information for procuring the insurance, will be a ground of responsibility against the first broker.[1]

Thirdly, Such fraud in the agent for the consignor, as will subject the principal for its consequences, will ground a claim against the agent's estate.

The consequence of the agent making himself responsible for the risk is, that he becomes the insurer himself; and he may avail himself of every defence which the underwriter would have had, if the insurance had been effected.[2]

CHAPTER IV.

OF MARITIME CONTRACTS.

INTRODUCTORY VIEW OF MARITIME LAW.

In the great department of national jurisprudence relative to maritime affairs, there is a great deficiency in the works of the institutional writers of Scotland.

One treatise exists in manuscript, professedly written on this subject, about the close of the sixteenth century, but of no very signal merit;[3] and amidst those preparations which appear to have been made, under the direction of Sir James Balfour, for completing a digest of the law of Scotland, in consequence of the legislative appointment of a commission for that purpose in the sixteenth century, there were collected some notes of sea laws, which are published in the book entitled Balfour's Practics.[4] But besides these we have nothing but occasional passages in our institutional writers, and the determinations of the Admiralty, and of the Supreme Court, to compose our national digest of maritime law.

The little which is to be found in Lord Stair's Institutions,[5] leaves room for sincere regret that this important subject had not received more attention from one so eminently qualified to illustrate it.

Lord Bankton, with less pretension to respect as an authority in Scottish jurisprudence, has more fully entered on some of the points of maritime law, as they stood connected with the subjects which, in the course of his work, he had occasion to consider.[6]

Erskine, our latest institutional writer, has, with his usual clearness and conciseness, touched the points of maritime law which came in his way; but so slightly, that the im-

[1] Seller *v.* Work, Marshall on Ins. p. 299.

[2] Marshall, p. 301.

[3] 'Tractatus Legum et Consuetudinum Navalium 'quæ apud omnes fere gentes in usu habentur, &c. 'auctore Alexandro Regio; in suprema Edinburgi 'curia advocato ac Amarantis delegati jurisdictionem 'in Scotia exercente.' MS. in Advocates' Library.

Mr Alexander King appears to have been admitted of the Faculty of Advocates, 20th December 1580; and Francis Stewart, earl of Bothwell, to whom, as admiral of Scotland, his work is inscribed, held that office from 1587 to 1592.

[4] 'The Sea-Lawis collectit furth of the Actis of 'Parliament, the Practiques and the Lawis of Oleron, 'and the Lawis of Wisbieg, and the Constitutionis of 'Francois king of France, anno 1543-1557.' There is no good authority for ascribing this book to Sir James Balfour, or for holding that it received his sanction, or was any thing more than the preparatory collections made for the use of him and the other commissioners for revising the laws.

[5] The second chapter of Book II. of Lord Stair's Institutions is a very valuable tract on Prize Law. But nothing more is to be found in that excellent work except a few scattered notices in the course of his systematical review of our jurisprudence. Thus, in treating of mandate, he bestows a single paragraph on exercitors. B. 1. tit. 12. § 18.

[6] B. 1. tit. 18. § 2.; and B. 1. tit. 19. § 2.

portant subjects of affreightment, bottomry, and insurance, are all discussed in a single paragraph: and this, with other two paragraphs on the subject of exercitors, is the whole of maritime jurisprudence that is to be found in that standard work on Scottish law.[1]

The Scottish Court of Admiralty is so far different from that of England,[2] that to this tribunal belongs the decision of 'all maritime and seafaring causes,' relative to charter-parties, freights, salvages, wrecks, collision of ships, bottomry, and policies of sea-insurance; without any regard to the place of the contract, as executed on sea or at land; while in all mercantile questions also this Court has jurisdiction, subject in the common way to an easy appeal to the Court of Session.[3] It had also, till lately, a jurisdiction in prize causes to adjudge captures from the enemy; wherein it remarkably differs from the Admiralty of England.[4] The judgments of this Court have never been reported.[5] But the most important of the cases which have there been decided have been brought before the Court of Session, and some of them appear in the printed reports.

Lord Stair's reports of the decisions in prize questions in his time, have been deservedly eulogized by those who know their value. But it is much to be regretted that so little attention has been paid to decisions of this description in Scotland; many very valuable determinations in maritime law not having been published in the collections.

The maritime law, however, partakes more of the character of international law than any other branch of jurisprudence; and in all the discussions on this subject in our Courts, the Continental collections and treatises on this subject, and the English books of reports, have been received as authority by our Judges, where not unfitted for our adoption by

[1] 3. Ersk. 3. § 17. 3. Ersk. 3. § 43, 44.

[2] The Admiralty, in England, cannot 'meddle of 'any thing done within the realm, but only of a thing 'done upon the sea.' 13. Rich. II. st. 1. c. 5.; 15. Rich. II. c. 3. Abbot, 458.

[3] Formerly the Admiral's jurisdiction in MARITIME causes was cumulative with that of the Court of Session. By 1681, c. 16. the jurisdiction is enlarged, and vested solely in the Court of Admiralty; with power to the Court of Session to review the sentences of this Court only by suspension and reduction; that is to say, only to suspend execution on cause shown; and to try the cause again as by a writ of error in England; not by the ordinary writ of appeal by which causes are *advocated* to the Court of Session from the ordinary civil courts. The Court retains a jurisdiction (though not exclusive nor supreme) in all MERCANTILE causes.

This tribunal, having thus a jurisdiction in maritime and mercantile causes, may properly be called the MARITIME and MERCANTILE COURT of SCOTLAND, and seems capable of producing the most beneficial effects in maturing this important branch of the law of the country. It is much to be wished that due attention were paid to this object; that so valuable an opportunity should not be lost, while the maritime and mercantile law of Scotland is still in its progress; and that it should be recollected how much may be done by a consistent and uniform course of determinations, grounded on comprehensive views of the whole system of mercantile jurisprudence; what actually was accomplished by Lord Mansfield in systematizing the mercantile law of England; and what is now accomplishing in the department of international law, by the determinations of that eminent person who presides in the High Court of Admiralty of England.

[4] The Court of Admiralty of England cannot proceed to condemn prizes in war without a special warrant from the king. But the Scottish Court of Admiralty has always exercised that power as part of its inherent functions, proceeding alone on the king's proclamation of war and reprisals. This power in jurisdiction, however, has now been abolished by 6. Geo. IV. c. 120. § 57.

[5] The late Judge-Admiral Cay devoted his particular attention to the reformation of this Court during the few years in which he sat there; and had he survived, would have succeeded in greatly augmenting its importance and usefulness. He bestowed exemplary care in deliberating on the cases which came before him; and, above all, seems ever to have had in his mind that most salutary of all judicial maxims, to preserve, as far as just principle would permit, uniform consistency, not only with former determinations in his own Court and in the Court of Session, but with those of England and of other European states. He has left many volumes of notes on cases discussed before him, which shew at once the importance of the tribunal, and the knowledge and care with which he administered his office.

any peculiarity which our practice does not recognize. Of these authorities it may not be entirely useless to make a slight enumeration.

I. The first authorities in order and in weight are the ORDONNANCES and CUSTOMS of MARITIME STATES, wherever they have been admitted to rank as part of the maritime law of Europe.

Rhodian Laws.

1. The RHODIAN LAWS are confessedly the most ancient maritime laws in Europe. They are supposed to be nearly of the age of Solomon, and were held as the law of nations among the islanders of the Ægean Sea. They were adopted by the Romans in the time, it is said, of the first Punic War. The high authority of those laws appears from the celebrated answer of Antoninus, as recorded by Volusius Mæcianus, 'Ego 'quidem mundi dominus, *lex* autem maris.'[1] The essence of those laws has been embodied in several titles of the Corpus Juris; on which a very learned Professor of Law in the University of Louvain has published a Commentary. This work has been republished by the acute and learned Vinnius, with notes, which (like every thing that Vinnius has done) combine, with the greatest conciseness, the most admirable perspicuity and comprehension of the subject.[2]

Il Consolato del Mare.

2. The navigation of the Mediterranean by the ships of Venice, Genoa, and the other small commercial republics which rose after the fall of the empire, led to a digest or compilation of rules for regulating that navigation; and which appears to have been universally adopted on the Continent, as the Code of Maritime Law, in the course of the eleventh, twelfth, and thirteenth centuries.[3] This digest is called IL CONSOLATO DEL MARE. It was compiled by order of the ancient kings of Arragon, and was originally published in the dialect of Catalonia. It comprised the ancient ordonnances of the Greek and Roman emperors, and of the kings of France and Spain; and the laws of the Mediterranean islands, and of Venice and Genoa. It has been translated into every language of Europe. VALIN announces (what I fear never was completed) a translation of it with notes by the celebrated EMERIGON. We have, however, the benefit of M. Valin's perusal of that work in his Commentary on the French marine ordonnance of 1681.[4] BOUCHER has lately published a translation from the Catalan.[5] When CASAREGIS[6] was about to give to the

[1] Dig. lib. 14. tit. 2. l. 9. de Lege Rhodia. Pothier, Pand. Justin. vol. i. p. 367.

[2] PETRI PECKII Commentaria in omnes pene Juris Civilis titulos ad rem nauticam pertinentes: published originally at Louvain, 1603; at Amsterdam, 1668; and, with his whole works, at Antwerp, 1679.

Republished, cum notis, ARNOLD. VINNII, J. C., Lugd. Batav. 1647. In this last edition the pretended Greek text of the Rhodian Laws is published with a Latin translation, but it is held to be spurious. The titles commented on are these: Nautæ, Caupones, &c.; De exercitoria actione; Ad legem Rhodiam; De Incendio, Ruina, &c. Rate, Nave, expugnata; De navicularii sive naucleriis publicas species transportantibus; De navibus non excusandis; De naufragiis.

Republished, with notes, by J. Laurentius, J. C., Amstel. 1668.

[3] See in Casaregis a chronological list of the adoptions of this code, vol. iii. p. 99.

[4] It is delightful to see the warmth of Valin's acknowledgments to Emerigon. After telling us that he had long resisted Emerigon's offer of a communication of his collection, (which occupation at the bar prevented Emerigon from finishing), lest he should anticipate so excellent a work, he says,—'Il m'en a 'donc fait passer une copie, dont j'ai fait un tel usage 'que presque tout ce que l'on trouvera de bon dans ce 'commentaire, quant à la partie de la jurisprudence, 'est en quelque sorte autant son ouvrage que le mien.'

[5] Consulat de la Mer, &c., par P. B. Boucher, Professeur de Droit Commercial, &c. Paris, 1808, 2 vol. 8vo.

[6] After speaking of the extent and variety of important matters to be studied in mercantile and maritime jurisprudence, and the rarity of authors, especially in Italy, who have treated of the subject, he says,—'Mi cadde tosto in pensiero di unire a miei discorsi 'di commercio una chiara e puntuale non meno che 'succinta spiegazione del celebre consolato del mare.' —'Alla mia spiegazione ho creduto ben fatto che 'andasse ancora congiunto il testo,' &c.

Joseph Laurentius Maria de Casaregis was born in Genoa in 1670. He studied law at Pisa; and, after his return to Genoa, was the first professor of civil law after the institution of that university. He practised

world his admirable Discourses on Mercantile Law, he was induced to publish along with them a clear and concise explanation of the Consolato, and to accompany this with an unadulterated copy of the Italian text then extant. An edition has recently been published in Spain by ANTONIO de CAPMANY.[1]

3. Next in the order of time stand the laws of OLERON and those of WISBUY, the capital of the isle of Gothland.[2] I shall not enter into the controversy in which the publisher, CLEIRAC, the English SELDEN, and VALIN, have engaged, relative to the origin and date of the respective LAWS of OLERON and of WISBUY. In general, they may be taken to be of the thirteenth century, and to have been adopted as authority in the Baltic, as well as in the Mediterranean.[3] We have seen that they were used as materials by BALFOUR in making his collection of Sea Laws observed in Scotland. Laws of Oleron and Wisbuy.

4. The ORDONNANCES OF THE HANSEATIC TOWNS were first published in German, at Lubec, in 1597. They were afterwards, on 23d May 1614, in an assembly of deputies from the several towns held at Lubec, revised and enlarged. The text of this digest, and a Latin translation, are published with a commentary by KURICKE;[4] and a French translation is given by CLEIRAC in his publication above referred to.

5. LE GUIDON DE LA MER was originally composed at Rouen in Normandy, and, in 1671, included by M. CLEIRAC in his collection. He could not discover the name of the author, nor is the date of the work ascertained; but, though a private treatise, it is composed from the several ordonnances and codes in observance at that time in Europe, including those of Amsterdam in 1598, and Antwerp in 1593, and has been received as almost equal in authority to one of the ancient codes of maritime law.

6. Later in the order of time, but above all the others in comprehensiveness and in authority, comes the celebrated ORDONNANCE DE LA MARINE OF LOUIS XIV. This was the accomplishment of what had been projected by Henry IV., and partly carried into execution under the administration of Cardinal Richelieu; but which was brought to maturity only in the ministry of M. Colbert; when, after the peace of Nimeguen in 1678, a great combination was formed of juridical and mercantile talents for the noble purpose of forming a systematical code of maritime law. The project was happily accomplished by a patient and careful digest of all that was fixed in the usage and customs of maritime nations, or expressed in the ancient codes of this department of jurisprudence; and by settling, with a wise and comprehensive spirit of legislation, looking to the general jurisprudence of Europe, those ambiguous points of maritime law, in which either the customs of nations were at variance, or on which no prevailing usage or certain rule was to be Ordonnance de la Marine, 1681.

at the bar with great reputation, and afterwards went to Florence at the desire of Cosmo III., where for twenty years he performed the functions of a Judge with universal approbation. During this time he published his DISCURSUS LEGALES DE COMMERCIO, and other works, which were held as standard authorities in mercantile law, and which still enjoy the highest reputation in Europe. About the age of 63, a life of severe and unremitting study terminated in settled melancholy, which, after four years, put an end to his life in the year 1737.

His work DE COMMERCIO was first published at Florence in 1719; and afterwards his whole works, in three volumes folio, at Venice, 1740.

[1] Codigo de las Costumbres Maritimas de Barcelona, Madr. 1791. I have not seen this edition, which is by the author of Memorias Historicas sobre la Marina, Commercio, y Artes, de Barcelona.

[2] Us et Coutumes de la Mer, par Cleirac, 1661. Jugem. d'Oleron, p. 1-174. Ord. de Wisbuy, 165-185.

[3] I fear there is some degree of English prejudice in ascribing the laws of Oleron to Richard Cœur de Lion. Valin is angry with this as connected with our maritime claims; Pref. p. ix. Boucher *hopes* he has demonstrated the absurdity of it; vol. i. p. 108.

[4] Jus Maritimum Hanseaticum, olim Germanico tantum idiomate editum, nunc vero etiam in Latinam translatum, et ad singulos titulos, &c. commentariis et dissertationibus juridicis politicis historicisque illustratum; studio REINOLDI KURICKE. Hamb. 1667, 4to.

This work is also published along with the works of STYPMANNUS and LOCCENIUS, by HEINECCIUS. Scriptorum de jure nautico et maritimo fasciculus. Halæ Magdeburgicæ, 1740.

found.[1] The ordonnance was published 1st August 1681: But the only commentary, previous to VALIN's, appeared, in the shape of Notes, in 1714; the author of which seems to have been utterly incapable of the task; and it is to the disgust which his ignorance occasioned to Valin, that we owe the valuable commentary of that author. VALIN's work is undoubtedly one of the best books on maritime jurisprudence of which modern Europe has to boast.[2]

7. The last code which deserves notice is the CODE DE COMMERCE; of which the second book corresponds with the Marine Ordonnance of 1681. This modern code is valuable, as a careful and concise digest of the edicts of 1675 and 1681, and of the jurisprudence of Pothier, Valin, and Emerigon.[3]

II. Next in authority are the DETERMINATIONS of maritime and mercantile courts. Of these there are many valuable collections in the several countries of modern Europe. I shall mention only a few of those which are most relied on in our courts.

1. The decisions of the mercantile court of GENOA are of high authority. The collection contains 215 decisions, on a great variety of questions in mercantile affairs.[4]

2. The decisions of the supreme civil courts of FRIESLAND, as published by one of the Judges of the court, also of great authority, and frequently quoted in mercantile causes in Scotland.[5]

3. The only other collection of foreign decisions which I recollect, as an authority to which reference is made in our courts, is that of NEOSTADIUS, of the decisions of the courts of Holland; in which there is much valuable matter relative to mercantile jurisprudence.[6]

4. But the decisions of greatest authority are those of the High Court of Admiralty of England. The jurisdiction of this court does not comprehend every question on maritime law; and it includes not mercantile contracts: It is confined to contracts made at sea, and so does not even extend to charter-party or insurance. But it is the great tribunal of maritime and international law, and, as such, a court of the law of nations; and, most happily for the credit of Great Britain, the functions of this high court have, during the whole of an unexampled period of difficulty since the commencement of the revolutionary war with France, been performed by a person the most eminently qualified to sustain the character of an international Judge. Lord Stowell's determinations, both in this department and in the more strictly municipal questions which come under his consideration, furnish models of correct and powerful reasoning, expressed in the most perspicuous and elegant language, adorned with various learning, and, above all, distinguished by the soundest and

[1] M. Valin, in studying the subject of this ordonnance, in the course of composing his commentary, found, in the library of the Duke of Penthievre, 'une 'savante, curieuse, et vaste compilation des loix an-'ciènnes maritimes; c'est a dire, des lois Rhodiènnes 'et Romaines, du consulat, et des us et coutumes de 'la mer, des ordonnances de Charles V. et de Philippe 'II. Roy d'Espagne, des jugemens d'Oleron, des ordon-'nances de Wisbuy et de la Hanse Teutonique, des 'assurances d'Anvers et d'Amsterdam, du Guidon de 'la mer, des projets d'edits et reglements dressés par 'ordre de Cardinal de Richelieu, enfin de nos ordon-'nances jusqu'à 1660; le tout conferé ensemble avec 'l'avis de plusieurs auteurs, et distribué en differens 'titres.' Pref. p. 5.

[2] Nouveau Commentaire sur l'Ordonnance de la Marine, du mois d'Aout 1681, par M. Renè Josuè Valin, Avocat et Procureur au siege de l'Amirauté de la Rochelle. La Rochelle, 1760, 2 vol. 4to.

VALIN was an advocate of France, and procureur du Roi in the Court of Admiralty of Rochelle. He published (besides his great work) a Commentary on the *Customs* of Rochelle, in three volumes 4to, and a Treatise on the Law of Prize, in two volumes 8vo. He died in 1765, about five years after the publication of his Commentary on the Marine Ordonnance.

[3] In Magens on Insurance, vol. ii. will be found translations of many of the foreign ordinances.

[4] Rotæ Genuæ de Mercatura et rebus ad eam pertinentibus Decisiones; Francofurti, 1612; also an edition in 1652, 4to.

Casaregis says of this collection, that 'in causis mer-'cantilibus maximæ est auctoritatis.' Disc. 36. § 3.

[5] Decisiones Frisicæ sive Rerum in Suprema Frisiorum Curia Judicatarum; auct. Joanne a SANDE ejusd. Curiæ senatore, 1663, 4to.

[6] NEOSTADII, Curiæ Hollandiæ, Zeelandiæ, et Westfriesiæ Decisiones, Lugd. Bat. 1627. et Hag. 1665. 4to.

most comprehensive judicial wisdom.[1] Wherever those decisions touch any question discussed in our courts, their authority is received with profound respect.

III. To enumerate those works of foreign authors in maritime law which are relied on in our courts, would require more time, and occupy more space, than can well be spared on the present occasion. But I may mention, that after the works of the older lawyers, CUJACIUS, MOLINÆUS, PECKIUS, VINNIUS, and VOET; and those of STYPMANNUS,[2] of LOCCENIUS,[3] and of VAN LEEWIN;[4] the works the most esteemed, and which will grow in reputation and authority in proportion as they are known, are the Notabilia of ROCCUS;[5] the Discursus de Commercio, already referred to, and Il Cambisto Istruito of CASAREGIS; the Discourses of ANSALDUS, De Commercio;[6] the Commentary of VALIN; the Treatises on Contracts of the admirable POTHIER;[7] the work of EMERIGON on Insurance and Bottomry;[8] and TARGA's Considerations on Maritime Contracts.[9]

Of the works of English lawyers on maritime law, there are, besides Maline,[10] Molloy,[11] and Beawes,[12] three in modern times of great and deserved authority. The first is the Treatise on the Law relative to Merchant Ships and Seamen, by Lord Chief-Justice Abbot while at the bar.[13] The other two are confined to the contract of insurance: one of them

[1] The series of judgments of this eminent person in Admiralty have been reported in these collections:—

1. Reports of cases argued and determined in the High Court of Admiralty, commencing with the judgments of the Right Honourable Sir William Scott, 1798–1808; by CHR. ROBINSON, LL.D. advocate; 5 vols. 8vo.

2. Reports, &c. by Thomas Edwards, LL.D. 1808–1811.

3. Reports, &c. by J. Dodson, LL.D. 1811–1813.

4. Reports, &c. by J. Haggard, LL.D. beginning with 1822, and continued periodically.

[2] Jo. FRAN. STYPMANNI Jus Maritimum et Nauticum, edited by Heineccius, 1740.

[3] JOANNIS LOCCENII, J. C. De Jure Maritimo et Navali, libri tres: first published in 1651, afterwards republished in 1652, and also included in the Fasciculus of Heineccius along with Stypmannus in 1740.

[4] Censura Forensis Theoretico-Practica, id est totius juris civilis Romani ubique recepti, et practici, methodica collatio, auct. SIMONE VAN LEEWIN, J. C. Batav. 1662.

[5] FRANCISCUS ROCCUS, a Neapolitan advocate and judge, published in the middle of the seventeenth century two treatises,—1. '*De Navibus et Nauto Notabilia:*' and, 2. '*De Assecurationibus Notabilia.*' Besides these tracts he published a Collection of Consultations, '*Responsarum Legalium centurii duo;*' and of these there has been published along with the above tracts, a selection of such as relate to the same subjects. The first edition of the Notabilia was in 1655. The edition which I use is that of Amsterdam, 1708.

[6] ANSALDI de ANSALDIS, J. U. C. Patricii Florentini et Sacræ Rotæ Romanæ Auditoris, Discursus Legales de Commercio et Mercatura, 1752.

I may remark of this work, and of that of Casaregi, that each discursus contains the discussion and determination of a case occurring in actual practice; not, as we should imagine from the title, a discourse or disquisition on an abstract subject or question in law. The case is related, the arguments detailed, and the prevailing rationes decidendi delivered at great length, with all the authorities fully quoted, and the subject often treated very satisfactorily, in a learned and careful discussion.

Ansaldus seems, like Casaregi, to have been under the patronage of Cosmo III. duke of Etruria.

[7] Traités sur differentes matières de Droit Civil appliqués à l'usage du Barreau et de Jurisprudence Françoise, 1781, in 4 vols. 4to.

This eminent man was a judge in the court of Orleans, and also professor of the French law in that university. He was born in 1699, and died in 1772.

[8] Traité des Assurances et des Contrats à la grosse, par M. B. M. EMERIGON, avocat au parlement de Provence, ancien conseiller au siege de l'Amirauté de Marseille, 1783.

[9] Ponderazioni sopra la Contrattazione Maritima dal CARL. TARGA, Giureconsulto Genovese. Geneva, 1787.

[10] Consuetudo vel Lex Mercatoria, or the Ancient Law-Merchant, by GERARD MALYNES, 1636.

[11] De Jure Maritimo et Navali, or a Treatise of Affairs Maritime and of Commerce, 1676.

[12] Lex Mercatoria Rediviva, or a Complete Guide to all Men in Business; by WYNDHAM BEAWES, Esq. his Britannic Majesty's Consul at Seville and St Lucar. Republished by Mortimer 1783, fol.; and recently, with notes and improvements, by Tomlins, 2 vols. 4to.

[13] This work was first published in 1802; afterwards in 1804, in 1808, and in 1812; and now (1827) a fifth edition by J. H. ABBOT, son of the author.

published by Mr Justice Park while at the bar, in 1786, and of which he has recently given to the public a seventh edition;[1] the other, by Mr Serjeant Marshall, published in 1802, a second edition in 1808, and a third edition by the author's son, Charles Marshall, Esq.[2]

The work on maritime jurisprudence by Mr Holt, which was expected when the preceding edition of this Work was published, has since appeared, and has not disappointed the hopes of the profession.[3]

In arranging the subjects which require to be considered under the title of Maritime Contracts, I shall follow the course of the ship's employment from the first fitting out to the termination of the voyage.

SECTION I.

OF CONTRACTS RELATIVE TO THE EQUIPMENT OF THE VESSEL.

Referring for what relates to the Property of the ship itself to a former part of this volume, this Section will comprehend—1. The employment of the ship: 2. The appointment of a shipshusband: 3. Contracts between the owners and the master: 4. Contracts with seamen: 5. Contracts with strangers for stores, furniture, and repairs, for the use of the ship.

§ 1. EMPLOYMENT OF THE SHIP.

There has been occasion already to state the rules of the statute relative to shares of ships; and under Partnership will be considered some of the effects of joint ownership. Here it is proper to consider, what is to be the result of dissension among the owners relative to the employment of the ship; for where she does enter on the expedition, there must be unanimity and effect given to all the acts of those who have the care of it.

The rights of the several part-owners are of the nature of pro indiviso rights, for the subject is indivisible. The difficulty in the joint management arising from this circumstance, appears capable of being resolved only by the exercise of a power to compel a sale; or, at least, by requiring reasonable security to be given to the party dissatisfied. In England, the former of these methods is rejected, the latter followed. The majority in value rules the employment; but the minority may arrest the ship till security be given, or, if they are satisfied with the credit of the owners, they may protest against them that they shall be responsible for every loss. In either of these cases the minority will be entitled to recover the value of their shares, if the ship be lost; and while they reap none of the benefit, will be liable to no part of the expense.[4]

[1] A System of the Law of Marine Insurance; with three Chapters on Bottomry, on Insurances on Lives, and on Insurances against Fire; by James Allan Park, one of his Majesty's counsel, now one of the Judges of his Majesty's Court of Common Pleas, 1817.

[2] A Treatise on the Law of Insurance, in four books. 1. Of Marine Insurance. 2. Of Bottomry and Respondentia. 3. Of Insurances upon Lives. And, 4. Of Insurances against Fire. By Samuel Marshall, Serjeant at Law; 1802 and 1808; by C. Marshall, 1823.

[3] A System of the Shipping and Navigation Laws of Great Britain, and of the Laws relative to Merchant Ships and Seamen, by F. L. Holt, of the Middle Temple, Barrister at Law.

[4] Ouston v. Hebden, 1. Wilson, 101. in which Chief-Justice Lee said,—'I have no doubt but the 'Admiralty has a power, in this case, to compel a 'security; and this jurisdiction has been allowed to 'this Court, for the public good.' See Abbot, 74. The Court of Chancery exercises this sort of equitable jurisdiction, in cases where the Admiralty cannot; as where the shares are not ascertained, the Court of Chancery will issue an injunction, and refer to the

If no arrest be used, or protest taken, the minority will be held to assent; or, at least, they will not be entitled to damage for such use, by a pro indiviso owner, in the fair course of the employment of the subject, as they might by the legal method have prevented; and they will also be entitled to part of the profit, and suffer in the loss.[1]

If the majority destroy the ship, they are liable to the others.[2]

In Scotland, the remedy has been by sale. Not only in the case of equality, but even where the minority opposed the employment, the dissentient owners, minority or equal, have, in Admiralty, been entitled to insist, either for a sale; or that, at a price put on the shares, the other owners shall purchase their share, or be obliged to part with their own.[3] This doctrine was grounded on the consideration, that part-owners, though not properly copartners, frequently suffer by the contracts or delinquencies of shipmasters, perhaps not of their own choosing; for which they are answerable, at least to the value of their own share.[4] And the same doctrine, though not supported by such considerations of hazard, was, in modern times, applied to the case of a brewery held in common.[5]

Which of these rules ought now to prevail in this united country, it might be presumptuous to say: But it may be necessary to reconcile them in some future case, in which the property comes to be mixed, and persons of both countries concerned in the same vessel. Perhaps the course followed in England may be followed on the same principles of equity which have recommended it to adoption by the Court of Chancery in England, as a measure of less harshness, and less attended with peril, than the remedy which we have long used.

§ 2. OF THE APPOINTMENT OF A SHIPSHUSBAND.

Office of Shipshusband.

The difficulty of administering with unanimity the affairs of a ship belonging to many owners, leads to the appointment of some person, in whom they all have confidence, as SHIPSHUSBAND. Sometimes the shipshusband is merely an agent for conducting the necessary measures on the return of the ship to port: as making the proper entries at the custom-house from the master's manifest; superintending the landing of the goods; checking the measurements; procuring the proper surveys of damages, to avoid disputes; seeing the freight settled before the lien is quitted, and so forth. But there is an appointment of more importance, extending to a more general agency, for conducting the affairs of the vessel in place of the owners. The person so appointed is empowered to enter into contracts for furnishings; to appoint the master and seamen; to enter into charter-parties; and, generally, to act as the sole representative of the owners.

Appointment.

The shipshusband may either be a part-owner or a stranger; and the authority may be conferred either by express deed or commission; or, even without a written commission, by verbal appointment, or by permitting him to exercise the function of shipshusband, so as to give him the character of accredited agent of the owners.

1. Where he is appointed by written commission, that commission must be executed by

Master to inquire into the value, and settle the security. HALY *v.* GOODSON, 2. Merivale, 77.

[1] STRELLY *v.* WINSON, 1. Vernon, 297. Here one of three owners refused to fit the ship for a voyage: She was lost; and he was found liable, as he had not expressly dissented, and notified that dissent. This is sanctioned by the high authority of Lord Chief-Justice Abbot, 71.

[2] Abbot, 71. BARNARDISON *v.* CHAPMAN, quoted from Sir P. King's MS. Cases; 4. East, 121.

[3] 1. Stair, 16. § 4. 3. Ersk. 3. § 56.

[4] CARNEGIE against NAPIER, 11th December 1672; 2. Stair, Dec. 130. (9349-51.) M'GIVAN against BLACKBURN, 2d December 1725; 2. Dict. 381. (14672).

[5] MILIGAN against BARNHILL, 8th February 1782; 9. Fac. Coll. 51. (2486). This was solemnly determined on a hearing in presence.

all the joint owners. It may refer generally to the customary powers and duties of the shipshusband; and, where special, should empower the agent to regulate the appointment of the master and the hire of seamen; to make contracts of furnishing, and affreightment; to levy freights; pay wages; make the necessary disbursements on account of the ship; and, generally, to act discretionally for all the owners.

2. It is chiefly in the case of one of the joint owners taking the management, that the powers of shipshusband are constituted without written authority. But both in that case, and even where a stranger acts in the capacity of shipshusband, the owners will be bound to reimburse and to recompense him; and his contracts in the proper line of a shipshusband's duty will bind them; provided the nomination, or the accrediting of the shipshusband be clearly proved.[1]

Duties. The DUTIES of the shipshusband are,—1. To see to the proper outfit of the vessel, the repairs adequate to the voyage, and the tackle and furniture necessary for a seaworthy ship. 2. To have a proper master, mate, and crew for the ship, so that in this respect it shall be seaworthy. 3. To see to the due furnishing of provisions and stores according to the necessities of the voyage. 4. To see to the regularity of all the clearances from the custom-house, and the regularity of the registry. 5. To settle the contracts, and provide for the payment of the furnishings which are requisite in the performance of those duties. 6. To enter into proper charter-parties, or to engage the vessel for general freight, under the usual conditions; and to settle for freight and adjust averages with the merchant. And, 7. To preserve the proper certificates, surveys, and documents, in case of future disputes with insurers or freighters; and to keep regular books of the ship.

Powers. His POWERS, where not expressly limited, may be described generally as those requisite to the performance of the duties now enumerated. It may be observed, however,—

1. That, without special powers, he cannot borrow money generally for the use of the ship, though he may settle the accounts of creditors for furnishings, or grant bills for them, which will form debts against the concern, whether he has funds in his hands or not, with which he might have paid them.

2. That although he may, in the general case, levy the freight, which is, by the bill of lading, payable on the delivery of the goods, it would seem that he will not have, and is not to be relied on as possessing, power to take bills for the freight, and give up the possession and lien over the cargo, unless it has been so settled by charter-party, or unless he has special authority to give such indulgence.

3. That under general authority as shipshusband, he has no power to insure, or to bind the owners for premiums; this requiring a special authority.[2]

4. That as the power of the master to enter into contracts of affreightment is superseded in the port of the owners, so is it by the presence of the shipshusband, or the knowledge of the contracting parties that a shipshusband has been appointed.

5. That he has not, as managing owner, or shipshusband, authority to pledge his owners to the expense of a law-suit.[3]

[1] See 3. Ersk. 3. § 33. supra, p. 399. and 478.

[2] FRENCH *v.* BACKHOUSE, 5. Burrow, 2727. French was by deed empowered, by two joint owners of a ship, to do and act as husband of the ship, as is customary, and to advance, lend, &c.; and for all payments on account of the ship to retain, &c. He insured the ship, and brought an action for reimbursement of the premiums. The Court of King's Bench held,—'That a 'shipshusband has no right to insure for any part-owner, 'without his particular direction, nor for all the owners 'in general, without their general direction, or some-'thing equivalent to it.'

BELL *v.* HUMPHRIES, 2. Starkie, 345. Ruled by Lord Ellenborough, that a managing owner has no power to insure the ship, to the effect of binding a part-owner.

[3] CAMPBELL against STEIN, in House of Lords, 5th June 1818; 6. Dow, 134.

6. That the common rule of mandate applies, namely, The shipshusband cannot delegate his powers.[1]

CLAIMS ON BANKRUPTCY OF THE OWNERS.

By Shipshusband.

1. The shipshusband will be entitled, on the failure of the owners, to demand the balance of his advances and commission; to claim relief from bills and engagements in his own name for the price of repairs, furnishings, &c.; and to hold a lien for his security and indemnification over the documents and warrants of the ship, and over the freight recovered, or which he has been empowered to recover.

By Furnishers.

2. Those who have entered into contracts with the shipshusband; or who have made furnishings to the ship of repairs, ropes, sails, &c.; or who have supplied provisions for the voyage, although the shipshusband shall have been furnished with money which he has applied to his own purposes, will have their claims against the owners.

CLAIMS ON THE SHIPSHUSBAND'S BANKRUPTCY.

The owners will have their claim on the estate of the shipshusband for whatever balance he is due to them.

They will be entitled to vindicate against the general creditors of the shipshusband, whatever can be identified as the property of the owners; ex. gr. bills granted for freights or for average.

They will have their claim as creditors for indemnification and reimbursement of whatever the shipshusband may, in their name, have engaged for, or done, improperly, or beyond the limits of his powers, for which they have been made, or may be made responsible, in so far as not lucrati by such act.

§ 3. OF THE SHIPMASTER OR CAPTAIN.

The MASTER, as he is universally called in this country; or the Captain, or Patron, of the ship, as he is sometimes denominated in foreign ordinances and books, is the person to whose care the navigation and management of the ship is intrusted by the owners or employers.[2]

Qualification of Master.

1. The master must be a British subject.[3]

2. It appears that of old the master was, in almost every instance, a part owner of the ship. He frequently, or perhaps generally, is not so now; and he may or may not be a part owner.

3. There seems to be no restriction (except that above stated) on the discretionary power of the owners in appointing a master, as to the description of persons, or the

[1] FORBES against MILNE, PHILIP and Company, 13th December 1822; 2. Shaw and Dunlop, 87.

[2] The owner, or dominus navis, may either be, strictly speaking, the owner and proprietor, or only the freighter of the ship: 'Exercitorem autem eum 'dicimus, ad quem obventiones et reditus omnes per- 'veniunt; sive is dominus sit, sive a domino navem per 'aversionem conduxit, vel ad tempus, vel in perpetuum.' Dig. lib. 14. tit. 1. De Exercit. Actione, l. 1. § 15.

[3] 6. Geo. IV. c. 109. § 12. and 16.—1. He must be a natural born subject of the king; or, 2. A subject naturalized by or by virtue of an Act of Parliament; or, 3. A denizen made such by letters of denization; or, 4. A subject becoming such by conquest or cession of newly acquired country, who has taken the oath of allegiance or of fidelity required by the treaty; or, 5. A person who has served on board any of his Majesty's ships of war in time of war, for three years.

skill, honesty, or qualifications required. Their own interest and their responsibility for damage will, in general, secure a fair appointment; as a ship with an unskilful master is not sea-worthy.[1]

Appointment of the Master.

The contract with the master is properly locatio conductio operarum. But the power which in his representative capacity he possesses is so great, that every thing relative to his appointment and dismissal is important.

1. If the ship belong to a single owner, he has the sole power of naming the master; and having named him, he may instantly dismiss him from his employment without control, leaving him to his remedy at law if unjustly dismissed.[2]

2. If the ship belong to several owners, the majority will be entitled to appoint a master; and there seems to be no other redress to the minority not satisfied with the safety of the appointment, than either a sale of their shares, or the adoption of that remedy which the law gives in the case of a voyage of which some of the owners disapprove.[3]

3. The appointment of master requires no written warrant of authority or peculiar solemnity. It is a contract with the owners, or with the shipshusband for them; and may be entered into by verbal agreement. The mere employment of master, with possession, is sufficient to impose on him all the duties, and to vest him with all the legitimate and customary powers of master.

4. A master appointed by consignees abroad as a measure of necessity, (on the desertion of the master, for example), may be entitled to the privileges, and competent to discharge the functions of a master appointed in the most regular manner, especially if ratified by any confirmation or recognition on the part of the owners.[4]

5. The master may delegate his power during the voyage, by naming another master; and, in questions with third parties, the master so named will, even where the exercitors have prohibited the master from delegating, be vested by the possession of the ship, and exercise of the office, with all the powers of master.[5]

Power and authority of Master.

The master has the sole direction of the course and conduct of the ship, and all the powers which are necessary for accomplishing the voyage in which the ship is engaged.

Employment of Ship.

1. In employing the ship the master's powers vary.—In a *home* port, his authority to freight the ship by charter-party is held to be superseded by that of the owners themselves, so as to require either an express or a tacit authority to entitle him to make contracts.[6] In a *foreign* port, the master has full authority to make a charter-party, binding the ship and owners.[7]

[1] Questions have arisen in England, under the 49. Geo. III. c. 126. § 1. 3, 4. as to the purchase of an appointment as captain of our India ships. See BLACKFORD *v.* PRESTON; 8. Term. Rep. 89. CARD *v.* HOPE; 2. Barn. and Cress. 661. RICHARDSON *v.* MELLISH; 2. Bingham, 229.

[2] Infra, p. 508.

[3] See above, page 404.

[4] Such an appointment by consignees was held good to sustain a bottomry bond for money advanced by them for repairs and outfit, the necessity and honesty of the transactions being fully made out, and a recognition of the appointment by an order for part of the freight, describing this man as master. The ALEXANDER, Tait, 1813; 1. Dodson's Adm. Rep. 278.

[5] Magister navis à domino navis electus et nominatus potest alium magistrum substituere et nominare, etiam si hoc fuerit ei à domino navis prohibitum. Roccus, Not. 5. p. 3.

It is different in the case of shipshusband. See above, p. 505.

[6] Ordon. de la Marine, liv. 3. tit. 1. De Charte-Parties, art. 2. 1. Valin, 587. Pothier, Charte-Partie, No. 48. vol. ii. p. 385, 386. Observe, that the law of the Pandects, generally quoted to prove the binding effect of such contracts, 'omnia facta magistri debet 'præstare qui eum præposuit,' (Dig. lib. 14. tit 1. De Exercit. Act. l. 1. § 5.), speaks merely by reference to the extent of the præpositura. In England, the doctrine of the text is law. Abbot, 91. et seq. The master himself is bound.

[7] Every authority in maritime law will furnish a text for this from Cleirac to Abbot.

Taking Goods on Freight.

2. The master has full authority to bind the owners by receiving goods where the ship is on *general* freight; on the principle, that this is within his powers as regulating the ship in its usual employment.[1] And, on the same principle, it has even been held, that where the master was authorized to advertise for general freight, the owners were bound by conditions inserted without their authority.[2]

In fitting out the Ship.

3. In fitting out the vessel these points are settled:—1. That the master is the presumed and accredited agent in fitting out, victualling, and manning the ship abroad; and that for his engagements in those respects, or even for money borrowed for the purpose of furnishing *necessaries* for the ship, the owners will be bound, provided the loan appears to be fairly supported by evidence of existing necessities. 2. That, even in a home port, the master's presumed power as agent for the owners will bind them; unless it shall be shown that the owners themselves, or a shipshusband, managed the concern, and that the party contracting with the master was aware of this. 3. That his authority will be effectual to bind the owners for necessaries, although they have furnished the master with money sufficient for all his occasions; since of this the public cannot be aware, while the office and trust in the master raises a general credit.[3] 4. That the master has authority to hypothecate the ship for *necessaries* in a foreign port: But no such authority to hypothecate the ship in a home port.[4] 5. That the master's negligence or fault will bind the owners; but with this limitation, that their responsibility shall extend no farther than to the value of the ship.[5] The master himself will be liable to the full extent.[6]

[1] ELLIS *v.* TURNER, 8. Term. Rep. 531.

The English cases are thus summed up in Abbot:—'It may be observed, that in each of the above cases 'the contract upon which the action was brought was 'made by the master without the particular knowledge 'of the owners. In the first, it was made in the course 'of the usual employment of the vessel; and, therefore, 'the Court held the owners to be bound to the perfor-'mance as a general rule, although they thought the 'particular suit improperly brought. In the second, 'the contract was not made, or, at least, did not ap-'pear to have been made, in the course of the usual 'employment of the ship; and, therefore, the owner 'was not bound by it. In the last, the contract was 'made in the course of the usual employment of the 'ship; and, therefore, it was considered to be a con-'tract made in substance by the owners.' Abbot, 97.

[2] RINQUEST *v.* DITCHEL, Abbot, 98. Here a broker in London had been employed by the master to advertise the ship as a general ship bound to Hamburgh; and in the papers the broker had inserted a clause, purporting that the ship was to sail with convoy from the place of rendezvous. This had not been complied with, and the action was upon the warranty. Lord Kenyon directed the jury, that as the broker was authorized to advertise the ship, the owners were answerable to strangers for his acts, although he had exceeded his authority, and must seek their remedy against him; and verdict went accordingly.

[3] See CARY *v.* WHITE, 1. Brown's Parl. Cases. Here the owner of a ship lying at Bristol, being resident at Dublin, authorized his master to take a freight for the West Indies, and to take up money on bottomry for fitting out the ship. The master entered into a charter-party with Cary, the owner agreeing to pay wages and provide all necessaries. For this the master borrowed L.200 on bottomry of Cary, and had a letter of credit on Jamaica for what he might want abroad. At Jamaica, the master, by Cary's letter of credit, took up L.789, and on the return the ship was lost. In the Court of Chancery of Ireland it was held, that Cary was not entitled to relief. On appeal to the British House of Lords, the owner was held responsible, if Cary's allegations as to the necessity of the expenditure were true; and the Lords directed a trial in Common Pleas to ascertain what had been laid out on Cary's order for the necessary repairs and use of the ship during the voyage, and decreed such sums to be paid to Cary. In two several trials (one at Bar) verdicts were given that nothing was *necessarily* laid out. And so Cary's suit was dismissed. Another appeal was taken, but not prosecuted.

See Abbot's Report of the case, p. 104.

[4] See below, Of Hypothec for Repairs of Ship.

[5] It was otherwise in the civil law, the owner being liable to the full extent of the loss. Dig. lib. 14. tit. 1. l. 1. § 5. De Exercit. Act. But that has been altered in all the modern codes. See the French Ord. de la Marine, liv. 2. tit. 8. art. 2.; 1. Valin, 535. A determination according to the old rule produced a great sensation among ship-owners in England, and led to petitions to Parliament, and to the statutes 7. Geo. II. c. 15., and 26. Geo. III. c. 86. See below, Of Charter-Party.

[6] See the above-mentioned statutes.

Master's liability.

The master is personally answerable for furnishings and repairs received for the ship under a contract with him, unless care is taken in the bargain to stipulate otherwise. This is contrary to the ordinary rule, by which one appearing as an agent binds only his principal;[1] but it is a very just and expedient exception, considering the extent of discretionary power vested in the master. The master is not liable, however, where the contract for furnishings is with the owners themselves before the master's appointment.[2]

The master is liable for damage done by himself, or by his orders, or by the crew under his command. And it will not discharge him of this responsibility that the act has been done under the direction of a pilot, who, by statute, supersedes him for the time in the government of the ship.[3]

Duties of Master as to certificate.

The master must carefully keep the certificate of registry, and produce it when required.[4] It may be renewed, if lost, under certain precautions. If the master refuse to deliver it, he might, even at common law, have been compelled by the Court of Admiralty to deliver it:[5] But this power is superseded by statute, which more effectually, rapidly, and cheaply accomplishes the purpose, in authorizing a complaint to a Justice of Peace, to have the master brought before him for examination; and giving power, if it shall appear that the certificate is not mislaid but withheld wilfully, to convict the master, fine him in L.100, and commit him to prison till it be paid.[6] Under the former Act to the same effect, an application on the common law to Admiralty was refused, reserving to follow out the directions of the Act.[7]

Dismissal of Master.

DISMISSAL.—In all situations of exuberant trust, there seems to exist a necessity for a power of instantly breaking up the connexion, lest the ruin of the party desiring to resile may be the consequence.[8] Accordingly, it is held in our Court of Admiralty, that shipowners may dismiss the master, without cause assigned; and that the majority may even dismiss a joint owner, who is employed as master, without giving their reasons. I do not know that this has been decided or questioned in the Supreme Court.

[1] See above, p. 494.

[2] FARMER *v.* DAVIES, 1786; 1. Term. Rep. 108. Here furnishings were ordered for the ship by the owners before the master's appointment, and partly delivered before, partly after, his assuming the command. Lord Mansfield said, There is not a shadow of colour to charge the captain for any part of those goods.

[3] BOWCHER *v.* NOIDSTROM, 1809; 1. Taunt. 568. A vessel in the Thames got entangled with the defendant's ship, the jib-boom of which went through his mainsail. The defendant's ship was then under the care of a pilot, who directed one of the crew to cut away; and the man cut five or six clews of the plaintiff's mainsail, and part of his boom. The defendant's ship was in no danger; and, by a little patience, would have probably been extricated. The master was in his bed asleep. Mansfield, Ch.-J. held, that although there was a pilot on board, the pilot did not represent the ship, and that the master was still answerable for every trespass.

An important distinction is to be marked in the case of a king's ship, NICHOLSON *v.* MOUNSEY and SIMES, 1812; 15. East, 384. Here a collision happened while a sloop of war, commanded by Captain Mounsey, was under the orders of the lieutenant, Captain Mounsey being asleep in bed. The captain was held not answerable.

[4] 6. Geo. IV. c. 110. § 21, 22, 23.

[5] 4. Robinson's Adm. Rep. 1.

[6] 6. Geo. IV. c. 110. § 27.

[7] KAY against BLAIR, in Admiralty, 24th January 1806; Judge Cay's MS.

[8] I find it laid down in the French Code de Commerce, that the owner may so dismiss the shipmaster. Code de Commerce, liv. 2. tit. 3. § 218. And a recent commentator on that Code has delivered the doctrine, that although strictly the contract can be discharged only for such causes as may justify a breach of any other contract of service for a time certain, 'the master may be superseded before the ship's de-'parture, or during the voyage, without notice assign-'ed, or any necessity of previously justifying the dis-'missal judicially.' Pardessus Cours de Droit Commercial, vol. ii. p. 35.

OF CLAIMS ON THE BANKRUPTCY OF THE OWNERS.

1. The master has a claim on the estate of the owner for his wages, with a lien or set-off upon the freight which he has levied; but no hypothec on the ship.[1]

2. He has a claim for reimbursement of what he has advanced, and for indemnification of any engagements which he may have undertaken for the owners, with a similar lien or set-off.

CLAIMS ON THE MASTER'S BANKRUPTCY.

1. The owners have a claim for the balance of freights levied by the master, deducting his salary, and the amount of his disbursements and engagements.

2. Although the master, acting in the ordinary line of the employment and outfitting of the ship, may bind the owners; they will be entitled out of his estate to relief of obligations, in which he has exceeded his power; or to which he has bound them, although furnished with the necessary provision of money, to save the necessity of such obligations.

3. The owners are liable for damages for breach of contract, and for the consequences of the neglect, fault, or fraud of the master, to the extent of the value of the ship; but they will be entitled to claim indemnification against the master's estate.

§ 4. OF THE HIRING OF MATE AND SEAMEN.

General Principles of this contract.

Within the term MARINERS or SEAMEN, the mate and every other officer under the master is comprehended. In England, this is of importance in giving the mate and other officers admission to a suit in Admiralty.[2] In Scotland it is of importance, in so far as it gives them the remedy against the ship and the master, as well as against the owners.

The contract for the hiring of mariners is an instrument, expressing the engagement of the parties, with respect to the description of the voyage on the one hand, and to the rate of wages on the other, for which the seaman has engaged his services; the particulars falling under these reciprocal obligations being settled by the general law. The legislature, for the protection of a set of men proverbially reckless and improvident, and requiring protection, interfered about a century ago to require ship-owners, on all occasions, to give to their seamen the benefit of a distinct written contract. At first it was not carried further than to settle thus, by undeniable evidence, the two great points of the contract mentioned above (2. Geo. II. c. 36). But to these by subsequent Acts many particulars have been added, and many penalties.[3] By these Acts,—1. There must be a special agreement with the seamen or mariners before proceeding on any voyage, both in the foreign and coasting trade, under a penalty for the benefit of Greenwich Hospital. 2. Such agreement must be in writing, declaring what wages each is to receive during the whole voyage, or for the time they ship themselves for; and what is the voyage. 3. This agreement is to be signed by each mariner, within three days after entering himself, and, when signed, is 'conclusive and 'binding on all parties.' 4. The master is bound to produce the articles; and want of them

[1] The master is presumed, in his contract with the owners, to trust to their personal credit. Abbot, 476. This, in England, deprives him of his remedy in Admiralty.

[2] In the case of THE FAVOURITE, 2. Rob. Adm. Rep. 232. the mate succeeding to the office of master, by capture of the former master, was allowed to sue in Admiralty.

[3] Seamen in ships trading to parts beyond seas, by 2. Geo. II. c. 36.; 2. Geo. III. c. 31.

The coasting trade in vessels of 100 tons or upwards going to open sea, 31. Geo. III. c. 39. § 37.

Regulations of seamen in ships trading to the colonies and plantations in West Indies, 37. Geo. III. c. 73.

is no bar to the seaman's action. 5. The agreement need not be stampt, where it relates to a coasting vessel. 6. No seaman is to be hired who shall, to the master's knowledge, have deserted from any other ship, under a penalty of L.100.[1] 7. No seaman is to be hired in the West India colonies or plantations at a greater hire than double the monthly wages contracted with other persons engaged at the ship's departure from Great Britain in the same capacity, unless by special authority of the governor, collector, or comptroller of the port, in writing under his hand. 8. These rules are not to extend to contracts entered into with seamen in the West Indies, who shall produce a regular discharge under the hand of the master or commander under whom they last served, signed in presence of witnesses; nor are they to hold with regard to contracts with seamen to serve on board any ship which, on account of very hazardous service or extraordinary duty, required such contract and hire, provided the necessity be proved on oath before the chief magistrate or principal officer of the port, and provided that the seaman shall de facto not have deserted; the wages being restricted to double the monthly wages.[2] 9. By the articles of agreement annexed to the Act of 37. Geo. III. in order to prevent desertion in the West India voyages, the seamen are not to have their wages till the arrival of the ship at the port of delivery, which is to be understood of the final port at the close of the voyage;[3] and it is a point of reasonable policy for all parties, and so authorized in almost all maritime codes, and adopted in the articles of agreement used by most nations, that a certain restraint should be laid on the right to demand wages, while the ship is abroad on her voyage.[4] 10. Wages finally earned are to be paid, in the case of a foreign voyage, within thirty days after the ship's arrival in Great Britain, and entry in the custom-house, or at the time of discharge, which shall first happen; and in the case of a coasting voyage, within four days after entry at the custom-house, or delivery of the cargo; unless in these cases a special agreement shall have altered the rule.[5]

It is the object of these Acts to render the agreement with seamen as distinct and definite as possible; to prevent any part of it from resting on parole testimony or vague conversation, which is at all times so difficult to be ascertained in a court of justice, and in no cases more so than in such as relate to this class of persons; to avoid, in such instruments, expressions so vague and arbitrary as to place the seamen at the discretion of their employers respecting the extent and direction of the voyage; and to exclude a variety and complication of minute stipulations, unfit for the comprehension of this improvident set of men, ready at all times to sign any thing.

On these principles it seems,—1. That there can be no demand, as under a custom, for additional wages or rights which are not mentioned in the articles, or made matter of special agreement.[6] 2. That no parole agreement can effectually be made for any additional wages, where there are articles signed.[7] 3. That the description of the voyage,

[1] This, though contained in the statute of 37. Geo. III. relating to West India voyages, may, it is thought, have an universal operation. Abbot, 436.

[2] It is very justly remarked, that there is extreme obscurity in this regulation; and that if it was intended to allow more than double wages without a magistrate's authority, where a discharge was produced, or where, in cases of extreme necessity, the seaman had not deserted, the latter part of the clause restricting the wages is ineffectual; and if, on the other hand, it was intended to allow the power only in cases of necessity, and to mariners who have not deserted, then the first part of the regulation as to a discharge is ineffectual. Abbot, 439.

[3] Abbot, 454.

[4] Pothier, Louage des Matelots, No. 211. vol. ii. p. 449. Abbot, 455.

[5] 2. Geo. II. c. 36. § 7. and 31. Geo. III. c. 39. § 6.

[6] The ISABELLA, Brand master, 22d November 1799; 2. Rob. Adm. Rep. 241.

[7] ELSWORTH *v.* WOOLMORE, 1803, cor. Lord Al-

one main object of the contract, shall be as precise as it is possible in the circumstances to make it. This particularly applies to an expression, which, on a pretended commercial necessity, has been introduced into such contracts after the description of the leading object of the voyage, by the words 'or elsewhere.' The introduction of such words, which contain no description of a voyage, but have well been called 'an unlimited de-'scription of the navigable globe, an universal alibi for the whole world, including the 'most remote and even pestilential shores,' are quite inconsistent with the spirit of the Act. That Act directed those contracts to be reduced to a distinct and intelligible statement of the reciprocal engagements of the parties, with a view chiefly to the interest of the seamen, whose ignorance make them objects of protection for the law. When words so vague are used, they are at least subject to great limitation. The construction must vary with the situation of the primary port of destination; larger, where it is remote from neighbouring settlements; narrower, if surrounded by many adjacent ports fit for the purposes of the voyage: And it must at least present a fair indication of some particular destination, conformable to the general routine of the commerce, and presumed to be commonly known.[1] And, 4. That in the construction of these contracts, an indulgent spirit of equity is applied to protect seamen against the consequence of their imbecility and improvidence.[2]

An agreement to give an extra sum to a mariner, as an inducement to extraordinary exertion while the ship is in distress, is null; on the principle, that he is already engaged to exert himself to the utmost.[3] But this would not seem to apply where the inducement were to incur extraordinary danger to life.

The duty of producing the articles is laid entirely on the master or owners; and the statute declares, that the want of the articles shall be no bar to the action of the seamen.[4] This seems to apply to the case where articles have been made, but are withheld; but it appears to be held as law in England,[5] and has been adjudged in Admiralty here,[6] that though the only agreement for wages has been verbal, action will lie for the wages agreed for, or for the usual rate of wages.

The seaman's demand for wages is a personal claim against the master, in the first place, or against the owners; with a preference by lien or privilege against the ship itself.

vanley; 5. Esp. N. P. Cases, 84. See also the Isabella, in the preceding Note.

[1] See the principles of this contract, and the limitations of expressions so vague, illustrated in the cases of the ELIZA, Ireland, 1823; 1. Haggard's Adm. Rep. 182. The COUNTESS of HARCOURT, 1824; ib. 248. The MINERVA, 1825; ib. 347. The GEORGE HOME, 1825; ib. 370.

[2] See the observations of Lord Stowell, 1. Haggard's Adm. Rep. 357. et seq.

[3] HARRIS *v.* WATSON, Peake's Cases, 72.

[4] 2. Geo. II. c. 36. § 8.

[5] 'The statute does not render a verbal agreement 'for wages absolutely void.' Abbot, 440. § 7.

[6] BURNET *v.* HARDIE, 15th May 1800; Judge Cay's MS. vol. A. p. 305. Burnet engaged, in 1798, at London, with Hardie, master of the brig Lord Dundas, for L.4. 10s., and to mess with him in the cabin. The voyage was to Riga, with liberty, if frozen in, to leave the ship and return. There was no writing; and as Burnet did not choose to leave the matter to the master's oath, he made his demand for the common rate of wages of a seaman. The Judge-Admiral considering the 8th section of the Act, and that no man can take advantage of his own unlawful act, held, that as the master had not produced articles, which he is by law required to possess, the pursuer was entitled to the usual rate of wages from the Thames to the Baltic in September 1798.

Afterwards the number of cases was found so great, that the Judge says,—'Every week's experience con-'vinces me of the necessity of enforcing, to the utmost 'of my power, the salutary statutes which provide that 'ship's articles shall be signed and executed previous 'to the commencement of every foreign voyage, and 'of every coasting voyage in a vessel of above 100 tons 'burden.' HERD against BEVEREDGE, 21st December 1804; vol. D. p. 328.

N. B.—I find a practice in the ports of Fife, to sign no articles for ships bound to the Baltic. This ought to be corrected, and shipmasters are clearly liable to the penalties.

The difficulties relating to the form of the demand, which seem to arise, in England, from the peculiar jurisdiction of Admiralty,[1] are unknown to the practice of Scotland. The Admiralty, in Scotland, having a jurisdiction in 'all maritime and seafaring causes;' and there being depute-admirals at every principal port, the seamen have all the remedies that can judicially be given against the owners, the master, and the ship, in the ordinary course of Admiralty proceedings.

This difference in the facilities afforded in England and in Scotland has led to the adoption of a new and more easy course of proceeding in England, by a recent statute[2] empowering seamen to apply to Justices of the Peace; while it seemed unnecessary to extend any such remedy to Scotland; and the Act is expressly restricted accordingly; sect. 5.[3]

CLAIMS ON THE BANKRUPTCY OF THE OWNERS.

The agreement for wages is for the voyage; or on time; or for a share of the profit, as in fishing voyages. They are exigible only on the successful termination of the voyage, entitling the owners to freight, insomuch that it is commonly said that 'freight is the 'mother of wages:' This is a quaint way of expressing a general rule, grounded on wise views of public policy, (in which the laws of Britain coincide with those of other commercial states), by which the successful issue of the voyage is made the great object of all employed, and the zeal and attention of mariners stimulated, by the direct prospect of their own immediate interest, to the due performance of very perilous and laborious service. But metaphorical expressions in law are dangerous, and apt to mislead. The true parents of the wages are, the contract, and the services performed; while the maxim does not hold true in all cases, that where freight is lost there are no wages. Where the ship, for example, is disappointed of her cargo; where the voyage is lost by the fault of the owners or master; where the ship is detained for debt, or seized for having on board contraband goods; the mariners are still entitled to their wages.[4]

Claims for the whole wages.

I. WHERE THE VOYAGE HAS BEEN COMPLETED.—The seaman's claim, where the voyage has been completed, and the ship has earned her freight, is for the whole wages; and for this he has a threefold remedy:—A preference over the ship and freight; a demand against the master; and a demand against the owners.

Preference.

1. By the oldest maritime laws of Europe, seamen have preference on the ship for the wages of the last voyage;[5] and it is a preference which has been continued to them almost universally.[6]

In England, the remedy is in Admiralty; by attaching the ship, and applying to have

[1] See Abbot, part iv. chap. 4. p. 482. et seq.

[2] 59. Geo. III. c. 58.; continued by 7. Geo. IV. c. 59.

[3] By the late Judicature Act of 6. Geo. IV. c. 120. § 28., actions for the wages of masters and mariners of ships and vessels, are declared to be appropriated to the Jury Court. It may be doubted whether this ought not to be changed, or greatly qualified. It is against the policy which has dictated the Act of 59. Geo. III. and 7. Geo. IV. respecting actions for seamen's wages in England.

[4] Abbot on Shipping, 452. The NEPTUNE, 1824; 1. Haggard's Adm. Rep. 232.

[5] Consolato del Mare, c. 33. 105. 135, 136. Nay, it is laid down,—'Se non si restasse se non un solo 'chiodo debbe essere per pagar li salari alli marinari.' The same rule is laid down in the laws of Oleron, and in those of the Hanseatic Code.

[6] By the ordonnance of Louis XIV. 'les loyers 'des matelots employés au dernier voyage seront payés 'par preference à tous creanciers.' De la Saise de Vaisseaux, art. 16. And Valin, in commenting on this article, lays it down, that they have a right of preference over the freight, as well as over the cargo, though this right is restricted to a year after the wages are earned. T. 1. p. 362, 363. and p. 313. Emerigon, t. 2. 569. 585. See also Pothier, t. 2. p. 454.

it sold, and the proceeds applied, in the first place, to payment of wages; and to this privilege the seaman is held entitled above all other charges, on the same principle upon which the last bottomry bond is preferred to those of earlier date.[1]

Retention for Wages.

In Scotland, the remedy is against the freight by hypothec, and against the ship itself by lien or jus retinendi et insistendi. There is a case in the 17th century, which denies to the seamen 'a *hypothecation* upon the ship for their wages of the last voyage;' but finds them entitled to a right of retention of the ship, of which even a purchaser cannot deprive them.[2] Where the freight has been paid, and the ship is brought to sale by the creditors of the owner on the termination of the voyage, it would seem that a preference will be given on the price of the ship for the seamen's wages: or the seamen will be entitled to arrest the ship, and apply to Admiralty for a sale. Such preference being sanctioned by the universal practice and laws of other maritime states, and especially by those of England, the high expediency of a uniform rule throughout Great Britain would undoubtedly, in the event of such a trial, establish a lien on the vessel for the wages of the last voyage. In this question, too, it deserves particular attention, that, as already stated, the payment of seamen's wages is made to depend partly on the successful termination of the voyage; while, on similar grounds of policy, they are not permitted to insure wages to be earned.

Personal Claim.

The personal demand for wages may, in Scotland, be made either by a claim in bankruptcy or by an action in the Court of Admiralty.

Limitation.

In England the claim for seamen's wages is limited to six years, by a provision in the Act of Queen Anne, for the 'amendment of the law and the better advancement of justice.'[3] This Act preceded the Union, and does not apply to Scotland. This would appear to be a sort of debt which should fall under the triennial prescription of the Scottish law; the obvious inconvenience of a claim which may, possibly, affect a ship after transference to a third party,[4] naturally pointing to the adoption of that prescription as peculiarly fit for this particular case. But perhaps the consideration, that no rule has been specifically laid down in Scotland, and that seamen will naturally conclude the same rule to apply universally, may lead to a doubt whether action for seamen's wages, in Scotland, would be held to fall by the elapse of three years, or whether the English limitation of six years would not be allowed.

When freight has been earned, but the individual mariner has not contributed to that result, distinctions must be made. And,—

Disability of Mariner, when hired by voyage.

1. If the seaman be hired by the voyage, he is entitled to his full wages, although by sickness in the course of the voyage, or by disability from hurts received in the course of his duty, he has been prevented from completing his engagement. This is

[1] See the case of THE FAVOURITE, De Jersey, 2. Rob. Rep. in Admiralty, 232. See also MADONNA D'IDRA PAPAGHICA, Dod. Rep. 40.

[2] SEAMEN OF THE GOLDEN STAR against MILN, 4th January, March 1682; Pres. Falc. 7. Harcarse, p. 145. 1. Sir P. Home, MS. No. 246. The judgment was, 'that the seamen had jus retinendi of the 'ship for their wages; and that being violently put 'out, they were in the case as if they had been in full 'possession of the ship;' and therefore the purchaser was ordered to pay their wages.

The only other reported case touching this question is in 1708, in which 'the Lords were clear, that the 'seamen's wages were no debt of bottomry, affecting 'either the keel of the ship or the cargo, but found 'the freight liable for the said wages.' SANDS, &c. against SCOTT, 6th January 1708; Forb. 219. It may be observed, that the negative part of this latter judgment can be considered only as opinion; for the action before the Court was by mariners against *the owners of the cargo*, who had not yet paid the freight; and the only point which the Court was called upon to decide was, Whether there was a hypothec on the freight? Accordingly, Mr Erskine lays it down as the doctrine of this case, that mariners have 'a tacit hypothec for 'security of their wages upon the freight which is due 'by the merchant.' 3. Ersk. 2. 34.

[3] 4. Anne, c. 16. § 17, 18, and 19.

[4] See Abbot, p. 492. Note f.

established in all the maritime codes,[1] and is laid down as law, and has been proceeded on as a ground of judgment in England.[2] If he die during the voyage, his wages are due to his heirs. Probably this would be regulated by the maritime law, as appearing in the standard books of that law, which seem to give the outward wages, if he die during the outward voyage; the whole, if he die during the homeward voyage. Balfour has the rule in general terms.[3] Where the hire is by the month, it rather seems that wages will be due only to the time of death. A special contract is not unusual in the hiring of seamen, by means of a note signed by the master, for a certain amount of wages on the ship's arrival, provided the seaman continues and does his duty in the ship till her arrival. And it has been found in England,—1. That there is no certain usage regulating the obligation under such a note: And, 2. That, at law, where such a note has passed, no wages can be claimed either on the note or on a quantum meruit, unless the condition be fulfilled.[4]

Hired by month.

Improperly discharged.

2. Where the seaman is, during a voyage, discharged in violation of the contract with the master or owners, he will be entitled to his wages up to the prosperous termination of the voyage.[5] But, in equity, there must be a deduction of such sum as he has earned in another vessel during the voyage.[6]

Claims for part of wages.

Where the ship does not proceed on her voyage, wages may be claimed for the time the seamen have been employed on board; and for damage on account of the breach of contract.[7]

3. A seaman quitting the ship before the termination of the agreement, forfeits all his wages.[8] The termination of the engagement is the delivery of the cargo. The voyage is not completed by the mere fact of arrival: The act of mooring is to be done by the crew, and their duty extends to the time of unlivery of the cargo; and indeed there is no period at which the cargo is more exposed to hazard than in the act of being transferred from the ship to the shore.[9] But, 1. It is not desertion if a seaman enter into his Majesty's service, either voluntarily or by impress. He is in either case entitled to his wages up to the period of his entry to the King's service, provided the ship which he has left has arrived at her port in safety.[10] 2. Neither is it desertion, if the master, by inhuman treatment, compel a seaman to quit the ship.[11]

[1] Balfour, Sea Laws, c. 6. Il Cons. del Mare, c. 125. Laws of Oleron, art. 6. and 7. Ord. de la Marine, liv. 3. tit. 4. art. 11. 1. Valin, 686. Abbot, 450.

[2] CHANDLER *v.* GRIEVES, 2. H. Blackst. 606. Note (a), where a seaman was disabled by a piece of timber falling on him while the ship was in the Bay of Honduras. He was put on shore at Philadelphia, and his wages till then paid up. In an action for wages to England, the Court of Common Pleas, after an inquiry into the practice of Admiralty, held, 'that a seaman 'disabled in the course of his duty is entitled to wages 'for the whole voyage, though he had not performed 'the whole.'

[3] Balfour, 615.

[4] CUTTER *v.* POWELL, 6. Term. Rep. 320.

[5] Salarium nautæ debitur quando navis magister ante tempus conventionis completum licentiam ei dederit aut cum in terram reliquerit et per eum servire non staterit. ROCCUS, Notab. 43.

This doctrine applied by Lord Stowell in ROBINET *v.* THE EXETER. Here the mate was discharged on a groundless charge of incapacity and drunkenness. 2. Rob. 261. Confirmed in the case of THE BEAVER, Grierson, an African ship. 3. Rob. 92.

[6] Abbot, 443.

[7] Abbot, 450. Comyn on Cont. vol. i. p. 372.

[8] 11. & 12. Wm. III. c. 7. § 17.; 2. Geo. II. c. 36. § 3.; 37. Geo. III. c. 73. Abbot, 463.

[9] THE BALTIC MERCHANT, 1809. Wheldon, a seaman, after having served in a West India voyage, left the ship in the Thames, within half a mile of the West India Docks. The defence against an action for wages was, forfeiture on the general maritime law, and on the statutes. Lord Stowell held the voyage not terminated till the vessel arrived in the West India Docks, and that the wages were forfeited by desertion. 1. Edwards, 86.

[10] 2. Geo. II. c. 36. § 13. Before this Act it was held he had right to wages to the time of impressing. WIGGINS *v.* INGLETON, 2. Lord Raymond, 1211. And since it has been found that he is entitled to no more. CLEMENTS *v.* MAYBORN, Abbot, 444. See 2. Camp. 320. Note.

[11] LIMLAND *v.* STEPHENS, 3. Espinasse Rep. 269. where Lord Kenyon said,—'Desertion is a forfeiture 'of wages; but if the captain conduct himself in such

Voyage not completed.

II. WHERE THE VOYAGE HAS NOT BEEN COMPLETED.—The general rule, as already stated, is, that no wages are due where no freight is earned. But,

1. The arrival and delivery of a cargo outward entitles the seamen, in the common case, to their wages of *that* voyage, freight being earned; although they will not be entitled to wages for the outward voyage if in ballast.

2. The outward and homeward voyages may be so consolidated in the agreement with the mariners, that they shall have no right to wages till the arrival at the final port of delivery: and, in general, such a stipulation is made a part of the agreement, in order to prevent the desertion of the seamen in foreign ports.[1]

3. So it is if the ship be captured; it being fully settled that capture defeats all rights and interests.[2] Wages may revive, however, on recapture. See below, p. 516. (5.)

4. If the voyage be not a single run, which by the wreck or capture is utterly defeated, but of the nature of a trading voyage; the seamen will have right to wages pro rata itineris.[3] But this may be altered by special contract, and the seamen's right to wages may be made to depend entirely on the arrival of the ship at her ultimate port. This, however, is commonly in the case of an agreement to pay a general sum for the voyage; and it would require a very strong stipulation to produce this effect in the ordinary case of wages on time. It is not deemed sufficient to stipulate, that no wages shall be demanded, or that the crew shall not be entitled to wages till the arrival of the ship. This is held only as a suspension of the demand, not a limitation of the right.[4]

'a way as puts the sailor into a situation that he can-
'not, without danger to his personal safety, continue
'in his service, human nature speaks the language,—
'a servant is justified in providing for that safety.'—
'In this case, the act of the captain has made the dis-
'solution of the contract necessary, and, in my opi-
'nion, justifiable on the part of the sailor; and I
'think that he is entitled to a verdict.' So it was accordingly found.

It may be doubted whether the doctrine would be restricted to the case of damage to 'personal safety.' Cruel inhuman usage, though it do not actually endanger life, seems to be a justification of desertion. At the same time there is much danger in departing from lines so obvious as to relax the discipline of this peculiar service. The admirable balancing of distress and necessity in such cases, in the judgments of Lord Stowell, are full of instruction, and deserve to be continually kept in view. See, for example, such cases as THE FAVOURITE, 2. Rob. 232. quoted p. 513. Note [1].

[1] APPLEBY *v.* DODS, 8. East, 299. In a voyage to Madeira, the West Indies, and home, freight was earned by delivery of cargoes at Madeira and Jamaica; but the ship was lost in her voyage home. Lord Ellenborough and Sir S. Lawrence held wages not to be due pro rata.

[2] Nothing can be better settled, says Lord Stowell, than that 'capture defeats all rights and interests.' THE FRIENDS, Bell, 4. Rob. Adm. Rep. 144.

[3] ROSS *v.* GLASSFORD, Feb. 22. 1771; F. C. (9177.); 1. Hailes, 406. Ross and others sailed with the Ingram from Clyde on a voyage to Newfoundland, and thence to Spain or Portugal, and then home. At Newfoundland she discharged three hhds. of tobacco, and took in a cargo of fish. These she sold at Lisbon, took in a cargo for Clyde, and was captured by a French privateer, who landed the crew in Ireland. The seamen brought their action in Admiralty for wages due at Lisbon, and they prevailed. The case was then brought under review of the Court of Session. Lord Kames first held 'the 'mariners entitled in equity to their wages pro rata 'itineris during the time the owners received the freight 'and profits of the vessel.' He afterwards held,—'That 'there being but one agreement and one voyage, the 'seamen, who did not accomplish the voyage, had no 'claim at common law for wages, though the failure 'was not occasioned by their fault, but by the fate of 'war; and that they had no claim in equity pro rata 'itineris, seeing the owners were not locupletiores, 'but lost considerably by the voyage.' After a learned argument at the Bar, the Lords were of opinion, that the first judgment of Lord Kames was right.

MORRISON against HAMILTON, Feb. 10. 1778; 6. Fac. Coll. 22. A similar decision was pronounced in the case of shipwreck. The voyage was from Greenock to the Lewes; thence to Philadelphia; thence to the Bay of Honduras; and so back to Greenock. It was stipulated that no wages should be demanded 'until the discharge 'at Greenock.' The ship took in her fourth cargo at Honduras, after which she was totally wrecked. On their return the seamen demanded wages till the time of the wreck. The Admiral awarded them wages till their finally unloading in the Bay of Honduras. And this was affirmed in the Court of Session.

See the English cases. Anonymous. 1. Lord Raymond, 639. EDWARDS *v.* CHILD, 2. Vernon, 727. Abbot, 448.

[4] So held in the above case of MORRISON against HAMILTON, (see preceding Note), where the agreement

Revival of Wages.

5. The claim for wages which is lost by capture, p. 515. (3.) will revive on recapture and the ship earning her freight, if the seamen have not been separated from the ship on the capture; the seamen's interest and right to wages being subject, however, to salvage.[1] But if he be separated from the ship, and have not rejoined during the voyage, however unfortunate to him the accident, it is an evil of war, to which, as a British subject employed in navigation, he is subject; and he has no right to revival of his wages.[2] The principle on which this matter has been grounded, viz. that the contract is defeated, subject to revival, seems to deprive a seaman of all claim to intermediate wages previous to his resuming his functions. A difference of principle gives a different result in the case of embargo. See below, p. 517. (7.)

Wages a debt on the Wreck.

6. If part of the cargo be saved from shipwreck, and freight earned by it, the seaman is held, by foreign laws, entitled to a proportional part of his wages.[3] Lord Chief-Justice Abbot, in his former edition, while he approved of this rule, knew of no English authority for holding it as law.[4] There has been no case of the sort decided in Scotland of which I am aware. But recently a case was tried before Lord Stowell, in which that eminent Judge gave effect to the rule to a still greater extent; having decided, that where part of a vessel had been saved by the exertions of the crew, they were entitled to the payment of their wages, as far as the fragments of the materials would form a

was in the usual terms, that 'no officer or seaman in 'the said ship shall demand or be entitled to his wages, 'or any part thereof, until the arrival of the said ship 'at the above-mentioned port of discharge at Green-'ock.' And 'no wages to be paid till the vessel arrives 'at Greenock.'

The same rule was followed, in England, by Holt, Ch.-J., in EDWARDS v. CHILD; and also in Admiralty, BUCK v. ROBERTSON, 1. Brown's Cases, 102. But this is said to have been disapproved of in the House of Lords; and Lord Chief-Justice Abbot has said, that he is at a loss to find any principle to justify it. Abbot, p. 448. In APPLEBY v. DODS, 1807, the Court of King's Bench held, that though the ship earned freight on the delivery of an outward-bound cargo at Madeira, and another delivered in the West Indies, yet, being lost in her passage home by a storm, the seamen could not recover wages pro rata, by reason of the express terms of the stipulation respecting their wages. This, however, was only the usual stipulation. 8. East, 300.

In Scotland, the decision proceeds on the construction of the agreement. If a case were to occur on an agreement so clearly expressed as that alluded to in the above work as beginning to prevail of late years, (viz. that the seamen should have nothing but the share of impress money, unless the ship returned to and arrived at the port), I have no doubt that it would, in Scotland, be held effectual.

A custom to the above effect was founded on in Ross against GLASSFORD, (see preceding Note); but the Court, while they found no evidence of it, said, 'that if such practice did exist, it was highly to be 'disapproved of, as fraught with inhumanity, and de-'structive to trade, and that it was high time it should 'be corrected.'

[1] BERGSTROM v. MILLS, 1800; 3. Espin. Cases, 36. Bergstrom, a Swede, was a sailor in the Brazilla, a government transport bound to Martinique. She was captured by a French privateer, and afterwards retaken by the Alfred, and carried into Martinique with her cargo. In assumpsit for wages, Lord Eldon said,—'I am of opinion that the voyage has been sufficiently 'performed as to the seamen, to entitle the plaintiff to 'recover. It is in evidence that the ship ultimately 'arrived at Martinique, the port of her destination. 'She was, on her arrival, entitled to freight; freight 'is the mother of wages: Salvage was due to the 'King's ship by which she was recaptured; but with 'that deduction she was entitled to receive her freight, 'and probably has received it.' The same doctrine seems to be deducible, Arg. ex. THE FRIENDS, next Note.

[2] THE FRIENDS, Bell, 1801; 4. Rob. Adm. Rep. 143.; where a seaman had sailed from Newcastle, the ship was captured, and he was sent to France as a prisoner. The ship was afterwards recaptured, and carried on to her port of destination. The seaman, after his liberation, came against the owners for his wages. Lord Stowell held him not entitled.—'Unfor-'tunately there is a circumstance in this case which 'makes a material distinction, viz. that the claimant 'was not on board at the recapture, but had been sent 'a prisoner to France, while the owner was obliged to 'hire another in his place to work the vessel on the re-'turn voyage. I am of opinion that this interest, (two 'day's wages before capture), too small, perhaps, to 'be the object of a litigation, is not legally revived in 'favour of this individual by a recapture, which in no 'degree restored him to his connexion with the 'vessel, although the misfortune of the captivity will 'entitle him to the kind consideration of his owner.'

[3] Ord. de la Marine, liv. 3. tit. 4. art. 9. 1. Valin, 68. Pothier, Louage des Matelots, Nos. 185, 186.

[4] Abbot, 3d edition, 437.

fund, although there was no freight earned by the owners.[1] And he has accompanied the decision with some very important observations on the principles on which the decision in such cases ought to rest. He is of opinion, 1. That seamen are fairly entitled to a reward for their meritorious exertions in this difficult and dangerous part of their duty. 2. That they cannot be considered as salvors, and so rewarded; nor is it expedient that they should. 3. That to reward them according to the quantum meruit, would be equally dangerous and inexpedient. And, finally, That the only safe rule is, to give those wages which are the reward of faithful service, and beyond which they should not be tempted to form an expectation, as the best and safest inducement to a seaman to cling to the last plank of his ship for satisfaction of his wages, or part of them.

Embargo.

7. An embargo laid on in the course of the voyage is different from capture. It is not a conversion of the property, but a mere restraint, imposed by authority for legitimate political purposes. It has been stated as analogous to detention by calms in a southern, or by frosts in a northern climate: as the inactivity of a moral, as the other is that of a physical detention. It has no effect in putting an end to contracts of affreightment;[2] and as to wages, the master and crew being, during its continuance, in possession, and the owners having all the benefit of their service, which, in the circumstances, may be necessary, wages are demandable during the detention.[3]

Hostile Detention.

A case occurred which gave rise to great doubts, being neither an embargo nor a capture, but a hostile seizure and detention of British ships in the Russian ports by the Emperor Paul in 1800. On 5th November of that year, while many ships, both from England and Scotland, were in Russia, the Emperor commanded an embargo to be laid on all British ships in his ports, till a supposed convention should be fulfilled. At first guards were stationed along the shore to prevent the crews from quitting their ships: Then they were taken from their ships, and marched into the interior of the country, and treated as prisoners of war. The embargo was removed 22d May 1801, but the crews had rejoined their ships in April, on the death of the Emperor Paul. On arrival in Britain, claims were made by the seamen for wages during the whole time of detention.

The first of these cases which appears to have been tried occurred in Scotland; and the Judge-Admiral held the detention to have no effect in discharging the contract. He, therefore, decided,—1. That the owners were liable for subsistence given to the crew during the embargo;[4] and, 2. That they were bound to pay wages.[5] The same question

[1] THE NEPTUNE, 1824, 1. Haggard's Adm. Rep. 227.; Abbot, 5th edition, 452.

[2] HADLEY v. CLARK, 8. Term. Rep. 259. See below, Of Affreightment or Charter-Party.

[3] The foreign merchants give only a half of wages on time. 1. Valin, 456.

[4] HEPBURN against KINNEAR, 19th June 1801. An action against the owners, on the master's bill, for the value of provisions to the men while detained under the embargo. The Judge held,—That money advanced for the sustenance of the crew while in a foreign port, is money advanced for the use of the vessel: That after the embargo, as well as before, the ship remained, though under detention, the property of the defender, who was bound to find support, and (as he will probably soon find) to pay wages to the crew; and although removed from the vessels, these men were still the crews of the vessels they belonged to; and a claim against the owners lies for their food, maintenance, and wages, while the property is with the owners. And so the defence was repelled. Judge Cay's MS. vol. A. p. 337.

[5] STEWART against WEATHERLY. Stewart entered as mate of the Ranger, Weatherly master, on 12th September 1800; arrived off Cronstadt 23d October. The embargo was laid on 5th November; but Stewart continued to be employed till 12th November, the ship having grounded. He was then sent up the country. He returned on board 7th April 1801. The action was for wages during the embargo. The defence was, that this embargo was similar to capture; and that no such wages had been paid by other masters or owners. The Judge-Admiral held,—'That an embargo is not 'similar to capture, but a mere temporary restraint, 'which does not dissolve the contract between freighter 'and owner, as capture does; and whatever does not, 'in its own nature, dissolve the contract of affreight-'ment, must leave the obligation to pay wages, which

afterwards came to be tried in England, first in the Court of Common Pleas, then in King's Bench; and the judgment finally was, that the contract of service was to be considered as having continued in force from the time of executing the articles up to and at the period of the ship's arrival at her port of discharge, and the final termination of her voyage there; and that the seamen were to be considered as entitled to their wages during the same time.[1]

Another case having afterwards occurred in Scotland, the Judge-Admiral decided conformably to his first decision.[2]

Embargo before Voyage.

8. If an embargo be laid on, or a prohibition of that trade proclaimed, before the commencement of the voyage, to the effect of losing the voyage, it is held by the foreign authorities that the seamen will have a claim only for wages while employed.

Not Sea-worthy.

9. Where the ship is not sea-worthy, and so unable to perform the voyage, or earn freight, the seamen are entitled to damages from the owners for the breach of contract.[3]

Fault of Seaman.

10. It is a good answer to the claim of wages, that the seaman refused his aid in defending the ship;[4] or was guilty of disobedience of orders, or habitual drunkenness; or was absent without leave:[5] And loss occasioned by the negligence or fraud of the seamen, forms a fit article of deduction from the wages, for relief of the owners.[6]

Female Sailor.

11. A claim for mariner's work done by a female is not absolutely illegal, although not entitled to much encouragement. Lord Stowell has supported such a claim.[7]

Wages by part of Gain.

12. Seamen engaged to receive part of the gain, (as in Greenland ships), are by foreign authors said to be a sort of partners in the voyage.[8] But it is not so held in the law of this country; where this forms rather an exception from what is certainly the rule of common law. So it was found in England.[9]

'accompanies freight, in full force.' 15th August 1801; 15th April 1803; Judge Cay's MS. vol. B. p. 270.; vol. C. p. 201.

[1] BEALE v. THOMSON, and JOHNSTON v. BRODERICK. These were two cases tried in the Court of Common Pleas, the plaintiff in the one being a British, in the other a foreign seaman. The cases came on a special verdict found before Lord Alvanley. The wages were all paid, except for the time of detention, and that made the point of the case. The Judges were equally divided in opinion, and their sentiments are fully reported. 3. Bos. and Puller, 405—434.

Judgment having gone against the seamen, (by assent of one of the Judges to the opposite opinion, in order to give an opportunity for a writ of error), the cases came in that way before the King's Bench, when Lord Ellenborough delivered the judgment of the Court in favour of the seamen. 1804, 4. East, 546—566.

[2] THOMSON against REDDIE and OTHERS, 8th June 1804; Judge Cay's MS. vol. C. p. 169. This case was afterwards brought under review of the Court of Session, when 'the Court considered, that although the 'proceedings of the Russian Court were attended with 'greater acts of hostility than usual, yet, upon the 'whole, they bore more the appearance of an embargo 'than a capture; and, consequently, that they did not 'void the contract, by which the sailors were entitled 'to receive their wages during the period of the voy-'age.' The judgment of the Court of Admiralty was therefore affirmed. THOMSON against MILLIE, 28th May 1806; 13. Fac. Coll. 560.

[3] EAKEN v. THOM, 1803, before Lord Ellenborough, 5. Espin. Cases, 6.; where a seaman having brought an action of assumpsit for wages, the owner had a verdict, on the ground that the action should have been for damage, no freight being earned, and no wages due.

We should not, in Scotland, oppose such a difficulty to a seaman's demand. His action would be laid in Admiralty alternatively for wages or damage.

[4] 22. and 23. Charl. II. c. 11. § 7.

[5] See the admirable system of principles adopted by Lord Stowell, for discriminating the degree of those offences fit for the cognizance of a court of justice. ROBINET against the ship EXETER, 1799; 2. Rob. Adm. Rep. 261. BULMER, Brown, June 1823; 1. Hag. Adm. Rep. 163. GEORGE, Bainfor, Dec. 1823; ib. 168. Note. ELIZA, Ireland, July 1823; ib. 182. NEW PHŒNIX, Leuthwaite, Nov. 1823; ib. 198.

[6] THOMSON v. COLLINS, 1. Bos. and Pull. New Rep. 347.

[7] JANE v. MATILDA, July 1823; 1. Hag. Adm. Rep. 187.

[8] Pothier, Louage des Matelots, No. 161.

[9] WILKINSON v. FRASIER, 4. Esp. 182.; where Lord Alvanley held the share in the nature of wages unliquidated at the time, but capable of being reduced to a certainty,—and that the seamen were not as partners,

§ 5. CONTRACTS FOR REPAIRS AND FURNISHINGS TO SHIPS.

GENERAL PRINCIPLES OF THESE CONTRACTS.

Contracts and obligations for equipment may relate to naval stores, anchors, cables, sails, masts, &c.; repairs of ship and rigging; sea-stores or provisions; subsistence to the crew, either abroad or on shore; necessary accommodation for passengers, &c., according to the object of the voyage; money for defraying the requisite expenses, either in paying for any of those furnishings, or duties, customs, &c.

Such contracts may be entered into, either with the owners or shipshusband, or with the master.

1. CONTRACTS WITH THE OWNERS FOR REPAIRS, AND WHO IS LIABLE AS SUCH.

Master not liable.

Where the owners themselves enter into a contract for repairs or furnishings, it has been contended, that the master is liable on two grounds: that he receives the goods into his possession; and, that he receives the freight. But it is settled, that a master can be held liable only in respect of his own contract. 'Where a captain contracts for the use of the 'ship,' says Lord Mansfield, 'the credit is given to him in respect of his contract; it is 'given to the owners, because the contract is on their account; and the tradesman has 'likewise a specific lien on the ship itself: Therefore, in general, the tradesman who gives 'that credit, debits both the captain and the owners. But where the captain makes no 'contract personally, but the owners contract for their ship, the credit is given to them 'only, and there is not a shadow of colour to charge the captain.'[1]

Owners bound against will.

Where there are several acknowledged owners, and an order is given by those in the apparent management of the ship, or by the shipshusband, all will be bound, though one of them should have given directions to the others not to act as managers, nor to pledge his credit.[2]

Where Owners liable pro rata.

Where owners take upon themselves the management of the ship, and the repairs or furnishings are made on the credit of a contract directly with them, they are liable only pro rata; each for his own share.[3] In England, if a part-owner be called upon alone, or if all are not sued to answer for the debt, a plea in abatement may be entered; which has the effect of preventing judgment against the defender in that action; leaving it to the plaintiff to bring a new action against the whole. But this limited responsibility cannot be pleaded, where the defendant has ordered the articles on his own credit, without dis-

but entitled to wages to the extent of their proportion in the produce of the voyage.

[1] FARNIER *v.* DAVIES, 1. Term. Rep. 108. Here the goods were ordered by the owners before the captain was appointed to the ship. Some of the goods were delivered before he was appointed, and a cable and other cordage were delivered afterwards. The question was, Whether the defendant (the master) is liable for the payment of all the goods furnished, or of the goods delivered after he was appointed? If the Court should be of opinion that he is liable for the whole demand, or for the cable and cordage after he was appointed, then a verdict to be entered for the plaintiffs; but if he be liable for none, then a nonsuit to be entered. On the opinion of the Court delivered by Lord Mansfield, as in the text, a nonsuit was entered.

[2] GLEADON *v.* TINKLER. Here Tinkler and two others were part-owners. Tinkler gave directions to the others not to act as managing owners, nor to pledge his credit for repairs. They appointed a master, and he ordered repairs. In an action for those repairs the ship-carpenter had a verdict against Tinkler. Holt, 586.

[3] 3. Ersk. 3. 45. This is the rule of the civil law.—'Si plures navem per se exerceant,' says Vinnius, 'et 'omnes simul contraxerint, hic neque in solidum singuli 'actione propria ex contractu suo tenentur sed tantum 'pro ea parte quam in nave habent.' Not. in Com. Peckii, p. 158.

closing that he has copart-owners: The tradesman, ignorant of the other part-owners, is in such a case entitled to action against the owner who gives the order.[1]

Where singuli in solidum.

Where the furnishings are on the order of the shipshusband or of the master, under his exercitorial power, all the owners are, in Scotland, liable singuli in solidum, as they are all bound by his act.

Liability of Owners Generally.

As to the persons who, either on special contract, or on the implied responsibility, are to be held liable for repairs and furnishings, it may be observed,—

1. That in the ordinary case, where the owners are in possession, and their titles on the statutes clear, the owners (and also the vessel itself in a foreign port) are liable for furnishings and repairs made on the order either of themselves, or any of them; or of the shipshusband; or of the master acting within the limits already laid down:[2] and the master's responsibility is added where the order is given by him.[3]

Contract of Owners.

2. The mere legal title of the ship will not attach to the person holding it the responsibility for repairs or furnishings made on the special employment of other persons acting as owners of the ship. It may raise a presumption, or furnish evidence of the repairs having been made on the order or credit of the apparent owner; but if in truth they were made on other credit, or the order of another, the legal owner will not be answerable. And so, 1. Where a purchaser orders the ship to be taken to a shipwright for repair, the seller will not be liable, although he continues on the registry to appear as the owner.[4] And, 2. On the other hand, the purchaser of a ship is not to be made responsible, in respect of his legal title as owner, for stores ordered previously to the sale; but only for such articles as were ordered by the master after the purchase.[5]

Order of Master.

3. Where the furnishings are made on the order of the master, (the workman, or shipchandler, or lender of money, ignorant of, or taking his chance of the ownership), those who remain truly part-owners, or who being once vested as owners have not legally transferred their right, but still appear on the registry as owners at the time the furnishings are made, will be liable; it being left to them, by means of their undivested right, to effect their relief.[6]

[1] BALDNEY *v.* RITCHIE, 1816; 1. Starkie, 338. See also DU BOIS *v.* LUDART, 1. Marsh. 246.

[2] See above, p. 504.

[3] See below, p. 522.

[4] YOUNG *v.* BRANDER, 8. East, 10.; where Dunbar and another sold the schooner Rebecca to Brander, and he received the bill of sale, and took possession, and acted thenceforward as sole owner; but no copy of the indorsement was delivered till 23d June 1804, when he got a new certificate. On 11th June the captain of the Rebecca, by order of Brander, took the ship to Young, a shipbuilder, to be repaired for her outward voyage. The repairs were finished by 19th June, during which time Dunbar's name remained on the register at the custom-house. A verdict for plaintiffs, subject to the opinion of the Court. Lord Ellenborough said, that to hold Dunbar liable would be *contrary to the credit actually given*. See below, WESTERDELL *v.* DALE, Note [6].

[5] TREWHELLA *v.* ROWE, 1809, 11. East, 434. Parnell, sole registered owner of a ship, gave orders for materials to be furnished, and work done for repairing it; but before all the articles were delivered on board, he conveyed the ship, with all its furniture, to Rowe, by bill of sale duly registered. Action was brought against Rowe. The Court of King's Bench held,—1. That Rowe was not responsible for any goods furnished before the completion of his sale: 2. That he was not liable for furnishings delivered after the sale was completed, the order being given before; and, 3. That he was liable for articles furnished on the order of the master after the sale was completed.

[6] GLEADON *v.* TINKLER, see above p. 519. Note [2]. 1. Where the defender still continues a part-owner, though he has expressly forbidden the other owners to act as managing owners, he is liable on the master's contract.

2. Where the right of ownership has been transferred, but not by a valid conveyance, the owner continues liable on the master's contract. So decided in the following English cases:—

WESTERDELL *v.* DALE. Dale and Wharton were joint owners of the ST VINCENT, and were so registered. Dale sold his share to Wharton, but the certificate was ill recited in the vendition, so as under

4. The shipbuilder, or furnisher, will not, however, be construed to limit his demand for repairs or supplies on the master's employment, to those who appear on the registry as owners; for if the ship has been hired to another for a certain period, or even for a voyage, but not merely on the contract of locatio operis mercium vehundarum, the hirer is strictly and properly the exercitor of the master,[1] and as such will be responsible.

5. It was once held, that if the lease of the vessel be unknown, the furnisher was entitled to sue the owners appearing on the register:[2] But more recently it has been determined, that the Registry Acts are not in all cases to be relied on so implicitly. And, *first*, An entry in the registry can have no effect, if truly there be no bill of sale, or if the right be put in the defendant's name, without his consent:[3] *Secondly*, Where there

the statute to make it void. Wharton mortgaged the ship to Dale, but the recital was also bad in the deed. No indorsement was made on the registry on either of these occasions. While matters stood thus, Wharton, who then acted as sole owner, employed Westerdell to repair her, and the account was thus entered:— 'Ship St Vincent, captain J. Lethrington, J. Whar-'ton debtor to T. Westerdell.' Wharton then sold the ship to Dale and to Tod, but no possession was taken. Westerdell brought his action against Dale for these repairs. The question on which the case was determined was, Whether by the exceptionable vendition, and the state of the register, Dale did not still remain owner on his original right, and so responsible? The Court held that it was not a legal transfer, but a mere attempt to transfer, and that Dale still remained owner, and responsible: that as between Wharton and Dale, the latter might have called on the former for the account of the profits of the ship; and if he had filed a bill in equity for that purpose, it would have been no answer to have set up this bill of sale, which is void by Act of Parliament; and that Dale was, therefore, liable on this ground, that if one part-owner suffers the other part-owners to employ a person to repair their ship, he is bound by these acts. 7. Term. Rep. 306.

N. B. Dale might have pleaded in abatement, that Wharton ought also to have been sued, but he did not.

3. When the vendition is correct, but the transfer on the registry has been neglected, the same rule is followed. So it has been decided in Scotland.

MENZIES and GOALEN against KERR. The Judge-Admiral held the tradesmen in a home-port entitled to bestow necessary repairs on any ship, upon the faith of their knowledge of the personal responsibility either of him who orders and authorizes the repairs, or of that of the owners of the ship. The defenders in the case were admitted to stand as owners in the subsisting registry, without any transfer made in terms of 26. Geo. III. c. 60. and 34. Geo. III. c. 68.; but it was said they had, by vendition two years before, sold it, although, by fault of the purchaser, the transfer was not duly indorsed. Then, on an elaborate consideration of the statutes, the Judge held it clear, that the defenders, in the character of owners undivested, were responsible; and, accordingly, he pronounced judgment against them jointly and severally. The case was then brought into the Court of Session by advocation, and Lord Meadowbank refused the bill, and adhered to the Judge-Admiral's sentence. And a petition against this judgment was refused, 22d February 1805.

Similar judgment by Judge-Admiral, 25th May 1804, OGILVY against BROWN, affirmed by Lord Meadowbank, 1st January 1805.

[1] See above, p. 505. Note [2].

'If a ship be let out generally to freight,' said Lord Mansfield, 'the freighter is owner for that voyage; 'but if there be only a covenant to carry goods, the 'owner of the vessel would have the direction of her, 'and the hiring of the master and mariners.' This was said relative to a case of barratry. VALLEJO *v.* WHEELER, Cowp. 144.

[2] RICH *v.* COE, 1777; Cowper, 636. Rich, a ropemaker, supplied the ship Henry and Thomas with cables to the value of L. 5, by order of the captain, Harwood; and made the captain and the owner of the ship debtors in the usual way, without naming the owners, or knowing particularly who they were. The ship belonged to Coe and others, who had let it to Harwood, the captain, who was to have the sole management and benefit for eleven years, at a rent of L. 36, and at his own cost to keep the vessel in repair. The action was against the owners for the debt. Lord Mansfield said the case was reserved for the opinion of the Court, 'in consequence of a general anxiety 'in the owners of ships to know how far they are by 'law liable for the acts of their respective lessees.' The Court held the owners liable, on the ground, that the credit was specifically to the ship, and generally to the owners; and that the private agreement between the owners and the master could not affect the creditors, who were entire strangers to the transaction.

[3] FRAZER *v.* HOPKINS, 1809; 2. Taunt. 5.; where in an action for provisions to a Harwich packet, the plaintiff referred to the register book of the port of London to prove the defender's ownership by transfer from a former owner. The question was, Whether it was not necessary in addition to shew that this registered transfer was with the defendant's consent: So the Court held, and rejected the evidence.

TINKLER *v.* WALPOLE, 14. East, 226.; where gunpowder having been furnished for the use of an East Indiaman by order of Clarke, shipshusband and manag-

is a lease of the ship, the master is agent for the lessee, not for the owner; and the reputation of ownership from the Registry Acts is, as a ground of action in such cases, qualified by the lease.[1]

6. Mortgagees in possession, whose names were in the register, were formerly held responsible for repairs and furnishings.[2] But by the recent statutes this matter is placed on a new footing: Where a transfer is made only for security by way of mortgage, or of assignment to trustees for sale, on a statement to that effect in the book of registry and on the certificate, the person to whom the transfer is made is not to be deemed as the owner, nor the person making the transfer to be held as having ceased to be owner.[3]

2. CONTRACTS WITH THE MASTER FOR REPAIRS, &c. TO SHIP.

Contracts by the Master.

Not only are contracts by the owners themselves, or by their shipshusband, effectual for repairs or furnishings made to the ship, but the master also has, by his office, full

ing owner, action for the price was brought against Walpole; and the plaintiff relied, first, on two bills of sale to Walpole of $\frac{6}{16}$ths of the ship; but there was no proof of Walpole's assent or acceptance: He next relied on two registers made on the oath of Clarke and two others, swearing that they and Walpole and others were owners. Lord Ellenborough nonsuited the plaintiff, on the authority of Frazer's case; and the Court was moved for a new trial to have that case reconsidered. It was fully confirmed. Lord Ellenborough, Ch.-J. said,—Notwithstanding the practice may have 'prevailed for a long time to receive ship's registers 'as evidence, without more, of the property being in 'the persons therein named; yet when we are brought 'to consider the admissibility of such evidence against 'the defendant, in a case where he has done no act 'to adopt the register as having been made by his 'authority; we cannot give effect to it without saying, 'that a party may have a burdensome charge thrown 'upon him by the act of a third person, without his 'own assent or privity. If it had appeared that the 'defendant had by any act of his own recognized the 'register, he would have been liable to all the conse-'quences, as a part-owner, which it describes him to 'be; but here he has done no act to adopt it. His 'partner *Clarke* has, indeed, dealt with the property as 'if the defendant were a part-owner, by registering 'the ship in his name; but the act of a third person, 'without some act of the defendant to recognize it, 'cannot throw upon him a burden, without violating 'the plain rule of law.' The other Judges concurred. Cooper *v.* South, 4. Taunt. 802.

[1] Frazer *v.* Marsh, 13. East, 238. Marsh, the owner of a ship, let the ship by charter-party for a number of voyages, at a certain rent, to Walker, then master of her. On Walker's subsequent order, stores were furnished by Frazer, who brought his action against Marsh. Lord Ellenborough tried the case at Guildhall, and the plaintiff was nonsuited, on the 'ground, that, during the existence of the lease, the 'relation of master and owner ceased to subsist be-'tween Walker and Marsh, and that the stores must 'be taken to be ordered on Walker's own account.' On a rule to set aside the nonsuit, Lord Ellenborough said,—'To say that the registered owner, who divests 'himself by the charter-party of all control and pos-'session of the vessel for the time being, in favour of 'another who has all the use and benefit of it, is still 'liable for stores furnished to the vessel by the order 'of the captain during the time, would be pushing the 'effect of those Acts much too far.' The question is, 'Whether the captain, in this instance, who ordered 'the stores, were or were not the servant of the defen-'dant who is sued as owner? And as they did not 'stand at the time in the relation of owner and master 'to each other, the captain was not the defendant's 'servant; and, therefore, the latter is not liable for his 'act. There is a late case in the Court of C. P. '(Frazer *v.* Hopkins and another, p. 521. Note [3]), 'where the mere entry of the defendants' names as 'owners in the register-book was held not to be even 'prima facie evidence to charge them, as such, with 'stores delivered for the use of the vessel by order of 'another.'

[2] Ex parte Machel, 1813, in Chancery, Lord Eldon Chancellor; 1. Rose's Cases, 447.

Annet *v.* Carstairs, 3. Campb. 354.

Jackson *v.* Vernon, 1. H. Blackst. 114. Chinnery *v.* Blackburn, 1784; 1. H. Blackst. Note 117. In a case before Lord Ellenborough, Twentyman *v.* Hart, 1816, 1. Starkie, 366. Hart was a mortgagee, the certificate of registry having been indorsed to him as a collateral security; and afterwards a new register was made in Hart's name. He never took possession. But the master having ordered necessaries, the action was brought against Hart. Lord Ellenborough said, 'Since the repairs were done by order of the captain, 'and the plaintiff knew no owner except Howard, '(whom the captain had given up as owner at making 'the order), and the defendant was never in possession 'of the ship, the plaintiff must be nonsuited.'

[3] See above, p. 164. 4. Geo. IV. c. 41. § 43.; 6. Geo. IV. c. 110. § 45.

authority to enter into such contracts.[1] By the maritime practice of nations, this authority is more clearly defined, or more strictly regulated, than in the text of the Roman law.[2] The rule of that law was, 'Omnia facta magistri debet præstare qui eum præposuit;' and there was no express qualification of the power in respect of the owner's residence. According to the early maritime usage, the master's ordinary resource in difficulty was, to sell part of the cargo:[3] But more enlarged provisions were necessary for an extended trade; and it is now established, that greater power is given to the master in a foreign port, on this principle, that, for extraordinary supplies at home, the authority of the owners is easily obtained; while, abroad, the voyage may be lost, and the interests of all may suffer, if it be necessary, even for extraordinary supplies, to wait for authority from a distance. This is, indeed, the great principle of distinction between the actio exercitoria and the actio institoria even of the Roman law.[4]

Referring to what has already been said of the general limits of the master's power, it will be necessary here to treat more fully of the authority which he has to bind his owners.

General ground of Master's authority.

The general ground of the master's authority is the presumed mandate which he holds from the several exercitors for conducting the navigation of the ship, as a joint adventure or partnership. These exercitors are not owners solely, but may be lessees of the ship; and the principle of their joint responsibility is, that a contract entered into with a single person shall not be disturbed, by forcing the tradesman to search out and prosecute all the owners before he can recover payment; while it cannot be shewn, that the tradesman did not place the whole credit of the furnishing upon one particular exercitor.[5] The same

[1] See above, p. 507.

[2] Dig. lib. 14. tit. 1. De Exercitoria Actione. Pothier, Pand. Just. vol. i. p. 365. Stair, b. 1. tit. 12. § 18. speaks of the master's power generally, and without observing any distinction between foreign and home ports.

So also does Erskine, b. 3. tit. 3. § 43.

[3] This is the only provision which appears in Balfour's Sea Laws. After stating the case of a ship lying 'abyding the wind swa lang that mony, &c. fails,' it is provided, that 'gif he has not stuff nor vivoris, he may 'tak of the wine, or uther gudis and merchandice, and 'sell the samin for vivoris,' &c. Balfour, p. 621. c. 136.

[4] In the mercantile decisions of Genoa, in speaking of the difference of those actions, the actio exercitoria is distinguished by 'necessitas contrahendi incertitu-'doque itineris navium, quæ aliquando in terras incog-'nitas vi ventorum impellentur, et ibi pecunias capere 'coguntur, quæ in institore cessant; quoniam dilationem 'res patitur et conceditur facultas dispiciendi de con-'ditione institoris antequam contrahat et datur plenius 'deliberandi consilium.' Rot. Gen. de Mercatura, Dec. 14. No. 107. p. 169.

[5] Si plures navem exerceant cum quolibet eorum in solidum agi potest. Dig. lib. 14. tit. 2. De Exercit. Actione, l. 1. § fin. l. 4. § 1. The Commentators add, 'Ne in plures adversarios (ut Caius ait) distringatur 'qui cum uno contraxit.' Peckius, Com. in. Tit. de Exerc. Act. 155. Vinnius gives the doctrine thus,—'Si plures sint, qui navem exerceant, placet singulos 'ex contractu magistri in solidum teneri: idque hac 'ratione, ne in plures adversarios distringatur, qui cum 'uno contraxit, *l.* 1. *par. ult. et l.* 2. *hoc tit.* fac. *l. et ancil-'larum*, 27. § *ult. inf. de pecul.* quippe actio exercitoria, 'qua tenentur exercitores, ex solius magistri persona 'et facto nascitur; utpote cum quo solo, non cum ipsis 'exercitoribus, contractum est. Cum igitur in plures 'dividenda non sit obligatio, quæ in unius persona ori-'ginem habet, ne in plures distringatur, qui cum uno 'contraxit, ex eo satis intelligimus beneficio divisionis 'hoc casu locum non esse. *Bald. in rubr. C. eod. in 'fin.* Idem est, si contractum sit cum plurium insti-'tore, *l. habebat*, 13. *par. ult. et l. seq. inf. de instit. act.* 'aut cum servo plurium voluntate dominorum navem 'exercente, *l.* 6. *par.* 1. *inf. hoc. tit.* Cæterum hoc jus 'apud Hollandos receptum non est, apud quos singuli 'exercitores, pro sua duntaxat parte exercitionis con-'veniri possunt. Neque enim ut singuli in solidum 'teneantur, visum est aut naturali æquitate convenire, 'quæ satis habet, si pro suis singuli portionibus con-'veniantur; neque publice utile esse, propterea quod 'deterrentur homines ab exercendis navibus, si me-'tuant, ne ex facto magistri quasi in infinitum tene-'antur. Quin et hoc constitutum, ne exercitoria etiam 'universi amplius teneantur, quam ad æstimationem 'navis et eorum, quæ in navi sunt, teste Grotio, *lib.* 3. '*introduct. ad jurisp. Bat. c.* 1. *et lib.* 2. *de jur. bell. et 'pac. c.* 11. *n.* 13. Cæterum Hevia, *p.* 2. *cur. Phil. lib.* '3. *c.* 4. *n.* 22. simpliciter sequitur dispositionem juris 'communis.'

Erskine has marked the peculiarity of the law of Holland; 3. Ersk. 3. § 45.

Secus in actione quæ ex delictis nautarum in eos datur. Poth. Pand. Just. vol. i. p. 366. in Note b.

rule has been followed in modern times,[1] and is laid down by our own authorities.[2] The practice of our Court of Admiralty has been, to hold owners jointly and severally liable for furnishings to the ship on the order of the master or shipshusband.[3]

In commenting farther on this subject, it may be proper to distinguish between the case of furnishing in a home and in a foreign port. In a home port the demand is direct against the persons of those concerned; but although there may be a lien, there is no hypothec.[4] In a foreign port, supplies may be furnished to the effect of giving both a direct and an indirect remedy; direct against the owners of the ship or lessees; indirect by the operation of a suit against the ship itself.

Repairs, &c. at Home.

I. Repairs and Furnishings at Home.—The common and necessary repairs and furnishings of naval stores, and daily subsistence for a ship, may, even in a home port, be made on the master's authority alone, so as to bind both him and the owners. Nay, in the very residence of the owners his presumed authority extends thus far. To support a demand against the owners, it will be sufficient to shew,—1. That the articles were sent to the ship, or the repairs made on her; and, 2. That those furnishings and repairs were not beyond the natural and common necessities of such a vessel;[5] and the criterion of what is to be held as necessary is, to ask what a prudent owner would himself have done had he been present.[6]

It will be no defence against this claim, that the owners themselves took the active superintendence of the outfit, and that they gave no authority for the repairs; or that there was a shipshusband appointed, and no order or authority for repairs by him: And this, because they should have been more vigilant; and because the master is, at any rate, to be considered as acting under their sanction and approbation, or as their servant. Neither

[1] Loccenius de Jure Mar. lib. 3. tit. 7. § 9.

[2] 'If there be many exercitors, they are all liable 'in solidum.' 1. Stair, 12. § 18. See also 3. Ersk. 3. § 45.

[3] Kinnear against Craig, 13th July 1804, where in an action for furnishings to the sloop Alexander of Saltcoats, the account was attested by the master.—Defence by Craig, that he had no concern in the sailing of the ship, and never got profit. The Judge-Admiral, in respect it was not denied that the defender was a joint owner at the time when the furnishings were made, and that the articles were furnished and not paid for, gave decree for the amount. Judge Cay's MS. vol. D. p. 184. Same principle recognized, Menzies and Goalen against Kerr, 2d March 1804; Judge Cay's MS. vol. D. p. 106. See above, p. 520. Note [6]. (3.)

In the case, Ogilvy against Brown, 25th May 1804, a similar decision by the Judge-Admiral was brought under review of the Court of Session, on the ground, that as Brown was proprietor of only a fourth of the ship, he should be liable only for one-fourth of the furnishings. Lord Meadowbank affirmed the judgment of the Judge-Admiral, subjoining this note:—'The Lord Ordinary conceives the rule of common 'law to be, to subject proprietors pro indiviso univer-'sally for a debt contracted by their præpositus nego-'tiis; and that in this case the employer of the charger 'had, by his possession of the ship by prescription of 'law, a title to bind the complainer' (the owner) 'for 'the expense of repairing her.' Judge Cay's MS. vol. D. p. 162. and App. No. 62.

See ex parte Machel, 1. Rose's Cases, 447. where furnishers to a ship were, in England, allowed 'to 'prove against their respective estates, and receive 'dividends not exceeding twenty shillings in the pound 'in the whole.'

[4] See below, p. 527.

[5] Lindsay and Allan against Campbell, 18th June 1800; 10. Fac. Coll. 423.; where a master, in the port where the owner was resident, ordered a cable, which the owner seeing on board found fault with. The master took it ashore, but it was not returned to the furnishers. Owner held liable.

The French Ord. de la Marine was more strict. Liv. 2. tit. 1. vol. 17. prohibiting repairs, or furnishings of sails, ropes, &c. for the ship, in the port of the owner's residence, without his consent. Valin's modification of this article, in so far as to give action for what was manifestly necessary, seems well grounded on the principle in equity, Nemo debet locupletari cum alterius jactura. Vol. i. p. 414.

[6] Webster v. Seekamp, 4. Barn. and Ald. 352.; an action for coppering a vessel at Liverpool, whose owners resided at Ipswich: she was bound for the Mediterranean, and to copper her was said not to be necessary, though admitted to be extremely useful. It was left to the jury to say whether the furnishing was such as a prudent owner, if present, would have ordered. This the Court confirmed.

will it be a good answer, that the master received money to pay for furnishings and repairs; for the public are not presumed to know this.[1]

But at the owner's residence the master's authority does not extend to extraordinary repairs; or to the victualling of the ship for a voyage; or to the borrowing of money.

Repairs, &c. in Foreign Port.

II. Repairs and Money in a Foreign Port.—Abroad the master has greater power. His office holds him out as the accredited agent of the owners; on whose authority all repairs, furnishings of naval stores, subsistence, or money necessary for the prosecution of the voyage, may be contracted for, or advanced, on the credit of the owners.[2] The only restraint is the necessity, on the part of the furnisher, or advancer of money, to see that the supply which the master requires is justified by apparent necessity at least; the general maxim being, that it is only as to necessaries that the master is præpositus.

Furnishings, Repairs, &c.

1. Naval Stores, Provisions, or Repairs.—The demand is generally made on an attested account; or on the draft of the master on his owners; or on acceptances by the master as representing them for the amount. In support of these, if questioned, it will be sufficient to show that the repairs were actually made on the ship; or that furnishings, in the nature of necessary stores, or victualling for the voyage, were actually put on board.[3]

Whether the repairs were *necessary* in the strict sense of that word, seems to be fairly referable in this case, as well as in the case of furnishings at home, to the criterion already stated.[4] The proper case requiring a proof of necessity is that of money borrowed; of which below, p. 528.

It is not a good answer to such a demand, that the owners have paid the master, or supplied him with money for the supply of the necessary repairs or furnishings. With this, the public, trusting to the accredited servant of the owners, have nothing to do.

Neither is it a good defence, that the employment has been directly by the consignee of the ship, and that the owners have paid him; unless the credit has been limited to the consignees; or they have been furnished with accredited documents or vouchers misleading the owners into a belief that the credit was so limited to the consignees.[5]

Hypothec on Ship for Repairs. Continental Law.

Hypothec on the Ship for Foreign Repairs.—But the remedy provided by law for enforcing the payment of repairs and furnishings abroad, is not confined to the personal

[1] See below, Stewart against Hall, Note [5].

[2] Consol. del Mar. c. 104, 105. 236. Ordon. de la Mar. liv. 2. tit. 1. art. 19. 1. Valin, 416.
See above, Hepburn against Kinnear, in Admiralty.

[3] Craigie against Ogilvy and Izett, in Admiralty. Ogilvy and Izett, owners of the Olive Branch, were sued by Craigie, a shipmaster in Montrose, who at a port in Norway had furnished, at desire of the master of the Olive Branch, a cable, value L. 36. *Defence*, No cable necessary; and so the question was, Whether necessity must be shown in such a case? The Judge-Admiral recognized a distinction between the furnishing of naval stores and the loan of money; holding it requisite in the latter case only to look to the necessity. He also recognized a distinction between articles of ordinary use and necessity to the vessel's safety, and articles manifestly superfluous as mere luxuries, (a Turkey carpet, ex gr. for the cabin). He 'repelled the defences, reserving all questions between 'the owner and the shipmaster.' 12th June 1807; Judge Cay's MS. vol. E. p. 196.

[4] Webster's case, supra.

[5] Stewart against Hall, 10th November 1813; House of Lords, 2. Dow, 29. This was the case of a Greenock ship, consigned to Knox and Hay at Hull, and repaired by Hall and Richardsons of Hull, on the employment of the consignees, the repairs being pointed out by the master. The master drew a bill on Stewart, the owner, for the amount of the consignee's account-current, including as one article the amount of the repairs; but there was no receipt or vouchers of the payment of the repairs by the consignees. Hall and Richardson, on the consignee's failure, made a demand against Stewart, which he resisted. The Court of Session held, that Hull was a foreign port, (see below, p. 528.), and that there was a *hypothec* for the repairs, never relinquished, and therefore that Stewart was liable. In the House of Lords it was taken as a case of *personal* contract binding the owners who never were discharged. And two points were decided:—1. That the owners were the debtors by law, unless there was a special agreement to the contrary; and, 2. That there was no such agreement and no discharge, there being no other voucher to show, than an account which bore the owner to be debtor, and which was not discharged.

action. A right is also given, without any express contract of bottomry, respondentia, or hypothecation, by means of tacit hypothec, to foreign repairers and furnishers of necessaries. In the Roman law, all those who had contributed to the fitting out or repairing of a ship, whether at home or abroad, were entitled to a preference by privilege in security of their advances;[1] and this rule still prevails in most of the nations of Europe. In Holland,[2] in Hamburgh, and all the other Hanseatic towns; in France,[3] in Spain,[4] and in Italy,[5] this prevails.

English Law. In England, in consequence of two opinions delivered by Lord Mansfield, (though only collaterally), it became a question for some time, whether the same rule did not prevail.[6] But it is now settled in England, that there is neither hypothec nor privilege for repairs in a home port; and that this security is allowed, in the case of foreign repairs, only from the consideration, that, without it, ships might often be interrupted in their course, at a distance from the residence of the owners.[7] It may be imagined, that furnishings for the

[1] Dig. lib. 42. tit. 5. c. 26. and 34. Vinnius in Peck. p. 99. and 233.

[2] Van Leewin Censur. Forensis, P. 1. lib. 4. c. 9. § 7. 1. Voet, l. 20. tit. 2. § 29.

[3] 1. Valin, Com. sur l'Ord. de la Marine, 363. and 367.; the claim being restricted to a year from the furnishing; p. 315. Emerigon, 557. et seq.; 562. et seq.

[4] Rodriguez de Concursu et Privilegiis Credit. 121. et seq.

[5] Casaregis, Disc. 18. vol. i. p. 46.

[6] The first was in RICH *v.* COE, in 1777; Cowp. 636. The other, still more explicit, in FARMER *v.* DAVIES, in 1786; 1. Term. Rep. 108.

[7] The law to this effect was laid down in very plain terms, so early as the year 1726, by Sir J. Jekyl, Master of the Rolls, and assented to by the counsel on both sides.—'That if a ship be in the river Thames, 'and money be laid out there, either in repairing, fitting out, new-rigging, or apparel of the ship, this is 'no charge upon the ship; but the person thus employed, or who finds these necessaries, must resort to 'the owner thereof for payment; and, in such a case, 'in a suit in the Court of Admiralty, to condemn the 'ship for non-payment of the money, the courts of law 'will grant a prohibition; and, therefore, if the owner, 'after money thus laid out, mortgages the ship, though 'it be to one who has notice that the money was so 'laid out, and not paid, yet such mortgagee is well 'entitled, without being liable for any of the money 'thus laid out for the benefit of the ship, as aforesaid; 'and the ship is no more liable for this money, than a 'carpenter, laying out money in the building of a house, 'has a lien upon the house in respect thereof, though, 'by the law of Holland, he has; but this not being the 'law of England, such carpenter must resort to those 'who employed him, or to the owner of the house, for 'his money.' He adds,—'But it is true, that if, at 'sea, where no treaty or contract can be made with 'the owner, the master employs any person to do work 'on the ship, or to new-rig or repair the same, this, 'for necessity and encouragement of trade, is a lien 'upon the ship; and, in such case, the master, by the 'maritime law, is allowed to hypothecate the ship.' 2. P. Wms. 367. This last part of his judgment was overruled in HUSSEY *v.* CHRISTIE; 13. Ves. Jun. 594. See also 9. East, 426.

In the case of BUXTON *v.* SNEE, in 1748, where the question of hypothec occurred in dividing the price of a ship, Lord Hardwicke seems to refer it entirely to the principle, that a ship in England is under the common law, not under the maritime, which, prevailing abroad, gives hypothec for foreign repairs.—'Certainly, 'by the maritime law, the master has power to hypothecate both ship and cargo for repairs, &c. during 'the voyage; which arises from his authority as master, 'and the necessity thereof during the voyage, without 'which both ship and cargo would perish; therefore, 'both that and the law of this country admit such a 'power. But it is different where the ship is in port, '*infra portus comitatus*, and the contract for repairs, '&c. made on land in England; then the rule of law 'must prevail. I know no case where the repairs, &c. 'whether it was by part-owners, or sole owner, master 'or husbands, have been held a charge or lien on the 'body of the ship; Watkinson *v.* Barnardiston, 2. Wms. '367. being a direct authority to the contrary: and if 'the ship in the river infra corpus comitatus should be 'proceeded against and stopped for such debt, the 'courts of law would issue a prohibition, the contract 'being on land, and not arising from necessity.' 1. Ves. 154. See also *ex parte* SHANK, 1. Atk. 234., where a repairer having got possession of the price of the ship, was ordered to account to the assignees of the owner, a bankrupt, and come in under the commission for his repairs. Lord Mansfield himself laid down the doctrine as it is now settled, in WILKINS *v.* CARMICHAEL, in 1779; and on the broad principle,—'Work done for a ship in England is supposed to be 'on the credit of the employers: in foreign ports the 'master may hypothecate the ship.' Doug. 101. In a case in Scotland, in 1788, the opinion of Dr Wynne was taken on this question, and he gave a very clear answer, that, 'by the law of England, a tradesman who

victualling of a ship are as necessary to the voyage, and as much entitled to the security of a lien, as repairs. But the Lord Chancellor has doubted whether the same rule would be followed in regard to them.[1]

Scottish Law.

In Scotland, the course of practice seems at one time to have run strongly in favour of the continental rule, viz. that the builders, or furnishers for building, or the repairers of ships, were entitled to hypothec.[2] But now the rule has been settled in perfect conformity with the English law, by a decision affirmed in the House of Lords; and confirmed in the Court of Session.[3]

No Hypothec for Home Repairs.

The law may now, therefore, be considered as fixed, that there is no hypothec on a ship for repairs in a home port; although there is reason to believe, that the deviation from that maritime rule which prevails in other nations, has originally proceeded in England from the peculiar notions of jurisdiction established there, rather than from any general principle of law or of expediency; and that it has been established in Scotland by mere adoption. By the law, as now settled, builders, and repairers, and furnishers to ships in a home port, though they may have a lien, provided the ship is in their entire possession; or a real security by bond of bottomry; have no hypothec under which, after the ship has quitted their possession, they can be entitled to a preference over other creditors.

Hypothec for Foreign Repairs.

Between that case, however, and the case of repairs in a foreign port, there is this ground for distinction, in reason and equity, that wherever a workman is deprived of the power of treating with the owners themselves, he ought to be secured by a hypothec or preference: where he may so treat with the owners, his situation is not different from that of other dealers. And on this ground a ship repaired in a foreign port is under hypothec for the amount, and may be proceeded against in Admiralty; or a preference claimed in any competition which may arise.

But is a foreign ship, repaired here, subject to hypothec for those repairs? If the principle be admitted, that where the repairer cannot treat personally with the owners, and have execution against them within his own territory, there ought to be a preference, it should be so. There seems reason to hold, that should the creditors of the foreign owners attach her before she left the country, and have her brought to sale, the repairers here would be entitled to a preference. This opinion prevails universally at the Bar in Scotland; though it has not yet been precisely determined. In England, some countenance is given to the distinction by Lord Stowell, who, in a question whether persons furnishing stores to an American ship were not entitled to payment out of the proceeds of

'repairs or furnishes materials for a ship, the owner 'of which resides in England, does not acquire any 'lien upon the ship, but is considered in the same light 'as any other personal creditor of the owner or person 'who employs him.' He cites and relies on the authorities quoted in this Note, without taking any notice of the two reports of Lord Mansfield's opinion in 1777 and 1786.

[1] HALKET, ex parte, 1814. 3. Ves. and Beawes, 135.

[2] GAY against ARBUCKLE, 16th November 1711; 2. Fount. 673.
MAXWELL and Others against WARDROPER, 18th January 1726.
PORT-GLASGOW ROPE-WORK against CROSSES, 4th March 1761; 3. Fac. Coll. 56.

[3] HAMILTON against WOOD and Others; 8. Fac. Coll. 65. Here Wood and others had repaired a Scottish ship in a home port, and claimed a hypothec for the amount. Lord Justice-Clerk M'Queen sustained that claim. The Court ordered a case to be sent for the opinion of English counsel; and the opinion of Dr Wynne, mentioned in the preceding note, was returned; on which the Court found, that Wood and the other furnishers had no hypothec or right of bottomry on the ship in question. This judgment was affirmed in the House of Lords, 15th June 1789.
In another case, WOOD and Company against CREDITORS of WEIR, wherein the same company was concerned, an attempt was made to re-establish the right of preference, on the ground of an extension of the lien which the repairer of a ship has while she remains in his possession, as if that possession could be retained animo. But this was, in other words, precisely the plea of hypothec, and was unanimously rejected by the Second Division of the Court, 31st January 1810.

the ship brought to sale by the seamen for their wages, admitted a distinction between the case of foreign and British ships.[1]

What is a Home Port.

It has not been determined what shall be deemed a home port in a question of repairs. In a case already cited,[2] Hull was held a foreign port, in a question as to repairs on a Greenock ship. But this decision was cancelled in the House of Lords, as determining a point unnecessary to the decision of the case: And although this may be regarded as an opinion of the Court of Session, proceeding on very ample discussion, the question must be held as still open. The natural course is to adopt the rule of the Navigation Laws, and to hold all British ports as home ports;—those Acts regarding all British ports as on the same footing; the repairers having immediate access to the registers to ascertain who is proprietor; and the communication by post giving to the owners full opportunity to take charge of the ship, and provide security for relieving her from the lien of the repairers.

Money.

2. Money may be raised abroad by the master for supplying the necessities of the ship. This is the most dangerous form in which the master's authority can be exerted; the facility of misapplication, and the temptation to it being so great, and the owners being exposed to an unlimited personal obligation beyond even the value of the ship. If in all cases a written authority to the master were requisite, the exercitors might limit the master's power in such a way as to lessen this danger, by requiring particular conditions to each loan; as the consent of the mate or some other confidential person; or certain proceedings, judicial or otherwise, in the foreign port, grounded on satisfactory evidence of the purpose and application of the loan. But even these limitations would manifestly form only an approximation to a safeguard; and as, by the maritime law, the master, by virtue of his place and possession, holds a general authority which requires no written title, the rule of adhering strictly to the terms of the mandate, which are so anxiously dictated by foreign jurists, seems to be vain and nugatory.[3] The power is given to the shipmaster to provide against necessities, which may come in such a variety of forms, or be feigned in so many plausible shapes, that there is no effectual safeguard but a wise selection of a shipmaster; backed, perhaps, by security at home, that the owners shall be indemnified against his transactions. The checks which seem practicable are these:— 1. That the lenders should make every inquiry, which time and circumstances permit, into the nature and extent of the commission held by the master; by requiring production of his authority, if any have been granted, in writing; or by inquiring at others on board; or by requiring to see letters from the owners. 2. That where a special commission is known to exist, or where its existence, or any limitation of power, must be supposed in the circumstances, the limits of the power must be observed.[4] 3. That the lender shall, in all cases, be held bound to see that a necessity exists for the loan required by the master; and, as a part of the same rule, that the loan does not exceed the limits of

[1] The John, Jackson. 3. Rob. Adm. Rep. 288.

[2] Stewart against Hall, supra, p. 525. Note [5].

[3] See Dig. lib. 14. tit. 1. De Exercit. Actione, l. 1. § 12. Igitur præpositio certam legem dat contrahentibus, &c. Stypmannus, *De Jure Marit.* P. 4. c. 115. No. 175.; where he says, Præpositio igitur est cynosura et forma totius negotii nec aliter exercitor tenetur quam quatenus et quousque in singulis contractibus præposuit. Edit. Hienec. p. 546.

[4] Creditoribus hinc circumspecte agere interest, ut in genus commissionis vel officii magistrorum eorumque conditionem quantum tempus et locus permittit sedulo inquirant antequam cum eis contrahant. Casaregis, Disc. de Com. Disc. 71. § 5. See also Vinnius ad Peck. § si plures, p. 111. Loccenius De Jure Marit. Lib. 3. c. 8. p. 6.

See also the judgment delivered by J. A. Murchius, an eminent lawyer of Italy, appointed by the Conservatores Maris to decide a case of this sort, and which Casaregis has printed in illustration of his own opinion. Disc. 71. No. 20, 21.

that necessity. 4. That the loan shall be made in a place and in circumstances to afford relief.[1]

Such are the precautions laid down in foreign authorities. They are so manifestly consistent with equity and good sense, that they have been universally adopted.

In England, they are followed as law.[2]

In Scotland, also, they are laid down by our authors, and followed judicially. Although, according to Lord Stair, 'he who contracts with the master, needs not instruct that the 'money borrowed was actually employed for the use of the ship's company or voyage;' yet 'this much he must make appear, that when he lent the money there was such need 'of it; albeit he be not obliged to take notice whether the master misemployed it or not, 'because the exercitor should have looked who he trusted.'[3] With this the doctrine of Erskine precisely accords.[4] He adds, that 'the bond must, for the exercitor's greater 'security, express the cause of borrowing.'

In Admiralty, several cases have been tried in which these rules have been applied, with the modifications which circumstances naturally dictated. As, for example, the general rule, that the lender is not bound to see to the application, was qualified in one case, where an enormous expenditure had taken place, and the master was admitted to be a weak man.[5]

The evidence of the master to the necessity of the furnishings has been held good in

[1] Casaregis, Disc. 71. No. 12. 15. Roccus says,—'Verum adverte quia quatuor requiruntur ut dominus 'navis teneatur ad restitutionem pecuniæ mutuatæ. 'Primum ut causa sit vera et in illam causam pecunia 'sit versa, licet precise creditor non teneatur habere 'curam ut in illam causam pecunia expendatur. Secundo, Quod mutuans sciat magistrum ad id esse 'præpositum. Tertio, Ut non plus mutuetur quam sit 'navi necessarium dictæ refectioni vel causæ. Quarto, 'Ut in eo loco comparari possint res illæ necessariæ 'ubi mutuum fuit factum.' *De Navibus, Notabilia*, Not. 23. p. 20, 21.

I give the passage, as the work of Roccus is scarce; but the doctrine is delivered in the 7th law of the Digest. See Pothier, Pand. Justin. vol. i. p. 366.

These requisites are well commented on in the judgment of Murchius, above referred to. Casaregis, Disc. 71. No. 34.

[2] Abbot, 103. et seq. CARY *v.* WHITE, in 1710, as reported by Abbot, 104. In a case tried at Guildhall, ROCHER *v.* BUSHER, 1815, 1. Starkie, 27. objection was taken to items for money advanced to the master. Lord Ellenborough (after holding the master a good witness to prove the necessity; see below, p. 530. Note [1].) said,—'In strictness, a claim of this kind is 'limited to articles supplied through necessity. But 'where the same necessity exists, money may be supplied as well as goods, and the amount recovered. 'This, however, must not be understood of an indefinite supply of cash, which the master may dissipate, 'but only such as is warranted by the exigency of the 'case, as for the payment of duties or other necessary 'purposes. I once held, that proof of the strict application of the money to the purposes of the ship was 'necessary; and Mr J. Heath, sitting for the Chief-Justice of the Common Pleas, did the same. We 'are in this case left much in the dark, and I cannot 'advise you to find more than you may deem to have 'been absolutely necessary for the use of the vessel.'

PALMER *v.* GOOCH, 2. Starkie, 428. ROBINSON *v.* LYAL, 7. Price, 592.

[3] 1. Stair, 12. § 18.

[4] Ersk. 3. § 44.

[5] BOGLE, JOPP and Co. against ADAM and MATHIE, 15th May 1801; Judge Cay's MS. vol. A. p. 296. Here the Concordia having sailed to Jamaica under Simson, as master, she struck on a rock at Jamaica, became leaky, and required repair. Money paid for and advanced to Simson at Jamaica, L.3175, on bills drawn by him, and a bond of hypothecation. In support of the action there were produced,—1. An account attested by the captain: 2. The captain's bill, bearing to be for repairs: 3. Hypothecation bond: 4. A survey, report, and attestation at Kingston. It was objected, that in the pursuer's correspondence the master was stated to be little better than an idiot; and that L.800 were stated in the account as paid at once, unchecked, to the master. The Judge-Admiral held the account to divide into four branches:—1. Sums paid to the master for the use of the ship: 2. Sums paid to tradesmen for repairs: 3. Sums paid to retire the master's drafts: 4. Sums for premium of insurance. The accounts being attested by the master, the first point was, Whether that was sufficient evidence? He required the discharged accounts and retired bills as vouchers of the articles paid towards those purposes, to prevent a second claim, as well as to verify the debt. He held the sum of advance to be so great, where the repairs were not paid direct by the merchant, and where the master was weak in mind; that the merchant was to be held responsible for a degree of care beyond the ordinary rule, and to see to the application of the money.

England.' But although the import of the document, bearing value in necessaries, may be prima facie proof to support the claim, it will not be held sufficient, without production of all the evidence, and the examination of the master on oath.

Master's Bond or Bill.

The master may sign a bond, or accept a bill, or draw upon the owners; taking care to express in the obligation the cause of borrowing. The checks on the exercise of this power are those already set down. The master himself is bound by all such obligations, unless he stipulate that the owners shall alone be responsible.

The modes in which pecuniary supplies may thus be raised by the master, besides the loan or mere personal engagement, are, 1. By bottomry or respondentia; and, 2. By sale of the ship or cargo.

3. CONTRACTS OF BOTTOMRY AND RESPONDENTIA.

Bottomry and Respondentia.

These are contracts which may either be considered as personal obligations for the loan of money, or as securities entitling the lender to a preference. In this last respect they might properly find a place among Securities over the moveable property; but it is more convenient to bring all the branches of maritime law into one place.

Definition.

By the contract of BOTTOMRY, or RESPONDENTIA, money is, in contemplation of a particular voyage, lent to the master of a ship in a foreign country, or to the owner of the ship or cargo in a home port; on this condition, that if the subject on which the money is taken be lost by sea-risk, or superior force of the enemy, the lender shall lose his money; and that if the voyage shall be successful, the sum shall be repaid, with a certain profit, or consideration for interest and risk, as agreed upon: and, for the payment, both the person of the borrower is bound; and the ship in bottomry, or the goods in respondentia, are, in certain cases, hypothecated to the lender:[2] In respondentia, however, the chief security is personal. See below, p. 535.

These contracts were formerly more in use, and of more importance than at present: They are now chiefly used for the securing of loans to foreign shipmasters. Abroad, they are still spoken of as among the most frequent and important of maritime contracts;[3] while, in Britain, the increase of trading capital has taken away a great part of their consequence, and made them comparatively of less use.

Parties.

These contracts are entered into either by the owners of the vessel themselves; or by the merchant who is fitting out the expedition; or by the master of the ship at a distance from his owner.

[1] In ROCHER *v.* BUSHER, (supra, 529. Note [2]), Lord Ellenborough held the master to be a good witness to prove the necessity.

It had formerly been so held in EVANS *v.* WILLIAMS by Lord Kenyon; 7. Term. Rep. 481. Note. Here the captain of an Indiaman borrowed money of Evans for the use of the ship. Williams, the owner, objected, that the money was for the use of the captain himself. The captain was called to prove the use; and was objected to, as 'being interested to discharge himself, by 'throwing the onus upon his owners.' It was answered, 'that the owners had a remedy over against him, 'if the money came to his hands; and that he was liable 'on his own bill of exchange, to the plaintiffs on the 'one hand, and to the owners on the other. Lord 'Kenyon thought the objection had been well answer-'ed; but to what extent the witness should be received 'is another question. This does not go on the ground 'of Maxwell being a witness of necessity; for courts 'have very seldom decided on such a ground. I 'think the plea of necessity was only admitted in cases 'upon the statute of hue and cry. I decide this case 'upon the ground, that the witness stands indifferent 'between the parties; for whichever way the question 'goes here, he is equally answerable.'

[2] This is the essence of the definitions given by BYNKERSHOEK, Quest. Jur. Priv. lib. 3. c. 16. vol. vi. p. 506, 7. 9.; by VALIN, vol. ii. p. 1. & 9.; by EMERIGON, vol. ii. p. 385.; by POTHIER, Tr. du Cont. de Prêt à la Grosse Avant. vol. iii. p. 77.; by BALDASSERONI, Del Contratto di Cambio Maritimo, vol. ii. p. 383.; by BLACKST. vol. ii. p. 459.; by PARK, p. 410.; by MARSHALL, 2d ed. 733, 734.; by ABBOT, 119.; and by ERSKINE, b. 3. tit. 8. § 17.

[3] Baldasseroni speaks of bottomry, as one 'che 'oggidi è il piu frequente che si pratiche nelle citta et 'paesi di mare.' Vol. ii. 383.

Owners of Ships.

1. Those only who have a vested assignable interest in the ship or freight may enter into a bond of bottomry to the effect of constituting a hypothec over the ship or freight: as the owners whose names are on the register; or mortgagees. The whole owners may join in bottomry; or any one owner may hypothecate his own share. Where there is dissension among the owners respecting the voyage, the majority carries: and, in case of refusal by the minority, the master may borrow money on bottomry for the outfit proportioned to their share.[1]

Of Goods.

2. In the same way as in regard to those having right to the ship or freight in bottomry, those who have a vested assignable property in the goods may borrow money on respondentia. This may vest a person who has a mere temporary possession as factor with the power of taking money on the credit of his owner's property; but it is limited, by the nature of the contract, to the occasions of the voyage.

Power of Master.

3. The master's power to borrow money on these contracts has already been considered; and for any thing farther that may be necessary on the point, I refer to the case below.[2]

As bottomry deprives the owners of a great part of the profit of a successful voyage, the master of the ship is not permitted, at the place of the owner's residence, to enter into such a contract. This rule seems to exclude such transactions anywhere within the British empire;[3] at least it has been doubted by Lord Stowell, whether the Union with Ireland has or has not altered the rule formerly adopted, holding an Irish to be a foreign port as to hypothecation for repairs.[4]

In a foreign country, the master is allowed to enter into bottomry, if he can no otherwise procure a supply: But where he has already received the money on the footing of personal credit, he is not held to have power to convert the personal contract into a bottomry transaction.[5]

Form of the Contract.

FORM OF THE CONTRACT.—The contract is in the form either of a bond, or of a bill, of bottomry. And, *First*, The sum must be expressed, with the marine interest payable for the loan. *Secondly*, The subject must be specified upon which the money is taken. *Thirdly*, The nature of the risk must be stated, and its termination, as well as its commencement.

The Sum, with the Marine Interest.

1. The sum advanced forms the distinguishing feature between this contract and insurance; and it is essential to the contract, that the sum lent, or a subject of security equivalent to it, shall be exposed to the perils of the voyage.[6] The consequence of loss under a policy of insurance is to render the underwriter debtor for the value insured; the effect of it in bottomry is to extinguish the lender's claim for repayment. The lender in the one case, the insurer in the other, is liable to the same perils.

Bond must bear for the use of the Ship.

Where the money is taken up by the master in a foreign port, the bond must bear, that the money was borrowed for the use of the ship, as the master has no power to hypothecate but for necessary supplies. And this prima facie evidence, supported by proof that the money was fairly and regularly lent for the ship's use, will be sufficient to sustain the contract, and give effect to the hypothec, although, in fact, the master has abused the confidence reposed in him, and misapplied the money.[7] If there be any fraud in which the lender is participant, the contract is of course impeachable on that ground.

[1] This is admitted as an exception in all the maritime codes. 2. Valin, Comm. sur l'Ordon. de la Marine, 10. art. 8, & 9. Molloy, De Jure Maritimo, b. 2. c. 11. § 11. Park on Insurance, 414.
The recusant owner must, according to the Hanseatic Code, be cited to contribute his share: and, at least, a protest would be required with us.

[2] THE GRATITUDINE, Mazzola master, 3. Rob. Adm. Rep. 255—278.

[3] Abbot, 123.

[4] THE RHADAMANTHE, Mayer; 1 Dod. Adm. 201.

[5] THE AUGUSTA, D'Bluhn, 1. Dodson, Adm. 283. See also SWORD against HOWDEN, 27th June 1826; 4. Shaw and Dunlop, 757.

[6] DE GUELDER *v.* DE PEISTER, 1. Vernon, 263.

[7] Marshall, 749.

Bond may be for Repairs or Furnishings.

But it is not necessary that *money* should have been lent: the bottomry creditor may be a carpenter or ship-chandler, who has repaired or supplied the vessel, and who rather chooses to put the amount into the form of a bond of bottomry or respondentia, than to leave it open as an account, though secured by tacit hypothec.

Maritime Interest.

The money lent, or the amount of the furnishing, with the maritime interest, constitutes the sum for which, on the successful issue of the voyage, the creditor has his claim. The maritime interest is in no sense usury. It is analogous to the profit in partnership, or the premium in insurance, and cannot (as it appears to have been under Justinian) be fixed, like common interest, to a particular rate.[1] It is not, like the Fœnus Nauticum of the Roman law, a current interest of so much per cent per month, but a certain sum fixed to be paid, as the maritime interest on the whole voyage. Sometimes, however, where a certain time is appointed for the duration of the voyage, a stipulation is made of a proportional addition, per month or week, after the elapse of that time.

The moment the risk is at an end, the marine interest ceases, and the debt becomes absolute, bearing thenceforward simple interest.[2] This interest has been held, by some lawyers of great authority, to run only on the principal sum, not on the interest.[3] But there seems to be some ground for regarding the sum in the bond as a principal and absolute debt on the successful termination of the voyage. And accordingly, by other authors of great authority, the interest is made to run on the whole sum.[4] In England, the law is laid down consistently with the former opinion.[5]

Subjects of Bottomry or Respondentia.

2. The contract by which sometimes money is lent on a high premium for risk, but without any pledge of the ship, &c. as a security, is not strictly speaking bottomry, but a loan on an adventure, in which the lender has only the personal security of the borrower. This is a legal contract in all cases, except the case of ships bound to or from the East Indies, in which an exception is made by statute for the protection of the trade of the East India Company.[6] In the proper contract of bottomry or respondentia, a subject is pledged for the loan; and the general rule of maritime law is, that whatever is capable of insurance, may be the subject of these contracts: the ship; the tackle and furniture; the provisions; the freight; the cargo; the goods; but not the wages of the sailors.[7]

Bottomry on Ship or Freight.

A bond of bottomry over the SHIP, of course, binds the ship and owners without any qualification. A bond of bottomry on the FREIGHT seems, properly, to have in contemplation only the freight of that voyage; but it has been held, that the lender has the freight of a subsequent voyage bound to him, where the interest of third parties does not intervene.[8]

[1] 2. Marshall, 756.

[2] Dig. lib. 22. tit. 2. De Naut. Fœn. l. 4. Marshall, 751.

[3] Pothier lays it down, that this interest can run only upon the principal, the marine profit being itself interest, which cannot bear interest without usury. Tr. du Prêt à la Grosse Avant. No. 51. vol. iii. p. 97.

[4] Emerigon lays down the law differently from Pothier, on the authority of a number of French decisions, vol. ii. p. 409—416.; but he expresses a humane hope, that some day or other a gentler spirit may regulate this part of the law.

[5] Marshall, 758, 759.

[6] 19. Geo. II. c. 37. § 5. Abbot, 119. But see 2. Marsh. 752.; and Park, 616.

[7] Pothier, Prêt à la Grosse Avanture, No. 9. vol. iv. p. 80. Marshall, 742—747. In France, it was not lawful to borrow money in this way on future freight, nor on the profits of goods. Ordon. de la Marine, Des Contr. à Grosse Avanture, art. 4.; 2. Valin, 6, 7.; 2. Emerigon, 480.

[8] The JACOB, Baer, 1802; 4. Rob. Adm. 245. A bottomry bond was executed in America, in general terms, over ship and freight. The voyage was described as from Baltimore to Cork. The ship sailed, and, without fraud, went to Dublin instead of Cork. She there discharged and sailed, and the lender had no opportunity of enforcing payment. She, after this

It appears that the contract may be entered into, although the ship be at the time at sea.[1]

As money may be taken on the ship, cargo, or parts of either, there may be many bottomry and respondentia bonds on one voyage. In case of partial loss, the right of each lender is appropriate to the subject in his bond.

Effect of the Contract.

EFFECT OF THE CONTRACT.—The effect of the contract of bottomry is to give, conditionally, at once a personal claim, and a real security for the sum to which the lender is entitled;—that of respondentia creates, in general, only a personal obligation.

Right of the Lender in Bottomry.

1. Respecting BOTTOMRY, Mr Erskine has laid it down, but without citing any authority or decision, that it imposes no personal obligation upon the borrower.[2] This doctrine, however, is contrary to all the authorities,[3] and even to the very nature and known effects of the contract. Indeed, the controversy in other countries has been, whether it creates *any other* than a personal obligation? Our older formalists inserted a clause of personal obligation in bottomry bonds; but, on the authority of Mr Erskine, this was at one time omitted in collections of forms. In more modern practice, however, the personal obligation is continued in bonds of bottomry.

Preference of Bottomry Creditors.

The real right which is vested in the lender in bottomry, extends over the particular subject of his security. Where the loan is to the owners of the ship, the security, unless restricted, is over the ship, with its tackle, furniture, and provisions. In England it is fixed law, that 'where the ship and tackle are brought home, they are liable, as well as 'the person of the borrower, for the money lent.'[4] There is not a single reported case establishing this to be the law of Scotland; but this circumstance, with the understood nature of the contract among merchants, is evidence of the law being fixed beyond dispute. Erskine lays down the real burden on the ship as the legal effect of this contract; and, in the records of the Admiralty Court, in every case of a competition of creditors on the price of a ship, the preference of bottomry creditors appears to have been held unquestionable.[5]

Risks to which liable.

RISKS.—In questions on bottomry, it may happen, that the ship may not have sailed; or, that she may have been lost by such deviation or defect as would free an underwriter; or, that she may have suffered damage without any such defect; or, that she may have completed her voyage.

second voyage, returned to Britain, and was arrested, and was by order of the Court of Admiralty sold. The price of the ship was not sufficient to answer the debt, and the freight of this second voyage was attached in the hands of the agents of the owners. The learned Judge of the Court of Admiralty 'held the freight of 'the subsequent voyage, in the custody of the Court, 'answerable for the demand.' He intimated, that this was not a general rule in all cases and circumstances, where any third party may be interested in the freight of the subsequent voyage. But, in this case, there is no person concerned but the owner of the ship and the holder of the bond.

[1] Emerigon denies this, vol. i. p. 484. But Valin (vol. i. p. 346.) lays it down, and his opinion seems to be followed. Marshall, 754.

[2] 3. Ersk. tit. 3. § 17.

[3] Marshall, 743. Pothier, *ut supra*, No. 50.

[4] 2. Blackst. Com. 457. Park, 410. Marshall, 742.

[5] 2. Ersk. tit. 3. § 17.

In a competition, in Admiralty, on the price of the ship George, of Prestonpans, Todd, a creditor by bill of bottomry, was preferred to a carpenter in a home port, and to several creditors by bill. 18th February 1702.

A creditor by bond of bottomry allowed to carry off the whole value of a ship, in competition with personal creditors, and with a carpenter who repaired the ship in a home port. 22d July 1718, Compet. on the JAMES of Leith.

Two bottomry creditors preferred to personal creditors and repairs in home port. 7th January 1726, Compet. on THE JOHN of Kirkaldy.

JAMIESON against RANNIE, 16th March. A creditor by bond of bottomry, granted in Norway by the master for necessary repairs after a storm, preferred to furnishers of ropes, &c. for the voyage.

VAUSE and FACTOR against ZUILLE, 9th April 1734. In a competition between Vause of Boston, on a bond of bottomry by the master in a foreign port, dated 17th October 1731, and a vendee of a sixth part of the vessel, by deed of vendition, dated 15th May 1730, the bottomry creditor was preferred.

Where the ship has sailed.

1. In the first of these cases a real right seems to be vested, as well as in the last.[1] The marine interest, indeed, cannot be due, because that is the price of a risk, which, in such a case, is not incurred;[2] but the money has been advanced on the faith of a real security, and it has been applied to the benefit of the ship; and therefore, to the extent of the principal and common interest, there appear to be legal grounds for preference.

Not Seaworthy.

2. Where the ship has perished by not being sea-worthy, or by deviation, the personal contract will be effectual. It may be questioned, whether, in a case of want of seaworthiness, the risk has ever begun; and so, whether the rule, applied above to the case of a ship which has not sailed on her voyage, should not regulate the lender's claim?

Fair loss.

3. Where there is partial loss, a distinction is (in the absence of specific stipulation) admitted between general, and particular or simple average; the lender being held liable to the former, not to the latter.[3] General average is for a loss incurred, towards which the whole concern is bound to contribute pro rata; because it was undergone for the general benefit and preservation of the whole. Simple or particular average is one of those incorrect expressions, which, though in familiar use, and sufficiently understood by persons versant in the matter, are apt to mislead. It means nothing more than the damage incurred by or for one part of the concern, and which that part alone must bear. The loss of an anchor, the starting of a plank, the leaking of a cask, the accidental loss of part of the ship, or cargo washed from the deck, are examples of simple or particular average, or loss incident to the proprietor that suffers. The loss of masts, or rigging, or goods, cut away or thrown overboard, to ease the ship and lessen the common danger, are examples of general average.[4] In one sense, simple or particular average affects the bottomry or respondentia creditor, where it lights upon the subject of his security; for it lessens the security which he holds: In another, it has no effect on his debt, since the condition of payment is the arrival of the ship or goods;—that condition is fulfilled by their arrival, though damaged; and unless there is an express stipulation that his claim shall be liable to particular average, the whole sum is due. In the same sense, the real security is subject to general average; but, farther, the creditor is also liable to a deduction from his personal claim against the lender, on account of general average. So it is laid down by the best foreign authorities,[5] who even hold an opposite stipulation to be unlawful. But different usages prevail in different countries, and that of the particular country to which the ship belongs must be regarded. In England, it seems to be a disputed point, whether the lender be liable to general average, independently of stipulation. The dicta of two eminent Judges, adverse to the lender's obligation, are reported in the books;[6] and the two authors who have lately written on this subject differ very much in their opinions on the point.[7] But Mr Marshall seems to me to have supported the doctrine very satisfactorily, that bottomry

[1] So it is laid down by Emerigon, vol. ii. p. 559. and 567. where he endeavours to reconcile the part of the Ordon. de la Saisie with the 23d chapter of Il Consolato.

[2] Dig. de Naut. Fœn. l. 1. Marshall, 756. In England, in the case of De Guelder v. De Peister, Lord Keeper North so decreed. 1. Vernon, 263.

[3] See below, Of Average.

[4] Pothier, vol. iv. p. 91. Prêt à la Grosse, No. 44. Lord Stowell's judgment in the Copenhagen, 1. Rob. 293.

[5] Pothier, vol. iv. p. 91. No. 44. 2. Emerigon, 505. with the authorities he quotes.

[6] Lord Mansfield, in Joyce v. Williamson, said,—'It is clear, that, by the law of England, upon a bottomry contract there is neither average nor salvage.' King's Bench, Michaelm. 23. Geo. III. MS. Marshall, 754. And Lord Kenyon, in Walpole v. Ewen, Sitt. after Trin. 1789, said,—'By the law of England, a lender on respondentia is not liable to average losses.' Park, 423.

[7] Park, 423. Marshall, 745. 760.

creditors are liable to general average. In Scotland, there is neither decided case nor authority on the subject. The bond will, of course, regulate the question where it is explicit: where it is not, the rule adopted abroad, and for which so fair a principle is assigned, would certainly have much influence.

Completion of the Voyage.

4. Where the voyage has been accomplished, the real right, as covering the whole claim, has vested over the ship, with its furniture, tackle, and freight: the ship, &c. may be brought to sale, the freight stopped in the hands of those by whom it is due.

Proceedings.

Proceedings.—To make the debt effectual, the proceedings are, in Admiralty, by an application for the sale of the ship, and payment of the bottomry debt, or a warrant against those who owe freight.

Ranking of Bottomry Creditor.

The order of preference of bottomry creditors is in favour of the last in date; that loan or debt of which it can be said, 'Salvam fecit totius pignoris causam.'[1] So, 1. Seamen are, for their wages, preferred to a bottomry creditor; for without their aid the furnishings are useless, and the voyage, whereon the lender's right depends, cannot be accomplished. 2. The last bottomry creditor is always preferred. If the owners have taken up money on bottomry to fit out the vessel, and, in the course of the voyage, the master has been forced to refit, the furnishers, in a foreign port, or lenders on bottomry for this purpose, are preferred before the former bottomry creditor. This proceeds on the same principle with the other rule of preference: Without this second loan, the vessel could not have proceeded, nor the voyage have been accomplished. 3. The bottomry creditors on the latest voyage, are, in the Continental laws, preferred on somewhat of a similar principle.[2] 4. An effectual bottomry debt is good against purchasers in the course of the voyage; and it seems also to be effectual against prior lenders on vendition in security; for they are either owners, or, at least, the subject of their right is benefited, or the managers of it furnished with means by the bottomry loan.

Respondentia.

2. The contract of Respondentia is, in foreign nations, attended with the same real security over the cargo that bottomry produces over the ship.[3] In England, Blackstone has laid it down, that the claim is only personal; but he rests this doctrine upon a principle so narrow,[4] that doubts are naturally suggested of the soundness of his rule in any case. Accordingly, the later authors seem to admit the real security, wherever there is an express stipulation to that effect.[5] In Scotland, we are not very familiar with

[1] See the principle of this well explained by Casaregis, in reprehending the judgment given by a celebrated lawyer, who was assumed by the Tribunal of Conservatores Maris to settle a contest respecting the price of a ship.—'Totum fundamentum, (says Casare-'gis), D. Martelli consulentis residebat in ea trita ac 'vulgari conclusione quod prior in tempore potior in 'jure esse debet.' Discursus de Commercio, Disc. 18. vol. i. p. 48.

[2] Guidon de la Mer, ch. 19. art. 2. and 3. Ordon. de la Marine, 'Des Cont. à la Grosse Avanture,' art. 10. Valin, vol. ii. p. 11. Casaregis, Disc. 18. n. 14. and 23. and D. 62. No. 20.

[3] Pothier, Tr. du Cont. de Prêt à la Gr. Avant. No. 56, 57. vol. iii. p. 97. Emerigon, vol. ii. p. 561.

[4] 'If the loan is not upon the vessel, but upon the 'goods and merchandise, *which must necessarily be* 'sold or exchanged in the course of the voyage, then only 'the borrower personally is bound to answer the con-'tract.' 2. Black. Com. 458. This principle does not apply to every case; for, 1. The voyage may be homeward. 2. If the voyage be out and home, the goods substituted for the outward cargo might afford the same security; and, in foreign nations, this is the law. Emerigon, vol. ii. p. 561.

[5] Thus, Mr Park says,—'Bottomry is a loan upon 'the ship; Respondentia, on the goods: in the former, 'the ship and tackle are liable, as well as the person 'of the owner; in the latter, *for the most part, recourse* 'must be had only to the person of the owner.' P. 410. Marshall, in his first edition, after saying, that the respondentia lender has, in general, only the personal security of the borrower, adds,—'But the personal 'responsibility of the borrower is not, in all cases, the 'only security of the lender. Where the money is 'lent for the outward and homeward voyage, the goods 'of the borrower on board, and the returns for them, 'whether in money or in other goods, purchased abroad 'with the proceeds of them, are liable to the lender.' P. 633. On this passage, in the first Edition of this Work, it was observed, that Marshall quoted, for this doctrine, only the authority of Pothier and Emerigon,

this contract; and no cases are to be found in our books in which it has become the subject of discussion. It is to be expected, that were any case to occur, our Judges would pay much regard to the English rules; and that they would be brought, with great reluctance, to sanction a real security upon goods on the footing of a respondentia bond, unless on special stipulation.

Claim.

CLAIM.—The claim under contracts of bottomry and respondentia, is not very different in the two contracts.—1. In respondentia, as in bottomry, where the goods have been utterly lost by the fault of the master; in consequence of wilful deviation; from the vessel not being sea-worthy; or from the goods being improperly packed and loaded; the claim of the respondentia creditor is effectual, but, of course, merely personal. 2. Where the loss has arisen from any other accident, for the risk of which an insurer would be liable, the claim is extinguished. 3. Where the voyage has never been entered upon, the claim is restricted to the principal sum, with common interest. 4. Where the voyage has been successfully accomplished, the claim for the principal and marine interest becomes absolute. 5. When the ship is lost, but the goods saved, a respondentia creditor is entitled to his money: as where the ship is saved, but the goods lost, the bottomry debt is good.

In concluding on this contract it may be observed, that there is nothing in the nature of it to prevent the creditor from taking collateral security for the personal obligation, provided the condition of completion of the voyage be made a part of it, and that it is not a wager.[1]

SALE OF THE SHIP OR CARGO FOR THE SUPPLY OF NECESSARIES.

The last resource for the supply of necessaries is the sale of the ship or cargo.[2]

The master has no power thus to sell, without having first deliberately tried every other expedient.[3] Nay, it has sometimes been denied that he has any such power; but only a power to hypothecate.[4] In later cases, however, this power has been sanctioned in England, and the precedent will apply in Scotland. In one case of the sale of the ship, it was laid down as law by Lord Stowell, that it must be shewn there was a necessity; and that in making out such a case, it is requisite to prove, not only that the vessel was in want, but likewise that it was impossible to find money for that purpose, without a sale.[5] In another case relative to a sale of part of the cargo, the same principles were applied;[6] and generally it may be observed, that the duty of the master being to send the goods to

two foreign lawyers: that both of these are certainly of great authority, (though, in truth, he has the support only of Emerigon; for Pothier, in the place referred to, is speaking of the question of *risk*, not of *preference*); and that there seemed reason to suspect, that, while the practical doctrine ought to be taken as broadly as it is laid down by Blackstone, the narrowness of the principle which he assumes has had a tendency to unsettle the rule. In Mr Marshall's 2d edition, he has altered this passage; confined the doctrine to the French law; ('According to the French writers, the 'personal responsibility,' &c.); and, on the authority of a case in King's Bench, laid it down,—'That unless 'there be an express stipulation to that effect in the 'bond, the lender has no lien on the homeward cargo, 'nor any other security for his demand than the per-'sonal responsibility of the borrower, or his sureties, 'if he has any.' P. 743.

The case referred to by Marshall is BUSK *v.* FEARON, sent, on a case by the Lord Chancellor, for the opinion of the King's Bench. 4. East, 319.

[1] So found by the Court of Session in MASON against HENDERSON, 16th December 1784; 7. Fac. Coll. 290.

[2] Abbot, 2. and 241.

[3] UNDERWOOD *v.* ROBERTSON, 4. Camp. 138.

[4] JOHNSON *v.* SHIPPIN, 2. Lord Raymond, 984.

[5] FANNY *v.* ELMIRA, Hicks, 1809; Edward's Adm. 117.

[6] FREEMAN *v.* EAST INDIA COMPANY, 5. Barn. & Ald. 617. See also, ROYAL EXCHANGE COMPANY *v.* IDLE, 8. Taunt. 755.; 3. Brod. & Bing. 151. Note.

their destination, no power is implied in him which has not this object in view: nor is he entitled to levy money by an absolute sale of goods, to be delivered at the port of destination to the lender or his agent, without a right of redemption to the owner.[1] 2. That although he may sell perishable goods which cannot be carried to their port, yet, where the goods are of a different description, circumstances must shew a necessity to justify a sale short of the port of destination.[2] How the master shall proceed to trans-ship, to deposit and store, or how else to deal with the goods, may be difficult to be determined in various circumstances; and no general rule can well be delivered, except the injunction to do that which a wise and prudent man will think most conducive to the benefit of all concerned.[3] But at least a sale is the last thing to be thought of, and the most difficult to be justified.

In short, the doctrine seems to resolve into this, that in proving the necessity that is to justify a sale, either of ship or cargo, without the consent and at a distance from the residence of the owners, it must at all events be made to appear, that the necessity was imperative; that there was no correspondent of the owners at hand, who could supply necessaries for the ship; that no money could be had by hypothecation; and that every thing had been done in bona fide, and for the true benefit of the owners.

CLAIMS FOR REPAIRS AND FURNISHINGS ON BANKRUPTCY.

Claims may arise on contracts for the repairs and necessaries of a ship, either on the bankruptcy of the owners, or on that of the master, or on that of all the parties to the contract.

I. Claims on the Bankruptcy of the Owners.—1. The owners are liable only pro rata on contracts in which they personally engage. They are not sureties for each other; but each is considered as the manager of his own share of the common estate. On the bankruptcy, therefore, of any one owner, or on the bankruptcy of them all, the claim must be restricted to the individual shares.

2. When the contract is by the shipshusband or master, the tradesman has, in Scotland, a claim against each owner for the whole sum; drawing no more on the whole than full payment. The claim is as extensive as in England, where the plea of abatement has been omitted.[4]

3. If the tradesman do not claim against the owners, but takes recourse against the master, the master will be entitled to a claim for relief against the owners.

4. Where a claim has been entered on both estates, if the master be indebted to the owners, he will be entitled to plead compensation or retention against his owners to the effect of relieving himself.

II. Claims on the Bankruptcy of the Master.—The general rule is, that the master is himself debtor for all furnishings of repairs and necessaries made by his order to the vessel under his charge, or sent to the ship while under his charge, without a special contract with the owners; and for all supplies of money to him as master. A claim may therefore be entered on his bankrupt estate in such cases, whether the supplies and furnishings have been actually bestowed on the ship; or converted to the master's use; or embezzled by the crew under his command. The claim may be made against the estates both of the owners and of the master: or it may be directed first against the owners; or first against the master's estate.

[1] See Johnston v. Greives, 2. Taunt. 344.

[2] Van Omeron v. Dowick, 2. Camp. 41.

[3] See Christy v. Rose, 1. Taunt. 313. Liddard v. Lopez, 10. East, 256.; Abbot, 242—3.

[4] Abbot, p. 82.

1. Where both have failed, and, the supplies having been fairly applied, the claim is made against both, the creditors may rank on the estate of each for the whole sum. In this case, the master's estate will have the benefit of set-off against any balance of freight levied by him. He will also be entitled still to insist on levying any freights not yet paid, but which he had previously power to levy, so as to indemnify himself for his engagements.

2. If the supplies have been fairly employed for the necessary occasions of the ship, then the master's estate, against which a claim for the amount has been made, will be entitled to demand relief from the estate of the owner, provided no claim has already been made on that estate by the merchant. But even where such claim is entered, compensation or retention will be pleadable by the master's estate against the owners, on any balance which the master may happen to owe to the owners.

3. If the master have abused his powers, and perverted to his own use the supplies given, or money paid to him, the owners will be entitled to demand relief from the master's estate, provided a claim has not already been entered on that estate by those who have made the advances.

SECTION II.

OF CONTRACTS FOR THE EMPLOYMENT OF THE SHIP ON GENERAL OR SPECIAL AFFREIGHTMENT.

A SHIP may be hired or freighted by one or more merchants for a particular voyage, or on time: Or it may be advertised for the general use of all merchants who have goods to send to the port of the ship's destination, and independent contracts may be made for the carriage of specific articles. The former is called a CHARTERED SHIP; being freighted by a special contract of affreightment, executed between the owners, shipshusband, or master, on the one hand, and the merchants on the other: The latter is said to be a GENERAL SHIP, or a ship on GENERAL FREIGHT; the bills of lading granted by the master on receiving the specific goods being commonly the sole evidence of the contract for carriage of those goods. Bills of lading are used both in special affreightment, and in taking goods on board of general ships; not to supersede in the former case, but to aid the evidence of the charter-party, by proving against the shipmaster the goods actually taken on board under the contract; and to afford the means of transferring the goods while the ship is at sea.

It is proposed in this Section to explain, in the first place, the leading principles by which the doctrine of these contracts is regulated; and then to consider the several questions that may arise on the failure of any of the parties.

§ 1. GENERAL PRINCIPLES RELATING TO CONTRACTS OF AFFREIGHTMENT.

The contract of affreightment is that by which an entire ship, or a principal part of it, is let to a merchant for the carriage of goods, or for such other use as it may be applied to; the owner of the ship being bound that the ship shall in all respects be fit for the stipulated purpose; and the merchant being bound to pay a certain sum for the freight or hire of the vessel. This contract, by us called AFFREIGHTMENT, or CHARTER-PARTY; AFFRETEMENT in the French books, NAULIS in those of Italy, is of the class of contracts locatio conductio.[1] The essential principles and rules by which it is regulated are

[1] See above, p. 451. Of Contracts of Hiring.

the same in special and in general freight. These the charter-party expresses pretty fully; while the bill of lading, in general freight, leaves the chief obligations to the construction of law.

1. OF CHARTER-PARTIES OF AFFREIGHTMENT.

Charter-party of Affreightment.

In Scotland, the charter-party is not trammelled by those technical rules which, to a stranger, appear to oppose so many bars to the efficacy of the contract, according to the jurisprudence of England.[1] The contract, when duly executed by the owners, or by the shipshusband, or by the master within the limits of his powers, is binding on the owners, and gives action direct in the Court of Admiralty against all concerned: It also in general contains a registration clause, in virtue of which it may be the ground of summary execution, without any necessity for a previous action.

Requisites of Charter-party.

The engagement to carry goods is, in its nature, a contract consensual; not absolutely requiring writing, but which may be proved by the oath of the owners; by the evidence of the master, mate, and others; by a bill of lading; by the fact of the merchant's goods having actually been carried; or by the fact of the goods being actually on board. The special contract of affreightment was formerly required by statute to be executed in writing in the form of a charter-party;[2] and now any written contract entered into on this occasion is subject to a stamp-duty:[3] But no particular form of instrument or solemnity is necessary. This contract may be proved by formal charter-party, authenticated according to the requisites of the Act 1681 and other statutes; or by a memorandum, letter, or the like, holograph; or even if not holograph, but only signed by the parties, such writings will, as in re mercatoria, be sufficient to sustain action.

Affreightment of whole Ship.

The affreightment may be of the whole ship; or of a part of the ship, described commonly by the ton, or barrel bulk.

Where the whole ship is freighted, it is the freighter's for that voyage; the unoccupied space is his, to fill up in any way that he pleases; and the master cannot receive other goods without the freighter's consent. If other goods be taken, either with his consent or without his knowledge, the master is accountable to him; while the whole freight is due whether the ship be filled up or not.[4]

Of Part.

Where a part only is freighted, the master sufficiently discharges his obligation, if he give the stipulated room either in the place of the ship agreed on, or in a safe and proper place.

Voyage. Time.

The ship may be hired for one or more voyages specifically described; or for a particular time. In the former case, the obligations are all regulated in reference to the particular voyage; in the other, they will be construed according to the more extensive object of the contract. The freighter, on time, is held tanquam dominus navis to many effects; as in questions of responsibility for furnishings on account of the voyage, or in the course of the ship's employment;[5] or in questions of stoppage in transitu. In affreightment for the voyage, the ship is still, in all respects, considered as in the possession of the owners.

[1] See Abbot, P. iii. chap. 1. p. 163. et seq.

[2] By 1466, c. 14. no ship was to be freighted without a charter-party, of which the points are specified. This law had fallen into neglect within the short space of twenty years, and was renewed by 1487, c. 109. But this, as well as the former Act, is not now in observance.

[3] The stamp-duty for a regular charter-party, or for a memorandum, letter, or other writing to stand in place of a charter-party, is by the statute 55. Geo. III. c. 111. £. 1. 15s.

[4] Pothier (Charte-Partie, No. 22. vol. ii. p. 377.) on this point corrects Valin, vol. i. p. 607.

[5] See above, p. 521.

General nature of the Contract.

By this contract, the owners, or their representative, let to freight to the merchant, and he, on his part, hires and takes to freight, the ship, by name and description, during a definite time, or for a specified voyage or voyages; for which the merchant binds himself to pay freight, either a particular sum, or so much per month, or so much per ton, &c. This being the essence of the charter-party, the obligations of the respective parties are raised by construction of law as the naturalia of the contract, unless in so far as altered by special stipulation.

Hiring of the Ship.

I. The OWNERS and MASTER are bound, in fulfilment of their contract, to the following particulars:—

Obligation of the Owner and Master.

1. That the ship shall be sea-worthy, or in all respects fit for the stipulated purpose; the hull sound; the tackle and outfit sufficient; the master and seamen able, and skilful, and adequate. 2. That the ship shall be at the loading port, and clear for taking in the stipulated cargo, on the appointed day; and shall lie in readiness to load, during a reasonable time; after which the master may sail; or, if he stay, he may claim a consideration for loss of time. 3. That the ship shall sail at the appointed day, wind and weather serving. 4. That in taking the goods on board, in stowing them, and during the voyage, the master and crew shall take due care of the goods, according to the diligence prestable in the contract of location.[1] 5. That the ship shall be navigated according to the rules of good seamanship, and by the most direct, or, at least, the usual course for the destined port: and, 6. That on arrival at the port of destination, the master shall deliver the goods, according to the bill of lading or address, in the same good condition as when put on board.

Obligations of the Merchant.

II. The obligations of the MERCHANT or FREIGHTER are,—1. That he shall furnish a sufficient cargo. 2. That the goods shall be sent within a reasonable time, otherwise the master may depart. 3. That provided the voyage is completed, and the goods delivered, the stipulated freight shall be paid either at delivery of the goods, or at a stipulated time; or that a bill shall be accepted for the amount. Many nice and difficult questions may arise, depending on the construction of the contract, whether, in various circumstances, freight may be demanded pro ratâ itineris. 4. That if the ship be detained beyond a certain period, the owners shall be entitled to an indemnification for loss of time.

Special Stipulations.

III. There may be many modifications of these terms, engagements, and risks; and many particular stipulations may be introduced, fixing new points of agreement between the parties, and giving rise to special claims. For example, although the parties may have

Course.

arranged generally the destination, it may often be requisite (particularly in time of war) to reserve a power of directing the course and termination of the voyage, according to circumstances. The merchant may, accordingly, reserve this power generally, or within certain limits; and, under such reservation, the supercargo is held to have the power in absence of the merchant.[2] How far this power may be exercised by the bill of lading, shall be considered below.[3] But a mere parole substitution of one port for another stipulated in the charter-party, will not be sufficient.[4]

Demurrage.

Sometimes again, instead of leaving the time of loading or unloading to legal construction, a certain number of days is specified; and, instead of leaving the indemnification for undue delay as a vague claim of damages, a certain sum, under the name of demurrage, is stipulated. But all these, together with the more minute discussion of the questions arising out of the co-relative obligations now enumerated, will be considered under the claims on the bankruptcy of the several parties.[5]

[1] See above, p. 454.

[2] DAVIDSON v. GWYNNE, 12. East, 396.

[3] See below, p. 543.

[4] THOMSON v. BROWN, 1. Moore, 358.

[5] See below, p. 545. et seq.

2. OF SHIPS ON GENERAL FREIGHT.

The contract for the conveyance of merchandise in a general ship, is made between the shipowners, or the master acting for them, and the several owners of the goods to be carried. It is the pure contract locatio operis mercium vehundarum. It is left to legal construction, being seldom reduced into a written contract further than as it may be said to consist, *first*, Of the advertisement of the ship for freight; and, *secondly*, Of the bill of lading.

Effect of Advertisement.

1. The ADVERTISEMENT proceeds expressly or tacitly from the owners or shipshusband.[1] The master in a foreign port has their full authority; while in a home port their assent is presumed to a public advertisement. The advertisement therefore is a part of the contract. Where it is conceived in general terms, the law supplies all the parts of the contract which the bill of lading does not express. Where the advertisement contains any special conditions, they are held as undertakings warranted on the part of the owners.[2] Some doubt was entertained on the import of an advertisement, bearing the expression 'to sail 'with convoy;' whether it amounted to a warranty, or expressed only an intention, which, if accidentally frustrated, gave no relief. But it has been held in England, under three Judges eminent for their knowledge in mercantile jurisprudence, that such an advertisement does infer a warranty.[3]

The owners of a general ship, advertised as bound for a particular port, must give to every person who may ship goods on board, specific notice of any alteration in the destination; and they will be liable for all the consequences of neglecting this.[4]

Bill of Lading.

2. The BILL of LADING expresses more directly, and in the way of contract, the principal points of the owner's and master's contract: But it is chiefly confined to the description of the goods acknowledged to be received; the port of delivery; and the risks to be run; with the rate of freight to be paid by the shipper.

Of engaging Freight in a General Ship.

In a general ship a merchant may, by contract, engage freight to a certain extent, and the agreement may be effectually established by parole evidence. It may, however, be observed, —1. That as the master has full power to contract for and take in goods where the ship is on general freight, no agreement with the owners engaging freight will be effectual to secure to a merchant room in the vessel; unless it is intimated to the master, or to those acting for him on board, before he has taken goods on board, or engaged freight for the whole of the vessel: And, 2. That although a merchant is entitled, on the advertisement of the ship

[1] RINQUEST *v.* DITCHEL, 1800; Abbot, 98. Lord Kenyon held owners bound to sail with convoy, though there was no proof of the owner having authorized the advertisement.

[2] Lord Chief-Justice Abbot lays down this law, 224. There is also reference in the note to a case, SNELL *v.* MARYATT, which is stated more correctly in the Addenda, p. 644. where a question arose on the expression, 'to sail with convoy,' in the advertisement, whether this was controlled or altered by a subsequent bill of lading not bearing those terms? The doubt seemed to be, not so much whether the advertisement could be received as part of the contract, but whether the expression amounted to a warranty, which, in the peculiar circumstances of the case, would ground an action.

[3] RINQUEST *v.* DITCHEL, supra, before Lord Kenyon. In SNELL *v.* MARYATT, 1808, in granting a new trial, the attention of Counsel was directed to the import of such an expression, but it was never tried. In SAUNDERSON *v.* BUSHER, 4. Camp. 54. Note, Lord Chief-Justice Gibbs held such an expression to import an undertaking to sail with convoy; and Lord Ellenborough concurred in this dictum. MAGALHAEM *v.* BUSHER, 4. Camp. 54.

[4] PEEL *v.* PRICE, 4. Camp. 243. Here a ship, first advertised for Messina and Naples, was afterwards altered to Naples and Messina. Peel came with his goods for Messina after this alteration, and he insured to Messina. He was afterwards obliged to effect other policies at a higher premium, with leave to sail to Naples, and brought his action for the difference. The owners were held liable for not having given specific notice of the alteration.

for general freight, to insist that goods which he brings alongside, and which are not unfit to be taken, shall be received by the master, provided the ship is not filled up; yet if the master has engaged, or if the owners have made a contract, which has been intimated to the master, for the unoccupied room in the vessel, the merchant who comes on chance must yield the preference.[1]

3. BILLS OF LADING.

A BILL of LADING is the written evidence of the undertaking to carry by sea, and deliver the goods therein described, for a certain freight.

Bills of lading are made use of, both in combination with a charter-party, and for an engagement of freight in a general ship. But the bill of lading is commonly the sole evidence of the contract in the latter case; while in the former it is only collateral,—its chief use being to fix the goods on the master, in fulfilment of that part of the charter-party. The form and effect of bills of lading have already been referred to in considering the question of delivery.[2] It is here necessary to consider the subject more at large.

Bills of Lading.

Bills of lading are generally preceded by a simple receipt, acknowledging, on the part of the master, or of the mate, or other person on board acting for him, that the goods have been received. This fixes the goods on the ship; and both master and owners would be liable to all the usual obligations or naturalia of the contract on this document alone. But the bill of lading is more ample, and serves important uses in the transference of the goods. The master must be careful not to give a bill of lading until the receipt is returned to him, or cancelled; for he may thus place himself under a double responsibility; to the shipper on the receipt, and to a holder of the bill of lading purchasing on the faith of it.[3] Care also must be taken not to deliver a bill of lading, even without a receipt, to any one but the shipper, without his orders, for he may in the same way incur a double responsibility.[4]

A bill of lading is called by French authors *Connoissement;* by Italian, *Polizza di Carico;* and by the Latin authorities of the Continent, *Apocha Oneratoria*. The form used in Britain is uniform, and generally printed with spaces left for introducing the names and descriptions of the ship, captain, goods, and voyage.[5] Special stipulations may, however, be introduced.

[1] THOMSON against CLARK, 15th June 1809. Thomson, trusting to the advertisement of a general ship, together with the assurance of the master that he would take goods if in time, brought alongside a quantity of goods, which were refused by the master, on the ground of his room being occupied by goods expected, and for which freight was engaged. Thomson, thinking he had a right to insist that his goods should be taken, took the violent proceeding of arresting the ship and the master, with goods worth L.70,000. The water-bailie of Clyde, under the direction of Mr Reddie, the learned assessor of that court, held that Thomson was not entitled to have his goods taken on board, as he had not established any special contract to that effect. And the Court of Session affirmed the judgment.

[2] See above, p. 198. et seq.

[3] CRAVEN v. RYDER, 6. Taunt. 433., and 2. Marsh. 127.
HAWES v. WATSON, 2. Barn. and Cresswell, 540.

[4] RUCK v. HATFIELD, 5. Barn. and Ald. 632.

[5] Shipped, by the grace of God, in good order and well conditioned, by A B, in and upon the good ship called , whereof C D is master, and now at , bound for , the goods following, viz. *(here describe the goods)*, marked and numbered as per margin, to be delivered in the like good order and condition at the port of , (the acts of God and the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted), unto , he or they paying freight for the said goods at the rate of per with primage and average accustomed. In witness whereof, I, the said master of the said ship, have affirmed to three bills of lading, of this tenor and date; any one of which bills being accomplished, the other two are to be void.
Dated at this day of 1827.
C. D.

Bills of lading of goods to be exported are invalid, if not on a stamp.[1] The right to the goods may, indeed, be otherwise established; but wherever the bill of lading is requisite to support the right of the claimant, the want of a stamp will be fatal.[2]

The parts of this instrument to which it is important to attend are these:—

Voyage.

1. After the name of the ship and master, the VOYAGE is described. Where the charter-party leaves the direction of the voyage to the merchant, the signing of bills of lading to a particular port precludes a subsequent change by the merchant; unless he shall give up those bills of lading, or indemnify the master and owners against claims by the holders of the bills.[3] On the other hand, in such a case, the taking of bills of lading specifying a certain port will not irreversibly fix the destination, or conclude the election, provided indemnity be offered. The master cannot in this case be heard to say, that he has insured to the port mentioned in the bill of lading; for under such a charter-party he ought to have insured to port or ports within the limits. Where a port mentioned in the enumeration of ports in the charter-party is omitted in the bill of lading, it fully relieves the master from going to that port: But where the foreign correspondent has desired him to go thither, his going has been held justifiable as in a question with the freighter.[4]

Goods.

2. The GOODS are described by their external characters and marks, varied according to the nature and condition of the commodity, and the degree of knowledge which the master has of it, and for which he agrees to be accountable.

Delivery.

3. The obligation to DELIVER may be either general, and left in blank; or filled up to a particular person, as consignee; or to the consignor, and his assignees. It may also be limited to a special purpose: But this latter form is seldom practised.[5]

Risks.

4. The exception of RISKS, for which the owners and master are not to be responsible, has been of late years enlarged from the simple exception 'of the dangers of the seas,' to an exception 'of the act of God, the king's enemies, fire, and all and every danger and 'accident of the seas, rivers, and navigation, of what nature and kind soever, excepted:' but from this, in particular cases, where cargoes are brought in boats from the shore, is saved, 'the risk of boats, so far as ships are liable thereto.'[6]

Freight.

5. The master may insist on the condition of the PAYMENT OF FREIGHT being performed before he delivers the goods, or he may at his discretion dispense with that condition.[7]

Several Bills of Lading.

There are commonly three bills of lading made out, (but that is regulated by the occasion); one for the buyer or consignee, to go by post; another to go with the cargo; and a third for the seller or consignor: Each bill containing a clause, that one being performed, the rest shall be void. Each is a contract in itself as to the holder of it; but the whole make only one contract as to the master and owners.

Under this instrument several questions may arise:—

[1] See below, p. 547.

[2] DAVIS v. REYNOLDS, 1. Starkie, 115. In this case 19 mats of flax were sent from the north of England to London, and landed on Reynolds's wharf there. The buyer of the flax from the consignee tendered a bill of lading in support of his demand of the goods. It was rejected for want of a stamp. Then the plea was, that there was no evidence of a transfer. Lord Ellenborough said, The right of possession follows the right of property. When the goods arrived at the wharf, they were delivered to the wharfinger, as bailee, for the benefit of the person entitled. At that time the consignees were entitled, for they had paid for the goods, and had thereby acquired a right of property which they were competent to assign.

[3] DAVIDSON v. GWYNNE, 12. East, 381.

[4] SHEPHERD v. DE BERNALES, 13. East, 565. Here ships were freighted to go to Tangiers, St Lucar, or Cadiz, and in the bill of lading Cadiz was omitted. The consignee at Tangiers ordered the master to deliver at Cadiz, and he did so. The freighter was held to have no defence against payment of freight on the ground of the master having gone to Cadiz.

[5] See below, p. 547. (5).

[6] See below, p. 561.

[7] See afterwards, whether, under a charter-party, freight may be claimed, where the master has delivered the goods in a bill of lading containing this clause, —without demanding the freight from the consignee.

Condition of the Goods.

1. The shipmaster is as a trustee; having possession of, and a special property in the goods, for the purpose of carriage and delivery to the person who shall have right to demand performance of his engagement. The bill of lading is his acknowledgment for the goods, as received in good order and well conditioned; accompanied by his obligation to deliver them in equally good order, under condition of the payment of freight. In general, the master is not liable for any thing but the external packages, and the fidelity of those on board in not invading the property within; unless the bill of lading shall contain a particular description of the goods, and of their condition. By the French marine ordinance[1] it was necessary to specify in the bill of lading the quality, quantity, and marks of the goods. But this means only the exterior and apparent quality; for it seldom can happen that the goods should be so exposed to the master's examination as to enable him to undertake for any specific condition of those goods. 'It is held,' says Valin, 'that the bill of lading affords evidence only of the genuine exterior and apparent quality 'of the goods; as, when it bears the goods to be indigo, hemp, sugar, linen, cotton, the 'master is responsible for goods of that sort, and for the same number of bales or casks, 'and with the same marks with those described in the bill of lading. But as to the 'specific internal or concealed quality; as, whether the indigo is the true or bastard 'species; the linens of a particular quality, &c. the bill of lading imports no obligation in 'this respect, unless proof be made of the bales, &c. having been exposed and examined.'

The master sometimes adds, for security against responsibility, 'the quality or contents 'unknown.' This ought to be added where there is any difficulty or uncertainty about them; and the claim will, in such a case, be limited to the delivery of the casks, bales, &c., as identified by their marks, in the same condition in which they were put on board.[2] In England, a bill of lading, though very particularly expressed, is not, in a question on a policy of insurance, taken as evidence of the property alleged to have been lost: And at all events, the addition of the clause, 'contents unknown,' has been held to render the bill of lading useless as proof of the contents.[3]

Where the master examines and expresses in his bill of lading the special condition of the goods, this will be evidence against himself and the owners; and it would seem that it will be good evidence also against third parties; as against underwriters.

Competition of Holders of Bills.

2. When the several parts of the bill of lading are found to have been indorsed to different persons, a competition may arise for the goods. Generally in such a case the shipmaster gives up the goods to him who offers the best indemnity against future challenge.[4] A still safer course is to lodge the goods in a warehouse; and to call the competitors to a judicial determination of their contest in a multiplepoinding; in which the

[1] Ord. de la Marine De Connoissemens, liv. 3. tit. 2. art. 2. 1. Valin, 599. Pothier, Charte-Partie, No. 17. vol. ii. p. 375.

[2] See Casaregis, Disc. 10. No. 56. where the obligation so restricted is held as a provision against any *further* liability, 'nisi ad traditionem doliorum seu 'sarcinarum *integrarum*, non autem ad mercium qua-'litatem et scrupulosam ponderationem.'

See also Targa, Ponderazioni, Della Pollizza di Carico, c. 30. & 31. p. 68.

[3] HADDOW *v.* PARRY, in 1810; 3. Taunt. 303. In an action on a policy of insurance, 'on specie or 'bullion, by any one of his Majesty's ships, at and from 'Jamaica to England,' a bill of lading was offered in evidence, signed by Lieutenant Lawrence of the Rook. It was a bill of lading for 12,000 dollars, 12th August 1808; and under were inserted the marks of the chests, and of their numbers and contents, being described as containing 2000 dollars each. The Rook was taken by a superior force after a gallant resistance, in which Lieutenant Lawrence and four-fifths of his crew were killed. At the trial before Sir James Mansfield, the bill of lading alone being tendered in evidence of the contents of the chests, he directed a nonsuit for insufficient evidence. On a motion for a new trial, Sir Allan Chambre observed, that the bill was signed with the words, 'Contents unknown;' and the Court declared, that these words rendered the bill of lading no declaration of what the chests of dollars contained. And so the rule was discharged.

[4] Abbot, 426.

master may obtain a warrant for payment of his freight, or for the sale of as much of the cargo as will satisfy it.

In exercise of the master's discretion, or in deciding the matter judicially, the rule of law is, that the property passes by the bill first indorsed.

In England, this rule appears to be adopted, on the principle, that where equity is equal between the parties, the legal right must have effect.[1]

But it may be observed, that if any one claims on the part of the consignor of the goods, to the effect of stopping in transitu, the master is bound to prefer him, provided the first indorsed bill has not got into the hands of a third party without notice.

The cargo may also be demanded by the vendee, or consignee, or by one having right from him, where it has arrived before the bill of lading; and delivery on such demand will be good against all the world, except subsequent indorsees of the bill of lading for a valuable consideration.[2]

Where Bills signed to different persons.

3. Where the master has signed different bills of lading, there seems to be room for a distinction:—

First, Where the shipper or consignor has shipt the goods without orders, he has authority to cancel a first bill of lading, and take another to a different person:[3] and in such a case, there can be no doubt of the right under the second bill of lading to demand delivery of the goods. But he who first acquires an onerous title will carry the property.[4]

Secondly, Where goods are sent in execution of an order, or in the way of sale, the seller, after he has put the goods on board under a bill of lading to the buyer, cannot make the master alter that bill: he has no right to vary the consignment, except on the insolvency of the buyer or consignee; and the master will still be answerable under the first bill, and will be held to have altered the bill of lading at his own risk, unless he take an indemnity.[5]

[1] Abbot, 387. Reference is there made to CALDWELL *v.* BALL, 1. Term. Rep. 205. See below, Note [4].

[2] NATHAN *v.* GILES, 1814; 5. Taunt. 558.; 1. Marsh. 226. Here Levin, by his attorney Josephs, applied to Nathan for an advance of L.1000, and Josephs pledged to Nathan in security a cargo of wheat, which had arrived before the bill of lading, undertaking to deliver the bill of lading. The captain refused to deliver, but on indemnity delivered to brokers on account of Nathan, they being to retain the proceeds till relieved of their indemnity to the master. The cargo was sold, and the price attached by a creditor of Levins. Afterwards the bill of lading arrived, and was delivered to Nathan. And it was held, that Nathan had a complete title, subject to the risk of Levins's dishonestly indorsing the bill of lading for a valuable consideration, which not having been done, Nathan's right prevailed over the attachment.

[3] Where goods are shipt without orders, says Lord Stowell, such a right exists. The seller, if he may be so described, retains an absolute power over the goods; for there is no purchase. But where orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed, the seller is functus officio, except in the particular case where he is again reinstated by the privileges of the vendeur primitif. THE CONSTANTIA, 6. Rob. Rep. 327.

[4] CALDWELL *v.* BALL, 1. Term. Rep. 205. Here Ball, the master, signed a bill of lading to deliver to Messrs Thomson and Fairbrother, or their assigns. This was indorsed by Thomson in the West Indies, and sent to Fairbrother with a letter, saying, that he 'had been obliged to assign the other bills of lading to 'Cappel and Company, for security of bills drawn in 'their favour;' and that bill was indorsed to Caldwell, who thereupon advanced money for Thomson's use. The other bills of lading were subsequent. The master signed them for different parts of the cargo, (making up the whole), to deliver to the order of the shipper or his assigns. These Thomson indorsed to Thomson and Fairbrother, provided they should engage to pay the net proceeds to Frome and Nephew, otherwise to the order of James Frome, nephew, on account of Cappel and Goldwin. These last bills were delivered to Cappel and Goldwin, as mentioned in the letter to Fairbrother, and were afterwards received by Frome and Company; so these were first acquired by a third party, though the other bill was first granted on the day the first bill was indorsed to Fairweather. On the master's arrival, Caldwell demanded the goods under the first bill of lading, offering freight, &c. Frome claimed the goods unless the net proceeds were paid to him. The jury gave verdict for Ball; *i. e.* they held him justified in delivering to Frome and Company, and the Court refused a new trial, on the ground that, the equities being equal, the first title was with Frome and Company.

[5] Emerigon gives three cases illustrative of this

Thirdly, The effect of the indorsement of a bill of lading is to vest the indorsee, where he is a holder for value and bona fide, with authority to receive the goods beyond recall or countermand.[1] But where no value is given for the indorsement, it does not pass the property:[2] And so there may be stoppage in transitu on bankruptcy; or if it be made a condition that the buyer shall accept bills in course, although the bill of lading has been sent to him the goods may be relanded, the condition not being performed.[3]

Bills of Lading indorsed.

4. Bills of lading are negociable by the custom of merchants. If the bill of lading be originally blank; or if it be indorsed blank, or to the bearer; the shipper, or other holder,

doctrine in the French jurisprudence. The first is of six bales of silk consigned to the bearer of the bills of lading; and those bills sent to one person, while a different bill of lading was afterwards transmitted to another house; and where the inferior court of Marseilles divided the goods between them, but the court of appeal preferred the holder of the first bills of lading. The second is of a quantity of sugar under bills of lading to Rey, but which the shipper having first tried to get altered, attempted to defeat by indorsing his own bill of lading to another: Rey was preferred. And the third related to bales of wool in somewhat similar circumstances. 1. Emerigon, 317.

In Admiralty, under Lord Stowell, a case was decided on the same principles. A hundred hogsheads of brandy were shipt on order and for account and risk of Kye. Afterwards the shipper and the master went before a magistrate, and on the back of the retained bill of lading it was recited, that the master had received the goods for Kye, but that the interest of the shipper requires that they should not be so delivered; and the master is prohibited from delivering them to Kye, but is ordered to deliver them to Ryberg. Lord Stowell said of the alteration of the bill of lading,—'I am clearly of opinion, that if Mr Kye had been an 'insolvent person, it would have amounted to a com-'plete and effective revendication of the goods. But 'if the person to whom they are consigned is not 'insolvent, if from misinformation or former excess of 'caution the vendor has exercised this privilege pre-'maturely, he has assumed a right that did not belong 'to him, and the consignee will be entitled to the de-'livery of the goods, with an indemnification for the 'expenses that may have been incurred. In the law 'of England, as far as I can collect it, and in all the 'books into which I have looked, it is not an unlimit-'ed power that is vested in the consignor to vary the 'consignment at his pleasure in all cases whatever. 'It is a privilege allowed to the seller for the parti-'cular purpose of protecting him against the insol-'vency of the consignee.' After quoting the cases from Emerigon already taken notice of, (supra, Note), he adds,—'These cases I consider to be a clear ex-'position of the law, that persons having accepted or-'ders, and made the consignment, have not a right to 'vary that consignment except in the sole case of in-'solvency. The alteration may be made provisionally 'without actual insolvency; but if the insolvency does 'not take place, the act which was done is a mere 'nullity, and the seller has exercised a power to which 'the law does not ascribe any legal effect.' The goods were afterwards adjudged to Mr Kye on a proof of the facts. THE CONSTANTIA, Henrickson, 6. Rob. Adm. Rep. 321—330.

[1] See supra, p. 213. et seq., and the cases of LICKBARROW *v.* MASON, &c.

HAILLE *v.* SMITH, 1. Bos. and Pull. 564. Here bills of lading were indorsed in security of money to be advanced by a banker. The advance was made by the person indorsing the bills of lading drawing bills on the banker; and the banker was held entitled to recover in trover for the goods.

CUMMING *v.* BROWN, 1. Camp. Rep. 104. In this case there was a sale to Main, the consignee indorsing to him the bills of lading; which he indorsed over to Cumming, his creditor, for a previous debt, and also for money advanced, both amounting to the value of the goods. Cumming was held to have right to the goods against the consignor.

VIRTUE *v.* JEWELL, 1814; 4. Camp. 31. Here the fact of notice of the insolvency of the consignee would have entitled the consignor to stop notwithstanding the indorsation, had it not been for the value which at the time of consignment the consignor had received from the consignee.

[2] See the case of COXE *v.* HARDEN, 4. East, 211. The opinions delivered to the above effect in that case ruled the determination in WARING *v.* COXE, 1. Camp. Rep. 369.; where goods having been sold by Everard to Baggot and Company, one bill of lading was forwarded, by means of which Baggot and Company got possession of the goods on their arrival; but after notice that the goods were to be delivered, not to Baggot and Company, but to Waring, Everard sent another bill of lading to Waring, in consequence of which he (being, in fact, agent for Everard, to stop the goods in transitu, on account of Baggot and Company's insolvency) demanded the goods from the people on board. Lord Ellenborough held, 1. That Waring, as indorsee, without value, had no right to the property; and, 2. That the right to stop in transitu is personal, and cannot thus be transferred.

[3] BRODIE against TOD and Company, 20th May 1814; 17. Fac. Coll. 609. Tod and Company of Hull sold 15 bags of clover-seed to Arnot of Leith, and sent to him the bill of lading and invoice, desiring him to return the draft for the price in course. This he failed to do, and they relanded the goods. In an action of damages for breach of contract, the Court of Session held this countermand to be good.

may fill up the name of a person to whom the goods shall be delivered: Or the bill still remaining blank, the holder, provided he has not come by the bill accidentally or fraudulently, has the legal right. The master is bound to deliver to the holder; and he will exclude other assignees or creditors. It is settled, that there is no distinction to be taken between a bill of lading indorsed in blank and an indorsement to a particular person.[1]

5. Where the bill of lading is indorsed under a special condition, the right to the contents is charged with the condition.[2]

6. The ordinary condition, 'he or they paying freight,' makes the payment of freight a burden on the consignee's right; and if the consignee refuse to pay, the master has a lien; as to which see below, (Of Liens).[3] But although the goods have been delivered without insisting for freight at the time, the master has a personal action against the consignee; and, if he cannot recover from him, against the shippers; the clause being introduced for benefit of the master only. It is the custom to apply for payment of freight a certain time after the goods are delivered, it being understood that the delay is not a discharge of the consignee, but an indulgence; and the taking of delivery is as a new personal contract to pay freight.[4] Payment of Freight.

The person to whom the receipt for goods put on board is given, and who holds it, has the proper right to the bill of lading; and the master is not entitled to give the bill of lading, except to the person who can give the receipt in exchange. See above, p. 453. Effect of previous Receipt.

Bills of lading for goods to be exported, were, by 48. Geo. III. c. 149. subject to a stamp-duty; and it was held, that goods carried from one part of Great Britain to another were not exported in the sense of the Act.[5] But, by the last Stamp Act, a stamp also is necessary for goods carried coastwise.[6]

§ 2. CLAIMS ON CONTRACTS OF AFFREIGHTMENT UNDER CHARTER-PARTIES AND BILLS OF LADING.

As the obligations are reciprocal, claims may arise out of the contract of affreightment, (whether under a special charter-party or in a general ship), against the estate of the owners or master; or against the estate of the merchant. Bankruptcy of the Parties.

1. CLAIMS ON THE BANKRUPTCY OF THE SHIPOWNERS.

Setting apart those questions which depend on rights of preference or security, of which hereafter, and looking only to the effects of the personal contract, it may be convenient to follow as nearly as possible the course of the voyage.

1. *In relation to the Loading.*

As to the goods taken on board, the usual stipulation in the charter-party is, 'with all

[1] See the verdict in LICKBARROW's case, supra, p. 216.

[2] BARROW *v.* COLES, 3. Camp. 92. Here a bill of lading was indorsed deliverable to Vos, if he should accept and pay a draft annexed; if not, to the holder of the draft. Vos indorsed the bill of lading to Coles, but did not pay the draft. Lord Ellenborough at Nisi Prius held, that the special indorsement on the bill of lading was sufficient to prevent Coles from acquiring the bill of lading from Vos for an onerous consideration, without satisfying himself that the condition was complied with. Verdict for the holder of the draft.

[3] WALLEY *v.* MONTGOMERY, in 1803; 3. East, 590.

[4] See below, p. 567. where this question is fully discussed.

[5] 48. Geo. III. c. 149. Sched. Part I. Bill of lading for any goods, merchandise, or effects to be exported, 3s. SCOTLAND *v.* WILSON, 1814; 1. Marsh. Rep. 204.

[6] 55. Geo. III. c. 78. Sched. Part. I.

'convenient speed to receive on board, load, and stow, in a regular and proper manner, 'all such goods and merchandise as shall or may be sent by the said freighters alongside 'the said ship or vessel, not exceeding what the said ship can conveniently or safely carry 'over sea, besides her provisions, tackle, apparel, and appurtenances, the master's cabin, 'and the usual and necessary room for the ship's crew excepted.' This, however, is only a special setting forth of what is implied in the contract of affreightment, and what, in its due proportion and relation, is implied in the engagement of freight in a general ship.

Goods taken on board.

1. The owners and the master are chargeable with those goods, (or the value of them, or damages for the loss of them), which are fixed on them by the ship receipt or bill of lading. The bill of lading, as already said, contains evidence of the existence, quantity, and external and apparent quality of the goods, considered in relation to the duties of the master;[1] the master and owners being responsible for the preservation and delivery of the articles received, the casks, bales, &c., as identified by their marks, in the same condition in which they were put on board.

Of taking Goods on board.

2. The goods must be taken on board with due care and skill: Tackling must be supplied sufficient to guard against injury: The ship itself must be capable of receiving the sort of cargo for which she is engaged; must not be endangered by taking on board contraband goods; and must not be overloaded, but room left for her own furniture, and the provisions of the crew, and the proper working of the vessel.[2] A failure in any of these points may ground a claim against the estate of the owners and master. Thus, if a cask be accidentally staved in letting it down into the hold of the ship, a claim will lie for the loss:[3] Or if a ship is freighted to go to America for timber, and, owing to the small size of her port-holes, she cannot take in the large timber of that country, a claim of damage will arise to the merchant, on the warranty that there shall be no obstruction to the loading.[4]

Where Ship distant from Warehouse.

3. The custom of the port regulates the responsibility in taking goods on board, where the ship is at a distance from the warehouse. In receiving goods on the quay, or in sending his own boats for them, the master is responsible for them from the moment of delivery.[5] If, in the timber trade, it is the custom to float down the timber in rafts by the merchant's servants, the responsibility of the ship will begin only with delivery into the ship: If the master send his crew to float down the timber, the risk will be reversed.

Stowage.

4. The goods must be properly stowed, otherwise a claim may arise against the estate of the owners, as represented by the master. By most of the marine ordinances this is specially provided for,[6] and rests securely on the general principle of the contract. By special statute in Scotland, 1467, c. 4. provision is made against improper stowage, 'under 'pain of tinsel of the fraught, and amending of the skaith of the merchands;' and it is in particular provided, that no goods shall be carried upon deck; that such goods shall pay

[1] See above, p. 544.

[2] Si quelque tonneau se perdoit par le defaut de guindage ou cordage, le maitre est tenu le payer au marchand. Cleirac, Jugem. d'Oleron, art. 10. p. 50. Ib. Ord. de Wisbuy, art. 22. p. 170. Balfour's Sea Laws, c. 126. p. 620.

[3] Abbot, 224. He cites a case of GOFF *v.* CLINKARD, from 1. Wilson, 282.

[4] Pothier, Charte-Partie, No. 27. vol. ii. p. 278.

[5] Roccus says, 'Nauta qui recepit a titio merces 'in littore maris, si ibi merces perierint periculo ipsius 'nautæ pereunt tanquam si essent in navi receptæ.' P. 88. Dig. lib. 4. tit. 9. l. 3. in pr. Nautæ, Caup. &c.

In CORBAN *v.* DOWN, 5. Espinasse, 41. delivery to the mate was held sufficient to charge the owners, according to the custom of London.

[6] Jugemens d'Oleron, art. 11. Cleirac, p. 54. and his Commentary. Ordon. de Wisbuy, art. 23. Cleirac, p. 170. See 1. Valin, 376. Roccus de Navibus, Not. 30. p. 29. Si plus Justo onere navem onerent sunt in culpa et tenentur de damno, &c. Ord. of Antwerp, 1563, art. 8. 2. Magens on Insurance, p. 16. Ord. of Rotterdam, art. 125, 126, 127. 2. Magens, p. 101, 102.

no freight; and that, if they be ('casten') thrown overboard, the other goods shall not make contribution with them.[1]

In reference to what has already been said as to the hiring of an entire ship, the burden is generally expressed in such cases; and from non-compliance with the description, or where the freight is rateable, and the burden is found different from that stated, claims of damage may arise. It would seem, 1. That where the burden is mentioned only in description, and loosely and vaguely, it will not conclude the parties—neither, on the one hand, to restrain the freighter, at a gross sum for the voyage, from loading a full cargo according to the actual capacity of the vessel; nor, on the other, to bind the master to receive as a full cargo what has been so loosely stated.[2] 2. That it will be effectual to confirm the contract, if the parties be careful by proper words to limit it.[3] The only legal criterion of the tonnage on which, independently of special bargain, is the description in the ship's certificate of registry.[4]

2. *In relation to the Condition of the Ship.*

Condition of the Ship, or Sea-worthiness.

If in the condition of the SHIP there be essential defects, the merchant will have his claim for any loss thence arising. The ship must be sea-worthy; by which is meant, that in all respects it shall be able for the voyage; that there must be a skilful master and able seamen; that the ship itself must be fit, in hull and in tackle, to encounter the perils of the sea; that it must be furnished with the proper papers; and that in rivers, ports, and narrow seas, the aid of a pilot must be taken. What, as a warranty, is implied in every policy of insurance, is either expressed in the contract of affreightment, or by the law implied as a part of the contract, viz. 'That the ship shall be tight, staunch, and strong, properly manned, and provided 'with all necessary stores, and in all respects fit for the intended voyage.'[5] If any vice in these respects shall have either the effect of defeating the voyage, or of injuriously delaying it, or of injuring the cargo, the freighters will have their defence against the claim for freight, or action for damages.

It is of some importance to mark the distinction between a *warranty* and a *covenant.* In a policy of insurance, sea-worthiness is properly a warranty; in affreightment it is a part of the contract of the shipowners. Want of sea-worthiness in the former case voids the contract: in the latter, it gives relief from the hire, or grounds a claim of damage. The distinction rests on the difference between a hypothetical engagement and a mutual contract. In the former, the engagement itself depends on a certain event taking place, and there is no latitude, no equity: the only question is, whether the event has happened? In the mutual contract a more liberal construction is admitted: the question is, whether

[1] Acta Parl. vol. ii. p. 87. In the collection ascribed to Balfour, a law, of date 15th February 1507, is quoted to a similar effect. Sea-Laws, c. 123. Balfour's Practics, 620.

[2] HUNTER v. FRY, 1819; 2. Barn. and Ald. 421. By charter-party a ship was described as 'the ship 'Humber, of the burden of 261 tons or thereabouts,' and the freighter covenanted to load a full and complete cargo. The burden truly was 400 tons instead of 261. It was held, that the loading of goods equal in number of tons to the tonnage described in the charter-party, was not sufficient fulfilment of the covenant; but that the freighter was bound to put on board as much as the ship was capable of carrying with safety. And a verdict was given, and approved of, for the difference between the sum actually paid for freight, and that which would have been payable if the skipper had loaded a full and complete cargo.

[3] Abbot, 168.

[4] The statute 43. Geo. III. c. 56. limiting the number of passengers to be conveyed in ships on distant voyages, enacts this as the regulation of the tonnage, according to the rate of which passengers are permitted to be taken.

[5] LYON v. MELLS, 5. East, 428. So strong is this implied covenant, and so inseparable from the contract of affreightment, that the owners cannot get quit of it by notice, whatever limitation may be competent in this way of other responsibilities.

the reciprocal engagement has substantially been performed?[1] Ignorance of the defect will not avail the owners; nor will the most regular and formal survey at setting out on the voyage have any other effect than to strengthen the evidence in their favour, should the vessel be wrecked in questionable circumstances. The controversy between Valin and Pothier[2] on this point, may be considered as settled in this country in favour of Valin's opinion. In England it is held, that the want of sea-worthiness implies a personal neglect; or, at least, that it is a breach of the contract; and this derives aid from the great principle of policy which regulates the responsibility of carriers by sea and land.[3] In Scotland, the doctrine has long been settled as an absolute rule, whether the defects were known at sailing, or secret and unsuspected, 'that the hazard of leakage, and such 'ordinary hazards as occur, not by stress of weather, or any such extrinsic accident, but 'only from the ship and her furniture, lie not upon the merchant, nor are relevant to free 'the skipper, who must have his ship sufficient, at his peril.'[4]

1. SHIP, RIGGING, AND TACKLE.—The ship, and rigging, and tackle, must be sufficient for the safety of the adventure, and performance of the voyage. Thus, a ship which has been lengthened, and the new part not built with knees, has been held unfit for a foreign

[1] See Lord Mansfield's doctrine in HIBBERT *v.* PIGOU, Marshall, 369.; Park, vol. ii. p. 499. See also Lord Eldon's distinction between representation and warranty, in the Scottish case of M'MORREN against NEWCASTLE FIRE INSURANCE COMPANY, 3. Dow's Rep. 255.

[2] Even where there is a survey at the commencement of the voyage, Valin holds the claim of the merchant for loss to be unaffected by it, provided it appear that the vessel was not sea-worthy at her departure.—'Dès que par évènement il seroit verifié que par des 'vices cachés il n'etoit plus navigable; c'est à dire, s'il 'etoit constaté qu'il avoit des membres pourris lassés 'ou tellement gatés qu'il fut réelement hors d'etat de 'resister aux accidens ordinaires des coups de vent et 'des coups de mer inevitables en toute navigation.' 1. Valin, 620.

Pothier combats this opinion, contending for the more equitable conclusion, that absolute ignorance of the secret defect may well deprive the owners of freight, but ought not to subject them for damages. Charte-Partie, No. 30. vol. i. p. 319.

[3] LYON *v.* MELLS, 5. East, 428. Lord Ellenborough, in delivering judgment, said,—'The declaration avers 'a breach,' (of the terms of the contract implied by law), 'that the lighter was not tight and capable of 'carrying the yarn safely; and the facts stated support 'the breach so alleged, by shewing that the vessel was 'leaky, and had nearly sunk in the dock before the yarn 'could be unloaded from the lighter into the sloop. 'This we consider as personal neglect of the owner, or, 'more properly, as a non-performance on his part of 'what he had undertaken to do, viz. to provide a fit 'vessel for the purpose.'

See Abbot, part iii. chap. 3. p. 231. 233.

[4] LAWRIE against ANGUS, 7th November 1677; 2. Stair's Dec. 553. Here Lawrie had a box of silk ware on board of Angus's ship, which, in the course of the voyage, was 'wet by the leakage or spouting of the 'pump.' He brought his action for damages, and succeeded. The pleas in defence were,—1. The ship and pump were sufficient at the embarking of the goods, and that a split or rift was broken in the pump upon the voyage, which no man could foresee. 2. That the box was securely stowed till Lawrie, who was himself on board during the voyage, insisted on changing it, and placing it near the pump. The merchant answered, that in this contract of freight the shipmaster undertook all hazards, except what occurs by stress of weather; or by accident of the sea, as breaking on a rock; or by piracy. A proof was ordered of these facts:—'1. In what condition the pump was at loosing, and if 'it had a stillage of timber about the pump, and if it 'was the ordinary custom to cover such stillages with 'pitched canvass, and if this was so covered? 2. How 'it came in the voyage to spout, and if there were any 'stress of weather or accident at sea? 3. If the mer-'chant chose to set his ware by the pump, and if the 'hazard was signified to him?' On considering the proof, the Court 'found, that the merchant chose not 'to set his goods by the pump; that the seamen could 'perceive no fault in the pump when they loosed, but 'that there broke up a rift or split in the voyage; and 'that the weather was fair all the time of the voyage, 'without any stress or accident.' The parties were 'then ordered 'to debate that point, whether the ha-'zard of leakage, and such ordinary hazards as occur 'not by stress of weather, but only from the ship and 'her furniture, lie upon the merchant, or the skipper 'and his owners?' And 'having heard them at length 'thereupon,' the Court pronounced judgment in the terms quoted above.

LAMONT against BOSWELL, 24th July 1680; 2. Stair's Dec. 791. The above rule was taken to decide this case, where, after repairing a ship at Dantzig, a leak sprung while the ship was in the roadstead, by which lint was injured. The skipper was found liable, 'see-'ing no extraordinary accident was proven either by 'stress of weather or otherwise.'

voyage.[1] A French ship, originally built without knees, according to their system of naval architecture, would not probably on that account alone be held insufficient.[2] So the want of ground tackling, sufficient for the ordinary perils of the sea, is a defect in sea-worthiness.[3] So a ship which has not the rigging, sails, &c. necessary to enable her to escape from an enemy, or proceed with due expedition, is not sea-worthy.[4]

These illustrations are taken from cases of insurance; but they are equally applicable to the present inquiry, with a due regard to the distinction already stated between the contracts.

Captain and Crew.

2. Captain and Crew.—The captain and crew must be of sufficient skill and strength for the voyage:[5] Where, therefore, in a policy of insurance, liberty was given to touch at one port, and the captain, from ignorance, went into another instead of it; this ignorance was held to be a defect in the sufficiency of the equipment.[6]

Of Pilots.

3. Pilot.—The master of a ship, though understood to be competent to the common course of a voyage, cannot be supposed so familiar with the peculiar dangers and difficulties of narrow firths and rivers, and the entry into ports, as to be able to conduct those parts of the voyage in safety.[7] To supply this skill, bodies of pilots or steersmen have been established in all maritime countries. After due trial or experience of their qualifications, pilots are licensed to offer themselves as guides in difficult navigation, and they are usually, as the counterpart of their privilege, bound to obey the call of a shipmaster to exercise their function. By the earlier marine laws, pilots ignorant of their duty were liable to penalties, the severity of which, while it shocks a modern reader, shows the importance then attached to the skill and fidelity of a pilot.[8]

[1] Watt against Morris, 10th May 1813; 1. Dow's Rep. House of Lords, 32. This was a case of insurance. The ship had been lengthened from 80 to 113 tons burden; the new parts not being fastened with knees, which were usual and proper for such a ship. She sailed heavily, and was at last lost. In an action on the policy, the defence was on the breach of warrant of sea-worthiness. The Court of Session held the insurers liable. The House of Lords reversed the judgment.

[2] See Parker and others against Potts, in House of Lords, 15th February 1815; 3. Dow, 23.

[3] Wilkie against Geddes, House of Lords, 27th February 1815; 3. Dow, 57. Here a ship at anchor in Leith roads drove under a strong breeze. She was riding with her best bower, and on dropping the small bower the cable broke. The master, with the view of entering into harbour, cut the cable, and made for Leith. The ship took the ground near the beacon, and in an action on the policy the defence was grounded on the warranty. The evidence showed the cables of the anchors to be rubbed and injured, and too light and short. The Court of Session did not consider the proof as sufficient, and pronounced judgment against the underwriters. Reversed in the House of Lords, on the ground that the law of the case was clear, and the evidence such as a jury would have held sufficient to show want of sea-worthiness.

[4] Wedderburn *v.* Bell, 1807; 1. Camp. 1. The ship in this case was lost in her voyage across the Atlantic, having parted with the convoy. Her main-topgallant sail and studding sails, useful in light breezes, were rotten and unserviceable; though the sails used in stormy weather were in good condition. The crew was also insufficient. Under Lord Ellenborough's direction, the underwriters had a verdict in an action on the policy of insurance.

[5] See the above case of Wedderburn.

[6] Tait *v.* Levi, 1811; 14. East, 481. This was an action on a policy of insurance, to port or ports in the Mediterranean, not higher up than Tarragona, which was then in possession of our Spanish allies. The captain, from ignorance, went into Barcelona, then in possession of the French enemy, instead of Tarragona. A verdict for the underwriters was directed by Lord Ellenborough, and the Court of King's Bench confirmed the nonsuit, on the ground, that there being special care taken to stipulate the means of avoiding a danger that required great discrimination, precise knowledge was requisite in the master.

[7] Stypmannus Jus Maritim. 322. No. 20.

[8] Il Cons. del Mare, cap. 247. Casareg. Spiegaz. p. 165. Cleirac, p. 90. No. 3. Emerigon, vol. i. p. 402, 403. Balfour's Translation of the law is a curious one. Sea Lawes, c. 17. p. 618.—'Gif ony ledis man undertakis the leiding and convay of ane ship to ony steid, town, or place, and the ship perish throw his default, and the merchandize incurrs skaith thairthrow, he is bund and oblist to restore the damage, gif he has quhairwith, and gif he has not, may lose his heid thairfoir; and gif the master, or ony of the mariners dois strike off his heid, they sall not be callit nor persewit ony mair thairfoir; bot they sould first, and befoir they do the samen, tak cognition gif he be responsal in guides or gear, and able to mak an amendes or not.'

English Pilots.

In England, pilots are established at several ports under the appointment of certain incorporations, deriving their rights from ancient charters, or from particular statutes, which have been passed for regulating pilotage. Those statutes were consolidated in two Acts in 1812 and 1813,[1] and again a new consolidating Act was passed in 1825.[2] But those Acts extend to Scotland no farther than as they may be evidence of maritime usage, and as illustrating some of the rules and principles of this branch of jurisprudence.

Scottish Pilots.

In Scotland, the matter has hitherto been left to the rules of maritime law, and the usages and regulations of the several ports, firths, and rivers of the kingdom, relative to the appointment of pilots. The Trinity House of Leith seems to be the only institution in Scotland similar to those which are the object of the English Acts above referred to. It was instituted in the 14th century, and enjoys many privileges by royal charters, (the last of which is dated 29th June 1797); and, in particular, authority to examine and appoint pilots for the Firth of Forth, and for the seas and firths, and along the coasts and islands of the Northern and German Oceans.[3] This corporation has appointed certain rules and orders for insuring the good conduct and attendance of pilots; but the employment of those pilots can be enforced only by an authority greater than that of the corporation; and the beneficial exemptions from responsibility, which, under the English statutes, shipmasters enjoy on duly placing their ship under the care of a pilot, are left to the disposal of the common law in Scotland, and the rules of discreet and prudent management. And,

1. It is a part of the rule which obliges the owners, in respect to the sea-worthiness of their ships, to have on board persons able and sufficient to navigate her, that they must have a pilot on board in all places which are said to be a pilot's fair way, where a pilot is by regulation or usage deemed necessary—whether at the commencement of the voyage, in its course, or at its close:[4] And where a pilot cannot be had, they must take the aid of persons locally acquainted with the navigation.[5] On this point questions may occur with underwriters, or with freighters; and in both cases the employment of a pilot seems to be an implied part or condition of the contract.

Pilot necessary where regulation or usage requires one.

Qualification of Pilot.

2. In compliance with this condition, it will be sufficient if the master take such pilot as, by the regular custom of the port, or the law of the place, is authorized to act in that capacity, provided he be at the time fit to act, and not by intoxication or otherwise manifestly incapable. If a pilot offer himself who is not licensed or qualified by the rules of the port, but whom the master has reason to believe to be a sufficient pilot, it has been doubted whether this be enough to save from responsibility. The question does not seem to have been determined;[6] but, at least, it would be requisite for the master to make out an exceedingly strong case in justification of his choosing such a person.

[1] 52. Geo. III. c. 39., and 53. Geo. III. c. 140. Those are not general Pilot Acts, though sometimes improperly called so. See ATTORNEY-GENERAL v. CASE, 3. Price Rep. 321. The Act of the 48. Geo. III. c. 104. has a title in the statute book greatly broader than belongs to it: It is an *English* Act merely.

[2] 6. Geo. IV. c. 125. These are all English Acts; and if any question were to be raised on them in Scotland, the English authorities alone can be safely resorted to.

[3] The town of Edinburgh has also a right to appoint pilots for the navigation of the port, harbour, and road of Leith.

[4] Si magister navis (says Ulpian) sine gubernatore in flumen navem immiseret, et tempestate orta temperare non potuerit, et navem perdiderit, vectores habebunt adversus eum ex locato actionem. Dig. lib. 19. tit. 2. l. 13. § 2. Locati Cond. See Roccus, De Navib. et Naut. No. 163. and Stracc. De Nautis, p. 3. No. 12.

[5] THOMSON against BISSET, 3d June 1826; Fac. Coll.; 4. Shaw and Dunlop, 670. In this case the ship was in pilot's fair way, at the entrance of a difficult harbour in the Isle of Scarpa, in the Hebrides; there were no licensed or branch pilots to be procured; but the lighthouse keeper and his assistant, and the fishermen on the coast, were in use to guide vessels. The master was held bound to take that aid.

[6] See LAW v. HOLLINGSWORTH, 7. Term. Rep. 160.

3. The principle of the rule which requires a pilot, does not seem to apply to the case of a port or river to which the ship belongs, and with the navigation of which the master is familiar.[1] Port of the Ship.

4. In cases where a pilot is necessary, the fact of his merely being on board will avail nothing, if the master control his proceeding, and damage arise. On the other hand, the presence of a pilot on board will not defend the master and owners from responsibility for neglect or wilful obstinacy, to the injury of others: it can only have the effect of supplying the requisite of sea-worthiness, and placing the peculiar dangers of the river or port on the same footing with the ordinary dangers of the sea. It seems even doubtful how far the owners can be saved from responsibility for damage arising while under the pilot's care. In England, this is provided for by the statute above mentioned:[2] But as the Act does not extend to Scotland, we are left to general principles. Perhaps the very groundwork, on the solidity of which the efficacy of this safeguard in navigation depends, namely, the entire superseding of the captain's authority in the conducting of the ship, should, in a question with the freighter, save the owner from responsibility. But, at least, a different consideration seems admissible in the case of collision or damage done to others not engaged in the adventure. And accordingly we find, that, in England, such responsibility has been contended for in several cases beyond the operation of the Pilotage Act.[3] Authority of the Pilot.

4. Bills of Health, Licenses, and Necessary Papers.—Under the stipulation, that the ship shall be furnished 'with every thing needful and necessary for the voyage,' the master will be bound to provide the vessel with such papers as are necessary for her sailing to the destined port, or to guard against capture or detention. She must have a license when engaged as a licensed ship, and a bill of health when she sails from a suspected port, or when that is required at the port of destination.[4] But the necessity

[1] Consistently with this, we find in the English statutes an exception from the obligation to have a pilot, in the case of a vessel within the limits of the port or place to which his ship belongs. 52. Geo. III. c. 39. § 59.; 6. Geo. IV. c. 125. § 62.

[2] By 52. Geo. III. c. 39. § 50. it is enacted, That no master or owner shall be answerable for loss or damage, nor prevented from recovering loss and damage upon a contract of insurance, 'for or by reason 'or means of any neglect, default, incapacity, or in-'competency of any pilot taken on board, in pursu-'ance of any of the provisions of the Act.' See also 6. Geo. IV. c. 125. § 55. It has been held, that the above law does not apply to vessels having on board pilots under any other regulations than those of this particular Act. Attorney-General v. Case, 3. Price's Cases, 320. So it cannot be held in Scotland, that the damage occasioned by the pilot's negligence, &c. is to fall merely on the pilot. See below, the question of Collision of Ships.

[3] Bennet v. Moita, Holt's Cases, 359.; 7. Taunt. 258.

So with regard to the Liverpool Pilotage Act, (though incorporating this part of the 52. Geo. III.) the Court of Exchequer held that this freedom from responsibility did not exist, on the ground that the Liverpool Act was not compulsory or penal on the captain to take a pilot. Attorney-General v. Case, 3. Price, 302.

[4] Levy v. Costerton, Holt's Rep. 167. The Samuel was freighted for Cagliari in Sardinia with iron. On her arrival at that port, the plague being at Malta, there was a general alarm at Cagliari. The board of health refused her admission for want of a bill of health. She then sailed back to Palermo to rejoin convoy; and at length got a certificate from the convoy's captain, which not being verified by the captain's signature, was not held sufficient at Cagliari. She was delayed for two months. Iron had fallen in value, and the action was for the difference. Evidence was given of a bill of health being always required at Cagliari: on the other hand, the custom-house had for several months not granted such certificates, leaving the application for them to be made to the foreign consuls. Lord Chief-Justice Gibbs said,—'The words "needful or 'necessary for the voyage," oblige the defendant to 'have every paper required to advance or facilitate the 'object of the voyage.' 'The ship was excluded, 'because she wanted this document, and the law of 'Cagliari was well known upon this subject.' 'It is 'contended, that the words apply only to documents 'required by the laws of this country, or the law of 'nations. But this is not the meaning of the covenant 'in the charter-party: the words bind the owner to fur-'nish the ship with every document necessary to the 'performance of the voyage; and as the ship was ex-'cluded from Cagliari on account of her not being pro-'vided with a bill of health, the defendant is responsible.' Same case also, 4. Camp. 389. and 1. Starkie, 212. See generally as to licenses, Siffken v. Allnut,

of a license will be limited to the necessity of the actual voyage, not extended to any imaginary necessity to guard against a possible danger.[1]

3. *In relation to the Conduct of the Voyage.*

Conduct of the Voyage.

In the conduct of the VOYAGE the master is bound to be ready at the appointed time; to sail as soon as wind and weather permit; to accomplish his voyage by the shortest and most direct course, consistently with safety and the usual practice; and to navigate the ship with skill and care.

Ready at Port of delivery.

I. COMMENCEMENT OF VOYAGE.—1. If the loading port is at a distance from the place where the ship is, she must be so dispatched as to reach that port against the stipulated time. If a day is specified, and the ship do not arrive, the merchant may hire another; the owners being liable, on the common principles of location, for any damage arising out of this necessity, unless they can justify themselves by inevitable accident or obstruction.[2]

Sailing.

2. The ship, when ready, must sail without delay; but the master is not only entitled, but bound to avoid sailing in a dangerous gale;[3] and a claim for loss will arise from his misconduct, if he neglect this precaution. In the older regulations he was bound to take counsel; but with the improvement of navigation this is left entirely to him,[4]—his owners and himself taking the risk on themselves.

In England, there has been much discussion on the nature and effect of such stipulations, under the doctrine of conditions precedent, and simple covenants. The doctrine is plain and intelligible, and well understood in Scotland. The question is, Whether, according to the true nature of the contract, this stipulation is meant to be an absolute condition, without which the counterpart of the contract is not to be performed? or, Whether the breach of it merely impairs the expected advantage, or exposes the party to loss, which may be the subject of a claim for damages? In a contract of affreightment, although there be an undertaking to sail on a particular day, or with the first convoy, it is not like a warranty in a policy of insurance, the nonperformance of which voids the contract; but it is an obligation to be substantially performed; the breach of which may expose the party to a claim of damages; and which admits of an answer by reasonable excuse.[5]

1813; 1. Maule and Selwyn, 39. BUTLER *v.* ALLNUT, 1. Starkie, 222.

[1] JOHNSON *v.* GREAVES, 1810; 2. Taunt. 344. A ship chartered to any port or ports in St Domingo, with a covenant to procure a license. A license was obtained, the ship sailing to Cape François and Gonaive, (ports under Christophe, and not in the power of the enemies of Great Britain). The ship was afterwards captured by a British frigate, with her return cargo, which the license was not sufficient to protect, supposing a license necessary; and she was condemned: but this was reversed, as no license was necessary to the ports before-mentioned. It was held, that there was action on the covenant to procure a license, because that covenant could only apply to a voyage for which a license was necessary.

[2] In SHADWORTH *v.* HIGGIN, 3. Camp. 385. an example of such stipulation held a condition precedent. See text below, (2).

[3] This is laid down in all the foreign codes. In Balfour is this rule:—'The master sould ask counsel 'at his fellowes in making of sail, and gif some of them 'sayis that the weddar is gude, and some sayis the 'contraire, the master sould accord with the maist pairt; 'and gif he does otherwise, and ocht cum to the ship 'bot gude, the master sould pay the skaith gif he has 'quhairwith.' Sea Laws, c. 37. Balf. Pract. 922.

[4] Abbot, p. 226.

[5] See above, p. 547.
DAVIDSON *v.* GWYNNE, 1810; 12. East, 381. Here one point was, Whether the direction to proceed and join the first convoy for Portugal was a condition precedent? Lord Ellenborough, and Grose, Le Blanc, and Bayley, Justices, held it not so; and that in the following cases the doctrine was settled, that, unless the nonperformance alleged in breach of the contract goes to the whole root and consideration of it, the condition broken is not to be considered precedent, but as a distinct covenant, for the breach of which the party insured may be compensated in damages. See BOONE *v.* EYRE, 1. H. Blackst. 273. CAMPBELL *v.* JONES, 6. Term. Rep. 573. CONSTABLE *v.* CLOBERIE, Palmer, 397. See also RITCHIE *v.* ATKINSON, 10. East, 295.

Sailing with Convoy, by Public Law.

II. Convoy.—The ship may be bound either by public law or by warranty to sail with convoy.

1. In time of war, when the danger of great losses to this country, or gain to the enemy, is imminent, the Legislature interferes to prohibit the sailing of merchant ships without convoy.[1] In the former and in the late French war this policy was followed. In time of peace, these hostile precautions are not required; and a very brief statement of the points in detail while the necessity subsisted may be sufficient:—1. The rule was general, that no private merchant vessel should sail on a foreign voyage without convoy. 2. The master was required to use his utmost endeavours to continue with the convoy during the whole voyage, and not to separate without leave of the commander, under heavy penalties. 3. Bonds with sureties to observe these rules were required at clearing out. 4. On breach of these rules, all insurances on ship, cargo, or freight, belonging to the master, or any one directing or privy to such evasion, were made void. 5. The only exception admitted was under license, in granting which Government had an opportunity of considering the particular case.[2]

Warranty to sail with Convoy.

2. In time of war, the obligation to sail with convoy is generally an express, but, if not, it is an implied, part of the contract. If the freighter insure, it is a warranty in the contract with the underwriters. This obligation may be undertaken by bill of lading, stating the ship to be bound to the port of destination with convoy;[3] or by advertisement, if a general ship;[4] or by charter-party, so as even to have the force of a warranty. Under this obligation, although the insurance be vacated, (which it would be for breach of the warranty), the merchant will have his indemnification against the master and owners. The general rules are these:—

1. Under a warranty to join convoy, the obligation is to join at the place of rendezvous appointed by Government, and the obligation is held sufficiently fulfilled by joining convoy at the usual place of assembling for convoy. This is part of the law merchant, which makes usage the great interpreter of mercantile contracts. A capture on the intermediate course, therefore, will not ground a claim against the owners for breach of contract, unless there be a special stipulation.[5] If the convoy have sailed, a ship cannot legally endeavour to overtake it.[6] If, having sailed with convoy, the ship be driven back, she is not obliged to wait for a new convoy, but may sail on her voyage. Or, if she be driven into a port where there is no convoy appointed, she may sail without convoy from that port.[7]

2. The convoy must be the naval force under the command of that person whom Government has appointed.[8]

3. The criterion of sailing with convoy is, generally speaking, the possession of sailing instructions from the commander of the naval force. Without this, the master cannot answer signals; he does not know the place of rendezvous in a storm; he does not put

[1] See the policy of France in this respect, in 1. Valin, 691.

[2] 38. Geo. III. c. 76.; and 43. Geo. III. c. 57. These Acts were limited to subsist 'during the present hostilities with France.'—See Abbot, 233. See also Marshall on Insurance, 3d edit. 383. Park on Insurance, 7th edit. vol. ii. p. 512—515.

[3] Sanderson v. Busher, 4. Camp. 54. Note. Magalhaens v. Busher, 4. Camp. 54.

[4] See above, p. 541. Rinquest v. Ditchel. Abbot, 122, 123.

[5] Park, vol. ii. p. 504. and cases there quoted. Marshall, 366. 1. Emerigon, 166. Abbot, 227. et seq. Warwick v. Scott, 4. Camp. 62.

[6] Cohen v. Hinckley, 1. Taunt. 249.

[7] Laing v. Glover, 5. Taunt. 49.

[8] This was exemplified in a very strong case of insurance, where the ship arrived in due time at the place of rendezvous, and, finding the convoy gone, put herself under the protection of a man of war which had come there to join the squadron. This was held not to be a departure with convoy within the meaning of the engagement. Hibbert v. Pigou, Park, vol. ii. p. 598. Marshall, 368.

himself under the control or protection of the convoy.[1] But this rule admits of exceptions, in so far as it will be sufficient, if the master has taken every means in his power to obtain orders, and has been prevented by inevitable accident from having them.[2]

4. The ship must continue with the convoy, in order to fulfil the contract. There are here three points:—1. It will be an excuse for parting, if the ship has been separated by a storm or inevitable accident; 2. It is not enough to depart with convoy, (though the words are so conceived), without continuing under protection; and, 3. It is not enough if the convoy is only for part of the voyage.[3] But,

5. Although the convoy does not go the entire length to the place of destination, it will be enough if it be the only convoy which is appointed for vessels destined to that port: The contract must be so modified by construction.[4] But it is not enough that the ship has sailed with the convoy appointed for another voyage, though that convoy is bound on the same course for great part of the way, if the ship be left unprotected during any part of the course which the proper convoy would have covered. It may, indeed, be said, that unless the loss has happened in the unprotected part of the voyage, there should be no ground for exception: But it is impossible to separate the question on the warranty from the provisions of an Act intended for a great object of public policy.[5]

6. It is a part of the same rule, that convoy must be always understood in reference to the orders of Government, by which it is to be regulated.[6]

III. Course of the Voyage.—Damage may arise during the voyage from delay or deviation; from injury received by the goods; or from the entire loss of them by capture, shipwreck, or jetson. But no indemnification can be claimed against the owners in any of those cases, where the delay, or injury, or loss, has been occasioned by perils of the sea or of the enemy. Against damage proceeding from perils of this description, the merchant may protect himself by insurance. Where the loss is of a nature which a policy of insurance will not cover, (as not being from perils of sea or enemy), the owners and the master must be responsible. If the ship be driven, by force of winds, or by hostile chase, into a port not included in the stipulated voyage; or if she be disabled by sea-damage or an enemy; not only can the merchant claim no damage from the owners for any injury the goods also may have sustained, but he cannot so claim on account of the deviation and delay occasioned by taking refuge, or which may be requisite to have the ship repaired, if that be practicable. Formerly, the master seems to have been held bound, even in such cases, to find another ship; but now the law is, that if the ship is capable of being repaired, the master is not bound to send the goods in another, but may detain them till the ship be refitted. Referring to the law, as already stated, relative to the power of sale and disposal on the part of the shipmaster,[7] either for the purpose of extricating the ship, or, as agent for the merchant, in preserving his goods; it may be added, that for any undue delay, deviation, or injury, by fault of the master, the claim by the merchant is for damages. This may furnish a plea of retention against the claim for freight, on the actio contraria; but cannot support a defence against payment of freight as on a broken condition or warranty.

Delay or Deviation by Storm or Enemy.

[1] Webb *v.* Thomson, 1. Pull. and Bos. 5. Anderson *v.* Pitcher, 2. Pull. and Bos. 164. Lord Eldon has in the latter case given a comprehensive view of the whole doctrine.

[2] Victorin *v.* Cleeve, before Lord Chief-Justice Lee at Guildhall, 2. Strange, 1250. Park, vol. ii. p. 509. See the remarks on the case in Lord Eldon's argument, 2. Bos. and Pull. 169.

[3] Park, vol. ii. p. 505—509. Abbot, p. 240.

[4] Abbot, part iii. c. 3. 232.

[5] Cohen *v.* Hinckley, 1. Taunt. 249.

[6] Abbot, 227. Park, vol. ii. p. 510.

[7] See above, p. 536.

4. *In relation to the Termination of the Voyage.*

Termination of the Voyage, and Delivery.

TERMINATION OF VOYAGE.—In bringing the voyage to a close, the master must take the assistance of pilots where necessary; secure the vessel safely; and deliver the cargo to the consignee, or holder of the bills of lading; or, after the lay-days are over, to a wharfinger, for the benefit of all concerned, otherwise the owners and he are liable for the goods, or for the damage suffered.

1. The cargo or goods are to be delivered safely. If not, the freight may be forfeited, or a right to damages raised. If the object of the voyage fail in this, the very last act of it, the freight will be lost: as where a ship is obliged to anchor on the outside of a bar, and to land the cargo by boats, the loss of the goods in their way from the ship to the shore will be attended with the same effect as if lost in the middle of the voyage. If damage be suffered, in the act of delivery, by sea-water, by collision, by bad tackling, or the like, the merchant will have his claim of damages.

Where the bill of lading acknowledges the goods to be received, and engages to deliver them safely, the master is chargeable with them as in good condition. He must by his contract guard himself against responsibility for what is unknown; and if he do not so guard himself, and do not obtain satisfaction as to the condition of the goods, he is held tacitly to undertake for the safety of the goods to the full extent.[1]

2. The goods must be delivered according to the number and weight acknowledged in the bill of lading. In the question for what the owners and master are accountable, there is no difficulty where the things consist in *number*. But where the commodity is in *quantity*, to be ascertained by measurement, great difficulties arise from the variations in weights and measures, and from the effect of heat, moisture, motion, &c. in diminishing or augmenting the bulk of the substance. In such cases, it must be left to a jury to determine whether there is truly embezzlement, or whether the difference does not proceed from natural causes or variation of measurement. A cargo of grain, for example, generally comes into less compass by the mere agitation of the voyage; and as corn merchants in their dealings generally allow an average to correct the measurement, perhaps it would be thought a fair rule that some proportion should be allowed of diminution, to save from the charge of embezzlement.[2]

Where foreign weights are mentioned in the bill of lading, the usage of merchants settles the construction of the contract. By that usage, the weight expressed in the

[1] SPROTT against BROWN, 15th February 1803; Fac. Coll. and M. 10,114. A large mirror was shipt from London, addressed to Edinburgh, and contained in a case marked "Glass." The master gave a receipt for the case, 'which I promise to deliver safe.' The contents of the case had not been examined. On arrival at Leith, it was sent on men's shoulders to Edinburgh, and, when opened, the great plate was found broken to pieces though the frame was unhurt. In an action against the master and owners, the Judge-Admiral 'found, that on receiving a package with the word *glass* 'written on it, it was incumbent on the master, if he 'did not mean to abandon all recourse against the person shipping the goods, to refuse taking the package 'on board till the shipper did satisfy him that it was 'actually sound and entire: that seeing the word glass 'so written, he was certiorated of the extent of his risk, 'and had sufficient ground to justify an extra charge 'on account of that risk; and, therefore, found it established, presumptione juris et de jure, that the defenders must have had the extra risk in contemplation 'when they fixed the rate of freight; and decerned 'against them for the value,' &c. The case was brought under review of the Court of Session, by suspension and reduction. But that Court unanimously adhered to the judgment of the Admiral.

[2] In STEIN against STENHOUSE, 2d February 1811, there were shipt 452 bolls of barley from Newburgh to Leith, but only 447½ bolls were delivered. It appeared from the lists of the shore-dues of Leith, that the measurement at the end of the voyage was *less* in one out of 30, and *more* in one out of 100. The Court held, that the diminution in this case did not raise any presumption of embezzlement.

contract is checked by the king's landing scales, and freight paid according to the net weight ascertained there.[1]

3. The manner of delivery, and the termination of the responsibility, will, in all cases, be regulated by the custom of the port. The delivery must be to the consignee, or to his wharfinger; or in boats; or on the wharf; according to that custom. But the consignee may, on tendering freight, demand delivery over-board, without landing the goods on the wharf.[2] If the custom is to discharge into lighters, the master is to watch and guard the lighters till fully laden;[3] but not afterwards:[4] nor will this obligation lie on the master, if it be the usage for the consignee himself to superintend the delivery of the cargo.[5]

The master will acquit himself of his obligation to deliver, if he lodge the goods with another shipmaster, or carrier, or wharfinger; provided he take care that they be so lodged as to make that other chargeable with them.[6] The master is bound to land and lodge the goods with a wharfinger where there is any difficulty about freight, instead of keeping them on board. In some landing-places (as in the London Docks) the wharfingers provide men to unload the ships, and do not permit labourers, provided by the owners, to be employed. In such case, they are held liable for negligence in the unloading, by which damage is occasioned, although they make no direct profit by the employment of those men.[7] The master will also discharge himself and his owners by delivering to one entitled to stop, and who shall regularly stop, the goods in transitu.[8]

4. If, by the terms of the charter-party, a time for completing the delivery is stipulated, the consignee is entitled to insist for the whole of that demurrage.[9]

5. The delivery is to be made only on payment of freight, and on payment also of the premium, and other petty average expressed in the bill of lading, and of any average contribution for loss in the voyage.[10] It has been laid down as recognized in practice, that security for average is required before delivery of goods.[11] But the master is not entitled to retain the goods for arrears of freight due on other goods.[12]

5. *Of the Responsibility of Shipowners under the Edict, and of the Limitations of this Responsibility by recent Statutes.*

Edict, Nautæ, &c.

The responsibility of shipowners and masters under the edict has been reserved for

[1] GIRALDES *v.* DONISON, Holt, 346., where too much having been paid, it was allowed to be recovered back.

[2] SYEDS *v.* HAY, 4. Term. Rep. 260. Here the consignee demanded delivery over-board, but the master refused, and delivered the goods to a wharfinger, who, he said, had by usage a right, when a ship was moored against his wharf, to have the goods landed on his wharf, and to have wharfage fees. The evidence was not sufficient to make out the wharfinger's right. The case turned on a point of the law of actions of trover; but the substantial question was, Whether the master had discharged himself by landing the goods at the wharf, when they were required from himself over-board? The Court held the master liable.

[3] CATLEY *v.* WINTRINGHAME, Peake's Cases, 150. ROBINSON *v.* TURPIN, Abbot, 248.

[4] ROBINSON *v.* TURPIN, 1805, before Lord Ellenborough; Abbot, 250.

[5] DUNNAGE *v.* JOLIFFE, Abbot, 248.

[6] See above, p. 465.

[7] GIBSON *v.* INGLIS, 4. Camp. 72., where a pipe of wine was staved by the negligence of the servants of the London Dock Company.

[8] See above, Of Stopping in Transitu, particularly p. 226. et seq.

[9] See below, Of Demurrage, p. 575.

[10] See below, Of Freight, &c. p. 566. and of General Average, p. 583.

[11] Abbot, 247.

[12] STEVENSON against LIKLY, 18th November 1824; 3. Shaw and Dunlop, 291.

this place;[1] because it has undergone, by special statute, some modifications which are not extended to the case of the other persons comprehended within this law.

The rule of the edict is, that the persons comprehended under it being once chargeable with goods, they must answer for their restitution in the same condition, unless the goods have perished or suffered injury by the king's enemies, or inevitable physical accident. The exception in the charter-party and bill of lading, includes 'the act of 'God and the king's enemies; the dangers and accidents of the sea, rivers, and naviga-'tion; the restraints and detention of kings, princes, rulers, and republics; and all and 'every other unavoidable dangers and accidents.' This is only an express enumeration of the inevitable perils which, by law, would excuse the owners from responsibility. Formerly the exception was expressed in terms more brief, 'the dangers of the sea excepted.' The alteration was made in consequence of a trial, the event of which alarmed shipowners; where a vessel which had struck on a sunk mast in the mouth of a river, and so had been forced on a bank which had altered its form by floods in the river, was held to have suffered by a peril too remote to come under the proper description of the act of God.[2] But it does not appear that the alteration changes much the rule of responsibility which would have been applied under the old form.

Perils of the Sea.

1. To the description of a peril of the sea, or, according to the new form, 'an act of 'God, danger, or accident of the sea, rivers, and navigation,' it is essential that it shall be a peril unavoidable. If due skill, vigilance and care, could have avoided, or repaired the misfortune, the owners will be liable. Thus, it is a peril of the sea if a ship strike a rock; or run on a sand-bank; or suffer in accidental collision by force of the winds against another ship, without fault or negligence on the part of those on board.[3] But if the ship have been negligently or unskilfully navigated, so as to be run on a known rock or shallow, without the compulsion of an irresistible gale to occasion the disaster; or if, in traversing the course of another vessel, the master or steersman has not kept his proper courses, and so has occasioned a collision; or if during the night he has not kept lights where they are required by the usage of navigation, the owners will be responsible for damage to the merchant.[4]

Capture.

2. Capture by pirates is a peril of the sea, and so held after taking the opinion and examination of merchants as to the construction by usage of the true perils of the sea.[5]

[1] See above, p. 465.

[2] See Abbot, 252. et seq. who relates this case of SMITH v. SHEPHERD, with the effect of the alarm occasioned by the decision; first, in an attempt to procure an Act of Parliament, which failed; and next, in the alteration of the bill of lading.

[3] BULLER v. FISHER, 3. Espin. Cases, 67. SMITH v. SCOTT, 4. Taunt. 126.

[4] See Abbot, 252. et seq., where this doctrine is well delivered. Roccus gives the rule thus:—Magister navis oneratæ, pleno velo navigans, si inciderit in vada, (vulgariter dicta *nelle secche*), tenetur de culpa; quod non præviderit id quod a diligente nauta fuisset prævisum. Verum si ex impetu ventorum et tempestate coactus, et non ex imperitia in vado seu scopulos inciderit navimque fregerit et merces sint amissæ vel deteriores factæ, tunc non tenetur. Note 55. Again, see, in Note 56. his amplification of the rule,—Culpa vacat nauta si id agit quod diligens faceret.

Emerigon details a judgment in a case of capture by pirates, where the distinction was correctly drawn. Holding such capture a peril of the sea, the judgment was against the owners, on account of the captain and his whole crew having gone on shore on a deserted island in the Morea to hunt, pirates having taken advantage of this desertion to run away with the ship. Vol. i. p. 532.

The case of the TRENT and MERSEY NAVIGATION v. WOOD, as commented on by Abbot, p. 257., may also be taken as an illustration; there being a fault in the master, in so far as he did not infer from the appearance of a ship in the river the neighbourhood of an anchor.

[5] PICKERING v. BARCLAY, and BARTON v. WOLLIFORD, as quoted by Abbot, 257. Loss by pirates was, in the Roman law, placed on the same footing with shipwreck. The doctrine of Labeo, as confirmed by Ulpian, is,—'Si quid naufragio aut per vim piratarum 'perieris non esse iniquum exceptionem ei dari.' Dig. lib. 4. tit. 9. l. 3. § 1. Nautæ, Caup.

See CULLEN v. BUTLER, 5. Maule and Selwyn, 461.

The question, what is a peril of the sea? gives rise to the preliminary difficulty, by what tribunal is that to be determined?—by the Jury, as a question of fact; or by the Judge, as matter of law for the Court? And this difficulty depends on the combination of fact with the legal construction of a written instrument. It is true, in general, that the construction of ambiguous expressions in instruments belongs to the Court; but the meaning of the words, as applied to the practice of trade, must be derived from usage, and merchants must be resorted to for the proof of that usage. And perhaps the rule is most correctly stated by the author of the Treatise on Merchant Ships and Seamen, where he says, that 'the cases furnish very strong authority to show, that even if the 'decision of the question does strictly and properly belong to the Judge, yet his decisions 'will be guided by usage, and the course of practice among merchants, which are matters 'of evidence and of fact.'[1]

Indirect Loss.

3. But not only the common perils of storms, and their direct consequences, by striking on a rock, stranding, &c. are clearly within the excepted perils: So also are the more remote dangers consequent on such accidents. Thus, the loss of goods plundered by the inhabitants on a ship going on shore, was, in a question of insurance, held as a peril of the sea.[2]

Irresistible Force.

4. The effect of storms and tempests on the ship herself, in straining, springing a leak, shipping great seas, and other such accidents occasioning damage or injury to the cargo, being within the exception, so as to free the master and owners from liability, where there is no fault or negligence; it was questioned, whether such effects, produced by the operation of superior force from the hand of man, are under the same rule: as where a vessel is taken in tow by a king's ship; or is forced to bear up to answer a signal; and in the course of her sailing under this external force suffers damage which otherwise would not have happened? It has been held, that such a case falls under the exception, as a peril of the sea.[3] But if this compulsion proceed from the fault of the master,[4] or from an order which was unlawful, and not backed by irresistible force, this extraordinary injury will scarcely be brought under the exception.[5]

Detention and Restraints of Princes, &c.

5. Detentions and restraint by kings, princes, rulers, &c. are held to apply only to 'actual and operative restraints, not merely such as are expected and contingent, how-'ever reasonable and well-grounded the apprehension may be, or however fair and honest 'the intention of the master.'[6] Detention of a British ship by a British man-of-war, proceeding on state necessity, or on mistake, not attributable to the master's fault, is within the exception.[7]

[1] Abbot, 255.

[2] BONDRETT v. HENTIGG, before Lord Chief-Justice Gibbs; Holt's Cases, 149.

[3] HAGEDORN v. WHITMORE, 1816; 1. Starkie, 157. In this case, the ship was taken in tow by a British ship of war, and obliged to use an extraordinary press of sail, in consequence of which, and a high sea, she shipped a quantity of water, by which her cargo of linens was damaged. It was an insurance case. Lord Ellenborough held this a peril of the sea. See next Note.

[4] In the preceding case there was a circumstance, which, had the case been for *loss on the charter-party*, would surely have barred the owners from pleading the exception. The captain, when hailed by the king's ship, took her for a Frenchman, and, concealing his British license, produced simulate papers, which led the king's officer to take the ship in tow.

[5] PHELPS v. AULDJO, 1809; 2. Camp. 350. This case may serve to illustrate the doctrine, though it was an insurance question. A ship in harbour abroad was ordered to examine a strange sail in the offing: the master, without protest or remonstrance, and uncompelled by any force or threat, set sail and found the vessel neutral. Lord Ellenborough held this a deviation unexcused, as, without force, the master had gone probably in hope of a prize. Damage to the cargo in such an expedition would probably not be held to fall under the exception in the charter-party.

[6] ATKINSON v. RITCHIE, 10. East, 534. Here the master, on a justifiable alarm proceeding from the British consul at St Petersburgh, of an intended embargo in the Russian ports, sailed with half a cargo. He was found responsible in damages to a large amount. The judgment delivered by Lord Ellenborough particularly deserves perusal.

[7] HAGEDORN v. WHITMORE, supra, Note [3]; so said in that case by Lord Ellenborough.

6. The saving clause adjected to the exception of the charter-party in West India voyages, where boats are used in loading and unloading, (viz. 'saving the risk of boats, 'so far as ships are liable thereto,') was meant to provide a remedy against the exemption, which, under the general words of the exception, might be pleaded in case of loss of goods in boats; and against the carelessness which might thus arise. The Judges in England have held, that though the wording of this saving clause is very obscure, it was meant to keep owners, as to responsibility for loss in boats, on the same footing on which, previous to the introduction of the exception, they stood as to losses on board the ship; that is, that they are not liable for dangers of the sea.[1]

Departure from Proper Course.

7. If a ship depart from the usual or stipulated course, and a loss happen, the master and owners will (under certain qualifications by statute) be responsible. Thus, 1. If being chartered to sail from Leith to London, the master choose to call at Berwick, or any intermediate port, and a storm afterwards arise, in which the goods of the merchant shipped on board are damaged, or obliged to be thrown over-board, the master and owners will be liable for the loss; the owners to the extent of the value of the ship and freight, the master for the whole amount. 2. If, according to the course of the voyage, it is usual or necessary to call at an intermediate port, any loss arising, in similar circumstances, will be construed as a proper peril of the sea, to be covered only by insurance. But, 3. If the contract of affreightment should be so expressed as to exclude such intermediate ports, though in the usual course of the voyage, the master and owners will be liable, as in the case first stated of the ship having deviated by calling at an intermediate port.[2]

Distinction between Charter-party and Insurance.

The claim for damages on account of breach of charter-party, is to be determined on a different principle from that which rules the case of insurance. Insurance is a contract of indemnity against loss, not for the securing of gain; and the prime cost is the value to be indemnified: Affreightment is a contract, whose object is the attainment of expected gain, by means of the transportation of goods to a particular place, which the shipmaster and owners undertake to perform. The loss by failure in the performance of this contract cannot be indemnified, unless by paying to the merchant the value of the goods as at the port of destination.[3]

Limitation Statutes.

By several statutes, the responsibility of owners of ships, and, in one instance, of masters also, has been very materially limited. Those limitations, 1. have been held not to extend to lighters, barges, boats, or vessels of any burden or description, used solely in rivers or inland navigation; but only to those which are used in sea voyages.[4]

[1] JOHNSTON v. BENSON, 1819; 1. Brod. and Bing. 454. Here, on such a bill of lading, the ship being at Anotta Bay, Jamaica, sent the shallop on shore with goods. A hurricane arose, and the shallop was lost, with the goods. The whole was proved to be according to the usage of landing goods there. An action was brought against the shipowner for breach of engagement, by non-delivery of the goods so lost. A verdict, under the direction of Dallas, J., was given for the defendant, and the Court refused a new trial.

[2] STEWART against JOHNSTON, 17th January 1810; 13. Fac. Coll. 504. Here the Perth Merchant Shipping Company publicly advertised vessels to sail from Perth and Leith, the only intermediate port mentioned in these advertisements being Newburgh. Stewart shipped 51 bolls of malt at Perth for Leith. The ship delivered part of her cargo at St Andrews. She was detained there two days, and afterwards was lost between St Andrews and Leith. The Court of Session, in an action for the value of the malt against the master and owners, held that the shippers were entitled to rely on the public advertisements as their contract of affreightment; and whatever was the custom, (into which they were not bound to inquire), to expect that the shortest, safest, and most expeditious course was to be pursued between the different ports mentioned in the advertisements. The Court therefore refused to allow a proof of the practice followed by the Company in performing voyages from Perth to Leith.

[3] Hujusmodi damnum proveniens ex culpa magistri in rebus et mercibus, æstimandum est ad rationem illius, quod valuissent merces, vel valere potuissent in loco ad quem destinatæ erant, considerato et habito respectu ad tempus quo ad illum pervenire potuissent. Casaregis, Disc. 23. § 88. See also Kuricke, Jus. Mar. Hanseat. tit. 9. art. 2.

[4] 53. Geo. III. c. 159. This matter came into ques-

2. Shipowners are freed from any responsibility for *loss or damage by fire.*[1]

3. Owners and part-owners are declared not to be answerable, *beyond the value of the ship and freight*, for any loss by act or neglect, without their fault or privity; value of the carriage of their own goods, and hire due or to grow due under any contract of carriage, being in this question deemed freight,[2] and the master and mariners being responsible as at common law.[3]

It is also provided, that if any loss or damage shall happen by more than one separate accident, or on more than one occasion, in the course of a voyage, or in the interval between two voyages, any such loss shall be compensated in the same way, and to the same extent, as if no other loss had happened during the same voyage, or in the same interval.[4]

4. Owners or masters are freed from responsibility for loss or damage to gold, silver, diamonds, watches, jewels or precious stones, put on board, *unless the true nature, quality, and value, shall be entered in the bill of lading, or otherwise declared in writing to the master or owner.*[5]

tion in a case from Greenock, relative to a gabbart or lighter used in navigating the Clyde; and when the case went to the House of Lords, this point of exemption of such vessels, which seems to have been taken for granted in Scotland, seemed so important, that the opinion of the twelve Judges was required on it. But the pressure of business having prevented the opinions from being given, the Chancellor, taking the aid of Abbot, Chief-Justice of the King's Bench, peculiarly conversant with the meaning of this Act of Parliament, delivered the opinion, 'that the Act of the 26. Geo. III. 'c. 86. relates only to ships and vessels usually occupied 'in sea voyages, and that it gives no protection in case 'of small craft, lighters, and boats, and so on, con-'cerned in inland navigation.' HUNTER and Company against M'GOWN and Company, 12th June 1819; 1. Bligh, 571.

[1] By 26. Geo. III. c. 86. § 2. it is enacted, 'That 'no owner or owners of any ship or vessel shall be sub-'ject or liable to answer for, or make good, to any one 'or more person or persons, any loss or damage which 'may happen to any goods or merchandise whatsoever, 'which shall be shipped, taken in, or put on board any 'such ship or vessel, by reason or means of any fire 'happening to or on board the said ship or vessel.'

[2] 53. Geo. III. c. 159. § 2. and § 4.

[3] 7. Geo. II. c. 15. A. D. 1734; 26. Geo. III. c. 86. § 1. A. D. 1786.—'That no person, &c. who is 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 or damage by reason of embezzle-'ment, secreting, or making away with, by the master 'or mariners, or any of them, of any gold, silver, dia-'monds, jewels, precious stones, or other goods or 'merchandise, which shall be shipt, taken in, and put 'on board any ship or vessel; or for any act, matter, 'or thing, damage or forfeiture done, occasioned, or 'incurred by the said master or mariners, or any of 'them, without the privity or knowledge of such owner 'or owners, farther than the value of the ship or vessel, 'with all her appurtenances, and the full amount of the 'freight due, or to grow due, for and during the voy-'age wherein such embezzlement, &c. or other malver-'sation of the master or mariners shall be made or 'done.'

By 53. Geo. III. c. 159. § 1. the above Acts are amended, part-owners are expressly included, and liability discharged 'for any loss or damage arising or 'taking place by reason of any act, neglect, matter, or 'thing done, omitted, or occasioned, without the fault 'or privity of such owner or owners, which may happen 'to any goods, wares, or merchandise, or other things 'laden or put on board the same ship or vessel; or 'which may happen to any other ship or vessel, or to 'any goods, &c. being in or on board of any other ship 'or vessel; farther than the value of his or their ship 'or vessel, and the freight due, or to grow due for and 'during the voyage which may be in prosecution, or 'contracted for at the time of the happening of such 'loss or damage.'

[4] 53. Geo. III. c. 159. § 3.

[5] 26. Geo. III. c. 86. § 3. (1786).—'And whereas 'disputes may arise, whether the owners or masters of 'ships are liable to answer or make good the value or 'amount of any gold, silver, diamonds, watches, jewels, 'or precious stones, which may be lost after the same 'have been put on board their ships, on freight, with-'out the shipper's declaring at the time the value of 'such goods;' be it therefore enacted, &c. 'That no 'master, owner, or owners of any ship or vessel, shall 'be subject or liable to answer for, or make good to, 'any one or more person or persons, any loss or da-'mage which may happen to any gold, silver, diamonds, 'watches, &c. which from and after the passing of this 'Act shall be shipped, taken in, or put on board any 'such ship or vessel, by reason or means of any rob-'bery, embezzlement, making away with, or secreting 'thereof, unless the owner or shipper thereof shall, at 'the time of shipping the same, insert in his bill of lad-'ing, or otherwise declare in writing to the master,

5. By the English Pilotage Acts, no master or owner shall be answerable for loss or damage, 'for or by reason or means of any neglect, default, incapacity, or incompetency 'of any licensed pilot acting in the charge of such ship or vessel, under or in pursuance 'of any of the provisions of the Act, where and so long as such pilot shall be duly quali-'fied to have the charge of such ship, or where and so long as no duly qualified pilot 'shall have offered to take charge thereof.'[1] This statute does not apply to Scotland, being limited to pilotage on the coasts of England.[2]

In commenting on these Limitation Acts, it may be observed,—1. That the Act of the 53. Geo. III. c. 159. in the case of registered ships, comprises all the accidents and neglects intended to be provided for by the Legislature, and for most if not all purposes, may now be considered as containing the law on the subject.[3] 2. That these laws are grounded on reasons of policy recognized in other commercial nations.[4] 3. That the statutes are generally intended to limit the responsibility of owners, not of masters. There is, indeed, only one of the cases enumerated in which masters are named in the Act, viz. where jewels, money, &c. have been put on board without any disclosure of their nature or value. In such case, on proof of actual embezzlement, a remedy will lie against the master; as proof of privity on the part of the owners will charge them; but otherwise the loss will fall on the merchant.[5] 4. That as to damage from fire, since the master is not by name comprehended within this exception, it may be questioned whether it was not intended that the rigid policy of the common law should operate on him to the general safety of all concerned; but the stipulation in the modern bill of lading removes his responsibility.[6] 5. That where goods are injured by the spilling of corrosive liquids, as aquafortis, though, in common language, they are said to be burnt, the owners will not be free on the exception of fire out of their responsibility. Such an accident may, indeed, occasion fire, as lime may, and sometimes does, when carried by sea; but where there is no ignition, and damage thereby occasioned, the statute will not be held to apply:[7] and the matter will be determined on the footing of negligence, on the edict, unless the damage was plainly occasioned by sea-risk. 6. That, generally speaking, this law, which takes away the responsibility for fire, will not be held to derogate from the special regulations of ports and harbours prohibiting fires on board of ships lying there. In a case already quoted, where the 26. Geo. III. was, in the courts of Scotland, held to apply to ships engaged in river navigation, it not being alleged that the owners were aboard when a fire happened, the owners were held to be freed by the statute; care being specially taken to guard against the supposition that the Act was held to free the captain from responsibility.[8]

'owner, or owners of such ship or vessel, the true na-'ture, quality, and value of such gold, silver, diamonds,' &c.

[1] 6. Geo. IV. c. 125. § 55. See Abbot, 261. and 158.

[2] See above, p. 552.

[3] Abbot, 269.

[4] See Vinnius in Peck. p. 155. 1. Valin, 569. Ord. of Rotterdam, edit. 1621, art. 167. 2. Magens, 107. See Abbot, for History of the Statutes, 264.

[5] See below, p. 564.

[6] I see this doubt stated by Lord Chief-Justice Abbot, p. 260. He gives no opinion on the question; but holds it clear, that the ordinary words of the bill of lading exclude the responsibility.

[7] BRODIE against ROBERTSON, June 28. 1805; Judge Cay's Notes, vol. D. p. 385. This was a case on a policy of insurance in the Scottish Court of Admiralty. The question was, Whether, under a policy of insurance, a loss might be recovered, occasioned by the breaking of some baskets of oil of vitriol, as being damage occasioned by fire? Held to be an injury from improper stowage; that it was the effect of the sea, the wind, and waves, on goods improperly stowed, which occasioned the breakage of the oil of vitriol; and that this breakage, by erosion or otherwise, occasioned the damage.

[8] HUNTER against M'GOWN, 16th May 1811; 16. Fac. Coll. 242.

7. The owners are not, on the Act 53. Geo. III. held responsible beyond the value of ship and freight, although the loss be occasioned by the misconduct of one of their number, who was also master.[1] 8. The value of the ship is to be estimated, not as at the commencement of the voyage, but as at the time of the loss; and although there may be some practical difficulty in this, it is a difficulty in matter of evidence, not of law.[2] The fishing stores (belonging to the owners) of a ship employed in the usual manner in the Greenland fishery, and which often are as valuable as the ship itself, are valued as part of the ship and her appurtenances;[3] although in insurances they are usually made the subject of a separate agreement; that being entirely a matter of contract, of which the construction depends in many cases on usage. In reckoning freight, the whole freight of that voyage is to be taken, whether paid in advance or not.[4] But the value is not the amount of freight contracted for; it is not to exceed the amount that would have been carried had the voyage been completed, subject to diminution by jetson and other losses.[5] 9. It is declared that the remedy against the master and mariners shall remain entire, for embezzlement or fraud, abuse or malversation.[6] If, therefore, it can be proved against the master, that he actually received into his own custody a valuable packet of money or jewels; and if the evidence shall satisfy a jury that he has embezzled them, he will be responsible, although the contents were not disclosed or stated in the bill of lading. And, in the same way, he would be liable for the value of goods so embezzled, if, in the distribution of the value of the ship among those who had suffered loss, the owner of those goods should not receive his full payment. 10. In those cases in which the responsibility of the owners is restrained to the value of the ship and freight, provision is made for the case of several merchants having claims on a ship inadequate to the whole demand. This is to be settled by a proportional distribution; to effect which, certain proceedings are declared competent in England. 11. In questions of embezzlement which regard either the owners, or master, or mariners, doubts may arise on the bill of lading. Where the bill bears a certain quantity, as of coffee, and less is delivered, it is of itself proof of embezzlement, if the difference is considerable. Where the bills bear contents unknown, this will not preclude a proof of actual embezzlement, though it will throw the onus probandi on the merchant. Where goods are to be carried for hire, the proprietor has a right to the utmost care: Where they are not to be carried for hire, still proper and prudent care must be taken of that which is committed to the master's custody.[7]

[1] WILSON v. DICKSON, 1818; 2. Barn. and Alder. 2. This was an action against joint owners of the Hope, for loss on goods improperly sold by the captain, one of the joint owners. The arbitrator, on a reference, submitted by his award this question to the Court, Whether the fault or negligence of one of the owners takes away the protection given to part-owners by the Act? The Court held that it did not; that joint owners are not like partners, but are exposed to have persons introduced into the ownership of whom they know nothing; and that the Act specially protects each against responsibility, without his own fault or privity.

[2] See the above case of WILSON v. DICKSON, (preceding Note), in which this also formed a point. See also CAMERON v. RAEBURN, where this point was taken as settled by Wilson's case. 1. Bingham, 471.

[3] DUNDEE, Holmes, 1823; 1. Haggard's Adm. 109. GALE v. LAURIE, (same case), 1826; 5. Barn. and Cress. 156.

[4] Supra, Note [1].

[5] CAMERON v. RAEBURN, 1824; 1. Bingham, 465.

[6] This is both by the 7. Geo. II. c. 15., and by the 26. Geo. III. c. 86. § 5.; and also by 53. Geo. III. c. 159. § 3.

[7] NELSON v. M'INTOSH, 1816; 1. Starkie, 237. A seaman went on board at Trinidad, but was left behind. The captain afterwards opened his box in presence of several passengers, and placed the contents in a canvass bag, and deposited them in the captain's chest in the cabin, where his own valuables were kept. In the river the captain and mate left the ship. One mate remained. An excise officer was on board, and two young men slept in the cabin. Next morning the captain's trunk was carried off. Under the direction of Lord Ellenborough, a verdict was found for the seaman against the captain.