consequences, can withhold a cheerful obedience to the high duty it imposes, is unfit for a navigator. The principle has, in several instances, been more or less distinctly recognized by the American courts. It is

(*a*) *The Commerce*, 9 English Admiralty R., 288. In a note subjoined to the report, this decision is stated to have been unani- mously affirmed on appeal by the Judicial Committee of the Privy Council.

(*b*) *The Hope*, 1 W. Robinson's R., 154, 157.

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Neverthe-
less to be
cautiously
applied.

nevertheless to be applied with cautious reserve, and only when it is manifest that a resort or longer adherence to the cardinal rules enumerated in this chapter would be disastrous, or, at best, but fruitless, and when there is apparently a probability of escape or mitigation by disregarding them. This caution is inculcated in a case recently decided in the Supreme Court, and I gladly avail myself of the language of the learned and able judge by whom the judgment was pronounced, as an expression at once clear and authoritative of all that I deem it necessary to add upon this subject. "It must be remembered," observes Mr. Justice CURTIS, "that the general rule is, for a sailing vessel, meeting a steamer, to keep her course, while the steamer takes the necessary measures to avoid a collision. And though this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a strong case which puts the sailing vessel in the wrong for changing the rule. The court must clearly see, not only that a deviation from the rule would have prevented collision, but that the commander of the sailing vessel was guilty of negligence or a culpable want of seamanship in not perceiving the necessity for a departure from the rule, and acting accordingly(a).

It is time now to notice certain legislative enactments relating to this subject contained in two acts of Congress designed mainly to guard more effectu-

(a) *Crocket v. Newton*, 18 Howard's R., 581.

ally against destruction by fire and explosion on board of steamers carrying passengers, and also certain nautical regulations prescribed in pursuance of one of these acts.

The first is that of July 7, 1838, by the *tenth* section of which it is enacted "That it shall be the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars(*a*)."

The act of August 30, 1852, requires "That on any such steamers [steamers carrying passengers], navigating rivers only, where from darkness, fog, or other cause, the pilot on watch shall be of opinion that the further navigation is unsafe, or from accident to or other derangement of the machinery of the boat, the engineer on watch shall be of opinion that the further navigation of the vessel is unsafe, the vessel shall be brought to anchor, or moored as soon as it prudently can be done: *Provided*, That if the person in command shall, after being so admonished by either of such officers, elect to continue such voyage, he may do the same; but in such case, both he and the owners of such steamer shall be answerable for all damages which shall arise to the person of any passenger and his baggage from said cause in so pursuing the voyage, and no degree of diligence shall in such case be held to justify or excuse the person in command, or said owners(*b*)."

(*a*) Ch. 191, § 10; 5 Stat. at Large, 306.

(*b*) Ch. 106, § 28; 10 Stat. at Large, 72.

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The last clause, it will be seen, is, to some extent, a modification, and, *pro tanto*, a repeal of the act of March 3, 1851, ch. 43, limiting the liability of the ship-owner to the value of his ship(*a*).

The act of 1851 is, in like manner, further modified by the 30th section of the act under consideration, which is as follows: "That whenever damage is sustained by any passenger or his baggage from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus, or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of law herein prescribed as to navigating such steamers, may sue such engineer or pilot and recover damages for any such injury caused as aforesaid by any such engineer or pilot(*b*)."

The act of 1838, above cited, initiated a system of inspection of steamers by persons appointed for that purpose, and the system was greatly amplified by the last above cited act of 1852. In addition to the inspectors of hulls and boilers required by the

(*a*) Vide supra, p. 245.

(*b*) Act of August 30, 1852, ch. 106; 10 Statutes at Large, 72.

act of 1838, and, with some modifications, continued by the ninth section of the act of 1852, the eighteenth section of this act directs the appointment by the President, with the advice of the Senate, of nine "Supervising Inspectors:" and by the twenty-ninth section it is made "the duty of the Supervising Inspectors to establish such rules and regulations, to be observed by all such vessels in passing each other, as they shall from time to time deem necessary for safety; two printed copies of which rules and regulations, signed by the said inspectors, shall be furnished to each vessel, and shall at all times be kept up in conspicuous places on such vessels, which rules shall be observed both night and day. Should any pilot, engineer or master of any such vessel neglect or wilfully refuse to observe the foregoing regulations, any delinquent so neglecting or refusing shall be liable to a penalty of thirty dollars, and to all damage done to any passenger, in his person or baggage, by such neglect or refusal; and no such vessel shall be justified in coming into collision with another if it can be avoided."

In pursuance of the duty enjoined by this section, the Supervising Inspectors have established the following rules and regulations to be observed by steamers in passing each other:

"All pilots of steamers navigating seas, gulfs, bays or rivers (except rivers emptying into the Gulf of Mexico or their tributaries), when meeting or passing each other, shall, as they approach each other, observe the following regulations:

"**RULE I.** The pilot of a descending vessel, if in

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a narrow river or channel; shall check her engine, using only so much steam as shall be necessary to keep her steerage, and if no signal be given, each shall pass to the right or on the larboard side of the other; but if this mode of passing shall be deemed unsafe by either vessel, the pilot objecting shall give reasonable notice by a distinct and strong stroke of the bell, repeating the same, if necessary, at short but distinct intervals, which the other shall answer, as soon as heard, by a similar stroke of the bell, and they shall pass each other to the left instead of the right. But if a passage by each other is unsafe or impracticable, by reason of the narrowness of the channel or from some other cause, the pilot of the vessel first in such channel shall ring her bell rapidly, and the other if not already in the channel, shall give way and let her pass; but if both are in the channel, the ascending vessel shall give way to the descending vessel, and no vessel shall be justified in coming into collision with another if it be possible to avoid it.

“**RULE II.** Should the pilot of either vessel fail to make or answer the signal prescribed, or should a signal be answered erroneously, both vessels shall be immediately stopped. When a vessel is running in a fog, it shall be the duty of the pilot to cause a bell to be struck, or the steam whistle to be sounded every two minutes. This rule shall be observed by all pilots, in all seas, gulfs, lakes, bays and rivers.”

The act empowers the inspectors to grant licenses to persons to act as pilots and engineers; and it forbids the employment, on board steamers carrying

passengers, of any unlicensed person in either of these capacities, except for the purpose of temporarily filling vacancies that occur during the voyage(*a*).

Innovations upon the established nautical rules, tending to impair their certainty and simplicity, ought, if at all, to be very sparingly made, and only upon the most mature consideration: but the qualification introduced by these new regulations of the rule peremptorily requiring vessels to pass each other on the larboard hand seems to be reasonable and likely to be beneficial. It is limited, it will be observed, to vessels meeting in a narrow river or channel. The duty enjoined on the pilot of a vessel running in a fog extends to all waters, and seems entitled to unqualified approbation. The new regulations are applicable only to American vessels propelled wholly or in part by steam, and carrying passengers(*b*), and do not embrace public vessels, nor vessels not exceeding one hundred and fifty tons burthen used wholly or in part in navigating canals(*c*).

There is one reported decision of the Supreme Court in a case of collision, which I have not hitherto deemed it advisable to cite, and which I would gladly pass over in silence, were I not constrained by a sense of duty to notice it for the purpose of pointing out the numerous and dangerous errors it contains.

*St. John
v. Paine.*

(*a*) Subdivision 10 of § 9.

(*b*) Act of Aug. 30, 1852, ch. 106, § 1; 10 Stat at Large, 61.

(*c*) *Id.*, § 42, p. 75.

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These errors are so gross as to be readily detected by a reader already familiar with nautical usages, and if they had emanated from a less authoritative source there would be less necessity for warning even the uninitiated against them. But the judgments of judicial tribunals are reported and published for the express purpose of communicating authentic instruction to those who stand in need of it, and that to which I have alluded was pronounced by a court from whose decisions there is no appeal. It is the case of *St. John v. Paine*, reported in 10 Howard's R., 557 (18 Curtis's Decis. S. C., 503). The court saw fit, through Mr. Justice NELSON, by whom the judgment of the court was pronounced, to lay down the following as "among the nautical rules applicable to the navigation of sailing vessels, viz: A vessel that has the wind free, or sailing before or with the wind, must get out of the way of the vessel that is close-hauled, or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way or be answerable for the consequences. So, when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right. The same rule governs vessels sailing on the wind approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward that, if both persist in their course, the other will strike her on the lee side abaft the

beam or near the stern, in that case the vessel on the starboard tack should give way, as she can do so with greater facility and less loss of time and distance than the other. Again, when vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere in her course, while that on the larboard tack should bear up or keep away before the wind."

The first proposition of the learned judge is true, and, even without the repetition evincing so laudible a desire to make himself the more readily understood by landsmen, is, in itself, intelligible. It ought, however, to have been terminated by a period instead of a semicolon, followed by "and," unless, indeed, it was really designed to predicate what follows, of two vessels in the predicament before mentioned, namely, the one going at large and the other close-hauled. If so, it is altogether fallacious and even preposterous. But it was doubtless designed to refer to two vessels, both close-hauled, approaching each other, and so nearly abreast that, by continuing their respective courses, they would be likely to meet. There is nothing in the language used, however, to indicate this intention, while its improper grammatical connection with the first rule is calculated to mislead. But the rule, as stated, is not only defectively expressed—it is also erroneous. The rule respecting close-hauled vessels is not, as we have seen, that the one "on the starboard tack *has a right* to keep her course;" it is that she is *bound* to keep her course; and for the obvious

VOL. 1. and conclusive reason that the rule would otherwise be nugatory, for it is only by this means that the duty imposed on the other vessel is rendered effective in preventing a collision. By the very terms of the supposition, neither can change her course to windward; and if both were to alter their course, it could only be towards each other. To those who understand the true rule, this is too obvious to admit of mistake.

The next rule laid down by the learned judge relates to vessels "both having the wind free, and consequently having the power of readily controlling their movements:" and of such vessels it is asserted that "the vessel on the *larboard tack* must give way, and each pass to the right."

As we have already seen, there is no rule of navigation more firmly established than this: that when two vessels going at large meet, *each* is to diverge to the right. The obligation is mutual, as it ought to be, for the very reason so inconsistently assigned for this erroneous version of the rule—"both having the power of readily controlling their movements," and for the additional reason that the object is, by this means, more certainly attained.

"The same rule," continues the learned judge, "governs vessels sailing on the wind and approaching each other, when it is doubtful which is to windward." Now, this language can have no legitimate meaning, except what we are to presume it was intended to assert by the second rule, beginning with the words "and the vessel on the starboard tack." The words "when it is doubtful which is to

windward," can only be regarded as a bad substitute for the words *when there would otherwise be danger of a collision*, or other equivalent words. This, therefore, is but a repetition, though doubtless unconsciously made, of the second rule. But what shall be said of the next rule laid down by the court? "But if the vessel on the larboard tack is so far to windward," &c. The least that can truly be said of it is, that it is but an exception to the rule, the repetition of which has just been mentioned. This rule, like all other nautical rules, is designed for practical use, to accomplish a beneficial end, and it is to be interpreted and applied accordingly. Its object is to prevent a collision, likely otherwise to ensue, between two vessels gradually approaching each other by convergent courses. From its very nature, therefore, as already observed, it is applicable only to vessels moving abreast, or very nearly so. If either of the vessels is so far to the windward of the other, that, by persevering in their respective courses, they will run clear of each other, nothing is required of either. But the rule casts the responsibility of determining this question upon the vessel on the larboard tack, and points out the mode by which, if seasonably adopted, any apparent danger of collision may be avoided. She is bound, therefore, not only to decide it properly, but, when circumstances permit, *seasonably*. When the other vessel is or may be seen, and her course ascertained at a distance, if there appears to be the least danger of a collision, the vessel having the larboard tack is not to wait to ascertain the probable point of

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a general duty, correlative to that enjoined by the established rule for the government of the vessel on the larboard tack, would be in the highest degree objectionable, for that would be, by implication, to authorize and invite the latter intentionally to await the close approach of the former, in order to determine upon which of the two the duty devolved. The dangerous tendency of this declaration is enhanced by the reason assigned for requiring the vessel on the starboard tack to give way, viz., that "she can do so with greater facility and less loss of time and distance than the other," as if it were a mere question of convenience, and otherwise mattered little which of the two vessels gives way to the other; whereas the rule requiring the vessel on the larboard tack to give way at once, and the other to keep her wind—a rule of so much utility as to have been supposed to deserve the appellation of "the golden rule"—will lose all its value when it ceases to be rigorously enforced. To render it beneficial, it must be held absolutely obligatory as long as it remains practicable; and when obedience to it has been deferred, whether wrongfully, or from darkness or other accidental cause, until, by the near proximity of the two vessels, it can no longer be obeyed with any reasonable prospect of success, as will generally if not always be the case by the time they get so near each other that the precise point of threatened contact may be discerned, then, indeed, the obligation devolves upon the vessel on the starboard tack to give way, not because "she can do so with greater facility and less loss of time

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and distance," but for the more cogent reason that there remains no other means of preventing the impending catastrophe. The remaining rule, nominally the sixth, laid down by the court, is but another apparently unconscious reiteration, in somewhat less objectionable words, of the second!

Here then we have promulgated by the Supreme Court of the United States what purports to be, and what Mr. Justice NELSON doubtless supposed to be, *an enumeration of no less than six distinct laws of the sea relating to a subject of momentous concern, but in reality comprising only four, namely, the first three enumerated in the foregoing chapter, one of which is here erroneously and another falsely stated, and a fourth altogether imaginary and fraught with danger.* Is it not due to humanity that these mischievous heresies should at once be unequivocally repudiated by the high tribunal from which they emanated? Not one of the rules laid down had any specific application to the case before the court, nor, had they been genuine, could they have had any legitimate influence on its determination. This remarkable exposition was therefore wholly gratuitous, and is doubtless attributable to a desire to instruct the ignorant, and especially to furnish an authoritative guide to the inferior tribunals. It would have been strange if the extraordinary confusion of ideas of which it is the offspring had not pervaded also the review of the particular case before the court, and exerted a baneful influence on its decision; and we accordingly find this to be the case. The collision took place on Long Island

Sound between the steamer Neptune and the schooner Iole, in the night. The Iole was sailing with "a fresh wind," was "nearly close-hauled," and on the starboard tack. She was first seen by the Neptune at a distance of about one-fourth of a mile, and, as it was alleged in behalf of the Neptune, dead ahead. The Neptune thereupon put her helm to starboard for the purpose of passing the Iole to windward, and thus leaving her to pursue her course. The collision that immediately ensued was ascribed by the persons in charge of the Neptune to a sudden change of course on the part of the Iole by luffing. This movement was denied by those in charge of the latter, who also insisted that the direction in which she was proceeding when first seen from the Neptune was to windward of that of the latter. Upon both these points the court were of opinion that there was a preponderance of evidence in favor of the Iole. But, said Mr. Justice NELSON, the Neptune "was in fault in attempting to pass the Iole to windward. Even admitting that she was not mistaken in the position of this vessel, and *that she was dead ahead*, it was the duty of the Neptune to *bear away*(a), and to pass on the larboard side. As we have seen, the observance of no one of the rules of navigation is more strongly recommended or more steadily enforced, in the admiralty, than this one, where two vessels are approaching in opposite directions, and there is danger of a collision."

(a) This is a nautical phrase having reference to the wind, and is, I imagine, exclusively applicable to sailing vessels.

VOL. 1. The charge of ignorance or wilful misconduct against the pilot, which immediately follows this passage in the judgment of the court, doubtless originated, as it finds its only countenance, in this same misapprehension. It is true that what Mr. Justice NELSON so erroneously supposed to be the rule applicable to the case before the court has, as we have seen, since been established in England by act of Parliament as a universal rule; but the application of it made in the case under consideration was at that time entirely novel, in direct opposition to highest judicial authority even in England, and it still remains without a shadow of support in this country.

CHAPTER XIV.

ASSAULTS, BEATING, FALSE IMPRISONMENT, ETC.

THE admiralty possesses an unquestioned jurisdiction of suits for the redress of private injuries to the rights of personal security and personal liberty, committed on the high seas; and the appellation "high seas" is held, in this country, as we have seen, to comprehend all waters navigable from the sea, and which are affected by the ebb and flow of the ocean tides.

Injuries to the person may be committed on ship-board, by one mariner on another; by a mariner on a passenger; by a passenger on a mariner; or by one passenger on another. Generally, however, those wrongs which form the subject of this chapter are inflicted by the masters or other officers of vessels on seamen; and they are unhappily of no very uncommon occurrence.

Partaking somewhat of the boisterous nature of the element on which their lives are mainly passed, seafaring men are apt to be choleric in temper, and consequently rash and violent in language and conduct. It is not surprising therefore that masters of ships, being from necessity armed by law with very ample authority over the mariners on board, should sometimes abuse their power. In such cases the injured party, on his return to port, may seek repa-

VOL. 1. ration by admiralty process *in personam*, in a *cause of damage*, against the aggressor(a).

Between the contract with the mariner for his services on shipboard, and ordinary contracts for the hire of labor, there is this essential difference: that while in the latter cases the law affords no remedy for neglect or refusal to perform the stipulated service, except an action for the recovery of damages, in the former cases the employer is armed with the power of direct and forcible coercion.

Master's power of coercion founded in the exigencies of maritime pursuits.

This power has its origin in the nature of the business to which the engagement of the mariner relates, and of the services which he undertakes to render. Emergencies often occur in the navigation of vessels, requiring a promptitude of decision affording no time for consultation, and admitting of no delay in the execution of the measures which the exigencies of the case require. It is necessary,

(a) And by the act of Congress of March 3, 1835, ch. 40, § 3 (4 Stat. at Large, 776), "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 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 or 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."

"Malice," in the above enactment, signifies wilfulness, or a wilful intention to do a wrongful act; and to constitute the offence described, there must also be the absence of justifiable cause. *United States v. Taylor*, 2 Sumner's R., 584.

The word "crew" includes as well the officers as the common seamen of the ship or vessel. *United States v. Winn*, 3 Sumn. R., 209.

therefore, that all matters relating to the navigation of the ship, and to the preservation of good order on board, should be under the supreme direction of a single person. This authority is accordingly entrusted to the master, who thus becomes chargeable with the safety of the ship, and of the lives and property on board, and he is held personally responsible for any loss or injury that may happen to the ship or cargo through his negligence or misconduct. But to enable him to acquit himself properly of this important trust, and to sustain so great a responsibility, it is absolutely essential that he should be invested with ample authority over the mariners on board, and that he should have a right to compel prompt obedience to his orders. It is universally conceded, therefore, that in case of disobedience of his reasonable commands, or of riotous, disorderly or insolent conduct, the master of a merchant ship may subject the offender to corporal punishment.

His authority, in this respect, has been likened to that of a parent over his child, and that of a master over his apprentice or scholar(*a*); but unlike that of a parent, it extends only to the correction of such negligence or misconduct of mariners as relate strictly to their duties as such, or tend to the subversion of the discipline of the ship: for the master is not a general *ensor morum* over his crew(*b*): and the penal infliction upon the mariner

(*a*) Abbot on Shipping, Boston ed. of 1846, 233.

(*b*) *Bangs v. Little*, Ware's R., 506.

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Master's
authority
extends to
imprison-
ment.

It may be
exercised on
the spot or
subsequent-
ly.

may, under some circumstances, be lawfully carried to an extent which the law would not tolerate in the case of an apprentice, and may be administered in the form of imprisonment as well as of personal chastisement(a). It may be exercised on the spot, for the purpose, when necessary, of compelling instant obedience or desistance; or subsequently, with a view to deter the delinquent from the repetition of his offence, and others from following his example(b).

Concerning this extraordinary power, so liable to abuse, some of the ancient maritime codes of continental Europe are studiously silent, leaving its existence to be inferred, and its exercise to be justified, from necessity and usage. By the ordinance of Louis XIV., it is carefully limited and defined(c). In England, and in this country, there are no statutory regulations upon the subject.

To be exer-
cised with
moderation
and just dis-
crimination.

But though the power is admitted, and its just exercise upheld by the laws of both countries, it is not an arbitrary or unregulated, but a discretionary power, which the law watches with a jealous eye. It behoves the master, therefore, to be very careful in its exercise, and not to make it a pretext for cruelty and oppression. No punishment can be lawfully inflicted, unless for reasonable provocation or cause; and it must be moderate, and just, and proportionate to the nature and aggravation of the

(a) *The Agincourt*, 1 Haggard's R., 271, 273.

(b) *The United States v. Freeman*, 4 Mason's R., 505, 512.

(c) See *Butler v. M' Lallen*, Ware's R., 219; Abbot on Shipping, Boston ed. of 1846, 234.

offence. The law does not permit the master to gratify a brutal spirit of revenge, or to inflict cruel or unnecessary punishments. It allows no excess, either in the mode, or the nature, or the object of the punishment. It upholds the exercise of the authority only when it is for salutary purposes; not when it arises from caprice, or when it is prompted by gross or vindictive passions, or personal dislike (*a*). Unless, therefore, the master is able to show, not only that there was sufficient cause for chastisement, but also that the chastisement was reasonable and moderate, the mariner may recover damages commensurate with the injury received (*b*).

When the master is on board, the right to inflict punishment pertains exclusively to him, and it cannot be lawfully exercised by any subordinate officer, even for improper behavior to himself personally, without the authority or sanction of the master, express or implied (*c*). In the absence of the master, from the necessity of the case, the officer on board next in rank is clothed with his authority and rights, so far as they are necessary for the due performance of the ship's duties (*d*). It must be added also, that in those cases which sometimes occur, where

The master alone, when on board, authorized to inflict punishment.

In his absence, the power, in a qualified degree, devolves on the next officer in rank.

(*a*) *The United States v. Freeman*, 4 Mason's R., 505, 512; *Thomas v. White*, 1 Peters's Adm. Decis., 168; *Rice v. The Polly and Kitty*, 2 id., 420.

(*b*) *Abbot on Shipping*, 235; 4 Mason's R., 512; *Elwell v. Martin*, Ware's R., 53.

(*c*) *Thomas v. Lane*, 2 Sumner's R., 1, 11; *United States v. Taylor*, id., 584, 587; *United States v. Hunt*; 2 Story's R., 120, 125.

(*d*) *Ibid.*; *Elwell v. Martin*, Ware's R., 53. But, it is presumed, no further. The mate or other inferior officer would have no right, therefore, in the absence of the master, to punish for a past offence.

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In case of sudden and pressing emergency, the mate may enforce obedience, although the master is on board.

instant obedience to the orders of the mate is necessary; such as orders to take in sail in a sudden squall, or to cut away the rigging or spars, or to go aloft on a sudden emergency, the mate may instantly enforce obedience by the application of all the force required to produce prompt obedience. But such an exercise of authority is to be justified by necessity alone; and the force so used is not so much a punishment for the offence of disobedience as it is a means of compelling the performance of a pressing duty, admitting of no delay (*a*).

Inferior officers not responsible for punishment inflicted by them by order of the master, except in gross cases.

The inferior officers of the ship, as well as the common seamen, are subject to the commands of the master; and therefore, if the mate, under the direction of the master, assist in the infliction of punishment, he is to be held excusable, unless the infliction was clearly unjust or grossly excessive (*b*).

Master bound to protect seamen from violence.

Not only is the general authority to inflict punishment on shipboard restricted to the master, without any power of delegation to another; but he is bound to prevent, as far as he is able, any undue exercise of authority by his subordinate officers, and any abuses, injuries and trespasses by them. If he is present when any such officer takes it upon himself to inflict chastisement upon a mariner, if he do not interpose to restrain it, he will be deemed to have assented to and encouraged it; and if it was improper in its nature and character, or unjustifiable under the circumstances, he will be held responsible in damages. He cannot excuse himself on the

(*a*) *United States v. Taylor*, 2 Sumner's R., 584, 587.

(*b*) *Butler v M'Lallen*, Ware's R., 219.

ground of courtesy to his officers, or of the supposed necessity of upholding their authority and the discipline of the ship. He is bound, it is true, to support his officers in the proper discharge of their duties, and to maintain the discipline of the ship; but he is also to take care that the crew are not made victims to the passions, the insolence, or the caprices of the officers under his command(a).

The law enjoins upon the master temperate demeanor and decent conduct towards seamen. Disorder, disobedience and mutiny, the offences most likely to call for the exercise of the master's authority to inflict personal chastisement, are not unfrequently caused by his own violence and misconduct; and in deciding on the sufficiency of any defence he may oppose to a charge of unlawful violence, the court may rightfully scrutinize his own habits, disposition and conduct. If he has wantonly originated a quarrel, he must be careful in assuming to punish retorts which he has himself provoked. Even when the punishment is merited, and in itself justifiable, he has no right to accompany its infliction with insult and contumely; and if he do so, the court will take care, by its judgment, to admonish him "that passion is not to be indulged in the infliction of punishment; and that he who has to command others is not fully prepared for the duties of that station, unless he in some degree command himself(b)." And if the master so far forget

Sobriety and self-control on the part of the master, enjoined by law.

(a) *Thomas v. Lane*, 2 Sumner's R., 1, 11.

(b) Abbot on Shipping, Boston ed. of 1846, 238; *Thomas v. White*, 1 Peters's Adm. Decisions, 186; Lord STOWELL, in *The Agincourt*, 1 Haggard's R., 271, 289.

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 The master
 may be held
 accountable
 for setting
 an example
 of disorderly
 conduct.

the decorum and responsibilities pertaining to his station, as voluntarily to become a participant in disorderly conduct on board his ship, he will be held to a more rigid accountability for any punishment he may inflict for misconduct in others, which he has thus encouraged by his own example(a).

Master
 bound, in
 all suitable
 cases, to
 make due
 inquiry, and
 to hear the
 accused.

In all cases of alleged misconduct coming to the knowledge of the master through the report of others, or which may possibly admit of extenuation, due inquiry should precede the act of punishment; and, therefore, the party charged should have the benefit of that rule of universal justice, of being heard in his own defence. A punishment inflicted without the allowance of such benefit, is in itself a gross violation of justice(b). It is an act of tyranny calculated to arouse the resentment of the rest of the crew, and to diminish their respect for the master, and their confidence in his justice. A previous inquiry and hearing of the accused are not only in many cases necessary for the purpose of ascertaining the truth, but are attended with the further advantage of affording time for passion to subside, and judgment and conscience to prevail.

It is a standing rule of the East India Company, that no penal infliction shall take place on board their ships, under the sole authority of the captain, though the captains employed are generally a very respectable body of men; but must be sanctioned by the report of a court of inquiry, composed of the

(a) *Jarvis v. The Captain and Mate of the Ship Claiborne*, Bee's R., 248; 1 Peters's Adm. Decisions, 186.

(b) *The Agincourt*, 1 Haggard's R., 271, 274.

principal officers of the ship, and the whole proceedings are to be finally reported to the governor of the company, upon the return of the ship(*a*); and it has been said to be the duty of the captain to avail himself of the advice of others, and to have the result entered on the log, because he thereby prevents himself from acting solely on his own feelings, which may be excited; and to be his interest, because it furnishes evidence in his favor, to be used on the day of trial(*b*).

Attempts on the part of the master to justify what would otherwise be deemed undue severity, on account of antecedent offences, are, in general, entitled to little favor. Over by-gone acts, not punished when they took place, time has thrown a species of condonation, as well as a degree of obscurity and indistinctness in the evidence of the manner and circumstances of their commission. The impunity of former offences may also have contributed to produce their repetition; and the admission of this mode of defence leads, moreover, to a great accumulation of expense, bearing hard upon a seaman in the exertion of his legal right to enforce his claims. A recent act may, nevertheless, be justly visited by a more serious punishment than would be due to it standing perfectly alone, if antecedent acts of the same kind had proved the existence of habits too dangerous to be passed over

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Allegations of antecedent misconduct, to justify severity in the punishment of recent offences, not to be regarded with favor.

(*a*) *The Lowther Castle*, 1 Haggard's R., 385; *The Agincourt*, 1 Haggard's R., 274.

(*b*) *Murray v. Moutrie*, 6 C. & P., 471; Abbot on Shipping, Boston ed. of 1846, 233, note.

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But nevertheless admissible if the recent and past acts are of a kindred nature.

The mode and the instrument of punishment to be determined by usage and discretion.

Caution used in administering punishment.

The master is authorized in extreme cases to imprison seamen in a common jail in a foreign port.

upon the repetition. Evidence of such acts ought not, therefore, to be excluded. But the act should properly be one "allied in nature to those which it follows: an act of theft will not prove a habit of drunkenness; and if an 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*)."

The particular mode and instrument of punishment which may lawfully be used is left to be determined by common usage, and by the humane discretion of the person who has the right to command its application(*b*); but the master has no right to employ deadly weapons, except in self-defence, or to quell a mutiny(*c*).

The master, and others acting under his orders, are responsible for the exercise of due care in the infliction of lawful punishment; and if by reason of their harsh and inconsiderate conduct the offender receive a serious injury, as the dislocation of an arm, they are answerable for the actual damages thus sustained, but not for vindictive damages(*d*).

The authority of the master to confine an offending seaman on board the ship, by putting him in irons, or otherwise, when his conduct and a just regard to good discipline render it expedient, is unquestionable; but whether the master can law-

(*a*) *The Agincourt*, 1 Hagg. Adm. R., 271, 275, 280; *The Lowther Castle*, *ib.*, 384, 387.

(*b*) 1 Haggard's Adm. R., 274.

(*c*) *Jarvis v. The Master, &c. of the Claiborne*, Bee's R., 248.

(*d*) *Elwell v. Martin et al.*, Ware's R., 55.

fully imprison a mariner on shore, in a foreign port, has been doubted. In a case before the Circuit Court of the United States for the District of Massachusetts, it became necessary to consider and decide this question. The decision of the court affirmed the existence of the power, in certain cases, and where the proper correction or punishment cannot be effectual without it on shipboard(*a*).

(*a*) *United States v. Ruggles*, 5 Mason's R., 192. The question is of so much importance, and the opinion of the court upon it, as delivered by Mr. Justice STORY, is so instructive, that no apology will be required for inserting it entire.

"There is another point," he observed, "on which the court is called to express an opinion. In the present case, the master not only forced the seaman on shore, but he caused him to be confined and imprisoned in the common jail at St. Pierre's, under circumstances of such great exposure and severity as cannot be justified. It is said that the law does not clothe the master with any authority to imprison the seaman, for disobedience or misconduct, in a common jail in a foreign port; and that the imprisonment, if necessary or proper, must be on board the ship. I am aware that it has been doubted by very able judges, whether the law does authorize such an imprisonment on shore in a foreign port. My opinion, however, is, upon the most mature deliberation, that it does authorize it; but I am also of opinion that the authority arises, and can be exercised only in cases of flagrant offences, where there is a positive necessity of removal of the party offending, from the ship, to some place of safety on shore. The authority is of a very delicate and summary nature, and is justified only by the same necessities which clothe private persons in other cases with extraordinary powers. Cases may easily be conceived where the authority may be indispensable for the safety of the ship, cargo and crew. Suppose a mutiny in port, with an intent to murder the officers, or to embezzle the cargo, and the conspiracy be so extensive that the mutineers cannot be suffered to remain on board, but at the imminent hazard of the lives of the officers and the property on board. The master must have, as I think, a right, under such circumstances, to remove them from the ship, and to imprison them as well for punishment and safety, if he does not choose, as he may, to dismiss them altogether from the

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Seamen not bound to obey unlawful commands, and may in some cases restrain and confine the master.

The seaman, in common with all other men, is subject to higher moral obligations than that of obedience; and the duty of submission may be superseded by the right of self-defence. The mariner is not bound to obey an unlawful command, and

employment. But in such a case, the imprisonment must be with the intent to take them again on board the ship for the voyage, or to bring them home, and not with the intent merely to punish them, and at the same time to dissolve their connection with the ship. The master can punish only to promote good discipline, and to compel obedience to lawful orders on board the ship. He is not clothed with judicial authority to sentence seamen to punishment for their offences. The law has conceded that authority to the regular tribunals of the country, acting in the common forms of justice, and upon a trial of facts by a jury. While, therefore, I admit that a master may, in extreme cases, imprison a seaman in a foreign port (for no such authority is pretended to exist in a domestic port), I think the authority is confined to extreme cases, and cannot be justified when a more moderate punishment on shipboard would be effectual and safe. The notion so commonly entertained, that a master may, at his pleasure, for slight offences, imprison his seamen in a foreign jail, is utterly unfounded in law. It is well known that there is, in warm climates, great danger to the healths and lives of seamen in these miserable and loathsome places; and a power to imprison there, is often a power of life or death. It is high time that masters should understand that they are criminally liable for such wanton abuses of authority. If a seaman should lose his life by confinement and exposure in such a jail, through the instrumentality of the master, without justifiable cause, the master is responsible, as in other cases, for homicide. One of the strongest reasons against the exercise of the authority is, that the seamen are thus put utterly out of the control and supervision of the master. It is his duty to watch over them with paternal attention as long as they belong to the ship; and he has no right to delegate his authority or custody to jailers or turnkeys in a foreign country."

See, to the like effect, *Wilson et al. v. The Brig Mary*, Gilpin's R., 31; *Magee et al. v. The Master and Owners of the Ship Moss*, ib., 219.

The result of Mr. Justice STORRY'S opinion seems to be, that although the power exists in theory, yet that it is justly subject to restrictions so stringent as to render it practically nugatory. In the case supposed

may resist any force to which the master may resort to compel obedience; and if the master is about to commit an unlawful act, especially if it be a felony, a seaman may lawfully restrain him. So if the master assault a seaman, without cause, the seaman may, in self-defence, restrain him with so much force, and so long as is necessary for this purpose(*a*).

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A passenger on board a ship may sue the master in the admiralty for an assault committed by him at sea. The jurisdiction in this instance, as in all cases of tort, arises from the place where the injury was committed. "Looking to the locality of the injury," said Sir WILLIAM SCOTT, in a case of this sort, "that it was done on the high seas, it seems to be a fit matter for redress in this court(*b*)."

A passenger may maintain a cause of damage for an assault at sea.

But there are cases in which the master may lawfully subject a passenger to forcible restraint or coercion. The law upon this subject is very clearly and satisfactorily stated, and justly applied, by the learned judge of the United States for the Eastern District of Pennsylvania, in a case recently decided by him. "The law," he observed, "invests the master with a necessary control over his passengers.

Limits of the master's authority over passengers.

by him, of a conspiracy to murder the officers of the ship, or to embezzle the cargo, so extensive as to be uncontrollable by the aid of those who remain faithful to their duty, prudence would seem clearly to dictate the peremptory discharge of the conspirators, instead of first inflaming their evil passions by ignominious imprisonment, and then receiving them again on board for the return voyage.

(*a*) *United States v. Thompson*, 1 Sumner's R., 168, 172; *United States v. Cassidy*, 2 Sumner's R., 583, 584.

(*b*) *The Ruckers*, 4 Robinson's R., 73; *Chamberlain v. Chandler*, 3 Mason's R., 242.

VOL. 1. He may make proper regulations for their government, such as may insure their safety, promote the general comfort, and preserve decent order; and these regulations he may enforce by all temperate and needful exercise of power. But here his authority over his passengers finds its limits, and he is a trespasser if he goes beyond it. He must show not only a breach of regulation before venturing to use force towards any one of them, but also that there was a clear necessity for the exercise of force. He is not to punish an infraction of mere police rules, by striking a passenger with his fist, or beating him with a rope's end: still less is he to do this before he has exhausted all milder and less degrading means of vindicating the order of the ship. Courteous request, patience, and renewed remonstrance, or reprimand, and, at last, just so much restraint, and if that be unavailing, just so much force, and no more, as the exigency may call for: these are the legitimate rights of the captain over his passengers." Judge KANE said, moreover, that he had "no hesitation in adding, that no punishment higher than a reprimand should ever be inflicted on a passenger, without a conference with the other officers of the ship, and the entry of the facts on the log-book;" except in cases of urgent necessity, where the right to use force was virtually resolved into that of self-defence. In the case before the court, the libellant was a steerage passenger from Rotterdam to the United States, on board a vessel commanded by the respondent. One of the regulations for the government of the pas-

sengers forbade the use by them of any canvass, cordage, or other article of property belonging to the ship, without permission. The libellant, it was alleged, had more than once infringed this regulation, and had been reprimanded in consequence. On the occasion when the violence complained of was committed, he was charged by the master with using a small piece, or rag, as some of the witnesses called it, of tarred canvass, for the purpose of kindling a fire to cook his dinner; and although, as the witnesses testified, he repeatedly and distinctly denied the charge, the master snatched the burning canvass from the fire, and with it struck the libellant several blows in the face; and while he was in the act of retreating, gave him several blows with the fist, which caused his nose to bleed. The master, not content with what he had done, repaired to the cabin, and soon returned with a small cord, with which he inflicted on the libellant severe chastisement. Damages to the amount of \$100 and costs were awarded to the libellant(a).

I have met with no express adjudication affirming the right of one passenger to seek redress in a court of admiralty for an assault at sea, committed by a fellow passenger; but the principle above mentioned seems to be equally applicable to such a case.

A case of marine assault and battery against the master of a vessel, which arose several years ago, in the District Court of the United States for the

When a cause of damage may be maintained by a slave.

(a) *Kranskopp v. Ames*, decided August, 1840, in the District Court for the Eastern District of Pennsylvania (7 Penn. Law Journal, 77).

VOL. 1. District of Maine, turned upon the personal capacity of the libellant to maintain a civil suit. He was a slave in the island of Guadaloupe, and was on board the vessel, on her voyage to this country, in the capacity of a servant of his master's son, Eugene, a youth of seventeen years of age. While at sea, the libellant was assaulted and beaten by the master, for refusing to perform a service which he was directed to execute. On the arrival of the vessel in the State of Maine, he instituted a suit in the admiralty for this injury; and the question was whether the civil disabilities to which he was subject in Guadaloupe continued to attach to him in a state of the American Union, where slavery was not tolerated. Upon an elaborate and learned review of the authorities bearing upon the subject, Judge WARE decided that he was competent to maintain his suit(a).

A receipt is not a bar in a suit for assault, etc.

In accordance with the indulgent principles which govern courts of admiralty in deciding upon the rights of seamen, a receipt by a seaman on receiving the sum due to him for wages, stating that it was "in full for all services and demands, for assault, battery and imprisonment, against the owner and officers," has been held to be no bar to a suit for an assault, battery and imprisonment(b).

Punishment not to be inflicted for slight offences.

It is proper, in conclusion, to observe that, while upon the one hand, the master is bound to treat the sailor with the forbearance and lenity due to his

(a) *Poilydore v. Prince*, Ware's R., 402.

(b) *Thomas v. Lane*, 2 Sumner's R., 1.

humble condition, his usefulness, his hard and ill-requited service, and his proverbial indiscretion, and not to be "extreme to mark what is done amiss(a);" on the other hand, he is entitled to the indulgent consideration and construction of his own conduct when acting under honest impulses. I gladly avail myself of the language of the learned judge of the District of Maine, in stating what appear to be the just deductions of the authorities upon this subject. "When it is apparent," said he, "that punishment has been merited, I have never been in the habit of attempting to adjust very accurately the balance between the magnitude of the fault and the quantum of punishment. Unless unusual and unlawful instruments have been used, or there have appeared clear and unequivocal marks of passion on the part of the

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Master
entitled to
indulgent
construction
in cases of
merited
punishment.

(a) Lord STOWELL, in *The New Phœnix*, Haggard's Adm. R., 199. The case of *Morris v. Cornell*, in the District Court of the United States for the District of Massachusetts (6 Law Reporter, 304), affords a good illustration of the just import of this remark. One of the acts of assault and battery complained of, occurred as follows: The libellant, Morris, in an altercation with another of the crew, was using profane language. On being told by the captain not to swear, he retorted that he had heard him, the captain, swear; and in reply to the captain's inquiry what he referred to, he answered he had heard him *damn the man's eyes*. The captain thereupon, in a rage, seized him violently, pulled out some of his hair, and inflicted a blow which left a mark on the eye. The learned judge held the assault to be unjustifiable, and awarded damages on account of it; and in remarking upon this part of the case, said, that when properly checked for swearing, Morris was wrong in retorting on the captain, but that the provocation was not great, and there was no exigency—no emergency. The captain was bound to suppress his passion. If unable to control himself, he was unfit to command others. It was his duty to set an example of calmness and self-possession.

VOL. 1. captain, or the punishment has been manifestly excessive and disproportionate to the fault, I have not thought myself justified in giving damages. It would be holding the master to too severe a rule, to amerce him in damages, because in a case where punishment was deserved, he may, in the opinion of the court, have somewhat exceeded the limits of a moderate and reasonable punishment. The nature of the subject does not admit of any precise and exact measure; and the court cannot, without great injustice, make of its judgment a bed of Procrustes, and require of all masters an exact conformity with it. Something is to be conceded to the excitement of the occasion under which the master is required, by the duties of his office, to exercise this authority; some consideration allowed to the general character and temper of the man who is the subject of punishment; some latitude for differences of judgment, and something presumed in favor of a rightful and proper exercise of discretion; and when the propriety and legality of correction of some kind is made to appear, it lies on the libellant to show that the punishment, under all the circumstances of the case, was clearly excessive(a).”

CONSEQUENTIAL INJURIES.

The right of resort to admiralty process, for the redress of personal injuries committed on the high seas, has in this country been held not to be limited

(a) *Butler v. M'Lallen, Ware's R.*, 219, 230. And see, to the same effect, *Elwell v. Martin, ib.*, 53, 62.

to trespasses against the person, but to extend also to suits for the recovery of consequential damages resulting from tortious acts. The admiralty jurisdiction over cases of this nature was asserted and maintained by Mr. Justice STORY, in an eloquent and forcible judgment pronounced many years ago. The case was well calculated to quiet even plausible scruples, had it afforded room for them, as to the power of awarding reparation for the outrages complained of. The libellants, being a husband, wife and children, were passengers on board the ship Pearl from the island of Nookoo to Boston; and during the voyage, they were continually treated by the captain with wanton cruelty, insult and indecency.

Judge STORY said that the contract with the master which led to the injuries for which the libellants sought redress, was in itself a maritime contract for the conveyance of passengers on the high seas; and the wrongs complained of were gross ill treatment and misconduct in the course of the voyage, while on the high seas, by the master, in violation of stipulations necessarily implied in his contract, of the duties of his office, and the rights of the libellants under the maritime law. The jurisdiction of courts of admiralty over torts committed *in personam* on the high seas had never, to his knowledge, been doubted or denied by the courts of common law, and had often been recognized by adjudications in the admiralty.

* The jurisdiction resulted from the locality of the wrong, and not from its nature; and it could make

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Cause of
damage for
cruel treat-
ment, held
maintain-
able by
passengers.

VOL. 1. no difference, in point of principle, whether the injury was direct or consequential, whether it be an assault and imprisonment, or a denial of all comforts and necessaries, and a course of brutal insult and maltreatment, whereby the health of the party is materially injured, or he is subjected to gross ignominy and mental suffering. His conclusion was, that upon both authority and principle the suit was well founded in point of jurisdiction.

With respect to the principles of abstract justice involved in a case like that before him, after remarking upon the almost unlimited power of the master of a ship over the welfare of all on board, and the difficulty, by physical or moral force, of resisting the manifestation of a malignant temper on his part, his honor observed: "In respect to passengers, the case of the master is one of peculiar responsibility and delicacy. Their contract with him is not for mere ship room, and personal existence on board; but for reasonable food, comforts, necessaries and kindness. It is a stipulation not for toleration merely, but for respectful treatment, for that delicacy of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress. In respect to females, it proceeds yet farther: it includes an implied stipulation against general obscenity and that immodesty of approach which borders on lasciviousness, and against that wanton disregard of the feelings which aggravates every evil, and endeavors by the excitement of terror, and cool malignancy of conduct, to

inflict torture upon susceptible minds." After enumerating a series of acts of the nature intimated, the learned judge added: "It is intimated that all these acts, though wrong in morals, are yet acts which the law does not punish; that if the person is untouched, if the acts do not amount to an assault and battery, they are not to be redressed. My opinion is that the law involves no such absurdity. It is rational and just. It gives compensation for mental sufferings occasioned by acts of wanton injustice, equally whether they operate by way of direct or of consequential injuries. In each case, the contract of the passengers for the voyage is in substance violated. I do not say that every slight aberration from propriety or duty, or that every act of unkindness or passionate folly, is to be visited with punishment; but if the whole course of conduct be oppressive and malicious, if habitual immodesty is accomplished by habitual cruelty, it would be a reproach to the law if it could not award some recompense." There was a decree against the respondent for four hundred dollars damages(a).

In a subsequent case in the same court, it was held that a father might maintain a suit in the admiralty, in the nature of an action *per quod servitium amisit*, for the tortious abduction or seduction of his minor son on a voyage on the high seas; for although the tortious act originated on land, it was a continuing tort(b). The same doctrine had been laid down,

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An action of damages held maintainable by a father for the tortious abduction or seduction of his son,

(a) *Daniel Chamberlain and others v. Chandler*, 3 Mason's R.. 242.

(b) *Plummer v. Webb*, 4 Mason's R., 380.

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Although the minor is not an inmate of his father's family.

a year or two previous, by the judge of the United States for the District of Maine; and the action was held to be maintainable; although the son, at the time of the abduction, was not an inmate of his father's family, and although he had been left mainly to support himself by his own labor, unless it also appeared that the father had abandoned all care of him(a).

The owners of the ship are also liable.

What constitutes abduction.

In a subsequent case the liability for this description of tort was held, by Mr. Justice STORY, to extend also to the ship-owner; and that the charge of abduction was sufficiently established by showing that the minor had run away from another vessel, under circumstances implying notice to the master that the shipment was unauthorized by the father, and against his will. The just measure of damages in such a case he held to be, the amount of the wages which the son was earning on board the other vessel at the time of the abduction, down to the termination of the voyage; and the additional sum of \$50, to cover extra expenses and losses(b).

Employment of a minor without fault on the part of the master.

In a case where the minor son of the libellant had, without the knowledge of the master, secreted himself on board a whale ship until after she had sailed, and was subsequently employed on board during the voyage, the case was treated by the learned judge of the United States for the District of Massachusetts as one of implied contract, and wages were decreed(c).

(a) *Steele v. Thacher*, Ware's R., 91.

(b) *Sherwood v. Hall et al.*, 3 Sumner's R., 127.

(c) *Luscom v. Osgood*, 7 Law Reporter, 132.

CHAPTER XV.

SPOILIATION AND DAMAGE.

DEPREDACTIONS upon the rights of property, committed on the high seas, whether by destruction, pillage, damage, unlawful seizure or restraint, constitute another description of wrongs falling within the admiralty and maritime jurisdiction of the courts of the United States. Definition.

Suits for injuries of this nature are technically called causes of spoliation, civil and maritime(*a*). They most commonly occur in time of war, and consist in hostile aggressions committed either by the public armed vessels, or, more frequently, by privateers, acting, or pretending to be acting, under the authority of the belligerents. They may, and not unfrequently do, also happen both in time of war and of peace, by means of illegal captures in the nature of prize *jure belli*, made under color of instructions given to the commanders of national vessels, in pursuance of statutes, or other public ordinances, authorizing the exercise of belligerent rights to a limited extent; or by means of unauthorized seizures, or other unlawful proceedings for the enforcement of mere municipal forfeitures. They sometimes

(*a*) *The Hercules*, 2 Dodson's R., 353, 369, 370: "*causa spoliæ civilis et maritima*."

VOL. 1. also consist in mere piratical depredations, or of wanton marine trespasses partaking more or less of that character; though it has been argued in our courts that, in cases of piracy, the private injury is merged in the public crime. But it has been otherwise expressly decided by the Supreme Court of the United States. The common law doctrine of merger was held to be inapplicable; and "whatever," said the court, "may have been the barbarous doctrines of ancient times about converting goods piratically taken unto droits of the admiralty, the day has long since gone by since it gave way to a more rational rule, and the party dispossessed was sustained in his remedy to reclaim property as not divested by piratical capture(a).

Civil remedy not merged in piracy.

Captures *jure belli*, exclusively cognizable in the tribunals of captor's country,

When, however, a capture is made *jure belli*, by a ship of war, or by a private armed vessel acting under a belligerent commission, the case is one of prize; and it is a settled principle of the law of nations, that the cognizance of all questions of prize belongs exclusively to the tribunals of the country to which the captors belong, and from which they derive their authority to make captures. No neutral nation has a right to inquire into, or decide upon, the validity of such capture, even though it should concern property belonging to its own citizens or subjects, unless its own sovereign or territorial rights are violated. The seizure, as prize, vests the possession in the sovereign of the captors, and subjects the property

(a) *Manro v. Almeida*, 10 Wheaton's R., 473 (6 Curtis's Decis. S. C., 485); and see also, to the like effect, *The Hercules*, 2 Dodson's R., 353, 375

to the exclusive jurisdiction of his courts; and this right attaches not only where the captured property is brought within the territory of the capturing power, but also when it is carried into a neutral territory. As incident to the prize jurisdiction, the prize court may and ought to take cognizance also of any claim which the owner of the captured property may have to damages on account of the capture (*a*). If it is definitively pronounced rightful, it becomes the acknowledged act of the sovereign himself; and the parties who made the capture are completely justified as to all foreign nations, however repugnant it may seem to have been to the laws of nations. The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign; and if the citizens or subjects of a neutral country are injured by such acts, it belongs to their own government to demand redress, and not to judicial tribunals to administer it (*b*).

Although the prize be brought into a neutral territory.

(*a*) This claim is to be asserted in the prize proceedings instituted at the instance of the captor for the condemnation of the captured property; or if no such proceeding is instituted, as is sometimes the case, when the captor himself has become convinced of the invalidity of the capture, or the captured property has been lost by recapture or otherwise, the injured party may, in such case, himself become the primary actor, by calling on the captor to proceed to adjudication, and at the same time invoking the justice of the court to award damages, if the capture shall be adjudged to have been tortious.

(*b*) Story's Comm. on the Constitution, 528; *L'Invincible*, 2 Gallison's R., 29, 36, 44; S. C., affirmed on appeal, 1 Wheaton's R., 238 (3 Curtis's Decis. S. C., 532); *The United States v. Peters*, 3 Dallas's R., 121 (1 Curtis's Decis. S. C., 127); *Hudson v. Guestier*, 4 Cranch, 293 (2 Curtis's Decis. S. C., 107); *Rose v. Himely*, 4 Cranch, 241 (2 Curtis's Decis. S. C., 87); *The Alerta*, 9 Cranch, 359 (3 Curtis's Decis. S. C., 379); *The Estrella*, 4 Wheaton, 298 (4 Curtis's Decis. S. C., 406).

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Courts of a neutral country, therefore, incompetent to afford redress.

Even where the prize jurisdiction is lost by recapture, etc.

But cases involving a violation of neutrality form an exception.

For these reasons it has been held that no suit can, in general, be maintained in the courts of a neutral country, for torts committed on the high seas upon the property of its citizens, by a cruiser regularly commissioned by a foreign power, whether such cruiser be a national or a private armed vessel. And this has been held to be equally true in cases of subsequent recapture; for although the right to adjudicate upon captured property, as prize, remains only while the property continues in the actual or constructive possession of the sovereign of the captors, and is lost by recapture, escape, or voluntary discharge, yet the right of awarding damages upon the application of the original owner is not thereby impaired; while, on the other hand, this could not be done by a tribunal of the neutral power, without taking cognizance of the capture itself, and thereby of the question of prize, over which, originally, it could not assert any jurisdiction(a).

But cases involving the sovereignty and rights of neutral nations form an exception to the general doctrine of the exclusive jurisdiction of the courts of the capturing power over prizes; and if a capture has been made within the territorial seas of a neutral country, or by a privateer illegally equipped in a neutral country; or by persons who could not,

(a) *L'Invincible*, 2 Gallison's R., 29, 39; S. C., 1 Wheaton's R., 238 (3 Curtis's Decis. S. C., 532); *La Amistad de Rues*, 5 Wheaton, 385 (4 Curtis's Decis. S. C., 673). The doctrine of these cases is not in accordance with the principles which seem to have been assumed in the early cases of *Glass v. The Betsey*, 3 Dallas's R., 6 (1 Curtis's Decis. S. C., 74), and *Del Col v. Arnold*, 3 Dallas's R., 333 (1 Curtis's Decis. S. C., 248); but the doctrine is now firmly established.

without violation of their allegiance to a neutral country, act under a belligerent commission, such capture is invalid, and the property, to whomsoever belonging, may be rightfully restored to the owner by the prize courts of such neutral country, when voluntarily brought into its ports(*a*). In such cases, restoration, together with costs and expenses, alone can properly be awarded(*b*).

(*a*) *L'Invincible*, *ubi supra*; *La Conception*, 6 Wheaton's R., 235 (5 Curtis's Decis. S. C., 72); *Santissima Trinidad*, 7 Wheaton's R., 283 (5 Curtis's Decis. S. C., 268); *The Gran Para*, 7 Wheaton's R., 471 (5 Curtis's Decis. S. C., 302).

(*b*) *La Amistad de Rues*, 5 Wheaton's R., 385 (4 Curtis's Decis. S. C., 673). "We are now," say the court, "called upon to give general damages for plunderage; and if the particular circumstances of any case shall hereafter require it, we may be called upon to inflict exemplary damages to the same extent as in ordinary cases of marine torts. We entirely disclaim any right to inflict such damages, and consider it no part of the duty of a neutral nation to interpose, upon the mere footing of the law of nations, to settle all the rights and usages which may grow out of a capture between belligerents. Strictly speaking, there can be no such thing as a marine tort between belligerents. Each has an undoubted right to exercise all rights of war against the other; and it cannot be matter of *judicial* complaint that they are exercised with severity, even if the parties do transcend those rules which the customary laws of war justify. At least they have never been held to be within the cognizance of the prize tribunals of neutral nations. The captors are amenable to their own government exclusively for any excess or irregularity in their proceedings; and a neutral nation ought no otherwise to interfere than to prevent captors from obtaining any unjust advantage by a violation of its neutral jurisdiction. A neutral nation may, indeed, inflict pecuniary or other penalties on the parties for any such violation, but it then does it professedly in vindication of its own rights, and not by way of compensation to the captured. Where called upon by either of the belligerents to act in such cases, all that justice seems to require is, that the neutral nation should fairly execute its own laws, and give no asylum to property unjustly captured. It is bound, therefore, to

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So also captures by privateers pronounced unlawful by courts of captor's country.

It seems, also, that where a capture has been made by a privateer acting under a belligerent commission, and the courts of the captor's country have decided that the capture was tortious, and therefore not sanctioned by the captor's sovereign, the privateer, and also her owners, when subsequently found in the territories of the neutral country, may, under some circumstances, be subjected to damages in its courts(a).

Distinction between wrongful seizures *jure belli*, and other maritime seizures.

The distinction is nowhere clearly drawn, so far as I can discover, between seizures on the high seas which are to be considered as captures made *jure belli* or *quasi jure belli*, cognizance whereof belongs to the prize jurisdiction, and those seizures which are to be regarded as mere marine trespasses falling within the civil or instance jurisdiction of courts of admiralty: and in a case before Mr. Justice LIVINGSTON, in the Circuit Court of the Southern District of New-York, some difficulty appears to have been felt by him in deciding to which of these classes the case pertained. It was a suit for damages

restore the property if found within its own ports; but beyond this, it is not bound to interpose between the belligerents."

As between the belligerents, a capture made in neutral waters is valid. Its invalidity can be asserted by the neutral power alone, on account of the violation of its neutrality. *The Ann*, 3 Wheaton's R., 435 (4 Curtis's Decis. S. C., 253).

A capture made by citizens of the United States, of property belonging to the subjects of a country in amity with the United States, wherever the capturing vessel may have been equipped, or by whomsoever commissioned, will be restored. *The Bello Corunnes*, 6 Wheaton's R., 152.

(a) *L'Invincible*, 1 Wheaton's R., 238 (3 Curtis's Decis. S. C., 532).

by the owner of a Haytian schooner and her cargo, and the master, mate, supercargo, and one of the mariners of the vessel, against the owners of an American private armed brig. The schooner was boarded on her voyage from Port-au-Prince to Bermuda, near the close of the last war with England, by a crew sent for the purpose of search and examination by the commander of the brig. Having ascertained her neutral character, and the regularity of her papers, which employed about ten minutes, the crew of the brig, instead of returning to their own vessel, continued two hours on board the schooner; during which time they plundered the libellants of valuable property, beat the supercargo and one of the mariners, destroyed some of the schooner's papers, and on leaving her carried away the rest. In consequence of the loss of her papers, she was afterwards seized by a British armed vessel, and a large sum was paid for her ransom. It was for these injuries that the suit was instituted: and doubts having been expressed at the hearing, whether if such cases were cognizable in the district court, they were so in virtue of the powers which it possesses as a prize, or of those which belong to it as an instance court, Judge LIVINGSTON, waiving the expression of any opinion on this point, held it to be immaterial, inasmuch as the district courts possess, under the Constitution and laws of the United States, all the powers of a court of admiralty, whether considered as an instance or a prize court, unlike the High Court of Admiralty of England, which, merely as such, has no jurisdiction

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over prizes; so that it was unimportant to determine under what particular branch of the jurisdiction of the district court the case before him was cognizable, as the court must have a right to inquire into, and, if justice requires it, to award damages in all cases of marine trespass or tort(*a*). The case was carried by appeal to the Supreme Court; and the question of jurisdiction was by that court no otherwise noticed than by the remark that "the jurisdiction of the district court to entertain this suit, in virtue of its general admiralty and maritime jurisdiction, and independent of the special provisions of the prize act of the 26th of June, 1812, ch. 107, has been so repeatedly decided by this court, that it cannot be permitted again to be judicially brought into doubt(*b*). The distinction does not appear, therefore, to be in any other respect essential in our courts, than as it concerns the form of the proceeding proper to be instituted for the confiscation of the property seized, when sent in for adjudication. In a case of the capture by an American vessel of war of a Spanish privateer, under the piracy acts, the proceeding appears to have been by information *in rem*, in the ordinary form of proceeding to enforce a municipal forfeiture; although, with reference to the applicability of the doctrine of exemption on the ground of probable cause, the Supreme Court "deemed it to stand upon the same analogy as captures strictly *jure belli*(*c*)."

(*a*) *The Amiable Nancy*, Paine's R., 111.

(*b*) 3 Wheaton's R., 546 (Curtis's Decis. S. C., 287).

(*c*) *The Palmyra*, 10 Wheaton's R., 1 (7 Curtis's Decis. S. C., 1).

The aggressive rights which belligerent nations are authorized to exercise on the high seas, through their lawfully commissioned cruisers, are, like other rights, to be so used as to cause no unnecessary harm to persons or property subjected to their exercise. Under certain reasonable limitations, those by whom these rights are enforced proceed at their peril, and are liable for all injuries and losses occasioned by their own misconduct, and by that of those under their command. This liability extends to the owners as well as the commanders of private armed vessels.

Many cases have occurred in our courts illustrative of these principles, of which the case last cited will be seen to be one(*a*). The right of detention for examination is an unquestionable belligerent right, which may be lawfully exercised, in good faith, and in conformity with the principles just stated, over every vessel, except a national vessel, which a belligerent cruiser meets on the ocean, for the purpose of ascertaining her national character and her conduct(*b*); but in exercising the right of capture, the law exacts discrimination, and holds the captor responsible for wrongs committed through negligence, as well as through malice. But it is a settled

The right of search unlimited, except as to national vessels.

(*a*) See, also, *inter al.*, *The Lively*, 1 Gallison's R., 315; *Del. Col. v. Arnold*, 3 Dallas's R., 333 (1 Curtis's Decis. S. C., 248); *The Eleanor*, 2 Wheaton's R., 345 (4 Curtis's Decis. S. C., 129); *The Anna Maria*, 2 Wheaton's R., 327 (4 Curtis's Decis. S. C., 122); *The Ulpino*, 1 Mason's R., 91; *The George*, *ib.*, 24; *Maley v. Shattuck*, 3 Cranch's R., 458 (1 Curtis's Decis. S. C., 642).

(*b*) *The Eleanor*, 2 Wheaton's R., 345 (4 Curtis's Decis. S. C., 129); *The Anna Maria*, 2 Wheaton's R., 327 (4 Curtis's Decis., S. C., 122).

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 cause excus-
 es capture of
 neutral prop-
 erty.

principle of the law of prize, that probable cause will not only excuse, but even in some cases justify a capture. If there be probable cause, the captors are entitled, as a right, to exemption from damages; and if the case be one of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law proceeds yet farther, and gives the captors their costs and expenses in proceeding to adjudication(*a*). This rule has been held to embrace captures made by American vessels under the act of Congress of March 3, 1819, entitled "An act to protect the commerce of the United States, and to punish the crime of piracy;" and seems to have been considered by the court to extend to all seizures on the high seas, "under laws authorizing the exercise, to a limited extent, of belligerent rights(*b*)."
 But the right to protection on this ground may be forfeited by misconduct subsequent to the act of capture(*c*). The rule does not apply to cases of seizure, under mere municipal laws, as by a collector of customs for infringement of the revenue laws, except where probable cause is by some statute declared to be a ground of exemption from damages. In such cases the party who makes the seizure, seizes at his peril: if condemnation follows, he is justified; if an acquittal,

Probable
 cause not a
 justification
 of mere
 municipal
 seizure, un-
 less made so
 by statute.

(*a*) *The Apollon*, 9 Wheaton's R., 362 (6 Curtis's Decis. S. C., 88).

(*b*) *The Marianna Flora*, 11 Wheaton's R., 1 (6 Curtis's Decis. S. C., 497); *The Palmyra*, 12 Wheaton's R., 1 (6 Curtis's Decis. S. C., 497); 3 Stat. at Large, 510, 600.

(*c*) *The George*, 1 Mason's R., 24; *The Anna Maria*, 2 Wheaton's R., 327 (4 Curtis's Decis. S. C., 122).

then he is responsible in damages, unless he can shelter himself under the protection of some statute(*a*).

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Probable cause has been defined to be less than evidence which would justify condemnation, but sufficient to warrant suspicion(*b*).

What constitutes probable cause.

It has been held that where a capture is in itself justifiable, no responsibility is incurred by sending in the captured vessel for adjudication, although it should, upon investigation, clearly appear that the owners are entitled to restoration(*c*). We have already seen that the owner of captured property is permitted, in his character of claimant in the prize proceedings against his property, not only to insist on its restoration, but also to claim such damages as he may be entitled to, in the event of the capture being adjudged tortious(*d*).

This is equally true of mere municipal seizures; and therefore the owner of the property seized cannot regularly institute an independent cause of damage *in personam*, against the seizing officer, during the pendency of the proceeding *in rem*, for the enforcement of the supposed forfeiture(*e*). And if, in such proceeding, damages are claimed, and not awarded, it is presumed that no suit could subsequently be maintained for their recovery(*f*). The injured party, in cases of marine tort, may enforce

Claimant cannot sue *in personam* pending the proceeding *in rem* against his property.

(*a*) *The Apollon*, 9 Wheaton's R., 362 (6 Curtis's Decis. S. C., 88).

(*b*) *The George*, 1 Mason's R., 24.

(*c*) *The Marianna Flora*, *ubi supra*, 1; S. C., 3 Mason's R., 166.

(*d*) *Vide supra*, p. 451, note *a*.

(*e*) *The Apollon*, 9 Wheaton's R., 362 (6 Curtis's Decis. S. C., 88).

(*f*) See *Carter v. American Insurance Company*, 3 Peters's R., 307 (Curtis's Decis. S. C., 427).

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his remedy in a court of admiralty, by the arrest of the wrong-doer, including, in the case of privateers, the owners of the offending vessel; by attachment against the offending vessel, except national vessels, or against other goods and chattels of the offender, or by foreign attachment against his credits and effects in the hands of third persons(*a*).

Measure in damages.

The owners, not being participants in torts committed by the commanders and crew of private armed vessels, and being only constructively liable therefor, are bound only to the extent of the actual injuries and personal wrongs sustained by the parties aggrieved, although, in cases of gross and wanton outrage, the original wrong-doers may justly be visited, in the form of vindictive damages, with the punishment due to such lawless conduct. But in no case do the probable profits of an unfinished voyage form a proper element in the estimate of damages. Such a rule would be so uncertain in itself, and subject to so many contingencies and difficulties, as to render it inadmissible. The prime cost or value of the property lost, at the time of the loss, with all charges, and the premium of insurance where it has been paid; and in case of injury the diminution of value by reason of the injury, with interest on such valuation, constitute the true measure of remunerative damages(*b*).

(*a*) *Manro v. Almeida*, 10 Wheaton's R., 473 (6 Curtis's Decis. S. C., 485); *L'Invincible*, 2 Gallison's R., 29, 40. Rules of Practice in Cases of Admiralty and Maritime Jurisdiction, Appendix, Rule 11.

(*b*) *The Amiable Nancy*, 3 Wheaton's R., 562 (4 Curtis's Decis. S. C., 287); *The Anna Maria*, 2 Wheaton's R., 327 (4 Curtis's Decis.

S. C., 192); *La Amistad de Rues*, 5 Wheaton's R., 385 (4 Curtis's Decis. S. C., 673); *Del. Col. v. Arnold*, 3 Dallas's R., 333 (1 Curtis's Decis. S. C., 248); *The Lively*, 1 Gallison's R., 315. In this case, damages, including demurrage, were awarded against the commander of an American privateer. The subject of damages in cases of marine tort was maturely considered and fully discussed by Mr. Justice Story, both upon authority and principle. .

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