the vendor, and if he sells them, exercising reasonable diligence, he is responsible only for the proceeds.

8. SAME—ACTION FOR PRICE—EVIDENCE.

When the vendee in an executory contract of sale has rejected and returned the goods, but the vendor has refused to receive them, in an action by the vendor for the price, evidence of attempts to induce the vendor to arbitrate is competent on behalf of the vendee to explain a delay in selling the goods to save loss.

In Error to the Circuit Court of the United States for the Southern District of New York.

Manheim & Manheim, for plaintiffs in error.

Stern & Rushmore, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiffs in the court below to review a judgment entered upon the verdict of a jury.

The action was brought to recover the agreed price for goods sold and delivered by the plaintiffs to the defendants. The defense was a recoupment of damages for breach of warranty by the plaintiffs of the quality of the goods. The plaintiffs admitted the warranty, but denied the breach. The jury found upon this issue for the defendants, rendering a verdict for the plaintiffs for the sum of $1,106.25, being the purchase price of part of the goods and the sum realized by the defendants from a sale of the balance at auction.

It appeared upon the trial that in June, 1895, the defendants, merchants in business at Zanesville, Ohio, ordered of the plaintiffs, manufacturers of fur garments at New York City, 173 fur capes, at separate specified prices, which were to be perfect and like certain samples. Pursuant to the order the capes were made and shipped by the plaintiffs in July, and received by the defendants about the 1st of August. The defendants retained some of the goods as acceptable, but, insisting that the rest did not correspond to the warranty, and were unmerchantable, reshipped them to the plantiffs at New York City, notifying them accordingly. The plaintiffs declined to accept the goods, and in the following December the defendants caused them to be sold at auction. It appeared that there had been a steady decline in the market prices of fur goods since August, and that in December prices were 50 per cent. lower than in August. The evidence for the plaintiffs tended to show that the goods were in all respects perfect and according to the sample, and that they were at the time of the shipment equal in value to the agreed price. Evidence on the part of the defendants was given showing the amount which the goods brought at the auction sale, and also tending to show that the goods, in their imperfect condition, were not worth more than 25 or 30 per cent. of the market value of perfect goods. The defendants were permitted to show, against the objection and exception of the plaintiffs, that the expenses of the auction sale were $67.

The trial judge instructed the jury that the plaintiffs were entitled to recover the price of the goods which were accepted by the defendants, and, as to the rest of the goods, that, if they did not correspond

to the warranty, the defendants were entitled to return them, and, if the plaintiffs refused to accept them, the defendants were entitled to sell them on account of the plaintiffs, and were to respond only for the proceeds realized from the auction sale. The plaintiffs excepted to the latter part of the instruction, and asked the court to instruct the jury that the defendants were only entitled to recoup the difference in value between perfect goods and the goods as they were at the time of the sale and delivery. This instruction was refused, and the plaintiffs excepted.

Error is assigned of the instruction which was excepted to, and of the refusal to instruct as requested by the plaintiffs, and also of the ruling of the court in admitting the evidence of the expenses of the auction sale.

When there is an express warranty upon an executory contract of sale, and the articles which are the subject of the contract are found, when delivery is tendered to the vendee, not to correspond to the warranty, two remedies are open to him: He may return the articles and rescind the contract, or he may accept them and, affirming the contract, recover upon the warranty. Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69; Bagley v. Cleveland Rolling-Mill Co., 22 Blatchf. 342, 21 Fed. 159; Day v. Pool, 52 N. Y. 416; Brigg v. Hilton, 99 N. Y. 517, 3 N. E. 51. The right to rescind arises, not because the contract of warranty is broken, but because the articles do not correspond with the contract of sale, and the vendee is not bound to accept that which he did not agree to buy,—a consideration which has sometimes been overlooked in the adjudged cases.

A rescission contemplates that both parties shall be placed in statu quo, and ordinarily the vendee of goods who proposes to rescind the contract for their purchase must rescind in toto. But, where the contract of purchase embraces a number of distinct articles at different prices, then, even if they are of the same general description, so that a warranty of quality would apply to each, the contract is not entire, but is, in effect, a separate contract for each article, and a right of rescission exists as to each. Manufacturing Co. v. Wakefield, 121 Mass. 91. But, if one consideration is to be paid for all the articles, so that it is not possible to determine the amount of consideration paid for each, the contract is entire, and there cannot be a rescission without an offer to return the whole. Miner v. Bradley, 22 Pick. 457; Lyon v. Bertram, 20 How. 149.

In the present case the defendants elected to rescind, and were entitled to rescind as to that part of the goods which did not correspond with the warranty; but, by the refusal of the plaintiffs to receive the returned goods, they found themselves in the custody of the goods at a distant city. It then became proper for them, if it was not obligatory, to take such measures as would be most expedient to save unnecessary loss to the plaintiffs. If they had stored them, they would have been entitled to recover the reasonable expenses. If it was more expedient to sell them, and if they exercised reasonable diligence in selling them, they only became responsible for the proceeds. See Story, Sales, §§ 408, 409, where the authorities are cited. There was a long delay in making the sale, but the circumstances

which might supply an explanation for the delay are not in the record, beyond the fact that the defendants were endeavoring to induce the plaintiffs to arbitrate their differences. By the exception to the instruction given by the trial judge, and the request for the instruction which he refused, the plaintiffs sought to have the rule of damages applied to the case which would have been appropriate if the warranty had been made upon an executed sale, instead of upon an executory contract of sale.

Error is also assigned of the admission of evidence, introduced by the defendants, showing their attempt to induce the plaintiffs to arbitrate. This evidence was competent, as tending to explain the delay which occurred in selling the goods.

Error is also assigned of the reception in evidence of certain letters, written by the defendants to the plaintiffs during the period between the reshipment of the goods and their sale at auction. We find no objections or exceptions in the record to the admission of these letters, except to the letter of October 11, 1895. This was a letter from the defendants proposing to arbitrate. It was admissible for reasons which have been stated. If it contained other matter which was inadmissible for any reason, an objection should have been taken to reading that part of the letter. No such objection was taken.

We find no error in the rulings at the trial, and conclude that the judgment should be affirmed.

THE IONA.

SPEEDING et al. v. HARD et al.

(Circuit Court of Appeals, Fifth Circuit. May 4, 1897.)

1. SHIPPING—CUSTOM OF PORT—DELIVERY OF COFFEE.
   Evidence *held* to show a custom at the port of New Orleans that, in delivering coffee, the ship is to unload it on the wharf, pile it on skids in separate lots according to the bills of lading, and there make delivery to the several consignees; but *held*, further, that there was no sufficient proof of any custom as to the length of time that the coffee shall be allowed to remain upon the wharves after unloading.
2. SAME—CHARTER PARTY—CESSER OF LIABILITY CLAUSE.
   A provision in the charter party that charterer's responsibility is to cease as soon as the cargo is all on board, and bills of lading signed, does not also operate to release the ship from responsibility at that time; and a provision in the charter party that cargoes are to be delivered according to the custom of the port still binds the ship.
3. SAME—BILLS OF LADING.
   Bills of lading which contain no reference to the charter party do not, as between the shipowner and the charterer, operate as new contracts, and their stipulations as to mode of delivery do not supersede the provisions of the charter party on the same subject.
4. ADMIRALTY PLEADING—AMENDMENTS.
   An amendment to the libel, filed after the ship has been released on stipulation, setting up a claim not included in the original libel and not germane to the subjects thereof, cannot be allowed.

Appeal from the District Court of the United States for the Eastern District of Texas.

This was a libel in rem by Hard & Rand against the steamship Iona (Speeding, Marshall & Co., claimants), to recover the amount of certain exactions made by the master before he would consent to deliver cargo. The district court rendered a decree for libelants in the sum of $650.57, with interest, and the claimants have appealed.

The libel in this cause is brought for the recovery of an amount of $468.75, which the master of the steamship Iona exacted from consignees before he consented to deliver cargo at New Orleans. These charges are for stevedores, for handling coffee from the end of ship's tackle, for trucking and piling the same, and for watching cargo on the dock. The libelants paid these charges under protest, and now sue to recover them. The grounds upon which the action is based are that the charter party contains a clause providing that the cargo or cargoes shall be received and delivered according to the custom of the port of loading and discharging, and that, according to the custom of the port of discharging (New Orleans), libelants were entitled to have the cargo delivered upon the wharf to each consignee to whom bills of lading had been issued, with 48 hours for removal after discharge of the cargo. The respondents claim that they had the right to collect the charges in question for two reasons, to wit: (1) That bills of lading were issued, which superseded the charter party, both under its own terms and under well-established principles of law; and (2) because no custom has been established as claimed by the libelants. The libel in this cause was filed December 20, 1893. The ship was released December 26, 1893. On February 17, 1894, an amended libel was filed, claiming a further amount of $76.22, amount of certain other charges paid by libelants, the items of which will be found in the record. To this amended libel an answer was filed, substantially similar to the answer filed to the original libel. Upon the above issues testimony was duly taken, and after trial a decree entered in the lower court in favor of libelants for the sum of $606.57, with interest at 6 per cent. per annum from the date of the decree, March 18, 1896, until paid. From this decree claimants prosecute this appeal. The errors assigned are as follows: (1) That the court erred in decreeing in this cause for libelants for any amount whatsoever, but should have decreed in favor of respondents in manner and form by them prayed for. (2) That libelants claim to recover in this cause for the reason that the charter party sued upon contains a clause providing that the cargo or cargoes shall be received and delivered according to the customs of the port of loading and discharging, and that according to the custom of the port of discharge, to wit, New Orleans, libelants were entitled to have the cargo delivered upon the wharf to each consignee to whom bills of lading had been issued, with 48 hours for removal after discharge of the cargo. That the court erred in sustaining said claim of libelants, for the reason that bills of lading were issued subsequent to and superseding the charter party both by its own terms and under well-established principles of law; that by said bills of lading it was provided that the cargo should be delivered from the ship's tackle, where the ship's responsibility ceased. (3) That the evidence in this cause utterly fails to establish a custom in reference to the loading and discharging of cargo at the port of discharge, as claimed by libelants. (4) That the court erred in decreeing in favor of libelants upon the claim set forth in the amended libel, which libel was filed after said steamship had been released on stipulation, and upon a claim not germane to the claim set forth in the original libel, but entirely distinct from and independent thereof, and that libelants were without right by amendments to increase the liability of the stipulators, or of claimants or respondents, in a matter entirely disconnected from the subject-matter of the original libel, which said amended libel was duly excepted to on trial of said cause.

E. B. Kruttschnitt, for appellants.
J. Ward Gurley, Jr., and D. C. Mellen, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

PARDEE, Circuit Judge (after stating the facts). This suit is founded on a charter party which contains, among others, the following provisions:

"The bills of lading to be signed without prejudice to this charter, and any difference to be settled before vessel sails." "The cargo or cargoes to be received and delivered according to the customs of the ports of loading and discharge." "Charterers' responsibility to cease when cargo is all on board and bills of lading signed, but master or owners to have an absolute lien on cargo for freight, dead freight, or demurrage."

The bills of lading issued to the charterers and others made no reference to the charter party, and contained, among other provisions, the following:

"To be delivered from the ship's tackle, where the ship's responsibility shall cease." "The goods to be discharged from the ship as soon as she is ready to unload at the quay or into hired lighters, if necessary, but at the expense and risk of owners of the goods." "Goods to be taken delivery of as soon as they can be discharged from the steamer, the goods to be and remain at consignee's risk or expense immediately after being placed in the lighters or on the quay."

The evidence in the case proves a custom in the port of New Orleans, in regard to the delivery of coffee, that the ship is to unload the coffee from the vessel onto the wharf, pile it upon skids in separate lots according to the bills of lading, and there make delivery to the several consignees. The ordinances of the city of New Orleans provide that all produce, wares, goods, and other articles landed on the wharves or levees by any vessel or other water craft shall be laid as near as possible to the paved part of the levee approaching the street, so that the bank of the river and wharves be neither obstructed nor incumbered thereby, and fix 48 hours as the longest time that said produce, goods, wares, or other articles shall be allowed to remain on the wharves or landings. We find in the evidence no sufficient proof of any custom in the port of New Orleans as to the length of time that coffee, after being unloaded from a ship, shall be allowed to remain upon the wharves.

The first contention of the appellants is that the effect of the "cesser of liability" clause in the charter party is to take away all right of action by owners or charterers on the charter party when cargo is all delivered on board and bills of lading signed. The cases cited in support of this contention (Sanguinetti v. Navigation Co., 2 Q. B. Div. 238; Gullischen v. Stewart, 13 Q. B. Div. 317) are conclusive as to the proposition that, after cargo is all on board and bills of lading issued, no right of action remains by the owners of the ship against the charterers upon a charter party which contains a "cesser of liability" clause in favor of the charterers; and very properly so, because that is the exact language of the clause itself. Under the charter party in hand, charterers' responsibility is to cease as soon as the cargo is all on board and bills of lading signed; but, conceding this, it by no means follows that the responsibility of the ship, which in the main begins when cargo is loaded on board, shall also cease, and we find no adjudged cases asserting any such