

the current added to her speed, and though she had a right to assume that the Burke would accept her signal, yet when that was not done, and a misunderstanding arose, the dictate of prudence, as well as the terms of the rule, required that every effort should be made to stop the headway of his boat.

In connection with this point may be considered the failure of the *Ida* to answer the cautionary whistle of the *Burke*, which she blew just after she passed the steamer *Alabama*, which had stopped at Seymour's bluff. McDowell says he heard the whistle when he was in the reach above Chestang's bluff, but he says he did not respond because he thought if he did the ascending boat would take his signal as indicating a purpose on his part to pass on the west side of the river, when his purpose was to pass on the east or left side of the river. The boats must have been some three miles apart at that time, and the reason given scarcely seems satisfactory. It may not be clear that the failure of McDowell to respond to the cautionary whistle of the *Burke* contributed in a direct way to the collision, but he was thereby advised of the approach of the ascending steamer, and aware also of the usual manner in which the river was navigated at that point, and should therefore have sooner stopped the headway of his boat, especially after he found his signal was not accepted by the *Burke*.

I find, however, that there was a great disparity of fault, and that the burden of it lies with the *Burke*, as we have already seen, and the loss is apportioned in the ratio of one-fourth against the *Ida* and three-fourths against the *Burke*.

The decree is therefore for the libelants, Robinson & McMillan, against the *Burke*, her tackle, etc., for the sum of \$7,023.95, and the costs in both cases are divided in the same proportion.

THE CRAIGALLION.

(*District Court, D. Maryland. May 20, 1884.*)

SHIPPING—CHARTER-PARTY—DAMAGE TO CARGO—LIABILITY OF OWNERS.

A steam-ship was chartered at a certain hire per month, the owners to appoint and pay the master, officers, and crew, and the charterers to direct what voyages the ship should make, and pay for the coals. The charterers sent the ship to Kingston, Jamaica, to bring back a cargo of green bananas to a port in the United States, and instructed the captain to pay attention to the temperature, and close the hatches whenever the thermometer fell to 50 deg. Fahrenheit, or else the fruit would become chilled and injured. This instruction was neglected, and the fruit was chilled and injured in consequence of the neglect to close the hatches. *Held*, that the master and crew were servants of the owners for the purpose of navigating the vessel, and that, as it was part of the duty of those in charge of the navigation to take usual and proper care of the cargo, the owners were liable to the charterers for the damage.

In Admiralty

John H. Thomas, for Henry Bros.

A. Stirling, Jr., for steam-ship.

MORRIS, J. The British steam-ship *Craigallion*, of 978 tons gross register, was, by charter-party dated September 12, 1883, chartered by the owners to Messrs. Henry Bros. & Co., of Baltimore, importers of fruit, to be placed at their disposal on arrival at New York; she to be then tight, staunch, and every way fitted for the service, with a full complement of officers, seamen, engineers, and firemen for a vessel of her tonnage; the vessel to be employed by the charterers in carrying lawful merchandise between the United States, the West Indies, and South America. The charterers were to pay for the use and hire of the vessel for two months at the rate of 610 pounds sterling per calendar month, payable monthly in advance, and to have the option of continuing the charter for a further period of 10 months; the hire to commence on the day of delivery, and to continue until redelivery of the vessel in like good order and condition to the owners, fair wear and tear excepted, (unless lost,) at a port in the United States north of Hatteras. The owners were to provide the captain, officers, engineers, firemen, and crew, and to pay their wages and provisions, also the insurance on the vessel, all engine-room stores, and to maintain the steamer in a thoroughly efficient state in hull and machinery during the service. It was agreed that the captain, although appointed by the owners, should be under the orders and direction of the charterers as regards employment, agency, or other arrangements, and charterers agreed to indemnify owners from consequences of captain signing bills of lading, or otherwise complying with the same. The captain was to prosecute his voyage with utmost dispatch, and render all customary assistance with ship's crew and boats. The master was to be furnished by charterers, from time to time, with all requisite instructions and sailing directions, and was to keep a full and correct log of the voyages, which was to be patent to the charterers or their agents. It was agreed that if the charterers should have reason to be dissatisfied with the conduct of the captain, officers, or engineers, the owners should, on receiving the particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

The charterers were to have permission to appoint a supercargo to accompany the steamer and see that the voyages were prosecuted with utmost dispatch. All derelicts and salvage to be for owners' and charterers' equal benefit. In case of loss of time from deficiency of men or stores, break-down of machinery, or damage, preventing the working of the vessel for more than 48 hours, the payment of hire to cease until steamer should be again in an efficient state to resume her service; but, if steamer was driven into port or anchorage by stress of weather or from accident to cargo, the detention was to be at charterers' risk and expense. In case vessel was lost, freight paid in advance and not earned to date of loss to be returned. Charterers

were to have at their disposal the whole reach of the vessel's holds, decks, and usual places of loading, (not being more than she could reasonably stow and carry,) reserving proper space for officers, crew, tackle, stores, fuel, etc. The charterers agreed to pay for all coals, port charges, pilotages, agencies, and other charges except such as owners had agreed to pay. The owners were to have a lien upon all cargoes and all subfreights for any amounts due them, and the charterers to have a lien on the ship for all moneys paid in advance and not earned.

Under this charter-party the steamer was placed at charterer's disposal in New York on the nineteenth of September, 1882, and under their direction took on a cargo of locomotive machinery and delivered it at Aspinwall. Thence she went to several ports in Jamaica, taking in cocoa-nuts and oranges, and completed her return cargo at Kingston by taking on board 6,400 bunches of bananas. There was no supercargo put on board, and before leaving New York the charterers explained to the master that the bananas, which he was to bring back as part of the return cargo, would be injured if they became chilled, and instructed him to close the hatches if the temperature at any time on the voyage fell below 50 deg. Fahrenheit. Before the steamer left Kingston the charterers telegraphed their agents there to repeat this instruction to the master, which they did. The steamer arrived at the capes of the Chesapeake about the fifteenth of November. From the time of leaving Kingston until the steamer took a pilot inside Cape Henry the captain himself gave attention to the thermometer, and it stood at 60 outside the capes, but when the pilot took charge, the captain, being sick and suffering from a fever, went below, having given instructions to his first officer to observe the temperature and close the hatches if the thermometer fell below 50 deg. During that night on the Chesapeake bay the temperature fell to 38 deg., and the first officer neglected to have the hatches closed. When the steamer was ready to discharge on the 17th, it was found that the bananas, although otherwise in exceptionally fine condition, had been chilled. This was evidenced to observation by a slight brown discoloration on the green skins where the bananas touched each other, and was proved conclusively by the fact that the bananas did not ripen, but turned black and rotted, becoming so utterly worthless that quantities of them had to be carted outside of the city and thrown away. The actual net loss sustained by the charterers, from this damage to the bananas, was \$7,383.

These are cross-libs, the owners of the ship having sued for the hire of the ship, and the charterers for the damage sustained by the fruit. There is no difficulty whatever as to the facts of the case, and the only question is as to the legal liability. This is a charter by which the ship, fully equipped and manned, is let to hire, and it must be regarded as settled that under such an instrument as the present charter the possession and the responsibility for the naviga-

tion of the ship remains with the owners. *Leary v. U. S.* 14 Wall. 607; *Reed v. U. S.* 11 Wall. 600; Macl. 328; Abb. (12th Ed.) 36. The officers and crew were appointed and paid by the owners, and they were their servants to see to the navigation and direct the motions of the ship; the charterers were only to direct to what places she should go.

The case of *Onoa & Cleland Coal & Iron Co. v. Huntley*, L. R. 2 C. P. Div. 464, (1877,) arose upon a charter in substance identical with the present one. In that case, while upon a voyage, by the negligence of the master and crew, the vessel was stranded and went to pieces, and the cargo was totally lost. It was held that the master and crew were the servants of the owner for the purpose of navigating the vessel, and that he was liable to compensate the charterers for the loss of the cargo sustained by them. Mr. Justice DENMAN, in pronouncing judgment in the common pleas division, said:

"A person who contracts to provide workmen or seamen to perform a specified undertaking is bound to make good any injury which the other party to the contract may sustain from omission to perform their duty in a proper manner. Here, these who were employed by the defendant (the owner) have, by their negligence, inflicted an injury upon the plaintiffs, who are entitled to recover from him compensation for the loss."

Taking this to be the law applicable to such a charter-party, the only question is, was the duty with regard to this cargo of fruit which the master of the ship undertook to perform, and which his subordinates neglected, one of the usual and proper duties to be performed by those in charge of the navigation of the ship, in relation to such a cargo.

It is stated by Abbott, (12th Ed. p. 316, pt. 4, c. 5, § 4:)

"Moreover, the master must, during the voyage, take all possible care of the cargo. If it require to be aired or ventilated, as fruit and some other things do, he must take the usual and proper methods for this purpose."

It is urged that there is no express contract to carry safely, and that there is no breach of any clause of the charter-party, but almost every contract establishes duties which are not specifically mentioned, and the neglect of which gives an action. There was not in this case, it is true, the obligation of a common carrier to carry safely, but surely there was the obligation resting on those in charge of the navigation of the ship to use ordinary care and diligence in the care of the fruit. It was a well-known duty to open the hatches for ventilation, and how can it be contended that it was not equally a duty, and within the usual and necessary scope of their employment, to close the hatches when necessity arose. If the hatches had been negligently left open when the violence of the sea required them to be closed, that duty could not be said to be beyond the usual duties of those charged with the navigation of the ship; and in the present case, having been instructed that a certain and easily observable degree of cold would destroy the value of the bananas, and having un-

taken to give the necessary attention to guard against this danger by a timely closing of the hatches, how can it be said that this was not as much within the duty of protecting the cargo as to close the hatches to keep out the sea.

In *The Regulus*, 18 FED. REP. 380, under a charter-party in which it was provided that the ship should be "in every way fitted for the voyage, and that the hatches were to be taken off, whenever practicable, as usual for the ventilation of green fruit," it was held a breach of the charter for the owner to load the vessel with other cargo so deeply that in rough weather the hatches had to be kept on more than was fit or usual with such cargoes. If, then, it be the law, as I think clearly it is, that the owners were liable for the neglects of the officers and crew in any duty appertaining to the navigation of the ship, and the proper care of a fruit cargo is such a duty, I see no escape from the conclusion that in the present case the ship is liable.

A decree will be entered for the amount of the damage to the bananas, less the freight claimed in the cross-libel.

THE STERLING.

(District Court, D. Connecticut. June 5, 1884.)

1. SALVAGE—RELIEF OF GROUNDED VESSEL AT OWNER'S REQUEST, WITHOUT CONTRACT AS TO COMPENSATION FOR SERVICES.

The service of one in the steam-towing and wrecking business who is sought by the owner of a grounded schooner, and at his request relieves the vessel from its distress after three days' continuous effort, are salvage services, the work being successful, and no contract as to compensation having been made previously to the undertaking it.

2. SAME—LIEN NOT WAIVED THROUGH SALVOR'S INDULGENCE.

Abandonment or waiver of a salvage lien is not to be inferred from the fact of the owner being allowed the possession of the vessel. The mere forbearance of the libellant to distress the claimant, when nobody has been injured by the delay, is not to be considered as a waiver of the lien.

Libel *in Rem* for Salvage.

David F. Hollister, for libellant.

Morris W. Seymour, for claimant.

SHIPMAN, J. This is a libel *in rem* for salvage. On the night of May 10, 1883, or early in the morning of May 11, 1883, the schooner Sterling, of the value of \$1,200, went ashore on a sandy, pebbly beach near Point no Point, in Long Island sound, and about two miles from Bridgeport light-house, and lay parallel with the beach. The owner applied first to the agent of the libellant, who is the owner of steam-towing and wrecking tugs in Bridgeport harbor, and, being by the agent directed to the captain of one of the tugs owned by the libellant, asked him to go down, and pull the schooner off, and how much he would charge. The captain said that he guessed he would go, but that he did not know what he would charge. No bargain was made. On the same day the agent of the libellant went with one of

his steam-tugs and tried unsuccessfully to pull the schooner off, and made two more unsuccessful attempts on the same and on the following day. On the third occasion he took also another tug owned by the libelant, and both tugs made the attempt. At this time a hawser of one of the tugs was broken, and her rail was broken, and she was thereby damaged from eight to ten dollars. On the third day one of the tugs went alone, and this fourth attempt was successful, and the schooner was towed within the harbor of Bridgeport. The agent of the libelant went with the tugs on each occasion for the purpose of doing the work. The attempts could only be made at high tide, and the work was, in effect, a continuous undertaking. The schooner was not in immediate peril when the help was furnished, but she was fast aground, and help was indispensable and was greatly wanted by the owner, who was anxious to get her off before a high south wind should drive her further on the beach. On the last day he was afraid that the tug was not coming, and sent for her, and also displayed in the schooner's rigging a signal for a tow-boat. The claimant promptly asked the libelant for his bill, and that it be made as low as could be, because he had had bad luck that season. A bill of \$50 for towing the schooner off the beach was rendered, was approved, and payment was promised. It was, and was considered by the owner to be, a reasonable bill for the service. Payment has been frequently demanded of the claimant, but he had no money, and could not pay. The libelant offered to let the claimant work out the bill, but he was unable to do the work that was wanted. He did, however, make some repairs for the libelant, which were worth \$2.25, and which both parties intended should be applied upon the salvage.

The services were salvage services. The schooner was in distress and must have help; the assistance of the libelant's boats was asked by the owner of the schooner, but the services were not rendered upon an agreement for payment for the use of the tug in any event. There is nothing in the case to show that the services of the libelant's tugs were to be paid for in case of non-success. The success of the service and the distress of the vessel are the ground of the libel.

There has been neither abandonment nor waiver of the lien. It was not lost by permitting the owner to be in possession of the schooner, (*The H. D. Bacon*, Newb. 274; *Cutler v. Rae*, 7 How. 729,) nor by the subsequent conduct of the salvor. Payment has been frequently demanded, and has been promised when the schooner should be sold. The mere forbearance of the libelant to distress the claimant, when nobody has been injured by the delay, is not to be considered as a waiver of the lien. The owner of the schooner appears alone as claimant, and no *bona fide* purchaser seems to have been injured by the delay in bringing the libel. Under the circumstances of the promise and the delay of payment, interest should be allowed from May 16, 1883, to May 31, 1884, from which \$2.25 and interest should be deducted.

Let there be a decree in favor of the libelant for \$50.80, and costs.

SMALL v. NORTHERN PAC. R. CO.

*(Circuit Court, D. Minnesota. June, 1884.)***1. REAL ESTATE—STATUTE OF FRAUDS—PAROL CONTRACT—PART PERFORMANCE.**

The statute of Minnesota providing that contracts as to real estate must be in writing continues: "Nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance of agreements in cases of part performance of such agreements." Whenever a parol contract for the sale of real property is shown to be within this exception, a court of equity will not hesitate to enforce and decree specific performance by a conveyance from the vendor.

2. SAME—SPECIFIC PERFORMANCE.

Whenever it appears that a vendee, who is seeking the enforcement of the agreement, has been permitted by the vendor to treat the agreement as binding, and to do positive acts, amounting to part performance, based upon the assumption that the agreement is binding, specific relief will be granted and the vendor compelled to perform his part.

3. SAME—SEPARATE PARCELS OF LAND.

When, under an arrangement between two parties, by which one is to convey land to the other, the payments for the land are not to be applied upon the contracts generally, but always to specific sections or parcels, then, when a payment is made, it is payment in full only to the extent of the land upon which the application is made. And where the lands within the parol contract are of many distinct parcels and each tract separate from all the remainder, and the purchase price is not a gross sum for the whole quantity of land, and all the tracts upon which valuable improvements were made, and all of which possession has been taken, is conveyed to the vendee, equity will not decree a specific performance.

In Equity.

J. M. Shaw, for complainant.

W. P. Clough, for defendant.

NELSON, J. This action was heard before the circuit judge and myself. It was removed from Hennepin county to this court, and the hearing is upon the testimony taken in the case.

This is an action brought by the plaintiff to compel specific performance of a parol contract for the sale of real property by the defendant. There were but two witnesses on the part of the plaintiff. The defendant introduced no testimony, but relied upon the settled equity doctrine to defeat the right of action on the part of the complainant. The facts of the case are these:

That in May, 1880, the plaintiff and the commissioner of the land department of the Northern Pacific Railroad Company entered into a contract by parol for the sale of about 50,000 acres of land; at least, for all the land owned by the railroad company in four government townships in the territory of Dakota, that were granted to the railroad company in its land grant by the general government. A large portion of this land was surveyed into sections and quarter sections, or government subdivisions. The price agreed upon for this land was \$2.50 per acre for all of the land in three of the townships, and \$2.75 for all of the land in the other township. The purchase price stipulated under the contract was that payments should be made in the preferred stock of the company at par, from time to time, as fast as the plaintiff could procure and tender it to the company; and the same should be payment for such portions of the land as the amount of said preferred stock would pay for