13FED.CAS.—64

Case No. 7,491.

JONES ET AL. V. THE RICHMOND.

[28 Hunt, Mer. Mag. (1853) 709.]

District Court, S. D. New York.[1]

SALVAGE—WHEN NECESSARY—SALE OF CARGO—WRECK—POWER OF MASTER.

[1. The sale of the cargo of a vessel by the master, to be valid and binding on the owners, must he bona fide, and under circumstances of extreme necessity, and for the benefit of all concerned. The Sarah Ann, Case No. 12,342, followed.]

[2. The master of a whaling vessel wrecked in Behring's Strait, having no means of storing or saving his cargo, after posting notices on two other whalers which had come to the scene, sold by a disinterested person, at auction, sufficient of the cargo to fill them up. *Held* a case of extreme necessity, and that the sale was valid and binding on the owners.]

[See note at end of case.]

[3. In the absence of fraud or collusion, the fact that the masters of the wrecked vessel and one of the other vessels were brothers would not invalidate the sale.]

[4. It having been agreed at the sale that payment should be made at the Sandwich Islands, it was immaterial that no money passed at the time of sale.]

[5. The portion of the cargo sold having been actually delivered, the fact that there was no memorandum or formal bill of sale was immaterial.]

[6. Nor was it material that no entry of the sale was made upon the log book.]

[7. The transaction was not a salvage service on the part of the purchasers.]

[See note at end of case.]

[This was a libel by Walter E. Jones and others, owners of the ship Richmond and cargo, against the cargo, to recover the same. Similar libels were instituted in Cases Nos. 7,492 and 11,797.]

The libelants were the owners of the ship Richmond and her cargo, Philander Winters, master. She sailed in July, 1846, from a place called Cold Spring, L. I., on a whaling voyage, and having been out over three years, was about to take up her homeward voyage, with nearly a full cargo of oil and bone; and having fallen in with a dense fog, on the 2d day of August, 1849, she struck on the rocks, and was there wrecked to such an extent that she could not be got off, and eventually she became a total wreck. The place of this misfortune was in or near Behring's Strait, at about latitude 66° north. It was not until the year preceding this disaster that the Arctic Ocean was known as good fishing ground. While cruising in that vicinity, the ship Richmond found the object of her pursuit abundant and quite easily captured. The ship Superior, of Sag Harbor, Capt. Royce, Master, has the honor of this discovery, and was the first ship to take whale in the waters of the Arctic Sea. Only two months in the year are these waters open to the

bold navigators, while during the residue of the year these waters are sealed up by ice as impenetrable as the Rocky Mountains, upon their borders. On the 2d day of August, 1849, a short time before these seas were to be closed for that season, Captain Winters found his ship Richmond on the rocks, with water rushing into her until she was filled within eighteen inches of her plank deck. Still he did not abandon her, but kept lawful and actual possession, going with his boat to and from shore, a distance of about half a mile each way. His first impression must have been to have effected a landing of as much of his cargo of oil and bone as might have been practicable, but then he had no means of protection. The spot was a thousand miles from the face of civilized man, and the natives in that region were savages according to the worst import of the term, and to land the cargo within their reach, would prove as destructive as if left to the winds and the waves. Such was the condition of the ship Richmond, when, on the 4th day of August, 1849, two other ships hove in sight, and coming within hail, proved to be the Elizabeth Frith, Jonas Winters, master, and the Panama, F. M. Hallock, master. The masters of these two ships were called to view the condition of the Richmond, and, not being full, the master of the Richmond proposed a sale of oil and bone from his ship, in quantities sufficient to fill up each of those ships. And the master of the Richmond put up a written notice upon the masts of those two ships, the Elizabeth Frith and the Panama, that the oil and bone of the Richmond's cargo would be sold at auction, on board the Richmond, on the 8th of August, 1849. The notice having been so posted up four days, a disinterested person was designated as auctioneer by the master of the Richmond, and he then and there sold at public auction oil and bone as follows:—To

the master of the Panama 18,000 gallons of oil, at 75 cents per barrel, and 3,000 lbs. of bone. And to the master of the Elizabeth Frith 600 barrels (18,860 gallons) of oil, at $1 per barrel, and 6,000 lbs. of bone. These several quantities of bone and oil filled up the two last ships so that no more could be taken, and in order to receive this much, the Elizabeth Frith was obliged to throw overboard shooks and bread to the value of $800, and in like manner the Panama was obliged to throw overboard shooks and bread to the value of $500, to make room for the oil and bone. The oil and bone were delivered and taken out of the Richmond, and stowed in the respective ships, Elizabeth Frith and the Panama, with which these two snips returned home, bringing from the Richmond her master and crew. Five days from thence the master of the Richmond died, while on the passage to the Sandwich Islands, where, according to the terms of the sale, the oil and bone were to be paid for, to the master of the Richmond. There was no bill of sale executed by the master of the Richmond, and no security given by either of the purchasers. The auctioneer kept the only memorandum of the quantity sold to each purchaser. When taken out of the Richmond, the oil and bone were stowed indiscriminately with other oil and bone in the Frith and Panama, and on their arrival home the entire cargo of each ship was sold, together, amounting in all to a little short of $50,000.

The present libel is instituted by the owners of the ship Richmond against the owners of the Elizabeth Frith and the Panama, and they seek to recover the value of the oil and bone in the home market, to wit, in New York, yielding the right of the claimants to deduct there from such sum or sums as may be deemed just and reasonable for salvage service. It is not material to state the allegations contained in the libel, nor is it essential particularly to point out the admissions or allegations contained in the several answers of the claimants, as spread upon the record. It is sufficient that it should now appear that the claimants set up the sale made by the master of the Richmond, on the 8th of August, 1849, as the foundation of their title to the oil and bone taken from the Richmond and transferred to their ships respectively. And the claimants rest their defense on the grounds that the sale was made under circumstances of extreme necessity, for the good of all concerned; and that the sale was bona fide and valid, as against the owners. On the other hand, the libelants deny that the master had authority to sell the cargo, and insist that the property, in the cargo still remains in them; admitting, at the same time, that the court now, on the pleadings and evidence of the case, may award salvage to the claimants, but insist on a decree for the balance in the names of the claimants.

The statement of the controversy, thus far, puts the claimants in the affirmative, and it is incumbent on them to sustain their title to the property by the rules of law. To do that, they say:

I. The ship and cargo were wrecked and irrecoverably lost, within twenty or thirty days of the period when polar ice would inclose that whole region for ten months of the com-

ing year. She was 27,000 miles from her home port, and no vessel could be found to take her cargo on freight or salvage on so long a voyage.

II. The sale was bona fide, and there cannot be shown any want of integrity of motive on the part of the master of the Richmond in making the sale. Howland v. Two Hundred and Ten Barrels of Oil {Case No. 6,801}; 6 Owen, 271.

III. There being no other method of saving any thing from the ship, the master had authority, as agent for all concerned, constituted by the necessity of the case, to save what he could from inevitable annihilation by means of the sale. Abb. Shipp. (5th Am. Ed.) pp. 14, 19, and note to page 19; The Sarah Ann {Case No. 12,342}; New England Ins. Co. v. The Sarah Ann, 13 Pet. {38 U. S.} 387.

The points taken by the libellants were as follows:

I. The pleadings admit the ownership and title of the claimants to the cargo of the Richmond, subject only to the question, whether the alleged sale was valid. The burden of proof to show a valid sale is upon the claimant.

II. The service rendered was essentially a salvage service, and the sale was invalid. The vessel was an acknowledged wreck; and under this head, the counsel of the libelants assign the following reasons for the purpose of invalidating the sale: 1. The master and crew abandoned the ship, and sought a passage home on any terms. 2. This was no proper place for a sale. 3. There was no waiting for purchases. 4. This was no market 5. No money required or paid. 6. There was no written entry, bill of sale, or memorandum of the sale. 7. No counting or measurement except by the pretended purchasers for their own purposes. 8. There was a considerable portion in possession of the salvors on board the Elizabeth Frith at the time of the sale. 9. The whole was in their absolute power. 10. No actual change of possession. 11. No single circumstance to change the case from the ordinary one of wrecked property in danger of being lost. The rules of law applicable to the principles are familiar. See The Emulous {Case No. 4,480}; Bearse v. Three Hundred and Forty Pigs of Copper {Id. 1,193}.

III. The master in this case did not rightfully exercise any such powers of sale as he is, under some circumstances, entitled to exercise; the voyage being broken up. 1. The auction was without competition. 2. No notice given to any other vessels. 3.

The whole transaction was a combination, and if not so in fact, yet too much exposed to abuse to be permitted or sanctioned. 3 E. C. L. 215; 8 E. C. L. 309; Pope v. Nickerson {Case No. 11,274}; 2 Nev. & M. 303, 317, 328; The Tilton {Case No. 14,054}; The Sarah Ann {Id. 12,342}.

IV. The sale of the bone with the oil was of itself sufficient to impair the whole sale.

V. The ship, including boats, sails, anchors, &c, were sold for $5 only.

VI. This is a question of salvage and of its proper adjustment. Brevoor v. The Fair American {Case No. 1,847}; The Emblem {Id. 4,434}; 1 W. Rob. Adm. 331; 3 Hogg. Adm. 422; Park, Ins. 304; The Centurion {Case No. 2,554}; Butterworth's Case {Id. 2,251}; Joy v. Allen {Id. 7,552}.

VII. There was no serious danger.

VIII. There was no saving of life connected with the service.

IX. It must be either a sale or a salvage. The Emulous {Case No. 4,480}; The Tilton {Id. 14,054}.

X. The sale was not bona fide. 1. Not two parties. 2. The buyer was brother to the seller. 3. The public auction was a farce. 4. There was no time of payment. 5. The entry of the party buying in his private books was not enough. And 6. No entry in the log-book.

Mr. Moore and D. Lord, for libelants.

Hoxey & O' Connor, for claimants.

BY THE COURT. The preceding statement of this cause, and the singular ability with which it has been conducted by the learned counsel, mark it as one of great importance. The amount in question is of no small consideration. The principle involved, and the facts in evidence, tend to magnify the deep interest of the parties concerned, as well as the bearing it may have on the commerce and navigation of the country. The great question to be decided in this case is the effect of the sale made by Captain Winters on the 8th of August, 1849. If that sale was a valid one then these libelants are not entitled to a decree and as a necessary consequence the libel must be dismissed. But, on the contrary, if the sale was invalid, the libel must be sustained, and in that event other questions will be open for discussion. The learned counsel have given to the subject so thorough an investigation, that the duties of the court, are rendered much less arduous than they otherwise might have been.

Having alluded to the principle involved, I proceed now to state that principle more at large, and apply it to the facts of the case. Does the law afford the master of a vessel power, under any circumstances, to sell the cargo; and if so, under what circumstances may that power be exerted by the master? Recurring to the early cases in admiralty, the English courts may have held the question in doubt, and, perhaps, we are authorized in saying that the power was denied altogether; but in later years it has been decided otherwise, and in disposing of this case, it may not be important to extend our inquiry beyond

the period when, in this country, all doubts have been swept away, and the law on this subject has been settled, too well settled to admit of doubt or difficulty. I will state in the most concise manner possible, what may be considered thus settled. The sale must be bona fide, without fraud or collusion, and under circumstances of extreme necessity. Although in some of the leading cases, language less strong and emphatic, sanctioning a sale, has been used, still in disposing of the present case, it may be proper to adopt the characteristic language used in other cases, "extreme necessity," as more appropriate, without saying that evidence less strong may not be used in other cases. In The Sarah Ann [Case No. 12,342], Obadiah Woodbury and others, claimants, this question is considered at large, and Judge Story, in his opinion, says: "I agree at once to the doctrine, that it is not sufficient to show that the master acted with good faith and in the exercise of his best discretion. The claimants (upon whom the onus probandi of the validity of the sale is thrown) must go farther, and prove that there was a moral necessity for the sale, so as to make it an urgent duty upon the masters to sell for the preservation of the interests of all concerned. And I do not know how to put the case more clearly, than by stating, that if the circumstances were such that an owner of reasonable prudence and discretion acting upon the occasion would have directed the sale from a firm opinion that the brig could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value, as she lay on the beach, then the sale by the master was justifiable, and must be deemed to have been made under a moral necessity." The judge adds: "As to the position of the brig, there is abundant evidence that it was truly perilous." This opinion was pronounced at the May term of the First circuit, 1835, and was taken to the supreme court, and finally disposed of there, at the January term, 1839. See [New England Ins. Co. v. The Sarah Ann] 13 Pet. [38 U. S.] 387. After a very able discussion of the case, the unanimous opinion of the court is there pronounced, most fully confirming Judge Story's doctrine as laid down at the circuit, on the original trial of the cause. The marginal note is an epitome of the case, and is conclusive authority, thus briefly stated: "The right of the master to sell a vessel stranded depends on the circumstances under which it is done to justify it. The master must act in good faith, and exercise his best discretion, for the benefit of all concerned; and a sale can only be

made on the compulsion of a necessity, to be determined in each case by the actual peril to which the vessel is exposed, and from which it is probable, in the opinion of persons competent to judge, the vessel cannot be saved. This is an extreme necessity."

On a particular examination of this case, it would seem that whenever there "is a moral necessity, extreme peril or extreme necessity," the master has the power to sell the vessel, and of course he may, under the like necessity, sell the cargo when it belongs to the same owners. This principle must ever be qualified by the fact, that the master has acted bona fide, and for the benefit of all concerned. A reference to this case, of course, embraces the authorities cited in support of the doctrine maintained, rendering it unnecessary to enumerate those cases here. The doctrines of this case are recognized in Ben. Adm. p. 169, § 299, a work of great merit, recently published. The principles of law having been considered as settled, the remaining inquiry is, do the facts proved present a case falling within those principles?

The facts adduced to establish the sale belong to three distinct classes: (1) To show that the sale was bona fide; (2) to show that the sale was for the benefit of all concerned; and (3) to show that a case of extreme necessity existed. To the first, it is objected that the master of the Elizabeth Frith was a brother of Capt. Winters of the Richmond, under whose authority the sale was made. In the entire absence of all proof showing a collusion between the seller and the purchaser, the relationship alone should not impair the sale. The facts on this point very satisfactorily rebut all presumptions of fraud and collusion. As to the second, after a careful examination of the testimony, I have no doubt, but for this sale, the whole cargo must have proved a total loss. Although but little was saved, yet that little was designed by the seller, and was in fact for the benefit of all concerned. There was no alternative between a total loss and this sale. The testimony has established this beyond a reasonable doubt. As to the third and last class of evidence to sustain the sale, that the condition of the ship was that of extreme necessity, the evidence is overwhelming. Indeed, this point has been so thoroughly maintained, that the libelants do not make it a point in their case, but rely very much on other objections to the sale. There is no necessity of recapitulating the testimony as to the extreme peril the ship was in at the time of the sale, because it is all one way, and stands uncontradicted. The master finds his ship and cargo in the condition of extreme peril, and proceeds to sell so much of the oil and bone as could be taken out of his ship to the masters of the Frith and the Panama, and the same was delivered, on an agreement to pay therefor, at the Sandwich Islands, when the ships arrived there; but before their arrival at the place of payment, the master of the ship Richmond died at sea, and there was no person at the Sandwich Islands qualified to receive the same, and the money remains due to the owners of the Richmond, and the liability is admitted.

Numerous other objections have been suggested against the validity of the sale, most of which have been removed by evidence, and still a few of those objections require some notice.

It has been said that this was no proper place for the sale; there was no market there. But it should be considered that in waiting for a more convenient place, or a better market, the ship would have gone to pieces, and the whole cargo would have been lost.

It is said, likewise, that there was no money required, and no money paid. In reply to this, it will be remembered, that it was agreed that the payment should be made at the Sandwich Islands, but before the ships, whose masters had purchased the oil, arrived at that place, Capt. Winters, of the Richmond, had deceased at sea, and there was no one authorized to receive payment. It is urged, also, that there was no memorandum or bill of sale, of the oil, and that it never was delivered. Neither of those can avail—for in point of fact the oil and bone were delivered, and although there was no bill of sale, yet there was a memorandum in writing kept, and produced in court, of all the oil and bone purchased. In a case like the present a formal bill of sale cannot add to the title of the purchasers. An actual sale and delivery of personal goods, orally, will carry the title as well as a bill of sale. The law does not demand any particular form for the sale of personal goods.

It is insisted that the omission to enter the sale on the log-book is a good reason to set aside the sale as invalid, but the impression cannot well be avoided, that the disaster itself was calculated to prevent the entry. Great confusion, anxiety, and terror must have prevailed, and every moment after the ship struck was employed in devising means to secure something to the owners from the wreck. Besides, if the log-book had been here, with all the circumstances written down upon its pages, by the mate, it would only be cumulative evidence of what is amply proved by a mass of uncontradicted testimony.

And last of all, the principal stress of the libelants rests on their legal proposition, that this was salvage service, and not a sale. Salvage is the compensation that is to be made to persons by whose assistance a ship or its lading has been saved from impending peril, or reward after actual loss. By reference to the testimony, it will be seen at a glance, that this was never undertaken as a salvage service. Situated as these two vessels were at the time, on the best whaling ground, where both ships might have been filled in three or four days, it cannot be believed

that their masters would have undertaken the risk of bringing to the home port the property of another, relying, as they must have done, on uncertain litigation for their compensation. But, again, the oil was taken on an express agreement,—a sale for a stipulated price, excluding altogether the idea of salvage. The law did not compel these masters to receive the oil on such terms, and as they virtually declined, their owners cannot now be compelled to accept salvage compensation.

As to the chronometer, the instruments, and their medicine chest, they are not claimed under any sale or for salvage. It was a mere gratuity. And the owners of the Richmond should be satisfied then without suit or decree, especially when they have been safely kept for their use alone, without any pretence to detain them from the rightful owners.

So far, then, as I have been able to weigh the testimony, and bring the case to the test of well-settled principles of law, I am bound to say, that the sale of the cargo of the ship Richmond, on the 8th of August, 1849, was made under circumstances of necessity; that it was bona fide and for the benefit of all concerned. For these reasons, the sale is upheld, and the libel dismissed, without cost to either party.

{NOTE. Upon an appeal to the circuit court by the libelants, this decree was reversed, the sale declared void, and the respondents declared to be entitled to a moiety of the net proceeds, in the New York market, of the articles brought in their respective ships. The claimants appealed to the supreme court. The opinion was delivered by Mr. Justice Grier, in which the decree of the circuit court was reversed, in that the salvors were allowed compensation only by a moiety of the sarved property at the first port of safety,—the Sandwich Islands,—and an additional allowance for freight for the carriage of the owners' moiety to a better market at the home port. 19 How. (60 U. S.) 150. The case was held to be one of derelict, the transfer requiring no great exertions or any long delay. "The contrivance of an auction sale under such circumstances, where there was no market, no money, no competition, is a transaction which has no characteristic of a valid contract."}

[1] {Reversed by circuit court (case unreported). Decree of circuit court reversed in 19 How. (60 U. S.) 150.}