2. CLAIMS ON THE BANKRUPTCY OF THE MERCHANT OR SHIPPER.

On the bankruptcy of a merchant who enters into a charter-party, or who ships goods in a general vessel, claims against his estate may be grounded upon any of the obligations incumbent upon him by the contract, express or implied; and of which a short enumeration has already been given. Without entering minutely into all the questions which may be raised in this way, the points, Of Furnishing a cargo; Freight; and Demurrage, are important.

1. *Of the Obligation to Furnish a Cargo.*

This, which forms one of the chief engagements on the part of the merchant, includes two points of obligation; on each of which a claim may arise against him: One relative to the quantity of goods to be furnished as a cargo; the other to the time at which the cargo is to be furnished.

Cargo to be Furnished.

1. The ship may be freighted for a gross or general sum, or at so much per ton: Or the engagement may be rateably, at so much per cask or bale. In the two former cases, the freight will be demandable, and the rate is ascertained, whether a cargo is furnished or not: So that the actual loading of a cargo is of importance, chiefly as it affords security by lien for the freight:[1] But, in the latter case, the cargo must be furnished in order, strictly speaking, to raise a claim for freight at all, or, at least, to ascertain its amount. Questions sometimes occur as to the amount of damage to come in place of freight, as where the stipulated cargo was to consist of different commodities at various rates. The rule for such a case seems to be, that an average must be taken.[2]

If the cargo is not furnished, the master may, after waiting the appointed, or a reasonable time, take a protest, and engage for another cargo; and action will be competent to him for the loss suffered by the change.

If the ship is not fully loaded, the master may sail with the cargo which he has received, and demand full freight: Or he may take in goods from others so as to fill up the vacant room; and, instead of trusting to a claim of dead freight, indemnify himself in this way for the deficiency. But there is considerable delicacy necessary to be observed in taking in the goods of others. It may be of importance to the merchant to exclude from the market the goods which might so be taken, and rather to sail with a deficient cargo than to forward them. He is undoubtedly entitled to exercise this privilege, provided he give full security for the freight; and the shipmaster ought to be very careful to give the merchant the fullest opportunity of using this privilege, before taking other goods on board.[3] The master may take in other goods in the case of the merchant's insolvency.

Where the freight is rateable according to the cargo, the merchant must furnish a full and complete cargo, unless he has taken care specially in the charter-party to limit the extent of the cargo on which the master is entitled to insist. The parties may settle pre-

[1] Where the ship is freighted at so much per ton, it is of importance to have the goods put on board to the *full* extent; for there is no lien on what is deliverable to the consignee for the dead freight. See below, p. 574.

[2] THOMAS *v.* CLARKE, 1818; 2. Starkie, 450. In a charter-party of this sort, a great variety of articles were mentioned to be shipped at Rio Janeiro, as coffee at 12s. per hundred-weight, sugar at so much per hogshead, &c. The ship was forced to return without a cargo. Lord Chief-Justice Abbot intimated, 'that the 'proper course would be to estimate the freight by 'means of an average, so as to take neither the greatest 'possible freight nor the least; and that he should in-'form the jury, that such an average was the proper 'measure of damages;' and so the verdict went. See below, p. 567.

[3] See Pothier, Charte-Partie, No. 20. Abbot, 179.

viously what shall be considered as the cargo to be loaded: And when it is so settled, it will be of no importance in the question, whether the ship might have carried more or not. But this will require a precise and specific limitation. It will not be enough to control the general rule, that, in describing the ship, a certain measurement is mentioned, where either the implied bargain, or an express agreement, obliges the merchant to find a full and complete cargo: for no given dimensions can be a just measure of the quantity of tons which the vessel may carry; this necessarily varying with the specific gravity of the goods. It has been ruled, that as, on the one hand, in a charter-party for a gross sum, the master would not be entitled to refuse to take as much as the vessel could conveniently and safely carry, notwithstanding such descriptive mention of the measurement; so, in a rateable freight, he is entitled to insist on such complete cargo being delivered to him.[1]

Time of furnishing Cargo.

2. The time within which the cargo is to be furnished, is generally regulated by special convention. Independently of any such stipulation of lay-days and demurrage, the merchant is bound to bring forward the cargo within a reasonable time; or where the bargain is specific, he must furnish the cargo at the day appointed, otherwise the master is free to take other freight, and to bring his action for damage. This ruled a very strong case, where the merchant was not held entitled to a literal interpretation, but bound to have his cargo ready by the time which, according to the substantial purpose of the contract, the parties must truly have intended.[2] It is, however, a justification for not providing a cargo, if the merchant have stipulated the arrival of the ship at a particular day as a condition; for the presumption is, that he must dispose of his goods in another ship, if that contract be broken; or that, if the ship do not arrive, he will not enter into contracts for providing the goods.[3]

See further of Demurrage, below, p. 575.

2. *Of the Obligation to Pay Freight.*

Claim for Freight.

The principal obligation of the merchant is to pay freight; and this obligation rests either on the charter-party, or on the bill of lading, by which the payment of freight is

[1] HUNTER *v.* FRY, 1819; 2. Barn. and Alder. 421. Here the charter-party described the master as master of 'the ship Hunter, of 261 tons burden, or thereabout.' The voyage was to the West Indies, and the freight at so much per ton. The freighter's agent was to supply a full and complete cargo of 'coffee in bags and casks, with logwood for dunnage, &c. not exceeding in whole what the said ship could reasonably stow and carry, over and above her stores,' &c. In loading the ship there was furnished only 28 tons of coffee 20 tons of logwood, and 288 tons of sugar. She could have carried 240 tons of coffee in bags, 40 tons in casks, and 20 tons of logwood for dunnage; and a sum of L.918 was the amount of freight that would have been earned over what was received, had the full cargo of coffee been sent. Judgment was given for the above sum; Lord Chief-Justice Abbot, and Bayley, Holroyd, and Best, Justices, delivering their opinions that the description was not restrictive, and the contract for a full and complete cargo.

[2] THOMSON *v.* INGLIS, 1813; 3. Camp. 428. Here the contract was to load a full and complete cargo at Tobago, and to dispatch the ship therewith in time to join the convoy that should be appointed to sail for Great Britain on the 1st August. The ship arrived at Tobago 8th July, and was ready to load on 14th. The convoy sailed on 22d July, at which time the ship might have been loaded. A small quantity of goods was then on board, and the merchant offered a full loading, if the master would stay a few days. But he would not, and he set sail to join convoy. Lord Ellenborough held, that as the vessel was in time to load for the 22d, when the convoy passed, the charterers were, according to the reasonable construction of the charter-party, bound to supply her before the time when the general West India convoy passed by the station; and that the captain was not bound to wait, though he might afterwards have overtaken the convoy, as he must thereby have increased the risk of capture. A verdict went for the dead freight.

[3] SHADFORTH *v.* HIGGIN, 1813; 3. Camp. 385. A ship was freighted to go in ballast for a cargo, and the merchant engaged to provide a full one, 'provided she arrives out and ready by 25th June.' The ship did not arrive till 3d July. The question was, whether the merchant was answerable for having failed to furnish her with a full cargo? Lord Ellenborough ruled this to be a condition precedent, on failure of which the defender's liability was to be avoided; and a nonsuit went accordingly.

made a condition of delivery. Lien for freight will be considered afterwards: At present, only the personal obligation is to be taken into view.

What included under Freight.

FREIGHT is stipulated either,—1. As a gross sum for the whole voyage; or, 2. At so much per ton of the ship's burden; or, 3. Rateably, at so much per ton, or cask, or bale of the goods embarked; or, 4. By time, at so much per month, week, &c. Those agreements have different effects, of which something has already been said in speaking of the furnishing of a cargo.[1]

Primage or Hat-Money.

PRIMAGE, or HAT-MONEY, and PETTY AVERAGE, are duties which are generally provided by the charter-party or bill of lading to be paid along with the freight. The former is a small payment to the master for his care: The latter has nothing to do with average loss, but merely covers the expense of towing, beaconage, &c. These duties are regulated entirely by usage, and sometimes are converted for a per-centage on the freight.

The FREIGHT as agreed on, with these additional duties, or, where no special agreement has been made, the usual and accustomed freight, may be demanded before the goods are taken possession of by the consignee: adding, on the one hand, the average contribution which may be due on the goods, either to the owner of other goods or to the ship; and deducting, on the other, what may be due for average contributions from the ship, or the rest of the cargo, to the owner of the goods.[2]

Time Freights.

A remarkable distinction exists between the stipulation of freight by time, and the ordinary case of freight in the gross, or by the measure of the cargo: In the former case, the duration of the voyage is at the risk of the merchant; in the latter, at the risk of the shipowners.

In freights on time, it is material to fix what shall be the inception or commencement of the voyage. If no time be fixed, it is from the day on which the ship breaks ground and begins the voyage.[3]

Month.

The month is understood to be a calendar, not a lunar month.[4]

Shipper's liability for Freight.

1. Where, after a charter-party has been executed, a bill of lading is granted for the whole, or part of the cargo, deliverable to a certain person or assigns, 'he or they paying 'freight;' can the master deliver the goods to a third party, holder of the bill of lading, without demanding freight at the time, and afterwards claim against the shipper under the charter-party for payment of freight? When this point first occurred in England, Lord Kenyon held the shipper not to be answerable: But the Court of King's Bench was of a different opinion, and a new trial having been granted, a verdict was under Lord Kenyon's direction given against the merchant for the freight.[5] The doctrine is now, by subsequent cases, completely settled according to that decision.[6] The principle on which the English determinations have proceeded, seems correctly to accord with the true construction of the contract: That principle is, that the clause introduced into the bill of lading relative to the payment of freight, is intended solely for the benefit of the shipper. So it had been decided in Scotland previously to the case quoted in the preceding note.[7]

[1] See above, p. 566.

[2] See below, Of Average.

[3] CURLING v. LONG, 1. Bos. and Pull. 636. Molloy, b. 2. chap. 4. § 3. See judgment of Mr Justice Heath in BEAL v. THOMSON, 3. Bos. and Pull. 405. Abbot, 279.

[4] JOLLY v. YOUNG, 1. Esp. Cases, 186.

[5] PENROSE v. WILKES, 1790; Abbot, p. 281.

[6] TAPLEY v. MARTENS, 1800; 8. Term. Rep. 451. CHRISTY v. ROWE, 1808; 1. Taunt. 300. The Court held, that the master, having delivered the goods, if he could not afterwards get the freight from the consignee, might sue on the charter-party.
SHEPHERD v. DE BERNALES, 1811; 13. East, 565.; in which last case Lord Ellenborough, who delivered the judgment of the Court, takes a very deliberate review of all the prior cases.
See Abbot, 252. et seq.

[7] WILSON against BENNET in Admiralty, 17th December 1801; Judge Cay's Notes, vol. A. p. 253. This question made only one point of the case. The Judge-

It has also been held, that where the shipmaster has taken from the agent for the owner of the goods a bill on a third person, which is not duly honoured, the freighter is still liable on his charter-party.[1] And where the original shipper still retains an interest in the goods, an assignment of the bill of lading will not discharge him of his obligation for freight.[2]

Whether Consignee or Vendee liable for Freight.

2. It has been doubted, whether the person taking delivery under a bill of lading, with a condition that the consignee is to pay freight, becomes liable for payment of the freight as by personal contract. It is settled, 1. That a consignee is, in the general case, liable for the freight, and may be sued for it;[3] but that one who is merely agent for the consignor does not become personally answerable.[4] And, 2. That where the consignee sells to another, that other becomes liable for freight on receiving the goods. An opposite opinion was at first entertained both by Lord Kenyon and by Lord Stowell.[5] But Lord Ellenborough held, in a case tried before him, that the taking of the goods by the purchaser under the bill of lading, was a virtual assent by him (as ultimate appointee of the shippers for the purpose of delivery) to take the goods upon the terms of the bill. This opinion was confirmed by the Court of King's Bench,[6] and is approved of by the present Chief-Justice of that Court.[7] But if it plainly appear that the freighter alone was credited, the indorsees of the bill of lading will not be personally liable for the freight after delivery of the goods;[8] and the indorsee of such a bill of lading, making goods deliverable to order or assigns on payment of freight, although he has paid over the proceeds of the goods to the indorser of the bill of lading before being called on to pay the freight, will still be liable for it.[9]

3. If a consignee take the goods from the shipmaster, without a distinct intimation that he means to refuse payment of freight, he will not be held entitled, however bad the condition of those goods may be, to retain them on account of a claim of damage against the master and owners.[10]

Admiral's determination was affirmed in the Court of Session, 10th March 1809; 15. Fac. Coll. 254. See below, p. 571. Note [3].

[1] MARSH *v.* PEDDER, 1815; 4. Camp. 257. Gibbs, Chief-Justice, held it to be the same as if the freighter himself had paid the freight by a bill which turned out bad. If the bill is not paid, the principal remains liable. Osy here was agent of the freighter, and settled with the plaintiff in that character. Circumstances may vary the effect of taking a bill of exchange either from agent or principal. If the party having the offer of cash, merely for his own accommodation prefers a bill of exchange, upon that he must seek his remedy.

[2] KELTING against JAY, 16th January 1823; Fac. Coll. 2. Shaw and Dunlop, 121.

[3] Abbot, 285.

[4] WARD *v.* FELTON, 1801; 1. East, 507.

[5] ARTAZA *v.* SMALLPEICE, 1. Esp. Cases, 23. The THERESA BONITA, De Jong, 4. Rob. 236.

[6] COCK *v.* TAYLOR, 1811; 13. East, 399. Here a bill of lading at Alicant stated the goods to be shipt by Montgomery and Company on the Whim, to be delivered, &c. at London, &c. to the order of Hargraeve and Dalzell, or to their assignees, he or they paying freight. The bill of lading was indorsed to William Peters, and by him to Taylor and Son of London. When the goods were delivered to Taylor and Son, no freight was demanded or paid. The master brought his action against Taylor and Son for the freight, who pleaded, that, being purchasers from the original consignees, they were not liable for freight, there being no contract between them and the shipowners, express or implied. Lord Ellenborough held the action maintainable against them, as the ultimate appointees of the shippers for delivery, and who having taken the goods under the bill of lading, virtually assented to the terms of the bill. Verdict accordingly; and a rule refused for a new trial.

[7] Abbot, 286.

[8] MOORSOM *v.* KYMER, 2. Maule and Sel. 303.

[9] BELL *v.* KYMER, 1814; 5. Taunt. 477.; 1. Marsh. 146. This case Lord Ellenborough said he could not distinguish from the above.—'The holders of the bill 'of lading were bound to know that they were liable 'for the freight, and therefore should not have paid 'over the proceeds without first taking care that their 'employers had paid it.'
DOUGAL *v.* KEMBLE, 1826, in C. P.; 3. Bingham, 383.

[10] PILLANS and Company against PITT, 23d December 1825; 4. Shaw and Dunlop, 350.

It is next important to distinguish the cases in which freight is demandable in whole or in part. The GENERAL RULE is, that freight is due only provided the voyage has been performed, and the goods delivered at the destined port. For the intention is, that the goods should be carried to a particular destination, and the agreement is to carry them thither, unless prevented by the dangers of the sea, or other unavoidable accident; while the counterpart is to pay freight only if the goods be delivered at their place of destination.[1] But to this doctrine there are exceptions, resting on the ground either of an express contract, or on that of an implied contract, or on the equity between the parties, in the circumstances of the case.

In what circumstances Freight is due.

In England, this matter, as dealt with in courts of common law, rests on the narrow footing of a special contract, express or implied:[2] In Admiralty, the decision proceeds not only on contract express or implied, but on the relative equity between the parties.[3]

In Scotland, the mingled jurisdiction of law and equity prevents the necessity of having recourse to different principles of judgment in various tribunals. In the Court of Session, as well as in Admiralty, (and in both on the same grounds as in the Admiralty of England), the equity between the parties, as well as the contract expressly entered into, or that which may be inferred from their conduct, furnish grounds of exception to the general rule above laid down. And,

1. Where the ship has been lost or disabled during the voyage, but the goods have been saved, and carried on to their destined port, freight is due, the condition or undertaking by the shipmaster being performed: And the master is entitled, with this view, either to retain the goods a reasonable time, till the ship be repaired, or to hire another vessel to complete the voyage.[4]

If the Ship be stopped, and the Goods carried forward.

2. Where the goods have arrived at their destined port, but have suffered injury, it is settled,—1. That freight is due although the goods should have fallen in price, or have become damaged or spoiled by their own inherent vice.[5] 2. That freight is due by implied contract if the merchant take the goods; and that the freight must, in such case, be paid without abatement on account of the damage, or of the expense in trying to remove the injury which the goods have suffered; unless the damage has proceeded from the master's

If the Goods arrive damaged.

[1] See the general doctrine delivered by Lord Ellenborough in HUNTER *v.* PRINCEP, 10. East, 378. See also LIDDARD *v.* LOPES, ib. 526. OSGOOD *v.* GRONING, 2. Camp. 466.

[2] Abbot, 320.—'Upon a review of the cases (says the editor of the 5th edition) 'it will appear, that con- 'sidering the subject with regard to the proceedings 'of the courts of common law of England, the right 'to freight pro rata itineris must arise out of some new 'contract between the master and the merchant, either 'expressly made by them, or to be inferred from their 'conduct.' See the whole passage, with the cases referred to.

[3] THE FRIENDS, Crighton, 1. Edwards' Adm. Rep. 246. Lord Stowell, in explaining the grounds of judgment, and alluding to cases where American ships, bound for France, had been brought into British ports, and the full freight was given, said, 'In these cases the 'Court gave the master the full benefit of the freight, 'not by virtue of his contract, because, looking at the 'charter-party in the same point of view as the courts 'of common law, it could not say that the delivery 'at a port in England was a specific performance of its 'terms. But there being no contract which applied 'to the existing state of facts, the Court found itself 'under an obligation to discover what was the relative 'equity between the parties. The Court sits, no more 'than the courts of common law do, to make contracts 'between parties. But, as a Court exercising an equitable jurisdiction, it considers itself bound to provide, 'as well as it can, for that relation of interests which 'has unexpectedly taken place under a state of facts 'out of the contemplation of the contracting parties in 'the course of the transaction.' Below, p. 572. Note [1].

[4] Jugem. d'Oleron, art. 4. Cleirac, p. 17. Ord. de Wisbuy, art. 16. 1. Valin, Com. sur l'Ord. 617. 630. 'If a freighted ship,' says Lord Mansfield, 'becomes 'accidentally disabled on its voyage, without the fault 'of the master, the master has his option of two 'things;—either to refit it, if that can be done within 'convenient time; or to hire another ship to carry the 'goods to the first port of delivery.' LUKE *v.* LYDE, 2. Burr. 887.

[5] Guidon, c. 7. art. 10. 1. Valin, 635. Pothier, Charte-Partie, No. 59. vol. ii. p. 390.

fault, or the insufficiency of the ship.[1] 3. That the merchant will not be allowed to pick and choose, taking that part of the cargo which is not damaged, and rejecting that which is spoiled:[2] But it has been much contested, especially among foreign jurists, whether, in the case of damage by mere accident, the merchant can abandon the cargo for the freight? Valin and Casaregis favour the abandonment.[3] Pothier argues against it strenuously.[4] The principle on which the former place their opinion seems extremely questionable,—that the goods, forming the sole object of the contract, ought to be the only pledge for the freight; and that from the goods alone payment of it ought to be exacted. This is not true: For the personal contract gives a direct action for performance, and an actio contraria for the hire. It would, besides, make this contract a bargain of risk to the master, without any hope of corresponding advantage, if this doctrine were sanctioned; whereas the true nature of the contract is that of carriage, or locatio operis mercium vehundarum; which, in being available only if the service be duly and fully performed, is already attended with risk enough, inseparable from its nature. This question Lord Chief-Justice Abbot leaves doubtful in the law of England, having found no case in which the point has been adjudged; but stating, in general, that he understands the right to abandon, in such circumstances, never to be claimed in English practice.[5] In Scotland, this matter appears to have been regulated on the principles of equity and of the contract of carriage, whereby the owners are liable for all damage arising from negligence, bad stowage, the bad condition of the ship, unskilful navigation; while it never appears to have been held, that the merchant could be liberated from freight on account of damage by mere accident or irresistible force, which are cases excepted out of the edict.[6]

2 Goods opt short destined

3. Where the goods have not arrived at their port of destination, the rules are,—1. That if the ship be disabled by sea-damage or hostile force, and the shipmaster offer to carry the goods forward, but is prevented by the merchant, he will be entitled to his whole freight.[7] 2. That in those circumstances the shipmaster will be entitled to demand his

[1] Lord Mansfield said,—'It is nothing to the master of the ship whether the goods are spoiled or not, 'provided the freighter takes them. It is enough if 'the master has carried them; for by doing so he has 'earned his freight.' LUKE v. LYDE, 2. Burr. 888. See also HOTHAM v. EAST INDIA COMPANY, Doug. 272.; and LUTWEDGE v. GRAY, Abbot, 316.

[2] Lord Mansfield, as above.

[3] 1. Valin, 636. Casaregis, Disc. 22. § 46.

[4] Pothier, Charte-Partie, No. 59. vol. ii. p. 390. Lord Chief-Justice Abbot has translated the controversy of Valin and Pothier on the soundness of the principle adopted in the Marine Ordonnance of France, by which the merchant was not entitled to abandon. Ord. de la Marine, liv. 3. tit. 3. Du Fret ou Nolis, art. 25. Abbot, 297.

[5] Abbot, 299. and the authorities there referred to.

[6] LAWRIE against ANGUS, 7th November 1677; 2. Stair, 553.; where the shipmaster was held liable for damage to goods from 'the spouting of the pump,' not occasioned by sea risk. (M. 10,107.)
LAMONT against BOSWELL, 24th July 1680; 2. Stair, 791.; where a shipmaster was made liable for damage to lint by a leak, without any extraordinary accident. (M. 10,107.)

[7] In LUTWEDGE against GRAY and Company, 12th February 1732, Elchies' Decisions, voce Mutual Contract, No. 3. two points occurred:—1. Whether the shippers, refusing the master's offer, and abandoning to underwriters who take the goods under their own charge, are liable for freight in full? and, 2. Whether the merchant taking the goods, without insisting on the shipmaster carrying them forward, is liable pro rata itineris?
A ship from Glasgow to Maryland, and back to Glasgow, being on freight to Gray and Company for the homeward cargo, and having also goods belonging to others on general freight, was cast away on the coast of Ireland, and part of the cargo (tobacco) saved. The owners offered to carry forward the goods, and provided a ship for that purpose. Gray and Company abandoned their tobacco to the insurers, who shipped it to Bristol. The other tobacco on board in the same condition, belonging to the other shippers, they were willing to have forwarded by the ship provided; but the master would not engage to carry it to Glasgow, and they themselves had it transported thither, where part was found utterly spoiled, and was burnt. In an action for freight, the Judge-Admiral held the full freight to be due for the goods saved, since the

freight pro rata itineris, if the goods are received by the merchant.[1] This seems to proceed on the footing of a new agreement.[2] For, strictly speaking, the original contract is left unperformed; and nothing can be claimed, unless either the master shall fulfil his contract, or the owners shall agree to take the goods. This seems to be a proper case for abandonment. If the merchant look for advantage in taking the goods, the risk of the loss, if he take them, is his: If the goods be in a situation whence they cannot be extricated, or, at least, not without an expense beyond their worth, the loss is total, and the freight not due. The goods are held to be received, if they are abandoned to the insurer;[3] or where, having been captured, condemned, and sold, the proceeds on a reversal and restitution are taken by the insurer.[4] 3. If, in the course of the voyage, an obstruction shall arise not attributable to the parties, but the owners of the goods shall, on the whole, derive full advantage, as if the voyage had been completed according to the original design, freight will be due, not on the contract, strictly speaking, but on the equity between the parties. So, in the case of American ships bound to France or Holland, even during the subsistence of the extensive blockading system against France, the full freight was held to be due, where the owners of the cargoes made their election to sell the goods in England; and where they did not, it was left to them to settle the freight with the master. 'The Court (says Lord Stowell) considered a voyage from America to this

freighter offered to carry them on. The Court of Session altered this judgment, and, holding the contract of affreightment as dissolved by the loss of the ship, although some of the goods were saved, they found,—1. That the freighters abandoning to the underwriters did not thereby subject themselves to freight; and, 2. That freight was due pro rata itineris for the goods carried to Glasgow, though some of it found unmarketable and burnt. The House of Lords reversed this, and 'declared, that the merchants were 'liable for the full freight of such of the goods as were 'given up to the insurers, and for the freight pro rata 'itineris of such as were brought to Glasgow, notwithstanding some of the tobacco was found damnified, 'and burnt there.' 23d February 1733, House of Lords.

In the case of LUKE *v.* LYDE, Lord Mansfield stated and relied on the above case, and said, that Lord Chancellor Talbot delivered as the reasons of the above judgment in the House of Lords, 'That the 'whole freight is due upon the goods sent to Bristol, 'because the master offered a ship to carry the goods 'to Glasgow, which was the port of delivery. But as 'the master declined carrying the other goods to Glasgow, (the port of their delivery), as to them he ought 'to be paid only pro rata, viz. as much as was proportionable to his carrying them to Youghall, the 'place where the accident happened.' 2. Burr. 885. 887.

[1] See the above-cited case of LUKE *v.* LYDE, where fish were to be carried to Lisbon, and the ship was captured on the 17th day, and, being recaptured, was carried into Bedford in Devonshire, and the fish sent to Bilboa, where it fetched about a third of the prime cost. In an action for freight, half the cargo was held to have perished, and the owners were allowed freight in the proportion of 17 days to 21, which would have brought the ship to her port of delivery.

See THE COPENHAGEN, 1. Rob. Adm. Rep. 289. CHRISTY *v.* ROW, 1808; 1. Taunt. 300.

[2] This farther illustrated in the case of COOK *v.* JENNINGS, 7. Term. Rep. 381.; MULLOY *v.* BACKER, 5. East, 316.; and by the observations of Lord Chief-Justice Abbot, 370. and the cases which he has cited.

[3] See the preceding Note. See also LUKE *v.* LYDE, 2. Burr. 882.

WILSON against BENNET, 10th March 1809; 15. Fac. Coll. 251. Here a ship, freighted from Dundee to Bridport with grain, was stranded off Portland Island. The shippers abandoned to the underwriters, who took delivery of the greater part of it, and had it sold. The master did not claim his lien for freight, but an action was afterwards brought against the shippers. The Judge-Admiral decerned for 'such proportion of the stipulated freight as shall correspond to 'the part of the voyage performed, and the quantity 'of grain received, in respect that the obligation to 'pay freight in general only ceases on the total loss of 'the goods shipt, or on the total abandonment of those 'goods by the freighter to the master; in respect that 'although the master did not take advantage of his lien 'over the cargo, the obligation by the charter-party 'still remains entire upon the freighter; in respect that 'the master, where the partial non-fulfilment of the 'contract does not arise from any fault on his part, is 'entitled to such proportion of the freight as may correspond to the part of the stipulated voyage which 'the vessel has performed, and to the quantity of goods 'delivered, though not at the port of destination; and, 'finally, in respect that the abandonment of the cargo 'to the underwriters cannot affect the reciprocal rights 'of the freighter and master of the vessel.' Affirmed in the Court of Session.

[4] BAILLIE *v.* MONDIGLIANI, Marshall, 728. Park, p. 90.

'country, very nearly the same in effect as a voyage to those contiguous countries to 'which those vessels were originally destined: in all probability, the markets of this 'country were not less favourable than in the blockaded ports; and no doubt the sale 'was executed with every attention to the interests of the owners of the cargo.'[1] 4. If the voyage be divisible, there are practical distinctions and exceptions to the general rule above laid down. Where the parts are entire, and the words will allow them to be so considered, freight may be due for the part accomplished. Thus, the outward and homeward voyage may be so separated, that freight for the former may be due, although the ship is lost during the latter: But the separation must be distinct.[2] But, 5. Whatever doubts may be entertained of the right to abandon the goods to the shipmaster for freight, where the goods have arrived at their destination damaged; yet if they have been stopt short, and the freighters have no means of completing the voyage, the merchant is entitled to abandon them. So, where goods were wrongfully seized, sent to London, and delivered a considerable time, an offer afterwards to prosecute the voyage, but which was refused, was held to discharge all claim for freight.[3] Again, where a cargo was seized at Naples by the Government, and so prevented from being delivered to the consignee, the merchant was held not liable for outward freight.[4] In all these cases, according to the true construction of the contract, the payment of freight was made to depend on an event which never happened.

Part lost.

4. Where part of the goods have perished, if the stipulated freight be proportional to the quantity of goods, freight will, of course, be due only for what is delivered. But if the freight is stipulated generally for the voyage, there is a difficulty. Lord Chief-Justice Abbot seems to think, that where the charter-party does not afford a rule, still the owners of the ship are not to lose the benefit of the voyage; and it would seem, that where the loss is not such as to authorize an abandonment, the proportion must be settled rateably.

Goods thrown overboard.

5. Freight, or a compensation for it, is also due where the goods have been thrown overboard for the general safety, or sold for the use of the ship. The average contribu-

[1] THE FRIENDS, Crighton, 1810; 1. Edward's Adm. 246. This was the case of a British ship chartered at Campeachy for Lisbon. She reached the mouth of the Tagus, where she was warned off by the blockading squadron. She continued some days with the fleet; was blown out to sea; picked up by a Spanish privateer; retaken by a British cruiser, and carried into Madeira, where she was sold for the salvage. The general principle has already been explained, (p. 569. Note [3]). In this particular case the Court held, that 'the loss being unavoidable, if the incapacity of completing the voyage could be exclusively attributed to 'one of the parties, it would be proper that the loss 'should fall there; but the fact is, that the calamity is 'common to both, for both ship and cargo were equally 'affected by the blockade. The ship could not have 'entered the interdicted port in ballast, any more than 'the cargo could in any other vehicle. The loss arises 'from the common incapacity of the one and of the 'other. I think, therefore, that what equity would 'suggest is, that the loss should be divided; and under 'these circumstances, I shall direct that a moiety of the 'freight shall be paid.'

[2] In TAYLOR and Company against HOG, 9th July 1802; 13. Fac. Coll. 120.; the voyage out and home were not specifically distinguished; and it weighed much with the Court,—1. That the outward cargo was of coals, little else than ballast; 2. That the proceeds of it were presumed invested in the homeward cargo, and so lost along with it.

The following case and opinion were produced to the Court:—

'The Court of Session, before they pronounce their 'judgment, wish to have the opinion of his Majesty's 'Advocate as to the probable decision of such a case in 'the High Court of Admiralty of England.' Sir John Nichol, King's Advocate, answered,—'I am of opinion, 'that the High Court of Admiralty of England would 'probably hold, that the contract in this case is to be 'considered as for one entire voyage, which not being 'completed, and the cargo from Gottenburgh being a 'total loss, that no part of the freight contracted for 'is due to the owner of the Agnes.' Action was denied for the freight. 8th May 1802. See BYRNE v. PATTINSON, Abbot, 335. et seq.

Contrast with this the English case of MACKRELI v. SIMOND, Abbot, 333., where the charter-party was held to recognize an outward and a homeward voyage as two distinct voyages.

[3] SMITH v. WILSON, 8. East, 437.

[4] STOVER v. GORDON, 3. Maule and Sel. 308. See also GIBBON v. HUNDEZ, 2. Barn. and Ald. 17.

tion comes in place of the goods, and the freight is due under deduction of the average falling on it.[1]

Goods taken out prematurely.

6. Freight is also due wherever the merchant demands his goods before the completion of the voyage, without any fault on the part of the ship. And so the master may refuse to deliver them, unless the whole freight is paid.[2]

Capture.

7. If the ship have been captured, there is no freight due. If after capture, however, there is a recapture, and the ship proceed afterwards with the cargo to the port of delivery, the right to freight revives; or if an embargo have been imposed, and the voyage have afterwards been resumed and completed, freight is due.[3]

Detained.

8. Where the freight is for time, and the goods have arrived, but after detention by embargo or by capture, the freight is due in the same way as if the ship had been detained by contrary winds.[4] So, where a ship is detained by the crowded state of the docks or harbour, the freighter is liable to the owner of the ship for the delay.[5]

Stipulation for Freight absolute.

9. The rule already laid down, respecting freight, (viz. that it is not earned otherwise than by performance of the voyage), rests on the same views of expediency which insure the vigilance and exertion of mariners by making their wages depend on success. It is competent to the parties, notwithstanding, to stipulate for payment of the freight, either on the loading of the goods; or at particular points of the voyage; or to bargain for a sum absolute, to be paid independent of the risks of the voyage. But some difficulty has occurred in settling the lines of distinction. It would seem,—1. That where the sum stipulated is in the nature of proper freight, the right to it must depend on the condition which rules the claim of freight; and so, if that condition is not performed, the money, though paid, may be sought back.[6] But where the freight is expressly stipulated to be paid by anticipation, a stipulation of repayment has been required to sustain a claim for having it back on failure of the voyage.[7] 2. That parties may agree thus to pay by anticipation; but it will require a very precise stipulation to make the payment independent of the arrival of the ship.[8] 3. That where the agreement is to pay a sum absolute for taking the goods on board, action may be maintained for it independently of the fate of the voyage.[9] In cases of this sort, where there is ambiguity, it is a question for the jury what the agreement truly is;[10] which may depend either on the bargain or on the usage.[11]

[1] 1. Stair, 13. § 3.; 3. Ersk. 1. § 28.

[2] Pothier, Charte-Partie, No. 74. vol. iv. p. 396.

[3] THE RACE-HORSE, 3. Rob. Adm. Rep. 101. See above, p. 516.

[4] MOORSOM *v.* GRAVES, in 1811, before Lord Ellenborough; 2. Camp. 627. Here a ship freighted for L. 6300 the first eight months, and at the rate of 47s. 6d. per ton per month afterwards, was captured and confiscated, and detained some weeks. Being liberated, she took in a new cargo, which arrived. Held freight due as on a voyage never discontinued.

[5] RANDALL *v.* LYNCH, in 1809, before Lord Ellenborough; 2. Camp. 352.

[6] MASHITER *v.* BULLER, 1807; 1. Camp. 84. Here the contract was contained in the bill of lading, which bore, 'Freight for the said goods being paid in 'London.' The voyage was to Lisbon: the ship lost in the Downs. The action was for a sum to be paid on shipment. Lord Ellenborough held these words only to mean, that freight should be paid in London instead of Lisbon, but by no means to dispense with the performance of the voyage. He added, that if the defendants had paid the freight on shipment of the goods, they might have recovered every penny of it back again.

See Lord Chief-Justice Gibbs' remark in 5. Taunt. 437.

[7] DE SILVALE *v.* KENDALL, 4. Maule and Sel. 37.

[8] GIBBON *v.* MENDIZ, 1818; 2. Barn. and Ald. 17.; where it was laid down, that the parties are to be presumed as bargaining for payment of *freight*, unless they expressly stipulate otherwise. Here the payment was rateably per month, but the period of payment was after the first arrival.

[9] According to the strictness of English proceeding, however, it cannot in England be sued for as freight. BLACKEY *v.* DIXON, 2. Bos. and Pull. 321.

[10] ANDREW *v.* MOORHOUSE, 5. Taunt. 435.

[11] GILLAN *v.* SIMPKIN, 4. Camp. 241.

Dead Freight.

DEAD FREIGHT.—The merchant who freights an entire ship is liable to pay freight for the goods transported, and a compensation for the loss suffered by the failure to supply a full cargo. What is thus paid for the unoccupied space is not, strictly speaking, freight for which the goods may be retained by the shipmaster against the consignee.[1] It is called DEAD FREIGHT; but it is an unascertained claim of damages or unliquidated compensation for the loss of freight, recoverable in the absence and place of freight.[2] The claim for dead freight is grounded on the covenant in the charter-party, by which the shipper is bound to supply a full cargo. Where the agreement is for freight at so much per ton, according to the ship's measurement, the claim of dead freight is easily ascertained. Where the cargo is intended to be various, and at different rates, it has sometimes been said, that usage regulates the proportions; but it will generally be found, that this must be referred to a jury or to an arbitrator, and perhaps in the end resolve into a mere inquiry into average gain on such a voyage.[3]

Commencement of Freight.

The right to freight does not commence till the ship has broken ground, and begun the voyage;[4] and therefore, whatever expense in preparation, loading, &c. may have been incurred, the freighters will not have any claim for freight, if the ship be lost or captured before the voyage begins.[5]

If the voyage be subsequently prohibited by the government of the country, the contract is dissolved, and the goods must be unloaded, without any claim for freight arising from it. But neither will the increased danger from hostilities vacate the contract or alter the freight: Nor will a temporary embargo have this effect;[6] unless it be an embargo by way of reprisal against the country to which the ship belongs.[7]

Particular Stipulations.

In arranging a voyage, the slight hope entertained of a freight homeward, sometimes leads to the alternative covenant of a *consideration* for freight homeward; Or, the chance of losing the market for the exported cargo suggests a stipulation that the cargo shall be brought back; Or it is agreed to give a greater freight on success, and a smaller freight in case of disappointment: Under such covenants as these, several questions have arisen. And, 1. It has been questioned, whether a master, who had covenanted to carry out a cargo to St Petersburgh for sale, and, after waiting a certain time, to bring it back to England, was entitled to carry it to another likely market? It was held that, by so doing, he had substantially fulfilled the purpose of the voyage.[8] 2. In another case, goods were to be taken to St Petersburgh, and sold there, and a home cargo brought back, which was to be provided by the merchant. In that event, L.4000 of freight was to be paid:

[1] PHILIPS *v.* RODIE, 15. East, 554. BIRLEY *v.* GLADSTONE, 3. Maule and Sel. 205.

[2] That there may be a lien for it by stipulation is true; but there is none by implied contract. See below, Of Liens.

[3] See the case of THOMAS *v.* CLARKE, p. 565. Note [2].

[4] Molloy, b. 2. c. 4. § 3. See above, p. 567.

[5] CURLING *v.* LONG, 1797, in Common Pleas; 1. Bos. and Pull. 634.; where, according to the usage of the Jamaica trade, the shipowners, at an expense of L. 310, brought the goods on board, and expended L. 455 on wages and provisions to the crew; and the loading being completed, the ship cleared, and, waiting for convoy, she was cut out of Salt River by French privateers, and afterwards recaptured and carried back to Jamaica. The shipowners claimed in various ways, so as at least to get a part of their expense, but were nonsuited. A rule for a new trial refused, on the ground that there had been no commencement of the voyage, and no advantage gained by the merchant; and therefore neither freight nor recompense due.

[6] Pothier, Charte-Partie, No. 100. 1. Valin, 623. HADLEY *v.* CLARKE, 8. Term. 259.

[7] TOUTENG *v.* HUBBARD, 3. Bos. and Pull. 291. THE ISABELLA, Sovergren, 4. Rob. Adm. 77. See 4. East, 396. 487. 410.

[8] PULLER *v.* STANIFORTH, 11. East, 232. The master carried the cargo to Stockholm, (after waiting the stipulated time at St Petersburgh), where he sold it, and took in a new freight. He was found entitled to his freight, deducting what he had received for the freight of goods from Stockholm.

But if no cargo could be obtained, then L.2700 was to be paid. The master was held not to have departed from his charter-party in carrying the cargo (which was not suffered to be landed at the stipulated port) to a port where he might reasonably expect a market; and where, not having succeeded in getting a cargo, he took on board goods for which there was full room in the ship, so as to earn a freight without injury to the original freighters. The master was allowed to claim the whole stipulated freight of L.2700, without deduction of the freight for the goods taken on board.[1]

3. *Of Lay-days and Demurrage.*

To regulate the time during which the master shall be obliged to remain with his ship for the purpose of procuring a cargo, or of sailing with convoy, or of unloading at the port of delivery, it is commonly stipulated in charter-parties, 1. That a certain number of days, called LAY-DAYS, shall be allowed; or sometimes the customary time for loading and unloading; and, 2. That a farther time shall be allowed, called days of DEMURRAGE, during which the ship may be detained on payment of a daily sum as hire during the delay. Two classes of cases may be distinguished: 1. Where there is a special stipulation for lay-days and demurrage; 2. Where the contract is left general, or the customary time stipulated. And,— Lay-days. Demurrage.

I.—1. Where there is a special contract for a certain number of lay-days or demurrage, this is an absolute engagement by the freighter not to detain the ship beyond these periods; and if such detention should take place, the owners of the ship will be entitled to indemnification for the delay, not merely on the express contract, but in the nature and on the principles of a claim of damage.[2] To this demand the freighter will be liable, not only where the delay shall have been occasioned by his fault, but where it shall have arisen from circumstances over which he has no control, provided they are not such as to dissolve the contract. His engagement is absolute, that the thing shall be done within the time: He is 'the adventurer, who chalks out the voyage, and is to furnish at all events 'the subject out of which freight is to accrue.'[3] So the delay occasioned by the crowded state of the docks, or the order of warehousing the goods:[4] So also a merchant covenant- Days of Demurrage.

[1] BELL *v.* PULLER, 1810; 2. Taunt. 285. The Court held this to be nothing more than the case of a contract to bring back a certain quantity of goods; in which case there is no reason why the master may not earn what else he can, by taking other goods on board for his own benefit. Between this case and the one in the preceding note, this distinction was made by the Court:—'There the lead was the property of Messrs 'Puller; but the lead was not brought back; it was sold 'at Stockholm; and, for aught that appears, the means 'which the captain had of obtaining any freight at 'Stockholm might arise from the use he made of the 'lead there; and on that account, perhaps, the Court 'of King's Bench might think that the captain, who 'had not been authorized or directed to act thus, but 'had done all this for his own benefit, should not be 'entitled to that profit. But in this case, on the best 'consideration, we think that the defenders are not 'entitled to deduct from the L.2700 the profit which 'the captain made.'

[2] THE CORIER MARITIMO. Where a ship having been captured 13th November, the captors did not come forward to try the question of adjudication. In December, a monition was taken against the captors, but they did not appear till February, when they consented to restitution. Lord Stowell allowed a simple demurrage, referring it to the registrar and merchants to fix the proportion. 1. Rob. Adm. Rep. 287.

THE TRITON. Where a ship having been improperly captured, a month's demurrage was allowed. 4. Rob. Adm. Rep. 78.

See also THE MADONNA DEL BURSO, 4. Rob. Adm. Rep. 169.

[3] Lord Ellenborough in BARKER *v.* HODGSON, 1814; 3. Maule and Sel. 270.

[4] STRUCK *v.* TENANT, before Lord Mansfield, 1806; Abbot, 181.

RANDALL *v.* LYNCH, 1809; 2. Camp. 352.; 12. East, 179. It was agreed, that 'forty days should be allowed 'for unloading, loading, and again unloading the said 'cargoes;' and that ten working days of demurrage should be allowed, at L.5 a-day. In this case the great press of business at the docks prevented the unloading of the vessel for thirty-five days after expiration of the stipulated lay and demurrage days. But Lord Ellen-

ing to furnish a cargo at Gibraltar within a limited time, but prevented from doing so by a prohibition of intercourse on account of an infectious disease, was held answerable in damages to the owner.[1] In such cases, in short, the rule is, that during the loading or unloading of the ship, the merchant runs all the risk of interruptions from necessary or accidental causes; while the shipowners have the risk of all interruptions from the moment the loading or unloading is completed.[2] Even the unlawful seizure of goods by revenue officers occasioning delay, or detention by port regulations or custom-house restraints, is no defence against demurrage.[3]

Damage.

2. If the days of demurrage be limited, and the ship be detained beyond them, the sum settled for demurrage will, prima facie, be taken as the best measure of compensation of the damage, both in convenience and in justice; leaving 'it open, however, to the 'shipmaster to show that more damage has been sustained, and to the freighter to show 'that there has been less, than this allowance would compensate.'[4] If delay be occasioned by the merchant, by which expense is incurred, he will be liable for that expense.[5]

Demurrage on a General Ship.

3. It is not merely in the case of a ship under special affreightment that the law as to demurrage takes place; it also holds in the case of a general ship.[6] This point is not likely to occur often. But, 1. Where a merchant has engaged freight in a general ship, and unduly delays to bring forward his goods, a claim for demurrage may be grounded either on the general rule of law, as for damage sustained, or on a special stipulation; and, 2. In the delivery of a cargo from a general ship, it may happen, that great delay may be occasioned by those whose goods are to be delivered, who are apt sometimes to convert the ship into a sort of warehouse: Or there may, on the whole, be delay without fault imputable to any one: And, in contemplation of this, demurrage is often stipulated. Under contracts of this nature, it may be doubted on whom the demurrage is to fall. Where a merchant's goods happen to be in the bottom of the hold, and the stipulated lay-days are exhausted before the goods that are above them are delivered, is such merchant, though ready at the first to receive his goods, to pay demurrage? It seems to be settled in England, on the general principle already stated, that the demurrage, in such a case, falls on the owner of the goods still on board, leaving it to him to seek his redress against those who may have been in fault.[7] And although much has been said to free

borough held, that the merchant was liable; and the jury gave compensation for thirty-one days' detention after the days of demurrage, at the rate of the demurrage settled. In King's Bench a motion to arrest judgment was discharged.

[1] BARKER'S Case, supra, p. 575. Note [3].

[2] BARRET *v.* DUTTON, 4. Camp. 333. The distinction was curiously brought out by the concurrence of two accidents. After a ship was ready to load, the Thames was so frozen over, that it was impossible to continue the loading. After the frost the loading was resumed and completed; but the custom-house having been burnt, there was a delay of a fortnight before the clearances could be obtained. It was in evidence, that it was the master's business to get the clearances. Thirty lay-days, which were stipulated, expired during the frost. The action was for demurrage from the expiration of the thirty days. Lord Chief-Justice Gibbs held the frost no excuse from payment of demurrage; but the burning of the custom-house he held a defence, as it occurred after completing the lading.

[3] BESSEY *v.* EVANS, 1815; 4. Camp. 131. See also HILL *v.* IDLE, ib.; below, p. 578. Note [3].

[4] MOORSOM *v.* BELL, 1811; 2. Camp. 616.; before Lord Ellenborough.

[5] THE ANGERONA, Marks, 1814; 1. Dods. Adm. Rep. 382.

[6] As an authority for this, the case of BURMASTER *v.* HODGSON has been quoted; Abbot, 196. But I do not distinctly perceive the point as in Mr Campbell's report; 2. Camp. 488.

This has been held as law in the Scottish Court of Admiralty.

[7] LEER *v.* YATES, where the owners of goods undermost in a ship, the delivery of which was delayed by the necessity of bonding the goods that were uppermost, were held liable in demurrage at L.4 per day; 3. Taunt. 387.

The same point determined in HARMAN *v.* GANDOLPH; Holt, 35.

the innocent owners of the undermost goods from a claim for demurrage at the instance of a person unable to perform his part of the contract; it has been held a good answer to this, that neither the master, nor the owner of the undermost goods, nor any one else, is in fault, but an accidental loss is to be sustained, which, by the connexion between the parties, is laid on the owner of the goods; and that even on the principles of locatio conductio, the ship being detained while the goods are undelivered, the additional hire is due by the owner of the goods which are on board.

4. If demurrage be stipulated during the time the ship shall wait for convoy, the master is not entitled to claim demurrage for a single day after the convoy is ready to depart; and if stipulated while the ship is waiting for a cargo, demurrage ceases the moment the ship is fully laden, and the necessary clearances have been obtained. In either case, farther detention by adverse winds, a frost setting in, or an embargo imposed, will not continue or revive the demurrage.[1] Demurrage for Convoy.

5. In settling the lay-days, or the days of demurrage, the contract generally specifies 'working days,' or 'running days.' The former stipulation excludes Sundays and custom-house holidays: Under the latter, the days are reckoned like the days in a bill of exchange. Where the expression is general, 'days,' the legal construction is for running days; but if usage should settle it otherwise, it rules the construction.[2]

II. Where there is no special contract for lay-days or demurrage; nothing said on the subject; or an agreement that the usual time shall be allowed for loading or unloading; the time during which the ship must remain to load or unload will be regulated by what is customary, or reasonable, or (in circumstances not occasioned by fault of the shipper) necessary, to accomplish those acts. After this the master will be entitled to sail, if no demurrage has been stipulated; or to have his allowance for demurrage, if there is an agreement to that effect: Or, if still detained, will be entitled to demand damages.[3] Under this rule, the master will not be entitled to demurrage in this case as where a special contract for days is made, if the delay be occasioned by the crowded state of the

[1] See the case of LAWRIE against JAMESON and Company, below, p. 578. Note [7].

LANNOY v. WERRY, 2. Brown's Parl. Cases, 60.; where two ships were freighted, with special directions as to convoy in particular circumstances; and an agreement of L. 6 per day for the one, and L. 7 for the other, while they should 'wait for convoy at Gibral-'tar.' On 27th September the convoy arrived at Gibraltar, and the ships staid with the convoy a long time, partly detained by tempestuous weather. The determination in the House of Lords was, That demurrage should not be paid for such portion of the detention as was to be attributed to want of wind, or adverse winds, but for all the rest of the time during which the convoy was not ready, or able to sail.

See LIDDARD v. LOPES, 10. East, 526.

[2] So held by Lord Eldon in COCHRAN v. RETBERG, 1800; 3. Espin. Cases, 121.—'If it is left to the con-'struction of law, I should be of opinion the plaintiff 'ought to succeed; if the fact of usage is clearly 'made out, that the fourteen days mentioned in the 'bill of lading mean working days, that is a construc-'tion which excludes Sundays and holidays at the cus-'tom-house, there must be a verdict for the defendant.' The jury found for the defendant.

[3] PARY v. YELTON, 28th February 1806; Judge Cay's Notes, vol. D. 569. Here Yelton freighted from Pary, part-owner and shipshusband, the snow Duchess of Cumberland, about to proceed to Toningen on a voyage, thence to Memel for timber to Leith, at 33s. 6d. per load, &c. Nothing said of lay-days or demurrage. The voyage was performed, and the ship arrived at Leith. The master, 22d October, wrote to Yelton for instructions, but got no answer: 25th, he protested for six guineas demurrage for every day after expiration of ten days from his arrival. Twenty-one days from arrival passed before the ship was unloaded. Against a demand for demurrage, the chief defence was, that none was stipulated. The Judge-Admiral held 'demurrage due at common law, where-'ever a ship is unnecessarily detained by the fault of 'the shipper or consignee, either by not timeously 'furnishing a cargo, or by not timeously discharging 'it; no man being at liberty to convert a lawful con-'tract into an engine of oppression: and that this 'doctrine was fully recognized in Lawrie against Jame-'son and Company.' (See below, p. 578. Note [7]). The Judge allowed three guineas a-day for every working day between the ship's arrival and the time when the defenders began to work on her delivery. And in this judgment the parties acquiesced.

docks;[1] nor where the customary mode of delivery of the particular article requires more time than in ordinary delivery.[2] It will be only where the difference in the requisite time of delivery is to be ascribed to the shipper or consignee that demurrage will be due.[3]

The indorsee of a bill of lading, taken to assigns, has no defence against the payment of demurrage on account of having got no notice of the arrival of the ship, it being his duty to watch the arrival:[4] And the same rule has been applied, where the goods were, by the bill of lading, deliverable to a well-known merchant in London.[5] But where the ship's name is entered so incorrectly at the custom-house, that the consignee cannot, after due inquiry, discover the arrival, that will be a defence.[6]

If the master be detained forcibly after the expiration of the lay and demurrage days, or if he voluntarily stay on request of the shippers, he will be entitled to damage in the nature of demurrage.[7]

Protest. A protest ought always to be made; but it cannot be said to be indispensable where the charter-party settles the lay and demurrage days. Even where no days are

[1] In RODGERS *v.* FORRESTERS, 1810, 2. Camp. 483. the freighter was 'to be allowed the usual and 'customary time to unload the said ship or vessel at 'her port of discharge.' This, in ordinary circumstances, at London, was proved to be seven days; but, for bonded goods, when the ship can get a birth. The ship entered the London Docks 25th August, and on 31st the goods were bonded, and all ready to receive them into the cellar; but the crowded state of the docks delayed the discharge till 26th October. They might have been landed immediately on payment of the duties; but not sooner with the benefit of bonding. Lord Ellenborough held, that since the bonding system was introduced, the landing of goods on immediate payment of the duties, had ceased to be the usual and customary mode of unloading a cargo of wines; and so the implied contract had not been broken. Verdict accordingly.

In BURMESTER *v.* HODGSON, a similar verdict under Mansfield, Ch.-J. 1810, 2. Camp. 488., where, if the goods (brandies) were not to be bonded, but the duties paid at once, they might have been much sooner delivered. The universal custom of bonding such goods was held to rule the construction, and to bind the master to wait the turn of the dock.

[2] See cases in preceding Note.

[3] HILL *v.* IDLE, 1815; 1. Starkie, 111. In importing French wines from an intermediate port, a special order from the Lords of the Treasury being necessary, delay was occasioned in the delivery of six hogsheads of French wine from Oporto, by want of this order. Lord Ellenborough held it incumbent on the importer, whose conduct occasioned the necessity of the order, to procure it; and that he ought to have provided so as to avoid delay.

[4] HARMAN *v.* CLARKE, 1815; 4. Camp. 159.

[5] HARMAN *v.* MANT, 1815; 4. Camp. 161.

[6] HARMAN *v.* CLARKE, ut supra.

[7] LAWRIE *v.* JAMESON and Company. The ship Bell, Lawrie owner, and Anderson master, was sent by Jameson and Company of Leith to St Petersburgh for a cargo of tallow contracted for by Atkins and Company of that city. There was no bargain as to demurrage or lay-days. The instructions by Jameson and Company addressed the ship to Atkins and Company, and directed the master 'to get clear and sail 'before 1st September, N. S., as the premiums of in-'surance advance greatly after that day.' The ship arrived 22d July 1787, and the master applied to Atkins and Company. The tallow, owing to the dryness of the season, did not come down from the interior of the country till October. The master made a protest against the merchants for not loading by the 1st of September, but waited at desire of Atkins and Company, under an opinion that he was bound to do so. The lading was on board, and the ship cleared out 28th October, and actually sailed out of Cronstadt. By contrary winds it was forced to return, and was frozen in till 11th May. The master's claims were,—1. Freight; 2. Demurrage from 1st September to 11th May; 3. An indemnification to a merchant for whom he had shipt flax, which he was prevented from delivering. It was admitted on all hands, that, after the protest on 1st September, the master might have returned empty, or taken another cargo. But the owner contended, that the shipmaster having waited at the desire of Jameson and Company's correspondents, they were answerable for the effects of the delay. The case was first adjudged in the Court of Admiralty of Scotland, and afterwards carried by appeal first to the Court of Session, and then to the House of Lords. The judgments varied. But by one judgment of the Court of Session, which was affirmed in the House of Lords, the shipowner was allowed his freight, and a compensation in the nature of demurrage, for the period from 1st September to 29th October, when it was proved, that, by mercantile usage, the ship being clear and ready for sea, demurrage ceased. Determined in House of Lords, 10th November 1796; 6. Brown's Parliamentary Cases, 474.

the innocent owners of the undermost goods from a claim for demurrage at the instance of a person unable to perform his part of the contract; it has been held a good answer to this, that neither the master, nor the owner of the undermost goods, nor any one else, is in fault, but an accidental loss is to be sustained, which, by the connexion between the parties, is laid on the owner of the goods; and that even on the principles of locatio conductio, the ship being detained while the goods are undelivered, the additional hire is due by the owner of the goods which are on board.

4. If demurrage be stipulated during the time the ship shall wait for convoy, the master is not entitled to claim demurrage for a single day after the convoy is ready to depart; and if stipulated while the ship is waiting for a cargo, demurrage ceases the moment the ship is fully laden, and the necessary clearances have been obtained. In either case, farther detention by adverse winds, a frost setting in, or an embargo imposed, will not continue or revive the demurrage.[1] Demurrage for Convoy.

5. In settling the lay-days, or the days of demurrage, the contract generally specifies 'working days,' or 'running days.' The former stipulation excludes Sundays and custom-house holidays: Under the latter, the days are reckoned like the days in a bill of exchange. Where the expression is general, 'days,' the legal construction is for running days; but if usage should settle it otherwise, it rules the construction.[2]

II. Where there is no special contract for lay-days or demurrage; nothing said on the subject; or an agreement that the usual time shall be allowed for loading or unloading; the time during which the ship must remain to load or unload will be regulated by what is customary, or reasonable, or (in circumstances not occasioned by fault of the shipper) necessary, to accomplish those acts. After this the master will be entitled to sail, if no demurrage has been stipulated; or to have his allowance for demurrage, if there is an agreement to that effect: Or, if still detained, will be entitled to demand damages.[3] Under this rule, the master will not be entitled to demurrage in this case as where a special contract for days is made, if the delay be occasioned by the crowded state of the

[1] See the case of LAWRIE against JAMESON and Company, below, p. 578. Note [7].

LANNOY v. WERRY, 2. Brown's Parl. Cases, 60.; where two ships were freighted, with special directions as to convoy in particular circumstances; and an agreement of L. 6 per day for the one, and L. 7 for the other, while they should 'wait for convoy at Gibral-'tar.' On 27th September the convoy arrived at Gibraltar, and the ships staid with the convoy a long time, partly detained by tempestuous weather. The determination in the House of Lords was, That demurrage should not be paid for such portion of the detention as was to be attributed to want of wind, or adverse winds, but for all the rest of the time during which the convoy was not ready, or able to sail.

See LIDDARD v. LOPES, 10. East, 526.

[2] So held by Lord Eldon in COCHRAN v. RETBERG, 1800; 3. Espin. Cases, 121.—'If it is left to the con-'struction of law, I should be of opinion the plaintiff 'ought to succeed; if the fact of usage is clearly 'made out, that the fourteen days mentioned in the 'bill of lading mean working days, that is a construc-'tion which excludes Sundays and holidays at the cus-'tom-house, there must be a verdict for the defendant.' The jury found for the defendant.

[3] PARY v. YELTON, 28th February 1806; Judge Cay's Notes, vol. D. 569. Here Yelton freighted from Pary, part-owner and shipshusband, the snow Duchess of Cumberland, about to proceed to Toningen on a voyage, thence to Memel for timber to Leith, at 33s. 6d. per load, &c. Nothing said of lay-days or demurrage. The voyage was performed, and the ship arrived at Leith. The master, 22d October, wrote to Yelton for instructions, but got no answer: 25th, he protested for six guineas demurrage for every day after expiration of ten days from his arrival. Twenty-one days from arrival passed before the ship was unloaded. Against a demand for demurrage, the chief defence was, that none was stipulated. The Judge-Admiral held 'demurrage due at common law, where-'ever a ship is unnecessarily detained by the fault of 'the shipper or consignee, either by not timeously 'furnishing a cargo, or by not timeously discharging 'it; no man being at liberty to convert a lawful con-'tract into an engine of oppression: and that this 'doctrine was fully recognized in Lawrie against Jame-'son and Company.' (See below, p. 578. Note [7]). The Judge allowed three guineas a-day for every working day between the ship's arrival and the time when the defenders began to work on her delivery. And in this judgment the parties acquiesced.

docks;[1] nor where the customary mode of delivery of the particular article requires more time than in ordinary delivery.[2] It will be only where the difference in the requisite time of delivery is to be ascribed to the shipper or consignee that demurrage will be due.[3]

The indorsee of a bill of lading, taken to assigns, has no defence against the payment of demurrage on account of having got no notice of the arrival of the ship, it being his duty to watch the arrival:[4] And the same rule has been applied, where the goods were, by the bill of lading, deliverable to a well-known merchant in London.[5] But where the ship's name is entered so incorrectly at the custom-house, that the consignee cannot, after due inquiry, discover the arrival, that will be a defence.[6]

If the master be detained forcibly after the expiration of the lay and demurrage days, or if he voluntarily stay on request of the shippers, he will be entitled to damage in the nature of demurrage.[7]

Protest. A protest ought always to be made; but it cannot be said to be indispensable where the charter-party settles the lay and demurrage days. Even where no days are

[1] In RODGERS v. FORRESTERS, 1810, 2. Camp. 483. the freighter was 'to be allowed the usual and 'customary time to unload the said ship or vessel at 'her port of discharge.' This, in ordinary circumstances, at London, was proved to be seven days; but, for bonded goods, when the ship can get a birth. The ship entered the London Docks 25th August, and on 31st the goods were bonded, and all ready to receive them into the cellar; but the crowded state of the docks delayed the discharge till 26th October. They might have been landed immediately on payment of the duties; but not sooner with the benefit of bonding. Lord Ellenborough held, that since the bonding system was introduced, the landing of goods on immediate payment of the duties, had ceased to be the usual and customary mode of unloading a cargo of wines; and so the implied contract had not been broken. Verdict accordingly.

In BURMESTER v. HODGSON, a similar verdict under Mansfield, Ch.-J. 1810, 2. Camp. 488., where, if the goods (brandies) were not to be bonded, but the duties paid at once, they might have been much sooner delivered. The universal custom of bonding such goods was held to rule the construction, and to bind the master to wait the turn of the dock.

[2] See cases in preceding Note.

[3] HILL v. IDLE, 1815; 1. Starkie, 111. In importing French wines from an intermediate port, a special order from the Lords of the Treasury being necessary, delay was occasioned in the delivery of six hogsheads of French wine from Oporto, by want of this order. Lord Ellenborough held it incumbent on the importer, whose conduct occasioned the necessity of the order, to procure it; and that he ought to have provided so as to avoid delay.

[4] HARMAN v. CLARKE, 1815; 4. Camp. 159.

[5] HARMAN v. MANT, 1815; 4. Camp. 161.

[6] HARMAN v. CLARKE, ut supra.

[7] LAWRIE v. JAMESON and Company. The ship Bell, Lawrie owner, and Anderson master, was sent by Jameson and Company of Leith to St Petersburgh for a cargo of tallow contracted for by Atkins and Company of that city. There was no bargain as to demurrage or lay-days. The instructions by Jameson and Company addressed the ship to Atkins and Company, and directed the master 'to get clear and sail 'before 1st September, N. S., as the premiums of in-'surance advance greatly after that day.' The ship arrived 22d July 1787, and the master applied to Atkins and Company. The tallow, owing to the dryness of the season, did not come down from the interior of the country till October. The master made a protest against the merchants for not loading by the 1st of September, but waited at desire of Atkins and Company, under an opinion that he was bound to do so. The lading was on board, and the ship cleared out 28th October, and actually sailed out of Cronstadt. By contrary winds it was forced to return, and was frozen in till 11th May. The master's claims were,—1. Freight; 2. Demurrage from 1st September to 11th May; 3. An indemnification to a merchant for whom he had shipt flax, which he was prevented from delivering. It was admitted on all hands, that, after the protest on 1st September, the master might have returned empty, or taken another cargo. But the owner contended, that the shipmaster having waited at the desire of Jameson and Company's correspondents, they were answerable for the effects of the delay. The case was first adjudged in the Court of Admiralty of Scotland, and afterwards carried by appeal first to the Court of Session, and then to the House of Lords. The judgments varied. But by one judgment of the Court of Session, which was affirmed in the House of Lords, the shipowner was allowed his freight, and a compensation in the nature of demurrage, for the period from 1st September to 29th October, when it was proved, that, by mercantile usage, the ship being clear and ready for sea, demurrage ceased. Determined in House of Lords, 10th November 1796; 6. Brown's Parliamentary Cases, 474.

fixed, a protest appears not to be indispensable, though useful both to interpel the shipper or his agent, and to fix the time, and adjust those circumstances about which there can at the time be no dispute.[1]

SECTION III.

OF THE INDEMNIFICATION OF LOSS OR DAMAGE SUFFERED IN A VOYAGE.

THIS subject divides itself into four several heads of inquiry:—1. Collision of one ship against another. 2. Sacrifices for the common safety by general average of loss occasioned. 3. Salvage to those who have preserved the ship or cargo. And, 4. Contracts of Insurance.

§ 1. OF THE INDEMNIFICATION OF LOSS FROM COLLISION OF SHIPS.

Collision of Ships.

Evidence as to the true cause of the collision of ships is always of difficult access. The accident generally happens in the darkness of night; or is accompanied with a confusion and agitation, and attended by a feeling of irritation, or of self-interest, which poisons the sources of evidence. Where the fact is clear, that a fault has been committed, the law is settled, that the owners of the ship by whose fault the damage arises must suffer the loss which falls on them, and answer for the damage to the other ship. But where it is impossible to say, on the one hand, that there is a fault proved; while, on the other, the loss obviously has arisen from no violence of the elements, but from some error, or neglect, or want of precaution, of which circumstances preclude all hope of evidence, the case is of difficult decision, and has in various systems of jurisprudence been disposed of, or the determination at least assisted, by very different presumptions and rules.

There are four possibilities under which such an accident may happen:—1. Where there is no blame imputable to either party. 2. Where both are to blame. 3. Where the suffering party only has misconducted himself. And, 4. Where the ship that has done the damage has alone been in fault. These cases, again, seem to be properly reducable to two principles of decision; one, where pure accident leaves the loss where it lights; another, where the loss follows the fault. It is in the application of this last rule, that, in ambiguous circumstances, recourse has been had to the aid of collateral considerations of expediency and of equity.

I. Pure accident, or vis major, is plainly to be distinguished from the case of negligence or fault, open or concealed. It proceeds in no degree from the act of man; as to which it never can be certain that there is not some mixture of human passion and self-interest, or some neglect and want of precaution or vigilance. It arises from physical causes alone; from the violence of the winds or seas; the effect of a hurricane, storm, lightning, or other natural calamity: As when a ship, by the violence of a tempest, is driven from her moorings, and, in collision against another vessel, sinks her, or is sunk by the blow.[2]

II. Under actual, or possible, or presumed fault, may be comprehended cases of actual fault or negligence, in which the proof of the fault gives the manifest and clear rule, that the guilty person shall pay the loss: Cases also may be included under this class, where

[1] CHARTERS, 13th January 1665. The Court held parole evidence sufficient without a protest.

[2] This is a distinction acknowledged in English law as well as in general maritime jurisprudence. Indeed, I believe, the expression, 'act of God,' as denoting *pure* accident, has originated in England. See below, BULLER *v.* FISHER, p. 583. Note [4].

the damage proceeds from the act of man, in circumstances where it is impossible to say to whom blame should attach.

In all the cases which have been mentioned, the first question seems to be, how the decision shall be as between the ships? The next, how matters shall be arranged between the ship and cargo of each vessel?

Fault or Negligence. Rules.

I. As between the SHIPS.

1. The loss must be indemnified by the ship which is in fault, and the rules by which this is to be judged of, in so far as it depends on the Court, are important to be observed.

Fault on one side.

And, 1. The law imposes upon the vessel having the wind free, the obligation of taking proper measures to get out of the way of a vessel that is close hauled; and also, the obligation of showing that it has done so:[1] And a failure, in either point, will leave the responsibility on the owners of such vessel. 2. The neglect to furl the sails of a ship in attempting a creek or river in which others are lying; the allowing her to have too much head-way to be stopt by the ordinary precautions; the neglect to drop the anchor in due time to stop the vessel's way, and other the like omissions or mistakes, will lay the responsibility on the ship so circumstanced.[2] 3. If every proper precaution has been taken on the part of the ship which is said to be the assailant vessel, it will next be necessary to inquire, Whether those measures were counteracted and defeated by any improper measures taken by those on board the other ship? In questions of this kind, the assistance of Masters of the Trinity House is generally taken in Admiralty;[3] and failing this, and with a jury of unskilful men, it will be necessary to prove the rules of sailing, and the orders that in particular circumstances are fit to be given, that they may be compared with the facts as they appear in evidence.

Pure accident.

2. Where the loss arises by pure accident, or the act of God, the rule is, that it falls where it lights. This is the rule of all the codes maritime and municipal. It is the proper case of the Roman law, as laid down by Ulpian; which on occasion of damage by fault or negligence done by one ship to another, gave action for indemnification, but no remedy if the collision was blameless.[4] So also the rule was settled in the earlier codes of maritime law, both of the south and of the north.[5]

Both in fault.

3. It is in the case which lies between these two extremes that the main difficulty is found, for the resolution of which, rules so different have been resorted to. This is the

[1] THE WOODROP-SIMS, Jones, 1815; 2. Dod. Adm. Rep. 83.

THE THAMES, Drummond, 1805; 5. Rob. Adm. Rep. 345. Here the Thames had the wind free; it was daylight; the course which was taken by the Thames was voluntary; and, at least, a hazard was unnecessarily occasioned by the fault of those on board. The owners were made liable for the whole loss.

See MONTGOMERY against CRAIG, 15th June 1826; 4. Shaw and Dunlop, 719.

[2] NEPTUNE THE SECOND, 1814; 1. Dods. Adm. Rep. 467. BURNS against STIRLING in Jury Court, 1st March 1819; 2. Murr. 93.

[3] See the way in which Lord Stowell disposes of such a case in THE WOODROP-SIMS, supra, Note [1].

[4] Dig. lib. 9. tit. 2. Ad. Leg. Aquil. l. 29. § 2. and 4.

[5] Consolato del Mare, edit. Casareg. c. 197—200.; edit. Boucher, c. 200—203. Jus Maritimum Hanseat. tit. 10. art. 3. Kuricke, edit. Heinecc. p. 803. It was different in some codes, and regarded as a case of average, Ord. of Oleron, art. 14. Wisbuy, 26. Lord Chief-Justice Abbot, speaking of the rule of these latter authorities, by which injury without fault is to be borne equally by the owners of the two vessels, adds, that, 'by the law of England, damage happening in this 'manner either to ship or cargo by mere misfortune, 'and without fault in any one, the proprietors of the 'ship or cargo injured must bear their own loss, (Bul-'ler v. Fisher). I have already mentioned, that such 'a misfortune is considered as a peril of the sea, and in 'this respect the civil law agrees with the law of Eng-'land.' Abbot, p. 354.

'In general,' says Marshall, 'by the marine law, an 'injury done by collision to a ship or her cargo, where 'no blame is imputable to the master of either, the loss 'is to be equally borne by the owners of both. But 'this rule is not adopted by the law of England.' He also refers to the case of Buller v. Fisher, in 1800. Marshall on Insurance, p. 493.

case where both parties are to blame, or where there is neglect or fault which is inscrutable. By the maritime law this is a case of average loss or contribution, in which both ships are to be taken into the reckoning, so as to divide the loss. And although it may be said, (according to Cleirac),[1] that this rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of parties, or where they see faults on both sides; this impeaches neither the justice nor the expediency of the rule. The rule of the Roman law appears to be against the determination of the maritime codes:[2] But in the immature jurisprudence of Rome, relative to maritime commerce, the more difficult case which was forced on the attention of subsequent navigators does not appear to have occurred. In distinguishing more scrupulously the cases to which the doctrine is applicable, one case is, where there is fault *on both sides;* the other, where there is fault which *cannot be fixed on either*. As to the former, Lord Stowell, the greatest authority on a question of this nature, and under whose peculiar cognizance such questions fall in England, views the doctrine consistently with the rule of the maritime codes. 'A misfortune of this 'kind,' he says, 'may arise where both parties are to blame; where there has been a want 'of diligence or of skill on both sides: In such a case, the rule of law is, that the loss 'must be apportioned between them, as having been occasioned by the fault of both of 'them.'[3] In the other case, of inscrutable fault, there seems not to have been any example in England requiring decision; while the only authority on the point, in the books of Scottish law, is to be found in the book which goes under the name of President Balfour, where, as one of the Sea Laws, the rule of equity, as adopted in the maritime code, is laid down as the law of Scotland.[4] It seems, therefore, to be a point still open to consideration, both in England and here. In legal arrangement it belongs to the doctrine of Average or Contribution; and the point is, whether it be not consistent with equity and expediency that the contribution or average of such a misfortune, in the case of inscrutable fault, as well as in the case of obvious fault on both sides, shall comprehend both ships, to equalize the loss as if all were embarked on the same bottom? In point of equity, much, undoubtedly, may be said on both sides; in point of expediency, there appears to be no sufficient protection, without some such rule, for weak and small vessels against stronger and larger ships; the masters and crews of which will undoubtedly be more careless when they know that there is little risk of detection, and none at all of direct damage to their vessel, by which a smaller ship may be run down without injury to the assailant. But under the rule alluded to, the fear of loss will operate as strongly on the masters of large ships as of small, since the damage is to fall proportionally on both: and if thus equal vigilance and tenderness can be secured on the part of large ships against small, as if they were themselves in danger of direct injury, this rule of maritime law is recommended by very strong reasons of expediency.

It is very true that the laws already quoted from the Consolato del Mare may be construed as not entirely consistent with that rule. But while the cases there stated are, at

[1] Us et Coutumes de la Mer, p. 68.

[2] See above, p. 580. Notes [4]. and [5].

[3] THE WOODROP-SIMS, 2. Dods. Adm. Rep. 85. LE NEVE against EDINBURGH AND LONDON SHIPPING COMPANY, 7th March 1822, as decided in House of Lords, 15th June 1824. 'The Lords find, that both 'ships in this case were in fault, and that the whole 'damage sustained by the owners of the ship Wells, 'and of the cargo, which were sunk and lost, should 'be borne equally by the parties; and find, therefore, 'that the appellants are liable to the respondents in 'the sum of L. 1535. 16s. one-half of the value of the 'Wells and of her cargo, such half not exceeding the 'value of the Sprightly and her freight. And the 'Lords further find, that the appellants are not liable 'to pay interest on the said sum of L. 1535. 16s.; and 'that they and the respondents ought to bear and pay 'their own expenses.'

[4] Sea Laws, c. 52. Balf. Pract. 625.

least, such as arise out of physical accident, all the northern codes of maritime law accord with the doctrine. The laws of Oleron and those of Wisbuy, the code of the Hanse Towns, the Ordonnance de la Marine of Louis XIV., and, last of all, the Code de Commerce, all divide the damage according to the same rule which is laid down by Balfour in his Sea Laws, as already quoted:[1] And the principle of the rule is approved of by the most eminent commentators and jurists of the continent.[2]

Taking this then, in these circumstances, as a question not yet settled by any judicial determination, and respecting which any decision to be given would probably be ruled by the maritime law, as grounded on strong reasons of expediency, and established by all the authorities quoted, the question of contribution would on that footing include two points:—1. Whether the ships are to contribute *equally*, or *proportionally to their value?* The laws of Wisbuy made a rateable contribution.[3] The laws of Oleron made it a contribution in equal shares.[4] So did the Hanseatic code.[5] And the chief authorities seem to favour this rule. Valin, in arguing this matter, after quoting the various authorities, states not only the law, but the principle, to be in favour of an equal division of the loss, without regard to the value of the ships; as not only shorter and plainer, but as better fitted to operate on the minds of shipmasters, who might otherwise be careless of their course.[6] It will be observed, that the responsibility of shipowners is limited to the value of the ship and freight by the laws already taken notice of; both by the general statute relative to liability for losses arising by perils of the sea, and also by the Pilotage Acts. It will also be observed, however, that the Pilotage Acts do not extend to Scotland. 2. The next question would be, whether the cargo of the ship is to suffer contribution as well as the ships themselves? It ought always to be recollected in this question, that the owners of the cargo cannot possibly be in fault; and that the reason of expediency on which mainly the rule of the maritime code rests, cannot, therefore, apply to them, while no case of proper average can arise where there is not a voluntary sacrifice for the common safety.[7]

It is a different question, whether a cargo damaged in the collision should be deprived of the benefit of the contribution to be made by the other ship; for this is part of the damage which has been occasioned by the misfortune; and if it were to be considered merely as a peril of the sea, as between the merchant and his own shipowners, he who may,

[1] Jus Marit. Hanseat. tit. 10. art. 1. Jugement d'Oleron, art. 13. Ordon. de Wisbuy, art. 26. 50. 67. 70. Ordon. de la Marine, l. 3. tit. 7. art. 10.—where the rule of partition is laid down as the general rule, the case of damage by fault or negligence being brought in as an exception. Art. 11. Code de Commerce, l. 2. tit. 13. No. 487.

[2] Kuricke ad Dict. tit. Jur. Marit. Hanseat. p. 220. (edit. Heinecc. p. 801.) He adds, that the same rule is followed in the Danish, Lubeck, Prussian, and Hamburgh laws.

In Holland the rule is followed, 'propter bonum 'publicum et culpæ probandæ difficultatem.' Neostadii Decis. 49.

Cleirac seems justly to place it on a presumption that both are blamable, and their justifications unsatisfactory. Us et Coutumes de la Mer, p. 67, 68.

Pothier places the rule on the footing of equity and public expediency, 'that shipmasters may be more 'careful in taking all possible precautions.' Avaries, No. 165. vol. ii. p. 426.

Emerigon gives also his full approbation to the rule as well founded in principle. Vol. i. p. 417. ch. 12. § 14. No. 3.

Valin justifies the doctrine on reasons of expediency. Vol. ii. p. 165—169.

[3] Ord. de Wisbuy, art. 67.

[4] Jugement d'Oleron, art. 14.

[5] Jus Marit. Hans. c. 10. art. 1. 4. Kuricke, edit. Heinecc. 801. Vinnius in Peck. 263.

[6] Valin, vol. ii. p. 166.

[7] See above, Le Neve's case, p. 581. Note [3].

On this point much difference is to be found in the codes and authorities in maritime law. The Hanseatic Code excluded the cargo from contribution. Jus Marit. Hans. act. 2. and 4. The laws of Wisbuy and of Oleron included the cargo. Ord. de Wisbuy, art. 26. and 67. Jugem. d'Oleron, art. 4.; and Kuricke (p. 803.) and Vinnius (in Peck. 264.) seem to approve of this. But Cleirac and Valin are against it, and their reasons seem to be good.

perhaps, have suffered the most, would unjustly be left without a remedy. According to some authorities, the cargo ought, in such a case, to have the benefit of the contribution :[1] Valin dissents, and lays it down as law, that the contribution is only between the ships, to the total exclusion of the cargoes from the benefit as well as from the burden.[2] The former rule, however, seems to have been adopted by the House of Lords in a case already referred to.[3]

In cases of damage by collision, it is no defence to the owners that the ship in fault is under the direction of a pilot, and that the remedy lies against him. They are liable in the first place, and must seek their remedy against the pilot.[4]

II. As between the SHIP and the CARGO, it can admit of no doubt, that if damage have arisen to the cargo from the fault of the master of the ship in which it is embarked, the merchant will have indemnification against the master and owners, under the limitation of the Acts already referred to.[5] But if the ship be under the guidance of a pilot at the time, the remedy will be only against him, by the English pilot laws; 6. Geo. IV. c. 125. § 55.

If the loss is by accident, it is a peril of the sea, which must fall where it lights, and which is excepted from the obligation in the charter-party.

If the damage should arise in that case of inscrutable fault which we have already treated so much at large, as between the owners of the cargo and the owners of the ship which carries it, the rule appears to be, that it is a mere peril of the sea, and within the exception in the charter-party.[6]

§ 2. OF INDEMNIFICATION OF LOSS BY GENERAL AVERAGE; AND OF THE LEX RHODIA DE JACTU.

Among the losses and injuries incident to a sea-voyage, some are of a nature to affect only the subject which directly suffers injury; in others, the loss happening to one subject is relieved by a general contribution, on the part of all concerned in the adventure, towards the indemnification of the sufferer. The latter description of injury or loss forms what is properly to be called an average loss, the loss being spread by average allotment over the whole. The former is also commonly called *average*, though, strictly speaking, it is not entitled to the name, but is merely a partial loss. In using the term *average*, however, to express these very different sorts of loss, the words *general* and *particular* are added. A GENERAL AVERAGE is a loss incurred by sacrificing something for the common benefit, towards which the whole concern is bound to contribute pro rata; because it was undergone for the general preservation of the whole. SIMPLE or PARTICULAR AVERAGE is one of those incorrect expressions which, though in familiar use and suffi-

[1] Kuricke, 803. Vinnius ad Peck. 264.

[2] 2. Valin, 167–169.

[3] See LE NEVE'S case, supra, p. 581. Note [3].

[4] NEPTUNE THE SECOND, 1. Dods. Adm. Rep. 467.

[5] See BULLER *v.* FISHER, 3. Esp. Cases, 67. Here two ships, the *Patriot* and *Matthew*, were sailing in one direction, the *Atlas* in another. The Matthew was to leeward when they saw the Atlas coming, and kept close to the wind, in order to give the Atlas an opportunity to pass. This the Atlas mistook, and, unable to weather both ships, she and the Patriot ran foul of each other, and the Atlas went down. Lord Kenyon said, 'that if the defendants have been guilty of any 'degree of negligence, and it can be proved that the 'accident could have been prevented, they, the owners, 'would certainly have been liable on the charter-party; 'but they are exempt by the condition of the charter-'party from misfortunes happening during the voyage, 'which human prudence could not guard against; 'against accidents happening without fault in either 'party. I am of opinion that neither ship could be 'deemed to be in fault; and that the misfortune must 'be taken to be within the exception of the perils of 'the sea.'

[6] See above, BULLER *v.* FISHER, Note [5].

ciently 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 of goods 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.[1] It is of the latter, or general average loss, that we are now to treat. The doctrine is important, not only in regulating questions between shipowners and merchants whose goods have been put on board, but in questions of insurance of daily occurrence; for insurers are liable to indemnify the insured against those contributions which are properly denominated general average.

Roman law, De Jactu Mercium.

The doctrine of general average takes its origin from the LEX RHODIA DE JACTU; a part of that code of maritime law which has already been mentioned as the most ancient in Europe, and which was adopted by the Romans and all the nations of the Mediterranean. This law, establishing a partnership or rule of contribution for indemnifying sacrifices made for the common safety, has been praised and commented on in every maritime country in Europe, more, perhaps, than any other part of the marine law. Commentators have expressed their wonder and admiration, that a law so perfect in policy and in justice should be found in the most ancient code of marine law; while it is that very character of manifest equity which most naturally recommended it to early adoption. The justice of contributing, after the danger is passed, and the ship and cargo saved, to the repairing of the loss of what has been sacrificed in order to obtain that safety, could not fail to suggest itself to the framers of a code of maritime regulations: The reasons in policy have been engrafted afterwards.

The text of the Rhodian law is to be found in the Pandects, as preserved by Paulus: 'Lege Rhodia cavetur ut, "SI LEVANDÆ NAVIS GRATIA JACTUS MERCIUM FACTUS EST "OMNIUM CONTRIBUTIONE SARCIATUR QUOD PRO OMNIBUS DATUM EST.'"[2]

Text of the Law.

This law is illustrated and discussed in the Pandects by Paulus, Papinian, and other eminent lawyers. It forms the subject of ample and excellent commentaries in various countries of Europe; of which the most distinguished are those of Peckius and of Vinnius, which forms the third commentary of the book 'Ad rem Nauticam;' the short tract of Weitsen;[3] the treatise of the learned and judicious Bynkershoek; the treatise of Schomberg; and the dissertations on this subject which are to be found in the works of Valin, Pothier, and Emerigon. The subject is also treated very ably by the English authors on maritime jurisprudence, Abbot, Park, and Marshall. And there is a recent essay, in which a practical view of it has been given with great perspicuity and correctness.[4] Above all, are to be estimated the lights which have been thrown on this subject by the Judge of the High Court of Admiralty in England, whose decisions on this, as on every subject which has come under his cognizance, are directed at once to the decision of the cause and the improvement of the general system of jurisprudence.

GENERAL AVERAGE OR CONTRIBUTION proceeds on the principles of a partnership by necessity. Where, in the danger of shipwreck or capture, it is thought by those on board advisable to sacrifice any part of the cargo, or of the ship, the masts, guns, anchors, cables,

[1] 2. Pothier, Pret à la Grosse, vol. iv. p. 91. § 44. Lord Stowell's judgment in THE COPENHAGEN, 1. Rob. 923.

[2] Dig. lib. 14. tit. 2.; Ad Leg. Rhod. l. 1.

[3] Quintini Weitsen Tractatus de Avariis, on which Van Leewin and De Vicq have each published commentaries. Weitsen's book was first published in 1563. It was republished by Casaregis, with the two commentaries now mentioned. Casareg. vol. iii. p. 3—30.

[4] Essay on Average, and on other subjects connected with the Contract of Marine Insurance, by ROBERT STEVENS, of Lloyds, of which a fourth edition was published in 1822.

and so forth, for the general safety, the loss is to be adjusted by a contribution from all who have partaken of the benefit. But instead of labouring to adjust the dangerous limits of a definition, it is better to describe, in a detailed and minute commentary,—1. In what circumstances, or for what losses, a contribution may be demanded; 2. What is liable to contribution; and, 3. What is the mode of reckoning, and the principles according to which the contribution is to be laid on those concerned.

1. *In what Circumstances, and for what Losses, may Contribution be demanded?*

Requisites to Contribution.

Two things are necessary to ground the right to contribution:—1. That the property shall have been advisedly sacrificed for the common safety; and, 2. That such sacrifice shall have preserved the property of those concerned.[1]

The Sacrifice must be made advisedly.

1. If unadvisedly, and without due cause, goods have been thrown overboard by a timorous master, he and his owners alone will be liable; and it has been settled as the criterion of a sacrifice sufficient to ground a claim for contribution, that it must have been the result of a consultation among those on board, as grave and deliberate as the urgency of circumstances will fairly admit. This consultation is to be directed to two points:—*First*, The necessity of lightening the ship; and, *secondly*, The goods which it is most advisable to sacrifice.[2]

Regular and irregular Jactus.

Casaregis, and the other continental writers, distinguish two species of jactus; one regular and orderly, the other tumultuous and precipitate: The former, a measure of necessary precaution against approaching danger; the latter, from the perturbation and alarm of imminent peril: the former, admitting of orderly, though rapid deliberation; the latter, defying all consultation, where every hand, with desperate effort, is employed in throwing overboard whatever comes within its reach.[3] These distinctions are, perhaps, more curious than useful; more the result of the elaborate study of a favourite subject, than the result of practical cases and observation. In this country, every such case is properly a jury question; and the distinctions of regular and irregular jactus, though founded in nature, and useful in directing the consideration of those who are to deliberate on the case to the important points, are not fit to be set down as matter of law.[4]

Presumption.

The presumption is, that the case falls under the class of irregular jactus, so as to relieve the master from the necessity of having been too curiously observant of regular forms;[5] but to this presumption it is necessary that, in the first moment of tranquillity, an entry shall be made in the log-book of the circumstances, and a specification of the goods or articles thrown overboard; and that at the first port affidavits shall be made to

[1] 'Duæ res,' says Vinnius, 'concurrere debent ut 'actio hujus contributionis nomine competat,—1. Jac- 'tura rerum ex una parte; 2. Conservatio rerum ex 'parte altera.' Vinn. in Peck. 206. Note a.

[2] Ordon. de la Marine, tit. 8. Du Jet et de la Contribution, art. 1. and 3. 2. Valin, 175. et seq. Civitat. Hanseat. Ordin. Nauticæ, tit. 8. De Jactu Maris et Havaria, art. 4. Kuricke, 188. et seq. See also Quæstio 32. Si ex navi, &c. Weitsen, Tract. de Avariis, § 9. Van Leewin, Obs. ad Tract. Q. Weitsen, No. 20. Math. de Vicq, Obs. 21. Casaregis, Disc. 19. vol. i. p. 50.; Disc. 45. p. 145. No. 25. et seq. 1. Emerigon, 605.

[3] Targa, speaking of this irregular jactus, characterizes it as a state of alarm, where 'ogn' un gettació che 'li vienne alle mani; che percio é incapace di regola.'

[4] Any one who wishes to study this matter, will find it fully discussed in the 19th and 42d Disc. of Casaregis, already referred to, and Kuricke, tit. 8. art. 4. Emerigon, in his section entitled, 'Observa- 'tions Générales sur le Jet,' has collected the authorities to be relied on; vol. i. p. 605—611.

[5] Casaregis, Disc. 45. No. 31. 1. Emerigon, 605. Targa says, that during 60 years, in which he had officiated as a magistrate at Genoa, conversant with this subject, he had known only five instances of regular jactus, all of which were suspected of fraud, because the forms had been too well observed.

the fact, to prevent the purloining of goods under the cover of their having been thrown overboard. This is a universal rule.

Difference of Opinion.

Questions have been agitated respecting the effect of difference of opinion among those on board. The general rule laid down in all the codes, and by all the authorities, is, that the majority shall decide.[1] These provisions have chiefly in contemplation, what seldom happens now, that the merchants are on board. But in every such question the judgment of the master and crew deliberately formed will rule the case; the master's opinion, where he has no adverse interest, being entitled to great weight.

Safety must result from the Sacrifice.

2. The effect of the sacrifice must be to save the ship from the impending danger. Should the ship be wrecked in that storm, and some of the goods be saved; or should she be captured by the enemy who then has her in chase, and some of the goods be restored; those will not be liable to contribution.[2] But if, after having been preserved from that danger, they encounter another distinct and different; that part of the cargo, or the ship, which is saved, contributes to the first average, according to their value as saved, deducting salvage.[3] It does not seem to be laid down, whether the owners of the property so saved are to share the whole average loss with the proprietor of the goods thrown over; or only to bear such proportion as would belong to them, had there been no subsequent loss, deducting the contribution of all the rest of the cargo, as at the period of safety.

In the detail of particular losses, some questions of great nicety may arise.

Jactura, or Jettison.

1. The proper case is JACTURA, or JETTISON; or the casting overboard of parts of the cargo or of the ship, or guns, stores, &c. to lighten the vessel in a storm or for flight, or to enable her to float when aground.

Goods on Deck.

1. Goods stowed on deck and thrown overboard are not to be relieved by contribution: They are encumbrances to the navigation which ought not to have been there; and their ejection is to be ascribed rather to the necessity of clearing away this improper embarrassment, than to the consideration of lightening the ship. A claim for indemnity may lie against the master and owners; or the merchant, if he knew that his goods were so stowed, may be held to have run the risk himself; but the loss is not a proper average.[4]

Without Bill of Lading.

2. Goods on board without a bill of lading, are not to be averaged if lost.[5] But this circumstance can only found a presumption that the goods are beyond the proper cargo, and on board without the master's consent: And this presumption may be refuted. 3. Where goods are either thrown overboard to lighten the ship, so as to float her from a bank on which she has struck; or to get her over a bar in refuge from a storm, or capture; or for necessary repair: Or if they be placed in lighters or boats, and lost by the sinking of the boats or lighters; these are considered as proper cases of jettison.[6] But, 4. The lightening of the ship, in order to get over a bar at the port of destination, does not seem to be an average loss, for which contribution is

[1] Consolato del Mare, c. 97. Civit. Hans. Ord. Naut. tit. 8. art. 2. Ord. de la Marine, tit. Du Jet, art. 1. Kuricke, p. 186. Weitsen, § 6. and 29. Casaregis, Disc. 45. No. 26.

[2] Ord. de la Marine, tit. Du Jet, art. 15. 2. Valin, 194. 1. Emerigon, 616. But if any fair distinction can be made between the chance of recovery which is given to the owners of the goods remaining on board, by the sacrifice, and that which the ejected goods have of being recovered, average seems to be due. Weitsen de Avariis, No. 20. and Casaregis, Disc. 45. § 33, 34. 75. Observe in the former the word *postea*, and the case which he puts in illustration. So the case put in the Digest. l. 4. § 1. is of the ship having continued afloat, and wrecked *in alio loco*. So also Erskine should be understood, resting his dictum upon that law. B. 3. tit. 3. § 55.

[3] Ord. de la Mar. Du Jet, art. 16. 2. Valin, 193. Pothier, Avaries, No. 114. vol. ii. p. 409. Marshall, 537.

[4] 2. Valin, 189. Abbot, 344. This regulation of stowage is by special statute enforced in Scotland. See above, p. 459, 460.

[5] Jugem. d'Oleron, art. 8. n. 22. Loccennius, 205. Cons. del Mar. 92. 112, 113. 184. l. 54.

[6] 2. Valin, 195. 2. Pothier, Avaries, No. 145, 146. p. 422.

to be made, but is a loss by fault of the master.[1] 5. Where goods are sent on shore in lighters for the mere purpose of debarkation, the loss is not average.[2] 6. The cutting away of masts, sails, cables, &c. is average, when done for the ship's safety. But it has been observed, that, in practice, foreigners are apt to fall into a mistake, in conceiving that every loss of mast or sail on a lee-shore is average; and particularly, that such injury as afterwards requires them to be cut away, entitles the shipowner to contribution; whereas these are partial losses proper to the ship.[3] 7. The foreign rule, which holds as average the cutting of a cable, or loss of an anchor, in the necessary dispatch of joining convoy, is not sanctioned by our practice.[4] But similar losses occasioned by the danger of running ashore, or upon rocks, or being run foul of by other ships, or for the purpose of getting clear when run foul of, are average losses. 8. The sacrifice of sails, ropes, and other materials cut up and used at sea for the purpose of stopping a leak, or to rig jury-masts, or supply any other requisites towards the general safety, is average.[5]

Damage in the operation.

2. Not only goods or parts of the ship thrown overboard, or otherwise sacrificed, are average, but also damage occasioned to other goods, or to the ship, in ejecting them: as the cutting of the deck or sides of the ship to facilitate the ejection; or the injury that follows upon the cutting down of the mast, by its falling on some other part of the ship, or on goods, and occasioning damage.[6]

Expense in Port, &c.

3. The expense of going into port, and of the operations or detention there, have given occasion to many questions. Thus, where the ship has sustained injury in a storm or hostile encounter, and goes into port to refit; this may be necessary for the general interest and safety. But it has been much questioned, whether any, or what part, of the loss thus accruing is average. Where the injury has been voluntarily incurred as a sacrifice for the common safety, (as cutting down a mast), it seems to be clear, that both the expense of the repair itself, and the collateral and necessary expense of unloading and warehousing the cargo for the purpose of making the repairs, with the extra expense of maintenance and wages during the detention, are average.[7] Where the cause of going into port is damage sustained by a peril of the sea, it was decided in the Roman law, that the expense of refitting, and the collateral expenses, were not average.[8] It was held other-

[1] The rule is laid down generally by Callistratus.—Navis onustæ levandæ causa quia intrare flumen vel portum non potuerit cum onere. Dig. lib. 14. c. 2. l. 4.; by Peckius and Vinnius, p. 242.; by Weitsen, § 17.; and by Casaregis, Disc. 46. § 29. But the point which I have stated seems rather to be omitted than implied in those authorities. The principles on which contribution may justly be denied are,—1. That the master is in fault by taking a cargo which the port will not admit; and, 2. That each merchant whose goods are on board, takes such risk as in the ordinary course of that voyage may fall on him. Pothier draws the distinction plainly; and satisfactorily shews that the lightening of a ship for gaining access to the destined port is not average, but a loss by the fault of the master. 2. Pothier, 423.; Avaries, § 146.

[2] 2. Valin, 195.

[3] Stevens on Average, 15, 16.

[4] Stevens, p. 16.

[5] Stevens, p. 18.

[6] Dig. lib. 14. tit. 2. Ad. Leg. Rhod. l. 4. § 2. Ord. de la Mar. art. 14. Pothier, Avaries, No. 115. 2. Valin, 190. Marshall, 542. Abbot, 334.

Casaregis, in Disc. 19. relates a case of the mainmast of a ship having been broken in a tempest, so that it was necessary to cut the stays and ropes; and, in falling, it carried off the stern and part of the side, by which all the goods there stowed were thrown into the sea, and other damage sustained. If, in this case, the mast had been cut down, instead of having been broken by the tempest, the consequential loss would have been rightly adjudged average.

[7] Lord Stowell in THE COPENHAGEN, 1. Rob. Ad. 249. See also PLUMMER *v.* WILDMAN, below, p. 588. Note [6].

[8] So Julianus answered in a case where a ship, having met with a violent storm, and having her masts and rigging destroyed by lightning, was forced to go into a port to refit. Having put to sea again, and delivered her cargo safely, the question was, Whether the owners of the cargo were bound to contribute to the loss suffered by the shipmaster? Julianus decided that he was not 'respondi non debere.' Hic, enim sumptus

wise in Holland;[1] and in an early English writer the rule is laid down in the same way.[2] In France the same doctrine prevailed; the loss by delay, the expense of unloading, warehousing, and loading, and the maintenance of the crew, were held average; not the expense of the repairs themselves, unless they were of a more than ordinary cost.[3] In England, of late years, the doctrine of Beawes was questioned,[4] though it seems to have had the assent of Mr Justice Buller on one occasion.[5] In several recent cases the matter has been much discussed; and the result of those determinations may thus be stated:— 1. That where the general safety requires a ship to go into port to refit, by whatever accidental cause occasioned, the necessary expense of going into port, of preparing for the refitting of the ship, by unloading, warehousing, reloading, and even the charges of the crew during the necessary detention, are average. 2. That the costs of the repairs, so far as they accrue solely to the ship itself as a benefit, and are costs which would have been necessary at any rate in that port, on account of the ship alone, are not average. 3. That wherever the expense of repairs is such as would not have been incurred but for the cargo on board; as, for example, such as, though necessary for the ship, might have been made with safety to her in a port where they would have been less costly; the extra expense is average.[6]

instruendæ magis navis quam conservandarum mercium gratia factus est. Dig. lib. 14. tit. 2.; ad Leg. Rhod. l. 6. And conformably with this the doctrine is given by Vinnius ad Peck. p. 266. Kuricke de Jur. Marit. 774. Roccus, not. 59.

[1] Ricard, Neg. d'Amsterdam, 280.

[2] Beawes, Lex Mer. 166.

[3] 1. Emerigon, 625.

[4] Marshall, 539. Abbot, 336. In the 5th edition, p. 530. the point is stated as settled by the recent cases. See below.

[5] Da Costa v. Newnham, 2. Term. Rep. 407.

[6] The doctrine of this paragraph will be proved and illustrated by the following cases:—

1. Jackson v. Charnock, 8. Term. Rep. 509. But it will be observed, that here there was a peculiarity in the charter-party, by which the ship was to be kept in repair at the freighter's expense.

2. Power v. Whitmore, 1815; 4. Maule and Sel. 141. Here the ship encountered a storm off the Isle of Wight, which damaged her bowsprit. This, with the appearance of stormy weather, induced the master and crew to go into port, where the damage was repaired, and they staid 20 days to avoid the storm. The master claimed the expense of this repair, and the maintenance and wages of the crew during the 20 days' stay as general average. The Court of King's Bench rejected the claim. Lord Ellenborough said, that here there was no sacrifice of part for the sake of the rest. The damage incurred was by the violence of the wind and weather; and the only sacrifice made by the master was of their time and patience.

3. Plummer v. Wildman, 1815; 3. Maule and Sel. 482. Here the ship suffered by collision, so that for the general safety, and in order to prosecute the voyage, she was obliged, after cutting away part of the rigging, to return and refit in a West India port. The particulars claimed as contribution were, pilotage into Kingston; surveying and repairing the damage; wharfage and cooperage on landing, and stowing the cargo during the repairs; the charges of reloading; wages and crimpage for replacing deserters. Lord Ellenborough said, that if the return to port was necessary for the general safety of the whole concern, it seems that the expenses unavoidably incurred by such necessity, may be considered as the subject of general average. It is not a question so much what was the first cause of the damage, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from farther prosecuting her voyage, unless she returned to port, and removed the impediments. As far as removing the incapacity is concerned, all are equally benefited by it; and therefore it seems reasonable, that all should contribute towards the expense of it: but if any benefit ultra the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the shipowner only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment. The amount of the expense of repairing, to be placed to the account of general contribution, must be strictly confined to the necessity of the case; and the arbitrator will have to determine how much was expended upon such repairs as were absolutely necessary to the enabling the ship, with her cargo, to prosecute the voyage; and for so much, and no more, the defendant will be liable to contribute. As to the charge for the captain's expense during the unloading, repairing, and reloading, the shipowner must bear the captain's expenses, and crimpage must be disallowed; it does not come under general average. The other Judges concurred.

4. But it is not enough that benefit has arisen to the cargo or general interest; it must be a benefit proceeding from an act done with a view to the general interest.[1]

5. Where a ship is purposely run on shore to prevent her foundering at sea, or to shun the manifest danger of striking on rocks, and she is got off with damage, this is an average loss.[2]

The rule is the same when the vessel is run on shore to avoid capture.[3]

6. The expense of employing workmen to perform extraordinary service for the safety of the ship is average.[4]

7. Damage done to ship or cargo during a combat, the issue of which has saved the ship and cargo, and sums expended in curing the wounded, seem fairly entitled to be considered as average. But the point is settled in favour of the opposite opinion.[5]

8. If the whole ship be freighted, and the master on his own account take the goods of other merchants on board clandestinely, the jettison of those goods, if the owner of them had notice of the encroachment, will not ground a claim of average.[6] If he put his goods on board in bona fide, it would rather seem that he will have a right to claim average; the freighter having relief against the master and owners.[7]

2. *Of Property liable to Contribution.*

The subjects of contribution generally are—the cargo; the ship; and the freight.

1. CARGO.—The common rule is, that what pays no freight pays no average.[8] But this

[1] See POWER *v.* WHITMORE, above, p. 588. Note [6]. COVINGTON *v.* ROBERTS, 2. New Rep. 378. This was a case of damage occasioned to a ship by carrying too great a press of sail to effect escape from a privateer which had captured her. The cargo was saved, together with the ship, but the hull and masts were damaged. The benefit to the cargo was held as incidental, not the object and cause of the damage.

TAYLOR *v.* CURTIS, Holt, 192. 6. Taunt. 608. 2. Marshall, 309. This was a ship separated accidentally from convoy, which defended herself against an American privateer, whom she beat off. She arrived at St Thomas's almost a wreck, and delivered her cargo in safety. The cargo was valued at L.21,000: the goods of the defendant L.1000: the loss to the ship nearly L.3000. An average was claimed against the defendant of L.138. But it was held, after full argument, not to be a case of general average; that it was the duty of the captain and sailors to defend the ship, as much as to pump her after a leak. The loss fell where the chance of war directed it.

[2] Cons. del Mar. c. 192, 193. Roccus, p. 62. § 165. Beawes, 165. Abbot, 335. Marshall, 542. Stevens says, that the practice at Lloyd's has been conformable; and that the opinions of two eminent counsel sanctioned that practice. But he argues strenuously against it, as coming under the head of inevitable loss and partial damage. Stevens on Average, 31. 34. See also his Appendix, 231.

[3] Pothier, Avaries, § 150. vol. ii. p. 425. 2. Valin, 155.

[4] BIRKLEY *v.* PRESGRAVE, in King's Bench, 1. East, 220.

[5] So Pothier decides, Avaries, No. 144. distinguishing this from the dangers of the sea.

Emerigon, on the other hand, in a case where a French ship suffered much damage in fight with an English ship, gave his opinion, that it was a case of simple average, the exposure to an enemy being as much a peril of the sea as a storm. He supports his opinion by the authority of Cleirac sur les Jugemens d'Oleron, art. 9. tit. 5. p. 50.; of Casaregis, Disc. 46. No. 43.; Disc. 121. No. 3.; of Targa, 256.; Kuricke, tit. 14. art. 3.

Valin says, that the damage sustained by the ship and goods in a combat to avoid capture, is common average, 'although Kuricke, Targa and Casaregis, are 'of a different opinion.' 2. Valin, 156.

In ROBERTSON against BROWN, 27th July 1785, the Court of Session decided against the sufferers, contrary to what had been the prevailing opinion of Scottish merchants; on the strength of certificates, that such had been the view taken in London in the course of the American and French war.

This confirmed in England in TAYLOR *v.* CURTIS, above, Note [1].

[6] Abbot, 355. But he does not distinguish what seems very material, viz. the bona or mala fides.

[7] Weitsen, de Avariis, § 32. His illustration is a little homely, and not very good. Casaregis, Disc. 46. No. 40. Kuricke, Com. ad Jur. Marit. Hanseat. tit. 8. art. 4. p. 200.

[8] 1. Magens on Insurance, 62.

is not to be strictly taken, so as, according to the old Lubeck law, quoted by Langenbeck, (as alluded to by Magens), to exempt from average the goods taken by the master out of friendship freight-free. The substantial rule is, that goods, (or even money as goods), if on board for traffic, whatever may be their nature, or to whomsoever they may belong, and whether paying freight or not, provided they be on board at the time of the ejectment, are liable to contribution.[1] 1. That part of the cargo which has been thrown overboard is liable to contribution; otherwise the owners of it would alone be exempted from loss.[2] 2. Goods stowed on the deck are liable to average if saved; and more justly, perhaps, than if better stowed.[3] 3. There is no contribution for the passengers or crew; for it is impossible to put a value on the life of a free man.[4] 4. The wearing apparel, personal jewels, or money in the purse of passengers or crew, do not contribute:[5] as accessaries of the person they are, by the law or usage of some states, exempted;[6] while, in others, they contribute, with the exception of the ordinary wearing clothes.[7] In Scottish practice it seems only to be such luggage of passengers as is put in boxes or chests that contributes.[8] 5. Although money in a man's pocket may be exempted, as a sort of accessary of his person, money or bills in his possession are said to be liable to contribution: At the same time, bills are not themselves valuable, and the true interest may be held, and the money recovered, without them.

Property liable to Contribution.

2. SHIP.—The ship contributes to all average losses; but the stores and provisions do not contribute. The correct statement is, that the value of the ship, deducting provisions, stores, wear and tear, and partial loss, is the subject of contribution.[9]

3. FREIGHT contributes to average, but not the seamen's wages. It is not for the general benefit that the seamen should have any motive to oppose a sacrifice in which the safety of the whole is involved; while this exemption from average is no more than a fair recompense for their extraordinary exertions during the storm.[10] In reckoning the freight for contribution, the wages are deducted.[11]

3. *Mode of valuing and apportioning General Average.*

In the practical operation of adjusting the average, the value of what is lost is to be reckoned, on the one hand, and, on the other, the value of the contributory interest, or of what is saved.

Goods jettisoned.

Goods saved.

I. Goods are to be valued according to the following rules:—1. Goods jettisoned are to be taken at the market-price which they would have brought at the port of delivery; freight, duties, and other charges deducted. 2. To goods saved a different rule is to be applied according to the circumstances. When the voyage is completed, and the average is adjusted at the port of discharge, the universal practice now is, to take the actual value of the cargo at the market-price, stripped of all the charges attaching to it; as freight, duty, and landing charges; and to add the estimated neat proceeds of the goods jettisoned, (taken in like manner), to the neat value of the cargo saved.[12] In the charges are not to

[1] Emerigon, 639. 648. § 11. Pothier, Avaries, No. 121. Abbot, 344. Marshall, 543. Stevens' Essay, 48.

[2] Pothier, Avaries, No. 123.

[3] 2. Valin, 189. Stevens, 53.

[4] Corporum liberorum æstimationem nullam fieri posse. Dig. lib. 14. tit. 2. ad Leg. Rhod. l. 2. § 2.

[5] Abbot, 356. Price, 4. Taunt. 123.

[6] 1. Emerigon, 645. 1. Magens, 62, 63. 2. Molloy, c. 6. Marshall, 544. Abbot, 345.

[7] Casaregis, Disc. 45. No. 7.

[8] 3. Ersk. 3. § 55.

[9] Weitsen, Tr. des Avaries, p. 31. Stevens, p. 55. See below.

[10] 1. Magens, 71. Pothier, Cont. de Louage, No. 126.

[11] Stevens, p. 64.

[12] Marshall, 546. Stevens' Essay, p. 51.

be included the premiums of insurance; nor the commission which the consignee has on sales.[1] Where the ship has been put back, the valuation must be at the invoice price.[2] If the ship have arrived at a certain port, but unable to complete the voyage, and with no other means of sending on the goods, the value must be what the goods will bring there. 3. If the goods saved are damaged, they must be taken only at the deteriorated value, which alone has been saved.[3] If goods jettisoned have been recovered after having suffered damage by the jettison,—or if damage in the nature of average have been otherwise sustained,—the value, as if sound, must be taken in the estimate for their contribution; since by the contribution from the rest they are made good to the merchant.[4] If the cargo produce nothing, or the charges exceed the gains, or the goods be abandoned to salvors, there will be no contribution from the cargo; for there is no benefit.[5] 4. When the freight is paid at the loading port, it is added to the value of the cargo, the merchant having then the interest in the freight, by its being converted into a charge on the goods. The loss is to be contributed, not according to the bulk or weight of the property saved, but according to its value. So gems or pearls, of inconsiderable weight and bulk but great value, pay according to the interest which the owner has in the safety of the ship.[6]

Saved Goods damaged.

II. The valuation of the SHIP for contribution is attended with some difficulty. The wear and tear of the ship during the voyage, and the consumption of provisions and stores, make fair deductions from the value of the ship as contributory interest: and various methods have been taken in the several maritime codes to attain a general rule for this deduction. In one, the ship and freight are both taken, but at half their value;[7] in another, the ship or the freight is excluded, at the option of the owners of the cargo.[8] The object is to approximate as nearly as possible to the value of the ship as at the time of the average loss. This seems best to be done by taking the hull, masts, rigging, and stores, as at the time of her sailing, and then deducting the provisions and stores expended, the wear and tear of the voyage, and partial losses sustained. There seems to be another method of coming at the value, viz. to state the deteriorated value, and to add what is made good by general contribution. But the former is generally adopted.[9]

III. The amount of FREIGHT which is to be taken as contributory interest, is the actual sum received by the shipowner, after deducting the seamen's wages, and a third of the petty average. Those are the charges with which the freight is burdened. The wages are thus saved from contribution, to encourage the easier assent of the crew to the necessary measures of safety, and from a fair consideration of the justice of rewarding their personal

[1] Stevens, p. 51. Note.

[2] Abbot, 347. Stevens, 52, 53.

[3] Pothier, Avaries, § 132. vol. ii. p. 415.

[4] Pothier, ut supra. Stevens, p. 52.

[5] Stevens, p. 52.

[6] Dig. lib. 14. tit. 2. ad Leg. Rhod. l. 2. § 2. 1. Emerigon, 639. with the authorities there quoted. 3. Ersk. 3. § 55. Lord Kames has speculated on this subject against the united authority of all the codes and all the commentaries; but with no great force of reason. 1. Principles of Equity, 187.

[7] Ord. de la Marine, du Jet, art. 7. 2. Valin, 181.

[8] Ord. de Wisbuy, art. 40. 1. Magens, 57. where he states the authorities and the practice.

[9] Mr Stevens, who is an arbitrator at Lloyd's of mercantile, shipping, and insurance affairs, says, p. 58. that 'from a mass of MS. adjustments now before me, 'made within the last thirty years,' the formula to be recommended is the most conformable to practice. It is thus:—

Value of the ship at the outset,				L.1000	0 0
Deduct partial loss,	L.50	0	0		
—— provisions, and tear and wear, - -	50	0	0		
				100	0 0
Value to contribute,				L.900	0 0

exertions by that exemption. This deduction may come to eat up the whole freight where the voyage is very long.[1]

The freight of the goods sacrificed is paid for by general contribution, and so must contribute. But if, in an intermediate port, goods are taken in for those which have been thrown overboard, the freight of them is to be deducted from that of the lost goods, else the master will gain by the loss of the owner of the goods sacrificed.[2]

In concluding this subject it may be observed, 1. That the property of the goods abandoned is still with the owner, if they be saved or recovered; and that they are not liable to contribution for any average subsequent to the jettison. And, 2. That the valuation in a policy of insurance ought not in any manner to affect the value for contribution: this valuation having the indemnity of the insured alone in contemplation, according to an express or implied bargain in the insurance contract; while the value for contribution has relation to the actual state of the property, and the benefit conferred by the sacrifice.

§ 3. OF SALVAGE.

This sort of indemnity, like average loss, may come into question either between the shipowners and merchants concerned in a voyage, and those entitled to a recompense for saving the property; or it may occur with insurers in the consideration of partial losses in settling under a policy.

Salvage. SALVAGE is a reward or recompense given to those by means of whose labour, intrepidity, or perseverance, a ship or goods have been saved from shipwreck, fire, or capture; the losses to which this sort of property is peculiarly exposed. It forms one of the most natural burdens on property so saved or recovered: and gives at once a remedy in Admiralty IN REM, and at common law by lien;[3] and a personal action or claim against the owner to whom the property is restored.[4]

Difficulties. The subject of salvage is not, however, without its difficulties. How to give, on the one hand, such recompense as may fairly reward the labour and intrepidity of the salvors, and encourage their exertions and honesty; and, on the other, to prevent depredations on ships stranded or in danger, and the oppression of excessive exactions in the moment of alarm; is a difficult problem in legislation. It requires the aid of a vigilant officer, possessed of a large and honest judicial discretion. In all the codes of marine jurisprudence, we find that this difficulty has been felt: that while provision has been made for the recompense of those by whose means ships or cargoes have been saved from shipwreck, capture, fire, or other impending loss, it has been found necessary, by two sets of regulations, to restrain the oppression which is too frequently practised by those into whose power accident has thrown the unfortunate. These are,—1. Penal laws against depredation; and, 2. Regulations for settling a fair and reasonable rate of salvage.

English Law. In England, the provisions by statute relative to salvage make a part of certain laws, enacted principally with a view to restrain depredations on stranded and derelict property; laws which were rendered necessary by the slender aid afforded by the English common law in such cases. There are three several cases provided for, which it will be necessary to consider more fully hereafter:—1. The case of stranded ships, where application can be made to a magistrate: 2. The case of persons falling in with ships abandoned; and, 3.

[1] Stevens, p. 65.

[2] Stevens, p. 66.

[3] See below, Of Lien.

[4] See Lord Stowell, in the case of THE TWO FRIENDS, 1. Rob. Adm. Rep. 277.

The case of persons engaging, at the request of those interested, without the interposition of a magistrate.[1] Severe regulations are contained in those laws against depredation, and many wise precautions taken against frauds difficult to be restrained in the unprotected or scattered state of property which has suffered shipwreck. The regulations respecting salvage form the encouraging part of those statutes; and they also are framed with humanity and wisdom, for preventing oppression in settling the recompense of salvors.

Scottish Law of Salvage.

In Scotland, this matter is left chiefly to the common law. The statute of Queen Anne, indeed, has been held to extend to Scotland:[2] But the other Acts alluded to are confined to England. In Scotland, Depute-Admirals, and the jurisdiction of the Judge-Ordinary of the shire, are sufficient, in the exercise of our common law, to repress the depredations which are the subject of so many anxious regulations in England.

In commenting farther on the subject of salvage, it may be proper to consider,—1. Who are entitled to salvage: 2. For what acts, or in what circumstances, salvage is due: 3. Who is liable for salvage; and, 4. The principles on which the amount is to be ascertained under the common law, and the rules settled in particular cases by statute.

No Salvage to Master and Crew.

I. Who are entitled to Salvage.—1. The Master and Crew of the ship that is saved have no claim for salvage, however extraordinary their exertions of courage or of labour: for already, by their contract with the owners, their interest and exertions are engaged in the service of the ship and cargo.[3] But when their duty as seamen is over, (as by capture it is), any exertion subsequently made with success to recover and rescue the ship entitles them to recompense.[4] One distinction is to be observed between the case of a rescue from an enemy, (the crew being discharged from their duty as soon as the capture is effected), and the case of a mutiny quelled, which, however successful, does not discharge the crew. In the former case there is salvage; in the latter there is not.[5] Another distinction is to be observed between a claim of salvage in a case of successful mutiny, where that claim is made by part of the crew, and where it is made by another vessel coming to the aid of the distressed ship. In the former case there is no claim; in the latter, there is the same right as if the ship were rescued from an enemy.[6]

Passengers.

2. The Passengers are so far in a different situation, that although they are bound while on board to labour for the common safety, as persons not on account of the accident

[1] 12. Anne, st. 2. c. 18. 26. Geo. II. c. 19. 48. Geo. III. c. 130. 49. Geo. III. c. 122. 53. Geo. III. c. 87. All these are laws made for preventing frauds and depredations.

The case of Baring v. Day, 8. East, 57. seems to have led to the enactment of the above statute 48. Geo. III.

[2] 1. Bank. 211. § 8. Kames' Stat. Law abridged, *voce* Wreck, p. 414. Commissioners of Customs against Lord Dundas, 25th May 1810; 13. Fac. Coll. 665.

[3] See above, p. 511. as to agreement for extraordinary wages.

[4] The Two Friends, M'Dougall, 1. Rob. Adm. Rep. 271. Here both the captain and crew and passengers had recompense allowed them for rescuing an American ship on a voyage from Philadelphia to London.

In The Beaver, Conner, 3. Rob. Adm. Rep. 292. a British merchant ship having been taken by a French privateer, and all the crew, except the master and a boy, taken out, the master rose on five Frenchmen, who had been put on board, knocked down the prize-master, and seizing his pistols, the only fire-arms on board, drove the rest of the crew down below, and gained possession of the ship. He then steered towards the English coast, and had nearly perished in a storm, when he got help from an English frigate. They all went on board the frigate; the condition of the ship appearing desperate. But the storm abating, the master again went to his ship, and succeeded in bringing her into port. The ship was worth L.6000, and Lord Stowell adjudged a salvage to the master and boy of L.1000, in the proportion of L.850 to the master and L.150 to the boy.

[5] Governor Raffles, King, 1813; 2. Dod. Adm. Rep. 14. The claim of carpenter and sailors for rising on certain Malays, who had mutinied and overcome the rest of the crew, and for finally rescuing the ship from them, was very reluctantly refused by Lord Stowell.

[6] Trelawney, Lake, 1802; 4. Rob. Adm. Rep. 223.

coming from a state of safety to a state of danger, but as labouring for their own preservation as well as that of others; yet they are not bound to adhere to the ship: and if a passenger do continue for the purpose of giving aid when he might have left the vessel, and especially if any extraordinary sacrifices be made, or any uncommon exertion of courage, skill, or labour, he will be entitled to recompense as a salvor;[1] as where a passenger undertook the office of master on the desertion of the proper master, and by skill and labour brought the ship into port, it was held, that he was entitled to recompense in the nature of salvage, as having made exertions which he was under no obligation to make, and incurred responsibilities which were not incident to his own proper character. He was held to stand in a different situation from that in which the mate would have stood had he supplied the master's place.[2]

Pilot. 3. A PILOT employed to bring the ship into harbour is not entitled to salvage. That there is danger in the occupation of a pilot is true; but having taken up that occupation, he is not entitled to claim as the spontaneous salvors of a ship are entitled: though, in the liberal allowance which the Court of Admiralty gives in all cases of danger and distress, 'the safe conduct of a ship into a port, under circumstances of extreme danger and personal exertion, may exalt a pilotage service into something of a salvage service; and it 'is held expedient for the general safety of navigation, that persons ready on the water, 'and fearless of danger, should, by liberal reward, be encouraged to go out for the assist-'ance of vessels in distress.'[3]

Joint Salvors. 4. A claim to share as JOINT SALVORS must be supported by proof of an actual necessity, or at least apparent necessity, for the claimants lending their help to the persons already engaged. This is grounded on an equitable consideration of the interest of the merchant on the one hand, and on the other of that of the salvors who have already accomplished the deliverance of the vessel. So, where a third party has interfered with salvors already in the act of saving a wreck, and requiring no aid for that purpose, it will be held officious and unnecessary, unless the necessity shall be shown.[4] The proof of the necessity must

Joint Recapture. depend on the circumstances of the case.[5] Many nice questions have arisen as to cases

[1] In the case last cited of THE TWO FRIENDS, Miller, a passenger, had a great share in the rescue; and Lord Stowell said, that 'being of opinion that 'Miller was in reality a passenger, and not the ship's 'carpenter, and that his services had been very instru-'mental in effecting the rescue, the Court pronounced 'that he should be rewarded equally with the master.' And so he had L. 1250, besides L. 300 of actual expense in buying over some Danish sailors. 1. Rob. Adm. Rep. 285.

[2] NEWMAN v. WATTERS, 3. Bos. and Pull. 612. —Here the captain having abandoned the ship, those aboard applied to a passenger, who had been a naval captain, to take the command, which he did, and saved the ship. The owners offered him L. 200. He was found entitled to L. 400. Lord Alvanley directed the jury to refuse the recompense; but on a motion for a new trial he said,—'I have since been induced to alter 'that opinion, particularly by what is reported to have 'fallen from Lord Stowell respecting the claim of a 'pilot praying salvage.' See next Note, the case of THE JOSEPH HARVEY.

[3] Lord Stowell, in THE JOSEPH HARVEY, Paddock, 1. Rob. Adm. Rep. 306. This was a case in which an attempt was made to convert pilotage duty into an act of salvage, which the Court severely reprehended.

In another case, THE SARAH, where a boat went out to the aid of a ship in distress, Lord Stowell explained the policy by which the Court is accustomed to direct itself in adjudging rewards in which the benefit of navigation is concerned. Ib. p. 313. Note.

[4] MARIA, Kelstrom, 1809; 1. Edwards' Adm. Rep. 175. Here two fishing smacks were employed in towing a wreck to port, when a gun-brig came up and joined in the operation, and then ordered the fishing smacks off. One pretence of justification was, that the sailors in the fishing smacks did not know where they were. Another, that the wreck might have been seized by a French privateer, if towed on so slowly. Lord Stowell, holding the salvors to have a jus quæsitum, rejected the gun-brig's claim, and disregarded both the above pleas: the first, because the master of the gun-brig was bound to give all necessary information, if wanted; the other as not made out, and a mere pretence.

[5] BLENDENHALL, Barr, 1814; 1. Dod. Adm. Rep. 414.

of joint recapture, and several determinations of the Court of Admiralty of England have thrown great light on the subject. It would appear, 1. That no previous operation on the part of a ship which has not been present at the capture, though it may have had some effect in making the enemy in possession shape the vessel's course so as to fall into the hands of the captors, is sufficient to confer a right to share in the salvage as joint captor.[1] 2. That a King's ship being actually in sight at the capture, is entitled to the benefit; the fate of the capture being often determined by the hopelessness of successful defence; and it being, consistently with the duty of a King's ship, the presumption of law, that she has the animus capiendi:[2] The rule is different as to a privateer, and even a revenue ship.[3] 3. That constructive aid by boats not actually engaged in the capture, is not sufficient, unless a case can actually be made out of intimidation from these boats.[4] 4. That actual co-operation by a privateer, either in the recapture or in the chase, will entitle her to salvage along with the King's ship;[5] and even the being engaged in the chase, and continuing to sail in the direction of pursuit, will give right as joint captor, although darkness should have prevented the sight of the capture.[6]

Convoying Ship.

5. Whether salvage is due to the convoying ship for recapture of one of the fleet under her protection, seems to admit of very considerable doubt. It may certainly operate as an encouragement to negligence in the officer commanding the convoy, who ought to keep a sharp look-out after ships hovering about the convoy. Lord Stowell has held the point as settled in favour of the convoy, and has proceeded on that footing in subsequent cases.[7] But in all those cases special regard has been paid to the question, whether there be any neglect on the part of the convoying ship established before the proper tribunal, (the Lords of the Admiralty), to defeat the right of the salvors?

King's Ship.

6. King's ships may be entitled to salvage for assistance to vessels in distress, where their aid has been very splendid and extraordinary. But where such aid is given in the course of duty, and especially without any extraordinary danger or exertion, such claim is not sustained.[8]

Owners of the Saving Ship.

7. The master and crew of a vessel which interferes to save, and does save, another, are alone, strictly speaking, the salvors: but a consideration is generally given also to the owners of the vessel which interferes, on account of the risk of damage, or loss of insurance to the vessel, by the crew so engaging themselves.[9]

Crew remaining on board.

8. Of the crew of a vessel lending assistance to a ship in distress, those who remain on board their own ships, but who are willing to go in aid, as well as those who actually are selected to go on board the distressed ship, are entitled to salvage.[10]

II. What Acts entitle to Salvage.—In general, the cases in which salvage is due are, Shipwreck, Recapture, and Derelict.

Ship Stranded. Magistrate.

1. The simplest and plainest case is, that in which a magistrate is called upon to give aid and protection against depredation when a ship is stranded, or in danger of it. The

[1] Le Niemen, Dupotet, 1. Dod. Adm. Rep. 16, 17.

[2] The Sparkler, Brown, 1. Dod. Adm. Rep. 359.

[3] Bellona, Voltz, 1. Edwards' Adm. Rep. 63.

[4] See La Belle Coquette, 1. Dod. Adm. Rep. 20.

[5] Wanstead, Morton, 1. Edwards' Adm. Rep. 268.

[6] Union, Olmsted, 1. Dod. Adm. Rep. 346.

[7] The Wight, Ford, 1804; 5. Rob. Adm. Rep. 315. The Hinchinbrock, 1786, was a similar case, in which the Court of Admiralty had refused salvage. But the Lords of Appeal reversed the sentence.

[8] Belle, Betts, 1809; 1. Edwards' Adm. Rep. 66. Francis and Eliza, 1816; 2. Dod. Adm. Rep. 115.

[9] The San Bernardo, Laretta, 1. Rob. Adm. Rep. 178.

[10] Baltimore, Baker, 1817; 2. Dod. Adm. Rep. 132.

evils to vessels stranded, or in danger on the coast, are not merely those of shipwreck: Those evils are often augmented by the depredations of the idle or the profligate, who crowd to such scenes; and the Act in Queen Anne's time, already alluded to, (which extends to Scotland), regulated the aid to be given, under the direction of certain public officers. By this law, all sheriffs, justices, &c. shall, on application from those in danger of being, or actually being, stranded or run on shore, call together as many men as may be necessary, and require aid from King's ships, or those of his subjects in the neighbourhood, under a penalty of L.100 on the superior officer who shall refuse to obey the call: The master of the stranded ship is entitled to repel by force all who shall intrude without leave of the officer of customs, &c.: And provision is also made for the orderly proceedings of salvors, and for the settling of the salvage.[1]

No Magistrate interposing.

2. But aid may be sought by those belonging to the ship without the intervention of a public officer; and this, perhaps, is the more frequent case. At common law, those who give aid are entitled to their reward; and it is the province of the Court of Admiralty in Scotland to regulate the rate of salvage, on a due consideration of the danger and exertion; repressing any oppressive promises, which, in the moment of anxiety, alarm, and danger, those in hazard may be induced to give. In England, the settlement of the salvage in this case is regulated by a statute, enacted, like the other statutes on this subject, for the suppression of frauds and depredations committed by boatmen and others, but which does not apply to Scotland.[2]

Voluntary Aid.

3. Persons voluntarily assisting are often the most meritorious salvors; for it is in situations which preclude all regular proceedings that such aid is most necessary. The danger to be avoided in such cases is the interference of improper persons in the absence of the crew; persons whose aid is given more for the sake of depredation than of humanity. The English statute of George II.[3] on this subject, is also a police Act, for enforcing the laws against persons stealing or detaining shipwrecked goods, and for the relief of persons suffering losses thereby. It establishes a reward for persons who save ships which have been abandoned, provided they instantly give notice to a public officer. In Scotland this is left to the common law, and falls under the disposal of the Court of Admiralty.

Cables, &c. thrown over.

4. The salvage of cables, packages, and other single articles cast overboard or lost, is, in England, under regulation of the 49. Geo. III. c. 122. In Scotland, this is left to common law, by which the salvors are bound to restore the property to the proprietors, or to give it up to the Admiral-Depute for the benefit of the owner or insurers,[4] on receiving a fair and reasonable salvage under the cognizance of the Court of Admiralty.

Rescue or Recapture.

5. The rescue or recapture of vessels or goods lost by hostile attack, whether of the proper enemies of the country, or of pirates, the enemies of the whole mercantile world, entitle those engaged to salvage. The recapture of British ships is settled by statute:[5] That of neutrals gives salvage only where the capture is in circumstances which would have justified or led to condemnation.[6]

[1] 12. Anne, st. 2. c. 18. 1. and 2. Geo. IV. c. 75. § 37.

[2] 48. Geo. III. c. 130.

[3] 28. Geo. II. c. 19.

[4] In the case of the COMMISSIONERS OF CUSTOMS against LORD DUNDAS, 25th May 1810, the question was tried, whether the Act 12. Queen Anne extends to Scotland, so as to regulate the custody, 1. Of stranded vessels; and 2. Of wrecks. The contest was between the Vice-Admiral of Orkney, under his commission, and the Commissioners of the Customs, under the Act, claiming a right to take the exclusive charge of such vessels, without the interference of the Admiral. But the Act 12. Queen Anne does not apply to such a case as I have stated above, but only to the case where an application has been made to the magistrate for aid.

[5] 43. Geo. III. c. 166. See below, p. 597.

[6] THE CARLOTTA, 5. Rob. Adm. Rep. 54.

III. Who is Liable for Salvage.—The reward must be given by those who receive benefit, and who would have suffered the loss from which the exertions of the salvors have saved them. And so in a case where, by recapture, both ship and cargo were saved, (but, in so far as the merchant was concerned, to no better effect than to make him liable for freight, in consequence of the ship's arrival, while the goods were not worth the freight), the Court of King's Bench held the shipowners alone to be liable, in respect of the ship and freight.[1] In one case the private property of an allied sovereign was held free from salvage.[2]

IV. Of the Amount of Salvage.—The amount of salvage is, in some cases, fixed by statute; in others, left to the common law and judicial discretion. Amount.

1. On Recapture of any ship, boat, or vessel, or goods taken therein, belonging to any of the King's subjects, they are to be restored, at whatever time the original capture shall have taken place, on payment of one-eighth part of the value, if retaken by a King's ship; or if retaken by a privateer, or other ship, &c. one-sixth part of the value; or if jointly by King's ship and privateer, such salvage as the Judge of the High Court of Admiralty shall award.[3] There is an exception, however, of ships which shall have been set forth by the enemy, while in his possession, as ships or vessels of war: These are to be considered as prize. It has been adjudged by Lord Stowell, that the mere act of sending additional men aboard, and forcing the captured ship to act as a privateer, without any commission of war, is not sufficient to bring a ship under the exception.[4] But that eminent Judge has held the exception to comprehend the case of a ship, which, at the time of recapture, was acting as a merchant ship, but which, in the intermediate period, had been fitted out as a privateer.[5] On Recapture.

It has been well said, that 'the Prize Acts are drawn with no overflowing liberality 'towards recaptors:' that in forming the first of them, it was justly thought that a greater reward ought to have been held out to recaptors, as an encouragement to exertions of this nature; but that other opinions having prevailed, it is only left to the Court of Admiralty, in cases not within the Act, to exercise its judgment and discretion under the general maritime law.[6] It is not enough, to make out such a case, that a ship is cut out from a harbour, or from under a battery, instead of being recaptured at sea.[7] But respecting droits of Admiralty, the Court will exercise their discretion.[8]

2. Rescue of foreign property is not within the Prize Acts; and, therefore, is left to the discretion of the Court of Admiralty, on the general maritime law. It was a case of this sort which opened the discretionary power of the Court to give such a salvage to the master and his boy in the case already quoted,[9] as the Judge thought they eminently deserved. Rescue from Capture.

3. In cases where the accident and the relief are not upon the coast, so as to bring the case within the Acts of Queen Anne, or the later Acts, it has been held in England, that

[1] Cox v. May, 1815; 4. Maule and Sel. 152.

[2] Alexander, Crane, 2. Dod. Adm. Rep. 37.

[3] The Prize Acts of 33. Geo. III. c. 63. § 42.; 43. Geo. III. c. 160. § 39.; 45. Geo. III. c. 72. § 7.; and 48. Geo. III. c. 132., are British Acts, and regulate this matter in Scotland as well as in England.

[4] The Horatio Nelson, 6. Rob. Adm. Rep. 320.

[5] L'Actif, Lorrial, 1. Edwards, 185. He held the rule of the Prize Acts to form an exception to the general rule; that the jus postliminii expires where a ship has been condemned, or is carried infra presidia; and that what is stated as an exception to the Prize Act, is a reservation of the general law, as still intended to prevail in that case.

[6] Lord Stowell in The Apollo, Veal, 3. Rob. Adm. Rep. 308.

[7] See the above case.

[8] The Haase, Dreyn, 1. Rob. Adm. Rep. 286. This was a Dutch ship taken by a non-commissioned captor, condemned as a droit of Admiralty, and the whole was adjudged to the captors.

[9] The Beaver, Conner. See above, p. 593. Note [4].

the jurisdiction of the Court of Admiralty is untrammelled in considering the quantum meruit. This will hold respecting all cases in Scotland, except those which fall strictly within the statute of Queen Anne; that is to say, where an application is made to a magistrate by those concerned in a ship stranded, or in danger of stranding. And the great principle on which these determinations ought to be conducted, as repeatedly laid down by Lord Stowell, is to give a liberal remuneration; looking not merely to the exact quantum of service performed, but to the general interests of the navigation and commerce of the country, which are greatly protected by exertions of this nature.

Derelict. 4. In cases of derelict, by the old law a half was given; by the French law a third; by the modern practice in this country the recompense is discretionary.[1]

5. The cases of wreck which fall under the Act of Queen Anne, are, in Scotland, to be ruled by the provisions of that Act, as those in England are. The intention of this Act, in so far as it provides for the ascertainment of salvage, was, that an easy and economical process should be in the power of the parties for settling all disputes on this head, without going from the neighbourhood. With this view, in case of a dispute, the parties were authorized to nominate three neighbouring Justices of the Peace to adjust the quantum of gratuity to be paid to the salvors. When this imperfect remedy is found not to apply, as where the parties cannot agree, recourse must be had to the jurisdiction of the Judge-Admiral. And in general it may be observed, that in England this Act of Queen Anne, and the subsequent Acts of Geo. II. and Geo. III., have not been held to take away the jurisdiction or authority which previously belonged to the Court of Admiralty.

§ 4. OF CONTRACTS OF INSURANCE.

Insurance is a contract by which the insurer or underwriter, in consideration of a sum or premium advanced, undertakes to indemnify the insured against risks or perils to which his property is exposed. It is used as the means of security against the dangers of the elements or enemy, to which ships or goods are liable while at sea; against the danger of fire, to which commodities or houses are continually subject at land; and against the chance of death, and the loss which the insured may sustain by the death of others in whose existence he has a pecuniary interest; or that which his creditors or his family may sustain by his own. It is to the first of these sorts of insurance that our attention is now to be directed: Insurance against fire, and life insurances, will form the subject of a subsequent chapter.

It is needless to insist on the benefits of a contract by which the insurer, dividing the loss with others, contrives, on the average of his dealings, to earn large gains; while the insured is secured against the ruin which would crush an individual. But the obvious necessity of some such refuge from individual disaster, amidst the perils of such a trade as ours; and the impracticability of proceeding without this expedient, now that it is known; afford unquestionable proofs of the narrow limits of ancient commerce, in which insurance was not practised.

The contract of insurance is settled by a written instrument called a policy of insurance, which must be stamped, and pay a duty to Government, and in which are specified the premium, the risk, the names of the underwriters or insurers, and the name of the insured.

In England, this contract has been made the subject of two treatises, which stand

[1] Examples of the way of considering such a question, by Lord Stowell, will be found in THE BLENDENHALL, Barr, 1. Dod. Adm. Rep. 414.; and LORD NELSON, 1. Edwards' Adm. Rep. 79. ELLIOTTA, 1815, 2. Dodson, 75.
See 1. and 2. Geo. IV. c. 75.

deservedly high in public estimation.[1] In Scotland, we have had no work upon this subject since that of Mr Millar: His book was published forty years ago;[2] and during that long period, the mercantile law of Scotland has been making rapid strides towards maturity.

The chief design of the following commentaries on this subject, is to present, in a concise view of the subject, some important cases determined by the Scottish courts, in many of which the judgments of the House of Lords are now to be held as law in both ends of the island.

1. CLAIMS ON THE BANKRUPTCY OF THE INSURED.

Premium.

This claim can have for its object only the premium of insurance. But as, in every policy, there is a clause in which 'the assurers confess themselves paid the consideration 'due to us for this assurance by the assured,' it is necessary to look into the history and intention of this clause, as affected by the usage of trade, in order to see by whom a claim for premium can be maintained.

History and Use of the Receipt in the Policy.

The acknowledgment in the policy is said first to have been intended to preclude the plea of want of consideration in an action for loss.[3] Whether it be so or not, is of little consequence: It is certain that now this clause has come to serve as the groundwork of arrangements, according to which the whole business of insurance is managed in Great Britain. This business is conducted not by the principals, but by means of brokers. Those who insure are generally capitalists, who take no active concern, but are ready to undergo any risks which are presented to them, and recommended by their broker. The merchant, on the other hand, cannot waste time, at the critical moment of effecting an insurance, in seeking out persons willing to enter into this contract with him; but he applies to his broker, who has on his list a number of persons ready at a moment's notice to sign or underwrite a policy. The broker is thus the mutual factor of the parties. They, in their own persons, never come together, and are perhaps unknown to each other; while he, for a certain allowance by way of commission, undertakes the care of completing the contract, so as effectually to bind the parties to each other. The most effectual way of managing this complicated transaction, was to free the principals of direct intercourse, and to make the broker properly the middleman between them: to arrange it so that the relation of debtor and creditor should not subsist directly between the parties themselves, but between the broker and the several parties respectively; he undertaking the risk of recovering the premiums from the insured, and binding himself directly as debtor for the amount of them to the underwriter. According to this arrangement, mutual accounts are kept; in which the broker states in the underwriter's account all the premiums which he is authorized by the underwriter to draw, as already received, and as articles to the underwriter's credit; against which he places all return premiums or sums received for losses, (if he be authorized to recover them), and he settles the account periodically with the underwriter. On the other hand, he, in account with the insured, debits him with the unpaid premiums, giving him credit for any return premiums, or for losses which he may be empowered to recover. This arrangement is accomplished by means of that receipt, which is said to have originated from the system of special pleading, but which serves this occasion so well, that it may be doubted whether it was not devised for the purpose. The receipt for the premiums, signed by the underwriter,

[1] These are by Mr Justice Park and Mr Serjeant Marshall. See above, p. 502. Notes [1]. and [2].

[2] Elements of the Law relating to Insurances, by John Millar, junior, Esq. Advocate, Edinburgh, 1787. Mr Millar was son to the eminent professor of civil law in the University of Glasgow.

[3] Marshall, 341.

and delivered to the broker, is a power or warrant to him to receive the premiums so acknowledged; as the delivery to a steward of a receipt for rent, is a warrant to him to receive the rent from the tenant. On the other hand, the acknowledgment is not effectual to discharge the insured, since it is not delivered to him as his document of discharge; and thus the broker is enabled to state his accounts in the way already explained.

In England, the origin to which the receipt in the policy has been traced did certainly at one time so far prevail, that the receipt in the printed policy, being confessedly contrary to the fact, was not held to bar the underwriter's claim for premiums.[1] But by recent cases it is settled, that the receipt is conclusive between the parties to prove payment of the premiums, unless where there is fraud on the part of the insured.[2]

Although the broker be placed in the relation of debtor to the one party, and creditor to the other, by means of the receipt for the premiums, this is only as factor; his powers being subject to recall while matters are still entire, and while no jus quæsitum has arisen to the insured from the credit conferred on him by possession of the receipt: And so, by the recall of the broker's authority, the underwriter may be entitled to claim the unpaid premiums.[3] Bankruptcy of the broker has been held as equivalent to a recall of the man-

[1] Marshall, 341.

[2] 1. Marshall on Insurance, 3d edit. 341-2.

In Foy *v.* Bell, 3. Taunt. 493. and Mavor *v.* Simeon, ib. 497. Note, special juries seem to have been strongly impressed with the notion, that to limit the effect of the receipt, as in a question between the parties to the insurance policy, might endanger the whole system of underwriting, and subvert a most important branch of trade.

Dalzell *v.* Mair, 1808; 1. Campbell, 532. Mair was an underwriter in a policy to Dalzell on goods by ship or ships from Berbice to Great Britain. Reid was the broker who effected the policy. The action was by Dalzell, the insured, against Mair, for recovery of the premium, the goods never having been shipped; and the plaintiff gave the policy in evidence, bearing the usual acknowledgment by the underwriters, 'confessing ourselves paid the consideration,' &c. The fact was, that Reid, the broker, was due money to Dalzell, and persuaded him, by way of satisfaction, to accept of policies of insurance underwritten for him at Reid's office. This policy was effected accordingly; and Reid having a running account with Mair, gave him credit for the premiums, but never paid any part of them. Lord Ellenborough said,—'The defendant 'is bound by the receipt in the policy. If a man acknowledges that he has received a sum of money 'from a broker, and accredits him with his principal to 'that amount, he shall not afterwards, as between himself and the principal, be allowed to say that the broker never paid him. It would completely knock up 'the insurance business, if I were to allow this acknowledgment to be impeached. It is well known there 'are running accounts kept between the insurance-broker and the underwriter; and Lord Kenyon held, 'that the former, before paying the premiums to the 'latter, might maintain an action against the assured 'to recover the amount of them as for money paid.'

N. B.—It is proper here to observe the circumstance of the effect ascribed to the receipt, of accrediting the broker with the insured, which seems to be the main principle of the decision.

[3] In England, this doctrine is confirmed by the following case:—

Robson *v.* Wilson. Wilson, an insurance-broker at Liverpool, sent policies to Stoddart and Company of Newcastle, to be underwritten. Robson was an underwriter at Sunderland, who underwrote on policies presented by Stoddart and Company, on the terms usual at Newcastle and Sunderland, viz. that the broker accounts once a-year with the underwriter for premiums, paying him, by his acceptance, at three, six, and nine months, deducting L.5 on every L.105 of the gross premiums, and 5 per cent more on the net premium, in consideration of which the broker undertakes for payment of those net premiums. On 13th February Robson settled with Stoddart and Company, and got notes for the premiums due him. Stoddart and Company failed, and a commission was issued, when there remained of the premiums on policies sent to Stoddart and Company, and underwritten by Robson, L.79. A secret agreement subsisted between Stoddart and Wilson, to share the commission; and Robson claimed right to have his premiums from Wilson, in whose hands they remained unpaid. At the bar, the case was argued on a ground disapproved of by the Judges, namely, on the ground of partnership between the two brokers. On the Bench, the decision went on the principle laid down in the text. Lord Kenyon said,—that where a factor has received money belonging to the principal, and it becomes blended with his own estate, and cannot be distinguished from it, the principal must come in with the general creditors; but that here the money was clearly distinguishable from the bankrupt's estate, being premiums in respect of policies underwritten by the plaintiff, and remaining in Wilson's hands, to be paid to somebody. Before it is paid, the factor del credere becomes bankrupt. Is it not as clear as the sun, that the principal may resort to this money, which is ear-marked and distinguished from the general

date, so as to entitle the underwriter to claim the premiums directly against the insured, where no interest of the insured as with the accredited broker, or otherwise, interferes.[1] The receipt will have the effect of laying the onus probandi on the underwriter, to show that neither actual payment has taken place, nor such a settlement of accounts between the parties as is equivalent to payment of the premiums.[2]

The claim, when made by the broker, cannot be met by the receipt on the policy. As between the broker and the insured, the receipt is no evidence of payment of the premium: It is a mere authority intrusted to the broker to recover the premiums from the insured.[3]

Effect of Receipt against Brokers.

fund of the bankrupt? No man has any lien upon it, —no man has contracted debt on the confidence of its being in the defendant's hands. The case states that it was paid to him, and got into his hands as a premium, in consequence of policies underwritten by the plaintiff. Sir S. Lawrence said,—The plaintiff underwrites policies in consequence of orders from the defendant. The premiums for these insurances are not remitted, but still remain in the defendant's hands. Is it not most reasonable and just that he should pay them over to the plaintiff? 15th May 1798.

The above is stated from a report in the hands of the attorney in the case, and which was produced in the Court of Session in a similar case. But I find it also reported by Marshall, p. 301. and it is confirmed by the following opinion of Mr Baron Wood:—'I take 'it to be clear, that, by the law and practice of Eng- 'land, the underwriters are entitled to receive from the 'assured all such premiums as the broker had not ac- 'tually received at the time when he became bankrupt; 'and that it makes no difference whether the broker 'do or do not receive a premium for guaranteeing the 'premium to the underwriters. The premiums in the 'hands of the insured, unpaid, are the property of the 'underwriters, and can only be sued for in the name 'of the underwriters: neither the bankrupt nor his 'assignee could sue for them; and, consequently, they 'form no part of the bankrupt's estate, to be distri- 'buted amongst his creditors. His guaranteeing them 'may give the underwriter an additional security, but 'does not deprive him of the remedy the law gives him 'against the insurer, who has not paid over the money 'to the bankrupts. I do not know of any determi- 'nation, reported in any printed collection, directly in 'point with the present case. The principle will be 'found in a series of cases in Cook's Bankrupt Law, 'p. 414. The case of Robson v. Wilson was argued 'before the Court of King's Bench in May 1798, by 'Mr Chambre and myself. Mr Chambre argued that 'case on the footing of partnership, and I followed the 'same line of argument in my answer; but the Court 'decided in favour of the plaintiff, upon the principle 'above stated, viz. that as the premiums had not been 'paid over by the defendant to the brokers, who had 'become bankrupt, the plaintiff, the underwriter, was 'not bound to come in as a creditor under the com- 'mission of bankrupt, but was entitled to recover the 'whole of the premiums against the defendant. This 'case is not reported; but Mr Meggison, who was the 'defendant's attorney, has a note of the judgment of 'the Court, which I have seen.'

The same doctrine was held in the Court of Session, in BERTRAM against RICHMOND and FREEBAIRN. —Bertram underwrote for Richmond and Freebairn, brokers. The brokers became bankrupts; and the question arose, Whether the underwriters were entitled to get their premiums which remained still unpaid by the assured? or, Whether the trustee for the brokers and creditors was not entitled to draw those premiums, leaving the underwriters to claim for a dividend on the broker's estate? The Court was unanimous in holding, that although, where a factor has received money belonging to his principal, it becomes blended with his own estate, and cannot be distinguished; yet, when he becomes bankrupt before receiving it, the principal may claim his own money, which never made a part of the factor's estate, but is entirely separate and distinct. 26th November 1802.

[1] See preceding Note, and MUIRETT v. BARCHARD, 4. Taunt. 541. Note. PARKER v. SMITH, 16. East, 382.

See below, Of LIEN, and Of COMPENSATION, where several important cases on this branch of law are stated.

[2] DE GAMINDE v. PIGOU, 1812; 4. Taunt. 246. De Gaminde sent orders to Larrazabel and Company, of London, to insure goods from Alicant to Britain. They applied to Messrs Wagstaff, insurance-brokers, who effected an insurance with Pigou. There were returns of premium by short interest, &c. and a loss upon one of the ships by salvage for capture and recapture. The premium was, as usual, discharged in the policy, though not paid, but only entered in account between Pigou and the broker. The broker debited the London merchants, and they again debited De Gaminde, with whose concern in the transaction, however, Pigou, the underwriter, was unacquainted. De Gaminde brought his action for the loss. Pigou pleaded a set-off for the premiums; and the question for the opinion of the Court was, Whether this was a good set-off? The verdict had been for the plaintiff, De Gaminde, subject to the opinion of the Court. The Court held, that the receipt in the policy was a good answer to the underwriter, as conclusive evidence that the assured has paid the premium, unless the underwriter should show that the state of the relative accounts between assured, broker, and underwriter, is such as to take the case out of that ordinary rule.

[3] Mr Campbell, in reporting DALZELL v. MAIR, takes notice of this distinction, 1. Camp. 334. Note; and Mr Justice Park approves of it, p. 38.

Policy the Voucher.

The policy is the proper evidence to be produced in support of the broker's claim for premiums: for which purpose, among others, he is entitled to retain possession of it; nor can the underwriter demand it without indemnifying him.[1]

Amount of Claim.

The premiums in the policy are the measure of the claim. But,

1. This claim will suffer diminution or extinction by the amount of return premiums, (if any be under the policy), provided the broker is intrusted with power to settle losses and returns of premium. Special powers however are required for that purpose: and the possession of the policy with a receipt, although it confers power to recover premiums, gives no power whatever to settle losses or return premiums. It will undoubtedly be a good answer by the insured to the claim of the underwriters themselves, after the broker's bankruptcy, that return premiums are due to the insured. Return premiums are due,—1. Where the contract is void; as for want of interest, or for illegality.[2] 2. Where the risk has never been begun. 3. Where an event has happened on which it was stipulated there should be a return; as sailing with convoy, arriving safe, &c.[3]

2. The claim for premiums, when made by the *underwriters* against the insured, will be met by the claim for loss, if incurred. But this will not be a good answer to the *broker's* claim: for he has no authority to settle, nor is he under any obligation to pay for loss; so as to make a concursus debiti et crediti.

3. The insured, or his creditors, will not be entitled, while the risk is undetermined, to retain the premiums, or employ them in making a second insurance;[4] and action, or a claim in bankruptcy, will be effectual for the premiums, although the loss is not adjusted, and the settlement of it the subject of litigation.[5]

There may arise a claim on the bankruptcy of the insured, for repayment of losses settled in ignorance of circumstances, which, if disclosed, would have barred the insurer from recovery under the policy. Such a claim will not be sustained,—1. If the loss was settled in the knowledge of the circumstances: Or, 2. If settled by way of transaction or compromise: Or, 3. If the facts were all known, but the law of the case mistaken.

2. CLAIMS ON THE BANKRUPTCY OF THE UNDERWRITERS.

Claims against the Underwriter.

On the failure of the underwriters, a claim arises to the insured, either as a present creditor for the amount of the loss, if the risk be determined; or as a contingent creditor, to be ranked and have a dividend set apart. In England, no claim could be made in bankruptcy where the risk was still undetermined, until 1779, when the assured in a policy for a valuable consideration was suffered to *claim*, and, after the loss, admitted to prove and draw dividends, in like manner as if the contingency had taken place before bankruptcy.[6] By the law of Scotland, a creditor under such a policy might at all times claim either as a contingent or as an actual creditor.

Proofs in support of the Claim.

The evidence to support the claim will consist,—1. Of the policy; and, 2. Of the proofs of the interest; of the loss; and of the fulfilment of all the conditions.

[1] SCOTT and GIFFORD against SEA INSURANCE COMPANY, 22d January 1825.

[2] See below, as to the Effect of Fraud. See Park, 329.

[3] See Marshall, 649. Park, 562.

[4] SELKRIG against PITCAIRN and SCOTT, 14th June 1805. See below, Of LIEN.

[5] FERRIER against SANDEMAN, 29th June 1809; Fac. Coll. 373. Here an action was in dependance for settlement and payment of the loss; but the Court, in the action for premiums, held, that though, in practice, premiums are not always paid per advance, yet, in law, it is held that they ought to be so paid; and a court of law is bound to give action for them.

[6] 19. Geo. II. c. 32. § 2.