right of action or entry shall have accrued, before the time when this act takes effect, but the same shall remain subject to the laws now in force."

It will be observed, that the limitation act of 1818, being still in force, cannot operate on any of the femes covert of whom the plaintiff claims. It did not begin to run against them until they became discovert, from which time it required twenty years to bar their right. Under such circumstances, no presumption can arise against them, as they had no power to prosecute any one who entered upon their land. No laches can be charged against them until discoverture; and there is no ground to say that either the statute or lapse of time, since that period, can affect the rights of the plaintiff, or of those under whom he claims. The court, therefore, did not err in refusing to give to the jury the instructions requested.

Upon the whole, the judgment of the Circuit Court is affirmed, with costs.

WILLIAM E. POST AND OTHERS, CLAIMANTS OF A PORTION OF THE CARGO OF THE SHIP RICHMOND, APPELLANTS, *v.* JOHN H. JONES AND OTHERS, LIBELLANTS.

It cannot be doubted that a master has power to sell both vessel and cargo, in certain cases of absolute necessity.

But this rule had no application to a wreck where the property is deserted, or about to become so, and the person who has it in his power to save the crew, and salve the cargo, prefers to drive a bargain with the master, and where the necessity is imperative, because it is the price of safety.

No valid reason can be assigned for fixing the reward for salving derelict property at "not more than a half or less than a third of the property saved." The true principle in all cases is, adequate reward according to the circumstances of the case.

Where the property salved was transported by the salvors from Behring's Straits to the Sandwich Islands, and thence to New York, the salvage service was complete when the property was brought to a port of safety. The court allowed the salvors the one-half for this service, and also freight on the other moiety from the Sandwich Islands to New York.

THIS was an appeal from the Circuit Court of the United States for the southern district of New York, sitting in admiralty.

It was a libel filed by the owners of the ship Richmond and cargo, under circumstances which are particularly stated in the opinion of the court.

The District Court dismissed the libel, thereby affirming the sales.

The Circuit Court reversed this decree, and declared the

sales invalid, but that the respondents were entitled to a moiety of the net proceeds, in the New York market, of the articles brought in their respective ships, and sold by the said respondents, respectively; and that they pay to the owners of the Richmond the other moiety of the said proceeds, with interest, to be computed at the rate of seven per cent. per annum, from the dates of the sales of the said articles.

The claimants appealed to this court.

It was argued by *Mr. O'Connor* for the appellants, and *Mr. Lord* for the appellees.

As this case involved some very important points of law, with respect to the rights of captains of vessels upon the ocean, and also the rights and duties of salvors, the reporter thinks it proper to take an extended view of the arguments of counsel, although they sometimes refer to depositions and facts which are not especially mentioned in the narrative, which is given in the opinion of the court.

Mr. O'Connor, for the appellants, made the following points:

First Point.—The decree of the Circuit Court cannot be sustained, unless, by an unbending rule which admits of no exception or qualification, the power of the master to sell is absolutely limited to a sale by auction, with the advantage of free competition between rival purchasers. If, in any case, or under any circumstances, he may sell by private contract and to a single purchaser, the decree is erroneous.

I. The authority of the master to sell in cases of extreme necessity like the present, is, as a general proposition, definitively settled. Even where there is only "a probability of loss, and it is made more hazardous by every day's delay," to act promptly, and thereby "to save *something* for the benefit of all concerned, though but little may be saved," is his imperative duty. (Abbott on shipping, 5 Am. ed., pp. 14, 19; Ib., note to page 19; Brig Sarah Ann, 2 Sumner, 215; New England Ins. Co. *v.* Sarah Ann, 13 Peters, 387.)

II. The master of the Richmond had no other resort, for the purpose of saving anything, than the sale which he made.

1. Even if transportation to the shore was practicable, every witness who was examined testifies that preservation there, through the long winter then approaching, was not possible. The faint intimations to the contrary by *Reeve*, and those still fainter put forth by *Cherry*, scarcely form an exception to the universality of this opinion.

2. That freighting or salvage services were unknown in those

regions, and would not have been undertaken by any one, is still more distinctly established by the proofs. It rests not merely on the uniform opinion of experts, the absence of practice, the extreme remoteness of the scene from the theatre of any human action, except catching whales; for it is proven by the form of the insurance policies used by American whalers, the only civilized visiters of the territory. (1 Seward's Works, p. 242; The Boston, 1 Sumner, 335, 336; Elizabeth and Jane, Ware, 38.)

a. The freight, even as far as the Sandwich Islands, according to the best guess the libellants could elicit from any witness, if obtained by a miracle, would have exceeded the alleged maximum allowance in salvage cases.

b. A salvage service would involve a transportation over 25,000 miles for adjudication. A judgment *in rem* in a foreign intermediate admiralty would not be regular or binding; nor, if so, would it be beneficial to these libellants. (The Hamilton, 3 Hagg, 168.)

III. There was no want of ordinary judgment or prudence in the manner of the sale.

1. He gave notice to every vessel within reach; and, considering the season, the little experience yet had in those seas in respect to the time of its closing, and the great danger there was that the Richmond might go to pieces in case of any delay, prudence dictated the earliest possible action.

a. The experts differ much as to the time of the season closing.

b. Even Reeve deemed it unsafe to stay longer.

c. P. Winters's anxiety to get cargo on board of the Frith for safety even before the sale is manifest.

2. The event is not the proper test, but if applied here it would favor the master's decision. He could not have induced these three ships to lie *idle*, and to lie still in an unlucky spot until the 18th of August, waiting for customers. And if he had the means of working this singular achievement, there is no satisfactory evidence that he could have drummed up a sufficient company to make an auction such as the decree below requires.

3. The weight of evidence is, that as much was obtained as could have been gotten if there were numerous bidders.

4. The want of precision and exactitude as to weight and measure, in a place where neither weights nor measures existed or were in use, is an unimportant circumstance.

5. Dispensing with settlement or payment till the meeting at Sandwich Islands was natural, and indeed necessary; for money was not to be had.

6. The difference in value between oil and bone, which might have led to a more profitable arrangement, did not at the time occur to any one concerned in these transactions. It is not necessary to the validity of the sale, that in every detail the most subtle contrivances ingenuity can suggest for attaining a profitable result should have been resorted to.

IV. There is not the remotest ground for imputing fraud or ill motive to any one concerned.

1. That Philander Winters was in failing health, apprehensive of approaching death, and susceptible of fraternal tenderness, are not circumstances to excite suspicion of *his* motives.

2. The difference in age and experience between the brothers was trivial. There was evidently a total absence of concert between the three purchasing masters; and the weight of evidence is, that the Junior got the greatest amount of bone.

3. The relation between Jonas and Philander Winters, coupled with the omission of Jonas to secure for himself any advantage over the others, and his letting the wreck go to a stranger for $5, conclusively repel every suggestion of this kind. They also present a vivid picture of the extraordinary condition of things produced by a shipwreck in the Arctic regions.

4. The small price given for the wreck is like what frequently happens at regular auction sales with full competition. (7 Law Reporter, 378; 6 Cowen's Rep., 271.)

5. The resort to the forms of an auction may indeed have been idle, as there were not purchasers enough to take the whole, and so, necessarily, no competition; but, pursuing imitatively the practice *in the world*, is not alone adequate proof that these Polar wanderers were seeking to color the transaction.

V. None of the preceding propositions are affected by the testimony of Reeve and Cherry.

1. They are interested in the result, and actual prosecutors of the claim. Their testimony should be wholly rejected as incompetent, because of their interest. (The Boston, 1 Sumner, 328.)

2. They are evidently uncandid, self-impeached in a considerable degree, and are contradicted in many particulars. (The Jane, 2 Hagg, 338; The Boston, 1 Sumner, 345.)

Second Point.—The decree of the Circuit Court appears to borrow some of its principles from analogy to the position, assumed as law, that a contract between salvors and the salved, made at sea, is necessarily and *per se* void. Such is not the case; and the most that can be said on that head is, that the nature of the subject gives apparently more occasion to the

"*chancery of the sea*" than the chancery of the land, to vacate oppressive and unreasonable contracts.

1. There are two *obiter dicta* to that effect in 1 Bee, (pp. 136, 139;) but the English authorities, and those in the American admiralty, including this court, are merely that such agreements must appear to be fair and reasonable. (The True Blue, 2 W. Rob., 176; The Graces, 2 W. Rob., 294; The Westminster, 1 W. Rob., 235; The Industry, 3 Hogg, 205; The Mulgrave, 2 Hogg, 77; The Emulous, 1 Sumner, 210, 211; Houseman *v.* Sch. North Carolina, 15 Peters, 45.)

Third Point.—The libellants err in supposing that the law of nature, which enforces the saving of *life* as a duty, has any force in relation to the saving of property. (The Boston, 1 Summer, 335, 336; The Zephyr, 2 Hogg, 43; The Ganges, 1 Notes of Cases, 87; The Margaret, 2 Hagg, 48, note.)

Fourth Point.—It is not, as claimed by the libellants, a fixed and invariable rule, that salvage, in cases of derelict, shall not exceed one-half the value; and, if such appeared to be the rule in all former decisions, the present is a new case in all its features, and would require a higher compensation.

I. This moiety practice has a very barbarous origin, and is entitled to no respect. The authorities all show that it has no binding force, the allowance being merely discretionary. (The Aquila, 1 C. Rob., 41, 47, and note; 1 Sumner, 214, 215; 1 Story, 323; 1 Ware, 39; The Huntress, 1 Wallace, jr., 70.)

II. The instances of salvage service to be found in the books are confined to the highways of commerce, and within comparatively narrow spaces.

There is no recorded judgment upon the salvage to be allowed for rescuing property from shipwreck, under circumstances at all comparable with the present case. (The Martha, 3 Hagg, 434; Elliotta, 2 Dodson, 75; The Effort, 3 Hagg, 166; L'Esperance, 1 Dodson, 49; Sprague *v.* 140 Bbls. Flour, 1 Story, 197; Peisch *v.* Ware, 4 Cranch, 346; The Reliance, 2 Hagg, 90, note; The Jubilee, 3 Hagg, 43, note; The Jonge, 5 Ch. Rob., 322; Howland *v.* 210 Bbls. Oil, 7 Law Rep., 377; The Swan, 1 W. Rob., 70.)

Fifth Point.—The power of the master to sell in a case of extreme necessity, allows him to sell as he may. In the Polar regions, where, by an invincible and irreversible law of nature, it is impossible to perform the duty of agent for all concerned, in the methods usually employed within the territory of trade and civilization, he may still save what can be saved, by using such means as present themselves.

Mr. Lord, for the appellees, made the following points:

First Point.—1. The whole transaction was in its nature a salvage from a ship in hopeless distress on the high seas, and near an uninhabited coast; with a master and crew dependent on the other ships; which master was willing and had offered to give all the cargo, in order to be taken directly home, after a three years voyage. It therefore belongs to courts of admiralty to judge it by its own rules of humanity, policy, and justice.

2. In all cases within the admiralty jurisdiction, the court, as the chancery of the sea, supervises all attempted contracts, where distress of a ship or her crew enter into the transaction.

3. To allow contracts between parties dependent for salvage service and salvors to be valid, would defeat the jurisdiction of admiralty entirely. (Cowel *v.* The Brothers; Schultz *v.* The Mary, Bee's Rep., 136, 137; The Emulous, 1 Sumn. C. C. R., 210; The Henry Ewbank, 1 Sumn., 416; Bearse *v.* 340 Pigs Copper, 1 Story R., 323; Laws of Oleron, Ch. IV, (Godolphin, art. 4; 1 Peters Adm., App., art. 4 and art. 9;) The Packet, 3 Mason R., 253, 260; La Isabel, 1 Dodson, 273; The Augusta, 1 Dodson, 283; 8 Jurist, 716; The Westminster, 1 W. Rob., 230.)

Second Point.—The form of sale attempted to be made the means of divesting the property of the wrecked ship and cargo, was invalid in law; and, in substance and in circumstance, fraudulent as to the owners of the property.

1. There was no market nor any market value at the time and place of sale, whereby the form of a sale could afford any test of actual value. There was no competition, or expectation of it, by those who were to attend the sale; and the whole question of adequacy of price or reasonableness of conduct is as open as it would have been without the formality; it remains purely a question of salvage. (The Tilton, 5 Mason R., 477; The Sarah Ann, 2 Sumner, 217, S. C., 13 Peters R., 402.)

2. The form of a sale was contrived, arranged, and conducted, not by the master of the wrecked ship, but by his brother, the master of the saving ship, and his associates, masters of the other ships, to whom the master of the wrecked ship had offered to abandon all, for the sake of a speedy passage home. The master of the wrecked ship exercised no power of sale or other power whatever; he was throughout passive, and without the spirit or means of resistance to any demand whatever.

3. The absence of all arrangement to protect the interest of the sellers, as to quantity, security for price, means of examination of detail and mode of selling, would have avoided this form of a sale, if made under any circumstances. In all particulars of quantity saved, value of property, probability of recovery, or of loss, the transaction remains wholly open to be adjudged as in a case of salvage.

Third Point.—The salvage awarded was liberal, and fully and generously sufficient.

1. There was no danger worth remunerating; none beyond any shore salvage.

2. There was no generosity of motive in the salvors; but, on the contrary, there was an attempt to avoid the adjudication of the appropriate salvage tribunal, and actually to secrete the whalebone, the part of the saved property most valuable for the purpose of transportation home.

3. The attempt to show that it was as well to fill up the ships by catching whales and trying out the oil, as by taking oil and whalebone already prepared and at hand, entirely failed, and is intrinsically incredible.

4. The relations between the parties to the wrecked ship and cargo and the two saving ships, should have prevented, and should prevent, the latter from stripping the former, whether by a pretended sale or on a real claim of salvage.

5. The appellate court will not disturb an adjudication of salvage, unless largely erroneous. (The Sybil, 4 Wheaton, 98; Hobart *v.* Drogan, 10 Peters R., 108.).

Mr. Justice GRIER delivered the opinion of the court.

The libellants, owners of the ship Richmond and cargo, filed the libel in this case for an adjustment of salvage.

They allege, that the ship Richmond left the port of Cold Spring, Long Island, on a whaling voyage to the North and South Pacific Ocean, in July, 1846; that on the 2d of August, 1849, in successful prosecution of her voyage, and having nearly a full cargo, she was run upon some rocks on the coast of Behring's Straits, about a half mile from shore; that while so disabled, the whaling ships Elizabeth Frith and the Panama, being in the same neighborhood, and about to return home, but not having full cargoes, each took on board some seven or eight hundred barrels of oil and a large quantity of whalebone from the Richmond; that these vessels have arrived in the port of Sag Harbor, and their owners are proceeding to sell said oil, &c., without adjusting or demanding salvage, unjustly setting up a pretended sale of the Richmond and her cargo to them by her master.

The libellants pray to have possession delivered to them of the oil, &c., or its proceeds, if sold, subject to "*salvage and freight.*"

The claimants, who are owners of the ships Frith and Panama, allege, in their answer, that the Richmond was wholly and irrevocably wrecked; that her officers and crew had abandoned her, and gone on a barren and uninhabited shore near by; that

there were no inhabitants or persons on that part of the globe, from whom any relief could be obtained, or who would accept her cargo, or take charge thereof, for a salvage compensation; that the cargo of the Richmond, though valuable in a good market, was of little or no value where she lay; that the season during which it was practicable to remain was nigh its close; that the entire destruction of both vessel and cargo was inevitable, and the loss of the lives of the crew almost certain; that, under these circumstances, the master of the Richmond concluded to sell the vessel at auction, and so much of her cargo as was desired by the persons present, which was done on the following day, with the assent of the whole ship's company.

Respondents aver that this sale was a fair, honest, and valid sale of the property, made from necessity, in good faith, and for the best interests of all concerned, and that they are the rightful and bona fide owners of the portions of the cargo respectively purchased by them.

The District Court decreed in favor of claimants; on appeal to the Circuit Court, this decree was reversed; the sale was pronounced void, and the respondents treated as salvors only, and permitted to retain a moiety of the proceeds of the property as salvage.

The claimants have appealed to this court, and the questions proposed for our consideration are, 1st, whether, under the peculiar circumstances of this case, the sale should be treated as conferring a valid title; and, if not, 2d, whether the salvage allowed was sufficient.

1. In the examination of the first question, we shall not inquire whether there is any truth in the allegation that the master of the Richmond was in such a state of bodily and mental infirmity as to render him incapable of acting; or whether he was governed wholly by the undue influence and suggestions of his brother, the master of the Frith. For the decision of this point, it will not be found necessary to impute to him either weakness of intellect or want of good faith.

It cannot be doubted that a master has power to sell both vessel and cargo in certain cases of absolute necessity. This, though now the received doctrine of the modern English and American cases, has not been universally received as a principle of maritime law. The Consulado del Mare (art. 253) allows the master a power to sell, when a vessel becomes unseaworthy from age; while the laws of Oleron and Wisby, and the ancient French ordinances, deny such power to the master in any case. The reason given by Valin is, that such a permission, under any circumstances, would tend to encourage fraud. But, while the power is not denied, its exercise should be closely scruti-

nized by the court, lest it be abused. Without pretending to enumerate or classify the multitude of cases on this subject, or to state all the possible conditions under which this necessity may exist, we may say that it is applied to cases where the vessel is disabled, stranded, or sunk; where the master has no means and can raise no funds to repair her so as to prosecute his voyage; yet, where the *spes recuperandi* may have a value in the market, or the boats, the anchor, or the rigging, are or may be saved, and have a value in market; where the cargo, though damaged, has a value, because it has a market, and it may be for the interest of all concerned that it be sold. All the cases assume the fact of a sale, in a civilized country, where men have money, where there is a market and competition. They have no application to wreck in a distant ocean, where the property is derelict, or about to become so, and the person who has it in his power to save the crew and salve the cargo prefers to drive a bargain with the master. The necessity in such a case may be imperative, because it is the price of safety, but it is not of that character which permits the master to exercise this power.

As many of the circumstances attending this case are peculiar and novel, it may not be improper to give a brief statement of them. The Richmond, after a ramble of three years on the Pacific, in pursuit of whales, had passed through the sea of Anadin, and was near Behring's Straits, in the Arctic ocean, on the 2d of August, 1849. She had nearly completed her cargo, and was about to return; but, during a thick fog, she was run upon rocks, within half a mile of the shore, and in a situation from which it was impossible to extricate her. The master and crew escaped in their boats to the shore, holding communication with the vessel, without much difficulty or danger. They could probably have transported the cargo to the beach, but this would have been unprofitable labor, as its condition would not have been improved. Though saved from the ocean, it would not have been safe. The coast was barren; the few inhabitants, savages and thieves. This ocean is navigable for only about two months in the year; during the remainder of the year it is sealed up with ice. The winter was expected to commence within fifteen or twenty days, at farthest. The nearest port of safety and general commercial intercourse was at the Sandwich Islands, five thousand miles distant. Their only hope of escape from this inhospitable region was by means of other whaling vessels, which were known to be cruising at no great distance, and who had been in company with the Richmond, and had pursued the same course.

On the 5th of August the fog cleared off, and the ship Eliza-

beth Frith was seen at a short distance. The officers of the Richmond immediately went on board, and the master informed the master of the Frith of the disaster which had befallen the Richmond. He requested him to take his crew on board, and said, "You need not whale any more; there is plenty of oil there, which you may take, and get away as soon as possible." On the following day they took on board the Frith about 300 barrels oil from the Richmond. On the 6th, the Panama and the Junior came near; they had not quite completed their cargoes; as there was more oil in the Richmond than they could all take, it was proposed that they also should complete their cargoes in the same way. Captain Tinkham, of the Junior, proposed to take part of the crew of the Richmond, and said he would take part of the oil, "provided it was put up and sold at auction." In pursuance of this suggestion, advertisements were posted on each of the three vessels, signed *by* or *for* the master of the Richmond. On the following day the forms of an auction sale were enacted; the master of the Frith bidding one dollar per barrel for as much as he needed, and the others seventy-five cents. The ship and tackle were sold for five dollars; no money was paid, and no account kept or bill of sale made out. Each vessel took enough to complete her cargo of oil and bone. The transfer was effected in a couple of days, with some trouble and labor, but little or no risk or danger, and the vessels immediately proceeded on their voyage, stopping as usual at the Sandwich Islands.

Now, it is evident, from this statement of the facts, that, although the Richmond was stranded near the shore upon which her crew and even her cargo might have been saved from the dangers of the sea, they were really in no better situation as to ultimate safety than if foundered or disabled in the midst of the Pacific ocean. The crew were glad to escape with their lives. The ship and cargo, though not actually derelict, must necessarily have been abandoned. The contrivance of an auction sale, under such circumstances, where the master of the Richmond was hopeless, helpless, and passive—where there was no market, no money, no competition—where one party had absolute power, and the other no choice but submission—where the vendor must take what is offered or get nothing—is a transaction which has no characteristic of a valid contract. It has been contended by the claimants that it would be a great hardship to treat this sale as a nullity, and thus compel them to assume the character of salvors, because they were not bound to save this property, especially at so great a distance from any port of safety, and in a place where they could have completed their cargo in a short time from their own

catchings, and where salvage would be no compensation for the loss of this opportunity. The force of these arguments is fully appreciated, but we think they are not fully sustained by the facts of the case. Whales may have been plenty around their vessels on the 6th and 7th of August, but, judging of the future from the past, the anticipation of filling up their cargo in the few days of the season in which it would be safe to remain, was very uncertain, and barely probable. The whales were retreating towards the north pole, where they could not be pursued, and, though seen in numbers on one day, they would disappear on the next; and, even when seen in greatest numbers, their capture was uncertain. By this transaction, the vessels were enabled to proceed at once on their home voyage; and the certainty of a liberal salvage allowance for the property rescued will be ample compensation for the possible chance of greater profits, by refusing their assistance in saving their neighbor's property.

It has been contended, also, that the sale was justifiable and valid, because it was better for the interests of all concerned to accept what was offered, than suffer a total loss. But this argument proves too much, as it would justify every sale to a salvor. Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit. (See 1 Sumner, 210.) The general interests of commerce will be much better promoted by requiring the salvor to trust for compensation to the liberal recompense usually awarded by courts for such services. We are of opinion, therefore, that the claimants have not obtained a valid title to the property in dispute, but must be treated as salvors.

2. As to the amount of salvage.

While we assent to the general rule stated by this court, in Hobart *v.* Dorgan, (10 Peters, 119,) that "it is against policy and public convenience to encourage appeals of this sort in matters of discretion," yet it is equally true, that where the law gives a party an appeal, he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause. Hence many cases are to be found where the appellate court have either increased or diminished the allowance of salvage originally made, even where it did not "violate any of the just principles which should regulate the subject." (See The Thetis, 2 Knapp, 410.)

Where it is not fixed by statute, the amount of salvage must necessarily rest on an enlarged discretion, according to the circumstances of each case.

The case before us is properly one of derelict. In such cases, it has frequently been asserted, as a general rule, that the compensation should not be more than half nor less than a third of the property saved. But we agree with Dr. Lushington, (The Florence, 20 E. L. and C. R., 622,) "that the reward in derelict cases should be governed by the same principles as other salvage cases—namely, danger to property, value, risk of life, skill, labor, and the duration of the service;" and that "no valid reason can be assigned for fixing a reward for salving derelict property at a moiety or any given proportion; and that the true principle is, adequate reward, according to the circumstances of the case." (See, also, The Thetis, cited above.)

The peculiar circumstances of this case, which distinguish it from all others, and which would justify the most liberal allowance for salvage, is the distance from the home port, twenty-seven thousand miles; and from the Sandwich Islands, the nearest port of safety, five thousand miles. The transfer of the property from the wreck required no extraordinary exertions or hazards, nor any great delay. The greatest loss incurred was the possible chance, that before the season closed in, the salving vessels might have taken a full cargo of their own oil. But we think this uncertain and doubtful speculation will be fairly compensated by the certainty of a moiety of the salved property at the first port of safety. The libellants claim only the balance, "after deducting salvage and *freight*," conceding that, under the circumstances, the salvors were entitled to both. When the property was brought to a port of safety, the salvage service was complete, and the salvors should be allowed freight for carrying the owners' moiety over twenty thousand miles to a better market, at the home port. As this case has presented very unusual circumstances, and as we think the claimants have acted in good faith in making their defence, all the taxed costs should be paid out of the fund in court.

The case is therefore remitted to the Circuit Court, to have the amount due to each party adjusted, according to the principles stated.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the southern district of New York, and was argued by counsel.

On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to have the amount due to each party adjusted, according to the principles stated in the opinion of this court, and that all the costs of said cause in this court, and in the Circuit and District Courts, be paid out of the fund in the said Circuit Court.

E. J. DUPONT DE NEMOURS & CO., LIBELLANTS AND APPELLANTS, *v.* JOHN VANCE ET AL., CLAIMANTS OF THE BRIG ANN ELIZABETH.

To be seaworthy as respects cargo, the hull of a vessel must be so tight, stanch, and strong, as to resist the ordinary action of the sea during the voyage, without damage or loss of cargo.

A jettison, rendered necessary by a peril of the sea, is a loss by such peril within the meaning of the exception contained in bills of lading—aliter, if unseaworthiness of the vessel caused or contributed to the necessity for the jettison.

The owner of cargo jettisoned has a maritime lien on the vessel for the contributory share due from the vessel on an adjustment of the general average, which lien may be enforced by a proceeding in rem in the admiralty.

Where the libel alleged a shipment of cargo under a bill of lading, and its non-delivery, and prayed process against the vessel, and the answer set up a jettison rendered necessary by a peril of the sea, and this defensive allegation was sustained by the court, it was held that the libellant was entitled to a decree for the contributory share of general average due from the vessel.

There are no technical rules of variance or departure in pleading in the admiralty.

THIS was an appeal from the Circuit Court of the United States for the eastern district of Louisiana, sitting in admiralty.

As many points were decided by this court which were not raised in the court below, it is proper to explain to the reader how this happened; and this will best be done by tracing the history of the case from its commencement.

In December, 1852, Dupont de Nemours & Co. shipped at their wharf, on the river Delaware, an invoice of gunpowder in kegs, &c., the value at the place of shipment being, by the invoice, $6,325. The articles were shipped on board the Ann Elizabeth, bound to New Orleans, and owned by the claimants in this cause. Two bills of lading were signed by the mate, and delivered to the shippers. The brig sailed on December 21, 1852.

After the arrival of the vessel at New Orleans, the shippers