

pressly authorized and required the master to make the settlement, and that, in the absence of fraud or mistake of fact, the settlements made by him would bind the owners. In other words, if made under such circumstances and conditions as to be binding on him if he was dealing on his own behalf, it would be binding on them. And this view is strengthened by the provision contained in paragraph 20, that "any dispute under this charter party shall be settled at port where it arises." Therefore we do not deem it necessary to consider, or at least to express, any view as to the effect which the payment of the draft by the owners, with full knowledge of the facts, without protest or objection, would have on this action. We conclude that the answer of the respondent does present matters that will, if established by the proof, defeat the plaintiff's action, and that the court erred in sustaining the exceptions to the answer. Ben. Adm. § 290; 2 Pars. Shipp. & Adm. 7; Wait, Act. & Def. 476, 478.

We therefore conclude that the district court erred in sustaining the plaintiff's exceptions to so much of the answer of the respondent as showed the manner of taking, receiving, and using such drafts as the one given by the master in this case, and as is shown and relied upon as conclusive of the action of the master with reference to the settlement with the respondent, as evidenced by its bill rendered and his draft in satisfaction thereof. And it is now ordered that the decree appealed from be reversed, and the cause remanded, with instructions to award the respondent a new trial, and to overrule the exceptions to the answer on the merits.

THE BERTHA.

(Circuit Court of Appeals, Third Circuit. December 5, 1898.)

No. 17, September Term.

ADMIRALTY—PLEADING AND EVIDENCE.

On a libel to recover a balance due for repairs made to a tug under a written contract, a cross claim for damages founded upon the claimed breach of extrinsic oral understandings or agreements cannot be considered, when neither the answer nor the cross libel sets up that the writing did not embody the entire contract. Any evidence which may have crept into the case in respect to such supposed oral agreements is irrelevant and inadmissible.

Appeal from the District Court of the United States for the District of New Jersey.

This was a libel by Theodore Smith and others against the steam tug Bertha (Grafton M. Milliken, claimant) to recover a balance alleged to be due under a contract in pursuance of which libelants had placed a new boiler in the tug. The respondents filed a cross libel, claiming damages because of defective performance of the work.

In the district court the following opinion was delivered by KIRKPATRICK, District Judge:

"The libel in this cause was filed to recover, against the steam tug Bertha, the balance due upon the contract price of a new boiler and for sundry repairs made to the engines of the said tug. The correctness of the libelants'

bill is not disputed, nor is it questioned that for the amount due the tug is properly liable. The defense set up by way of a cross libel is that the respondents have the right to recover damages for the defective performance of the work. The work was done under a written contract, which provided for the construction of a boiler for the tug of certain specified dimensions, and which should be built sufficiently strong to pass a steam-boiler inspection for 104 pounds of steam, and tested by a hydrostatic pressure of 160 pounds to the square inch. The work of setting the boiler was completed on the 12th day of December, 1891. The tug was inspected by the officers of the United States government and a license granted. A payment of \$1,000 on the contract price was made by the owners, and the tug delivered to them. On the following day, as the tug was proceeding along the Hudson river, she shipped a sea, and, after going about a mile and a half, sunk. No complaint was made at this time by the respondents that the sinking of the boat was in any way due to the unworkmanlike manner in which the libelants had performed their work, nor was it claimed that the sinking of the tug was due to the improper location of the boiler. The libelants were, after the tug had been raised, employed to do further work upon the tug, another payment was made on account of the contract price, and promises were made respecting the payment of the balance remaining unpaid upon the whole bill of libelants, and insurance policies were delivered as security for the claim. The refusal to pay was not made until after the filing of the libel. The principal objection now urged against the libelants' work is that the boiler was placed so high in the vessel as to render her topheavy, and that it was not suitable for the vessel, and that the sinking of the boat, not only upon the occasion referred to, but shortly afterwards, was due to these facts. I have carefully considered all the evidence offered by both parties in regard to this matter. On the one side we have the opinions of persons not experts to the effect that the boiler was placed too high, who, upon cross-examination, declare that they made no actual measurements from which it would appear that it was practicable to properly place it otherwise; while, on the other hand, there is the evidence of practical men, including one in the employ of the United States, who made a careful examination for the purpose of ascertaining this very fact, to the effect that, when the shape of the boat and size of the boiler are taken into consideration, it would not be possible to lower the boiler any appreciable distance. It does not seem necessary to enter into the particulars of the testimony, but it is sufficient to say that, in my opinion, the evidence fails to show that the contract was not performed in a workmanlike and proper manner. There is testimony on the part of the respondents as to promises and warranties made by and on behalf of the libelants while the work of setting the boiler was in progress, but all of these that are material are denied by the libelants, and, if it were not so, would be void for want of consideration. The rights of parties were fixed by the written contract, and there was nothing to stand as consideration for the oral promise, if it were made. *Conover v. Stillwell*, 34 N. J. Law, 54. The libel is sustained, with costs; and the cross libel dismissed, with costs. Let decrees be entered in accordance therewith."

De Lagnel Berier, for appellant.

John Griffin, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

ACHESON, Circuit Judge. Neither in the answer to the original libel, nor in the cross libel, was the ground taken that the written memorandum did not embody the entire contract between the parties. Therefore, whatever testimony crept into the case, in respect to a supposed prior oral understanding that the libelants (the appellees) were to examine the steam tug *Bertha* and determine how large a boiler she could properly carry, was irrelevant and inadmissible. No such issue was raised by the pleadings. We have, however, carefully

read and considered all the evidence, with a result unfavorable to the appellant. We are well satisfied that the written memorandum sets forth the whole contract. The libelants, we think, assumed no responsibility with respect to the size of the boiler. We are by no means convinced that the boiler was too large for the Bertha, but, if so, her owner (the appellant), who ordered the work, was responsible.

The real defense against the libelants' bill for material furnished and work done for the Bertha set up in the answer was that the boiler was placed too high in the tug, and so as to project above the upper deck, whereas it could have been placed lower; that the libelants agreed that the boiler should be placed below the upper deck, and afterwards, before acceptance of the work, "warranted and agreed" that the tug should be "just as good" with her boiler as actually placed as if it had been below decks. To sustain these allegations the respondents' proofs were mainly directed. The defense failed of proof. The evidence clearly establishes that the boiler was set as low in the tug as was practicable. The alleged agreement to place the boiler below the upper deck is not satisfactorily shown, nor is the alleged agreement of warranty. No defense to the libelants' claim appears. The court below was right in its findings and conclusions. The decrees of the district court upon the libel and cross libel are affirmed.

THE OLINDE RODRIGUES.

(District Court, D. South Carolina. December 23, 1898.)

1. PRIZE—EFFECTIVENESS OF BLOCKADE.

The fact of a capture by a blockading vessel does not determine the effectiveness of the blockade.

2. SAME—EVIDENCE—MOTIVE.

Where the intention of the master of a captured vessel to enter a blockaded port is clearly proved, a motive therefor need not be shown, nor is affirmative evidence of want of motive material.

3. SAME—POWERS OF MASTER.

The acts of the master of a vessel in relation to an attempt to enter a blockaded port are binding on the owner, any abuse of trust on the part of the master being a matter to be settled between them.

4. SAME—EFFECTIVENESS OF BLOCKADE—REQUIREMENTS.

To constitute an effective blockade of an enemy's port, it must be maintained by a sufficient number of vessels, and by vessels of such a character as to render the danger to a vessel attempting to enter evident and manifest.

5. SAME—FACTS CONSIDERED.

The Olinde Rodrigues, a French steamship having a regular route and carrying the French mails, one of the points on such route being the port of San Juan, Puerto Rico, was warned on leaving that port on the outward voyage of its blockade by the United States. In passing it in the usual course of the return voyage, but without any intention of entering, the Rodrigues saw but a single blockading vessel, which was 15 miles from the port, and was the only one on the station, and attempted to enter the port, but was captured. *Held*, that there was not an effective blockade of the port, within the spirit and intent of the law of nations, and that the captured vessel was not lawful prize.