The Court decreed that the seamen were entitled to their wages according to the tender, and condemned the proctor for the promoters in all such costs as were occasioned to the opposite party by the allegation dated January 10th, 1823.

[226] "ELIZABETH"—(Lisboa) January 21, 1824—An appeal from the Vice-Admiralty Court at the Cape of Good Hope,—on the cognisance of a charter-party—deserted.

This was an application for a decree of *desertion of appeal* The motion was unopposed.

It appeared, that in a charter-party made at the Cape of Good Hope, some merchants of that place agreed to insure to the owner of the vessel 7000 rix-dollars, "against all such risks as underwriters run"—whilst the schooner was thus employed, she was wrecked, and the owner instituted proceedings in the Vice-Admiralty Court at the Cape, and on 29th April 1822, a monition issued against the charterers for the payment of the above sum into the registry It was personally served on one of the parties, and, on 20th May, an appearance was given to the action under protest to the jurisdiction of the Court This was met by a recital of the terms of the patent of the Judge,* whereby he is empowered to take cognisance of *charter-parties* And on the 22d July, the protest was overruled with costs On 5th August, the money and the interest due from the issuing of the monition were decreed to abide the Order of the Court, and on the 14th, the charterers brought in the money, "and prayed leave to appeal to the High Court of Admiralty" The money was subsequently paid out, on bail being given to answer the appeal † The appeal not being duly prosecuted, Adams now moved the Court to pronounce the appeal to be deserted, and to condemn the appellants in costs

Motion granted

[227] "NEPTUNE"—(Clark) February 17, 1824—Where part of a vessel had been saved by the exertions of the mariners, held, that they were entitled to the payment of their wages, as far as the fragments of the materials would form a fund, though there was no freight earned by the owners

[Referred to, *The* "*Lady Durham*," 1835, 3 Hagg 202. Explained, *The* "*Reliance*," 1843, 2 W. Rob 121 Adopted, *The* "*Warrior*," 1862, Lush. 481 Approved, "*Le Jonet*," 1872, L R 3 Ad & Ecc 559, *Cargo ex Schiller*, 1877, 2 P D 149 Discussed, *The* "*Solway Prince*," [1896] P 120 Referred to, *The* "*Leon Blum*," [1915] P. 95]

This case came on upon the summary petition of George Rounds, a seaman, claiming wages due to him from the master and sole owner of the "Neptune" The petition alleged, that in February 1823, the ship being then in the port of London, designed on a voyage to Rio de Janeiro, Hamburgh, and London, Rounds was hired as a seaman by the master for such voyage, at £2, 5s per month, and entered on board her accordingly On the 17th of February 1823, he signed the usual ship's articles, and shortly afterwards the "Neptune" sailed with her cargo to Rio de Janeiro, where she safely arrived in June, and discharged the same, thereby earning freight to a considerable amount On the 4th of July she discharged the last package or part of her cargo She then took on board a cargo for Hamburgh, and proceeded on her voyage; but in October was driven by a gale of wind upon the French coast, and there stranded, so that only a part of the ship, and no part of the cargo, could be saved That Rounds and the other mariners exerted themselves very laboriously in saving the masts, spars, rigging, some of the sails, the anchors and cables, and a considerable part of the hull, which were afterwards sold for much more than the wages of all the mariners who had sailed from Rio de Janeiro to the 6th of November, when Rounds and the other mariners were discharged by the master And the petition contained the usual averments, that Rounds, while in the service of the ship, well **[228]** and truly performed his duty. The balance of wages claimed by the petition amounted to £8, 3s

For the owner, Arnold objected to the admission of the summary petition in the form in which it was laid The wages earned for the outward voyage have been

* See the observations in the judgment of *The* "*Apollo*," Tennant, *infra*, p. 313.

† See *The* "*Woodbridge*," p 76

paid; but the wages of the return voyage perished with the ship. If the cargo had been saved, so as to earn freight, then the rule of law, "that freight is the mother of wages," would have applied, and wages would have been due in proportion A principle of encouragement to the sailor furnishes another rule—that if the vessel be not preserved, the wages are lost Molloy, the oldest book to which reference is usually made in these cases, says, "In a suit for mariner's wages it was agreed, that if the ship do not return, but perishes by tempest, &c, the mariners shall lose their wages; for if the mariners shall have their wages, they will not use their best endeavours, nor hazard their lives to preserve the ship," p 245, citing 1 Siderfin, 179. This rule has never been impugned in the Courts of this country,—there is no statute, nor any particular decision to the contrary, and foreign codes vary materially upon the subject. The owners do not deny that the men remained by the vessel till she was lost, doing their duty, and preserved a part of the wreck, and they admit that they are entitled to a compensation for these services, but of a different kind from the payment of wages, as something of a salvage remuneration, or on a *quantum meruit* I am aware that to this reasoning, language of this nature may be urged;—that wages are a consideration of a very sacred kind, that they are almost imprescriptible, but such language applies only **[229]** to a case where the right to wages has fully accrued

Adams, *contra*—It is admitted that wages were due to Rio de Janeiro, and that the men are entitled to compensation for their exertions the vital position is, that a loss of wages arises from a loss of the ship The general *dictum* upon which this argument is founded, like other general *dicta*, may be *generally* true, but it is not *universally* maintainable. there are many cases of exception. Suppose a ship going out upon a voyage of speculation, in search of freight, and she returns home empty, no one can maintain that no wages would be acquired Again, in a case of barratry on the part of the masters or of the owners, they could not set up their own misconduct as against the favoured claimants of the law. Suppose a ship overtaken by a violent storm, and goods are thrown overboard, but the ship returns in safety, no freight in such a case would be earned, but the owners could not deny the claim for wages Here there was one entire subsisting contract, from London to Rio de Janeiro, and then to Hamburgh, and back to London. Why were wages due up to Rio de Janeiro? On account of the contract. When was that put an end to? I contend that as long as the materials existed, to which the contract attached, it cannot be said to be extinguished, or on what ground could the owners undertake to sell these materials, unless as subject to the contract, which overrides all parts of the ship? The men continued to employ themselves as sailors in the service of the ship, and they could not have been justified in refusing to obey the lawful authority and orders of the cap-**[230]**-tain. It is allowed that a compensation should be made, but who is to be the arbitrator? No one has hitherto been bold enough to bring sailors forward for a salvage on their own ship. The duty of saving the ship implies a duty of the owners to pay the wages. Mariners cannot insure their wages, and on this principle, that nothing should remove an inducement, on their part, to exertion, in the hour of danger With respect to the authorities cited, Molloy uses the words, "if the ship *perisheth*"; Siderfin says, "if the ship is *lost*," thus referring to a total loss, and here neither one nor the other applies But Abbott, in his treatise on the law of merchant ships and seamen, p 435, 3d ed, contains all the law that can be collected together upon the subject, and it appears that some foreign ordinances, in cases of this description, give a proportion of wages, and some do not There is, therefore, neither authority nor principle to oppose to this claim

In reply to the hypothetical cases, Arnold observed, that the first must be a matter of special contract as to the second, freight might have been earned, and would have been, if there had been no misconduct of the owners, or of those employed by them, this could not work an injury to innocent parties, and in the ejection of goods in a storm, freight would be earned on a claim upon underwriters for an average loss.

Judgment—Lord Stowell This case comes before the Court upon the summary petition of George Rounds, a seaman, who claims wages to be due to him upon the facts there set forth. The admis-**[231]**-sibility of this petition is not contested upon any contradiction of fact, and indeed it could not be in the present stage, for the petition must be taken to be true in its statements of facts, for the purpose of con-

sidering its admissibility, unless it involves some stringent contradiction in its own representation of them I understand, however, that the truth of the facts represented would not be denied, even if in this stage of the proceedings there was any place for any such opposition. The parties agree to take the judgment of the Court, assuming the facts stated as not to be denied, upon this question of law, whether, in this admitted state, the conclusion follows in point of law—that mariners are entitled to wages out of the remains of a ship so preserved.

That they are not so entitled is, I think, contended principally (I had almost said exclusively) upon the ground of a maxim well known in our maritime law (indeed much more familiarly there than in any other system), that *freight is the mother of wages*. The case in Siderfin, p. 179, quoted in argument, relates to a total loss and perishment of the vessel, in which no part is saved; and the *dictum* in Molloy, p. 245, ed. 1707; founded upon it (he himself not being a writer usually placed in the first class of authority upon such subjects), lie both out of the sphere of any just application to the present question The maxim itself, a peculiar favourite of English maritime law, is, I think, to be taken upon the argument as the sole ground of a solid opposition to the claim of the mariners, if it be entitled to be so con-**[232]**-sidered For no freight was earned, and there was a forfeiture of freight, and therefore of wages, if this maxim governs this case

The maxim, though generally received, like most other maxims delivered in figurative terms, certainly is not formed with real and strict accuracy For the natural and legal parents of wages are the mariner's contract, and the performance of the service covenanted therein, they in fact generate the title to wages The rule that makes the payment of wages dependent on the earning of freight is an additional security to the safety of ship and cargo; and, as the Lord Chief Justice Abbott expresses it in his excellent publication, p 435, 3d ed, was framed in order to stimulate the zeal and attention of this class of persons engaged in very perilous service. The payment of wages is made by the policy of maritime states to depend on the successful termination of the voyage, entitling the owner to his freight, though in other commercial contracts, the workmen are entitled to their stipulated wages, though a losing concern does not supply a fund to the merchant adventurer himself for the payment

At the same time, although the rule so introduced prevails generally, it by no means follows universally, *è converso*, that where no freight is due, no wages are due also. Mr. Jacobsen, in his laborious and comprehensive work on Sea Laws,—"It is a general rule, that freight is the mother of wages, but to this there are several exceptions", and he enumerates some of them ‡—there are others that are not so enumerated; as the cases of ships going **[233]** out in pursuit of a freight and returning disappointed without a cargo, in which case it can never be said that the seamen are not entitled to their wages both on the outward and on the return voyage, though no freight whatever was earned A rule so evidently bending to reasonable exceptions, can never be considered as universally conclusive in the absence of all other confirmation, arising either from the institutions of nations, or from the decisions of their tribunals, and standing in opposition to reasonable principles of law and jurisprudence, and to public utility and convenience

The practice, at least the modern practice of great maritime states, shews a repugnance to the application of this particular rule, of total forfeiture of wages where parts and fragments of the vessel are preserved that can be applied to a total or partial satisfaction of them. The French, a great maritime state, enjoin expressly in their celebrated ordinances of Louis the Fourteenth, that they shall be so applied. By the ordinances of Spain of 1563, when that country was at its zenith of maritime glory, the same practice was enjoined In Holland, a country the most exclusively maritime, the ordinances of Rotterdam prescribe it Such is likewise the rule of the Danish Code, as may appear from Mr Jacobsen, that if any part of the vessel is saved, the crew are to be paid out of the materials of the wreck which they have saved So in the North American States, as I understand, *ex relatione* of a gentleman high in judicial station in one of the states, that he had never found any decision direct upon that point, but that such was the received understanding of the settled practice of that country (which has turned its attention

‡ "As where the voyage is lost by the fault of the owners, as if the ship be seized for their debt, or on account of having contraband goods," p. 153.

sue-**[234]**-cessfully to questions of maritime law), and that understanding is there fortified by the general notion of its being the settled practice of their parent state, though they had not found such a written rule in our books, any more than in their own *1 Chief Justice Abbott, in his book, admits that he had met with no decision upon the question in any English reports, and Mr Bell, in his learned commentary on the Laws of Scotland,† remarks a similar absence of any recorded judgment in the reports of that country However, it may safely be asserted upon the enumeration already produced, that much the greater part of the eminent maritime states have adopted this rule

Now, such being the fact, I think I do not go too far in saying that it founds something of a presumption that, if nothing appears to the contrary in English statutes or English decisions, this great maritime state to which we belong is not more indifferent to the merits of its own seamen,—men who can certainly come into successful competition with that class of persons belonging to **[235]** any other community I take it without hesitation upon the authority of the Lord Chief Justice, that no adjudged cases are to be found in the reports of our Courts of general jurisdiction This may arise from one or two causes—either that the law was so generally understood one way or the other, that it did not admit of controversy (for it is controversy that leads to decision), or that if there have been decisions upon the point, they have, like many other decisions upon many other points, escaped the attention of former reporters It is but a late practice in this Court to have its reports published ;*2 the manuscript collections are but few, and I find no notice of any adjudication upon this matter in those which have fallen into my hands Nor do I find any rule prescribed by any ordinance of the Legislature This dearth of any direct domestic authority of any species upon the subject, drives us necessarily to the consideration of what is the most reasonable rule in principle, and the most useful and beneficial in practice, aided as it may be by the prevailing practice of other maritime states, adopting into their positive institutions rules derived from their ancient usage upon the subject, or from a more recent and correct consideration of it. Taking, as far as may be proper, the benefit of that collateral authority, I am of opinion, that private justice and public utility **[236]** range themselves decisively on that side of the question which sustains the claim of the mariner.

What is the obligation which a mariner contracts with the ship in which he engages to serve ? It is not only to navigate her in favourable weather, but likewise in adverse weather inducing shipwreck, to exert himself, as the Chief Justice expresses it, to save as much of the ship and cargo as he can It is a part of his bounden duty in his character of a seaman of that ship. It is certainly a laborious, and probably a dangerous portion of his service, but certainly not less a service, and a meritorious service on those accounts In performing that duty he assumes no new character. He only discharges a portion of that covenanted allegiance to that vessel which he contemplated, and pledged himself to give in the very formation of that contract which gave him his title to the stipulated wages

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*1 The attention of the American Courts seems to have been directed to this subject in more than one instance The case of *Frothingham* v *Prince* (3 Mass Rep. 563) decided, that the payment of wages did not depend upon the earning of freight, if the ship or any of her materials, equal to the wages remained after the voyage But this decision is regarded by Mr Justice Story, as a single case, standing alone against the current of authority (*The "Saratoga,"* 2 Gallison, 183); and he accordingly approves of those cases in which the wages are adopted "as a mode of ascertaining and fixing the salvage The wages recovered in cases of shipwreck, are recovered in the nature of salvage, and as such from a lien on the *property* saved." —*Phillipps on Insurance*, p 163 (Boston. 1823.)

† Vol. 1 p 504 Mr Bell has recently been appointed Professor of Scotch law in the University of Edinburgh

*2 It is almost superfluous to observe, that the public is indebted to the labours of the present King's Advocate, Sir Christopher Robinson, for the establishment of the Admiralty Reports in 1798,—"a publication calculated to prove to the world that Great Britain administers the public law of nations with the same distinguished ability and unblemished purity, which have so long been the glory of her Courts of municipal judicature"—Lord Grenville's speech on the Russian convention of 1801, p. 28 (n).

I ask, is he to have no recompence for this continuation of his service in its most formidable shape, which that service to that ship can assume? Nobody, I think, ventures to say that But, say they, he should have it by way of salvage, or on a *quantum meruit* There are, I think, decisive objections to both these views of the matter. The doctrine of this Court is justly stated by Mr Holt, p 522, 2d ed.—that the crew of a ship cannot be considered as salvors What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship;—not so the crew, whose stipulated duty it is (to be compensated by payment of wages) to protect that ship **[237]** through all perils, and whose entire possible service for this purpose is pledged to that extent Accordingly, we see in the numerous salvage cases that come into this Court the crew never claim as joint salvors, although they have contributed as much as (and perhaps more than) the volunteer salvors themselves I will not say that in the infinite range of possible events that may happen in the intercourse of men, circumstances might not present themselves that might induce the Court to open itself to their claim of a *persona standi in judicio* But they must be very extraordinary circumstances indeed, for the general rule is very strong and inflexible that they are not permitted to assume that character. As the law stands, generally they are excluded from it upon just grounds

A proceeding for salvage would be less beneficial and safe for the owners if permitted. In a salvage case you must take into consideration the quantum of personal danger incurred, the value of the property saved, and other circumstances which may influence the demand of salvage, whereas the rule of wages presents only a stipulated sum which in no case can be exceeded By the same rule, every temptation to throw the ship into situations of danger with a view to an extravagant salvage is effectually removed, for no increase of danger can bring to the mariner an increase of profit. I may add from experience in such cases, that such experience does not invite the Court to adopt a rule, which, in the conflict of numerous affidavits—impossible either to be reconciled, or to receive a decided preference, too often leads to conclusions founded rather in the conjectures of an honest hope than in the confidence of a satisfactory judg-**[238]**-ment To most of these objections the rule of *quantum meruit* is equally obnoxious, and they are both equally exposed to the inconvenience of driving the parties to sue for an unliquidated sum, the one party hardly guessing what is proper for him to ask, and the other equally ignorant what he ought to refuse, and the Court having to find the proper liquidation, often on evidence sworn on both sides with equal intrepidity On all views of the relative justice between the parties and of the public policy and convenience, there can be no doubt that the rule of wages has the advantage upon the clearest grounds; but take it upon the most naked principles of law applying to it, the contract covers the whole ship, one part as well as another, and no one part more than another, with the mariner's lien A part separated by a storm is not disengaged by that accident from that lien If it be recovered, it is recovered as a part of the primitive pledge mortgaged to the mariner Again, when does the authority of the master cease? His authority does not certainly merge in the misfortune, nor are the seamen at liberty without staying a reasonable time for the recovery of parts of the ship and cargo (if there be any prospect in his judgment of such recovery), immediately to disperse themselves over the country on whose shores they have encountered the mischance, without some discharge from him No such attempt was made in the present case; they received their discharge, and not till then considered themselves as emancipated from his authority The duty of service survives as long as the rights of authority exist, their relations are created by the same contracts, they have a contemporary origin, and a cor-**[239]**-responding termination on all just construction of that contract

Upon all these grounds of the general practice of maritime states, upon the just policy of the rule, its simplicity and convenience, upon the legal nature and duration of the original contract, and upon the understanding of the law which has generally, though silently, prevailed, that I adhere to the spirit, I had nearly said the letter, of what I am reminded of having said in a former case not exactly upon this question, "that a seaman had a right to cling to the last plank of his ship in satisfaction of his

wages or part of them" * Be it remembered, that by the general and just policy of all maritime states, the total loss of the ship occasioned solely by the act of God visiting the deep with storms and tempest, brings with it the loss of all the earned wages (except advances), although the general rule of law is, that the act of God prejudices no man, and although the mariner has contributed nothing to the mischance, but exerted his utmost endeavours to prevent it, and although he is prohibited by law from protecting himself from loss by insurance, as his owner is empowered to do for his, it is surely a moderate compensation for these disadvantages, that he shall be entitled upon the parts saved, as far as they will go, in satisfaction of his wages already earned by past services and perils

The Court admitted the summary petition; and the owners discharged the wages according to the schedule annexed to it

[240] "PITT"—(Crosse) February 25, 1824—Sale of a ship by the master in the West Indies On the decree of a warrant of arrest at the instance of the original owners, the Court declined to disturb the possession.

[Adopted, *The* "*John*," 1830, 2 Hagg. 314]

This was a cause of possession. It appeared, that on 2d February 1820, Messrs Luke, Ayles & Weston, the legal registered owners, chartered the above ship of 369 tons burden to John Crosse, the then master, for a voyage from London to the islands of Nevis and St Christopher, with liberty to touch at Madeira, and back to the port of London The owners were to receive £1000 as freight, and it was stipulated that the ship should not be detained in the West Indies beyond the 1st of August. The ship sailed on 23d April, and arrived at St Kitt's on 17th July, and was stranded on the beach of Basseterre on 28th August her cargo was taken out, and the ship soon afterwards floated Two inspections were made of the damage, and the necessary repairs were estimated at £2152, the surveyors reporting "that it would be most for the benefit of all parties concerned that the ship should forthwith be sold." This report was attested by Mr Woodburn On the 20th December the owners wrote to Crosse:—"We have been advised to abandon the ship, and call upon the underwriters for a total loss, which we have done Under these circumstances, although we fully concur in opinion with you that to enter into repairs would be more than the value of the ship, we cannot now interfere in this matter You, no doubt, will do everything in your power for the benefit of the concerned" The ship was afterwards twice bought in at a public auction, and was at length, on 4th July **[241]** 1821, purchased by Mr Woodburn, a merchant of St Kitt's, for the sum of £560. Subsequently to the sale the master wrote to Hall & Co, his agents in London (and they were also the agents of Luke & Co), in the following terms—"The public opinion was, and so it is at present, that I can give no good title to a purchaser under any circumstances whatever, without having a special power of attorney from the owners or underwriters for that purpose; and to remove the doubts, then, existing on that point, with a view that the ship may bring a higher price, I have had the Attorney General's opinion here, which is, that under all circumstances I could not give an unquestionable title If this opinion had been otherwise, for me to have produced at the sale, a much greater sum might have been obtained." There was no proof that the purchaser was aware of this defect of title. Crosse, "acting as agent for his owners and the underwriters," executed a bill of sale of the ship to Woodburn, and a new register was immediately granted to him at the island. The vessel being slightly repaired, went to New Brunswick in ballast, from whence, having been further repaired, she returned with lumber, and proceeded to St. Eustatia, and subsequently to Halifax in ballast, and arrived at Liverpool, in October 1823, with a cargo of timber from Cape Breton—The repairs were said to amount to £1500, and the value of the ship when she quitted England was fixed at £3500. It appeared that no more than £250 of the purchase-money had ever reached the house of Luke & Co

For the former owners, Lushington and Haggard.

Adams and Gostling, *contra*.

[242] *Judgment—Lord Stowell*: This is a case in which the Court is prayed to transfer the possession of a ship from the present possessor and owner, as he describes

* *Sydney Cove*, 2 Dods 13