The resemblance between the trustee for the estate of an insolvent debtor, in the district of Columbia, and the assignees of a bankrupt is admitted; yet a clear distinction exists between the cases cited at bar and
*39] *that before the court. In those cases, the deed was declared void, without any view to creditors. In this case, the deed is declared void for the particular benefit of creditors. To set up this deed against the creditors, would be to defeat the very object for which the law was made. The counsel for the appellant is well apprised of this distinction, and though he claims for his clients the benefit of this deed against the trustee, he admits that it could not be sustained against the creditors suing in their own names.

In reason, there can be no difference between this suit, which asserts the right of the creditors, in the mode prescribed by law, and an assertion of that right in their own names. Nor does the law distinguish between them. The cases cited did not turn on any distinction between the rights of the assignee and the creditors, but on the preference which ought to be given to him who has trusted on the credit of the particular fund over those who had trusted the general fund. The decree is affirmed, with costs.

Decree affirmed.

Marcardier *v.* Chesapeake Insurance Company.

Marine insurance.—Total loss.—Memorandum articles.—Charter-party.

Where a technical total loss is sought to be maintained, upon the mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, all deterioration of memorandum articles must be excluded from the estimate. Therefore, in a cargo of a mixed character, no abandonment for mere deterioration in value, during the voyage, can be valid, unless the damage on the memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles.[1]

Where the general owner of a ship retains the possession, command and navigation of the same, and contracts to carry a cargo on freight, for the voyage, the charter-party is to be considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership.[2] In such case, the general owner is also owner for the voyage; consequently, if he be the master of the vessel, he is incapable of committing barratry.

Error to the Circuit Court for the district of Maryland. The facts of this case were thus stated by Story, J., in delivering the opinion of the court:

This is an action on a policy of insurance, underwritten by the defendants, on the 29th of October 1806, for $31,000, upon any kind of lawful goods on board the brig Betsey, whereof Alexander McDougal was then
*40] *master, on a voyage at and from New York to Nantes. McDougal was the general owner of the brig, and on the 1st day of October 1806, by a charter-party of affreightment, made with the plaintiff, granted and to freight let, to the plaintiff, the said brig, excepting and reserving her cabin, for the use of the master and mate, and for accommodation of

[1] See Morean *v.* United States Ins. Co., 1 Wheat. 219; s. c. 3 W. C. C. 256; Humphreys *v.* Union Ins. Co., 3 Mason 429; Robinson *v.* Commonwealth Ins. Co., 3 Sumn. 220; Great Western Ins. Co. *v.* Fogarty, 19 Wall. 640.

[2] Reed *v.* United States, 11 Wall. 601; Leary *v.* United States, 17 Id. 611; Shaw *v.* United States, 93 U. S. 235.

passengers, as therein mentioned, and so much room in the hold as might be necessary for the mariners, and storage of water, wood, provisions and cables, for the voyage from New York to Nantes; and McDougal, by the same instrument, covenanted to man, victual and navigate the brig, at his own charge, during the voyage, and to receive on board any shipment of goods, not contraband, which the plaintiff should tender at the side of the ship, or within reach of her tackles, at New York, and to stow and secure the same, and proceed therewith to Nantes, and there discharge the same. The passengers on board the brig were to be at the joint expense of the parties, and the passage-money was to be equally divided between them. The other clauses in the charter-party are not material to be stated, except that the plaintiff covenanted to pay the stipulated freight and demurrage. The cargo put on board by the plaintiff, was of the invoice value of $29,889, of which $7439 were in memorandum articles.

The brig sailed on the voyage, under the command of McDougal, on the 9th of November 1806, and during the voyage, was compelled by stress of weather, and other accidents, to bear away for the West Indies, and arrived at the port of St. Johns, in Antigua, on the 22d day of December. There the master made application to the vice-admiralty for a survey, &c., and such proceedings were had upon his application, that the cargo was landed, and by a decretal order of the court, of the 31st of January 1807, the same was ordered to be sold for the benefit of all concerned, reserving the question as to freight. Under this decree, the cargo was accordingly sold, and the sales completed before the 28th of March 1807; and the net proceeds of the whole of the plaintiff's property amounted to $13,767. The net proceeds of the memorandum articles, included in the same sum, were $6863.30. The whole proceeds were paid over to an agent appointed by McDougal, and the freight for the whole voyage was allowed him by the admiralty, upon a report *of commissioners, to whom the question was referred. [*41

The brig was repaired at Antigua, within a reasonable time, at the expense of one-sixth only of her value, and capable of performing the voyage with the original cargo; but McDougal voluntarily abandoned the voyage, at Antigua, for his own emolument and advantage. Of the cargo, 99 bags of coffee were spoiled and thrown overboard, and the residue greatly damaged by the perils of the seas; and the whole cargo, including the memorandum articles, sustained a damage, during the voyage, exceeding a moiety of its original value. On the 4th of February 1807, and within a reasonable time after receiving information of the loss, the plaintiff abandoned the whole cargo to the underwriters.

The declaration contained two counts, for a total loss: 1st, by the perils of the seas; and 2d, by barratry of the master. At the trial, the court below, upon the facts and circumstances above stated, held that the plaintiff was not entitled to recover, as for a total loss of the cargo insured, including the memorandum articles; and the cause came up to this court, upon a bill of exceptions to that opinion.

Harper, for the plaintiff.—The great controversy between the parties in this case, turns on the question, whether the loss of the cargo now under consideration, was partial or total. It is contended, on the part of the plain-

tiff, that it was a total loss. 1st. By the dangers of the seas. 2d. By the barratry of the master.

By the dangers of the seas: 1st. Because the voyage was broken up and lost by the deterioration of the cargo, to more than half of its value. 2d. Because there may be a total loss of memorandum articles, by the loss of the voyage; although the articles themselves remain in existence, and of some value.

*42] *By the barratry of the master: 1st. Because the acts imputed to him, amount to barratry, if he were in a situation to commit it. 2d. Because by the charter-party, the plaintiff became owner *pro hâc vice*, and McDougal merely master, so as to be in a situation to commit barratry.

The question to be first considered, may be stated as follows: Whether, in case a cargo consists partly of memorandum articles (on which no partial loss can be recovered), a total loss is incurred, by the breaking up of the voyage on account of such a deterioration of the whole cargo (including a deterioration of the memorandum articles), as reduces the value of the whole cargo more than one half? We hold the affirmative of the question.

But there are two cases which have been considered as very strong in favor of the negative. These are, 1st. The case of *Wilson & another* v. *Smith*, 3 Burr. 1550, cited also in Marsh. (1st Am. ed.) 141. This was of a ship with a cargo of corn, which, having met with a storm, was obliged to run for the nearest port to refit, where she incurred a considerable expense in repairs. On her arrival at her port of destination, it was found, that the corn was damaged to more than half its value. Lord MANSFIELD decided, that this loss, not being of the nature of a general average, nor arising from the ship's being stranded, could not be recovered on the policy; for that the words of the memorandum, "free from average, unless general, or the ship be stranded," did not make a condition, but only an exception. The answer to this case is, that the vessel had arrived at the place of destination; the voyage, therefore, was not broken up, and so no total loss could be claimed, on the ground, that the cargo was deteriorated more than half its value.

*43] *2d. The other case, and that which is chiefly relied upon by the defendants, is the case of *Cocking* v. *Fraser*, Marsh. (1st Am. ed.) 144. Here, the voyage was broken up; and it was decided by Lord MANSFIELD, and the other justices who sat in the cause, one of whom was Mr. Justice BULLER, that if the articles for which the insurer is warranted to be free from average, except general, specifically remain, after the voyage, though by sea damage they are rendered of no value, yet, if the ship has not been stranded, this is only a partial loss, for which the insurer is not liable. The authority of this case, it must be confessed, would go far to prevent the present plaintiff from recovering as for a total loss, were it not for the observations made upon it by Lord KENYON, in the case of *Burnett* v. *Kensington*, 7 T. R. 210; also Marsh. (1st Am. ed.) 151. The opinion of the court in that case tends very much to invalidate its authority.

The principle of *Cocking* v. *Fraser*, is also overruled in the case of *McAndrews* v. *Vaughan*, Marsh. (1st Am. ed.) 150, and Park 114, which goes to show, that, where a cargo consists of memorandum articles, if the voyage be lost, the assured may recover as for a total loss, though the cargo be not wholly destroyed. And there is, in fact, the same reason that the

breaking up of a voyage, in case of memorandum articles, should constitute a total loss, as where the cargo consists of articles not mentioned in the memorandum. The general doctrine now is, with regard to both descriptions of goods, that there may be a total loss by the breaking up of the voyage.

Dyson v. *Rowcroft*, 3 Bos. & Pul. 474, is another case against the principle laid down in *Cocking* v. *Fraser*. The opinion of the court here, was, that it is a total loss of memorandum articles, although they may remain in specie, if they become so much damaged as to be no longer worth carrying to the port of destination.

The next question is, whether there was a total loss *by the barratry of the master; and this must be decided by ascertaining who [*44 was the owner of the vessel for the voyage; for it is agreed on all hands, that if the master was in a situation to commit barratry, he was actually guilty of that offence. A person may be owner for the voyage, who is not the general owner of the ship; and barratry may be committed against such person, by the master, although the barratrous act of the master may have been done with the consent of the actual general owner. *Vallejo* v. *Wheeler*, Cowp. 143. See the same case also in Marsh. (1st Am. ed.) 454. In the case now before the court, Marcardier, the plaintiff, was owner of the vessel *pro hâc vice*, although McDougal, the master, was the general owner. We contend, therefore, that, according to the principles laid down in the case last cited, the master was in a situation to commit barratry against the plaintiff; that he has actually done so; and therefore, that the plaintiff is entitled to recover as for a total loss.

Pinkney, contrà.—It has been contended for the plaintiff, that there may be a total loss by the breaking up of a voyage, if the goods on board be deteriorated more than half. No English authority, to this effect, is recollected. The courts in New York have so decided, it is true; but the principle may be considered as arbitrary, and the decision as local. According to Marshall (Eng. ed.), vol. 2, p. 486, if the goods insured specifically remain, and are actually landed at the port of delivery, however damaged in the voyage, the injury will amount but to a partial loss. Why, then, should the assured have a right to abandon as for a total loss, at an intermediate port, if the goods can be carried, in the same or another ship, to the place of destination? All the authorities in favor of the right to abandon at an intermediate port, are cases where the voyage was broken up by the incapacity of the vessel to perform it. But in the present case, there was no such incapacity. The vessel *was repaired at Antigua, within a reasonable [*45 time, at the expense of one-sixth of her value, and was capable of performing the voyage, with a considerable part (at least one-third) of the original cargo. The case, therefore, is materially different from those cited on the part of the plaintiff. See Park's observations on the cases of *Cocking* v. *Fraser*, and *Dyson* v. *Rowcroft*, 1 Park (6th Lon. ed.) 152; also *Manning* v. *Newnham* (3 Doug. 130).

It is the opinion of the best judges, in cases of this nature, that the law of abandonment has already been carried far enough; but the counsel for the plaintiff would carry it to an extent hitherto unprecedented.

With regard to memorandum articles, all the authorities go to show,

that there must be an actual total loss, in order to justify an abandonment. A technical total loss is not sufficient. The underwriters are not liable for mere deterioration, however great, of such articles: they refuse to have anything to do with it, on account of the difficulty of knowing the real cause of such deterioration. 1 Marsh. (Eng. ed.) 227, note to the case of *Cocking* v. *Fraser*. As to memorandum articles also, the intermediate port makes no difference. In the case of *Dyson* v. *Rowcroft*, 3 Bos. & Pul. 474, there was an actual total loss. The court, in that case, do not mean to say, that memorandum articles may be subject to a technical total loss.

The alleged barratry is next to be considered. The question arising on this point is, as has been already stated, whether the master, under the circumstances of the case, could commit barratry. If he could, the facts seem to show that he was guilty of the offence. But we contend, that the master was, in fact, the owner of the vessel for the voyage, as well as general owner, and therefore, since barratry is a fraud against the owner, he could not be guilty of that offence, inasmuch as a man cannot commit a fraud against himself. The charter-party, in this case, is of a peculiar construction; it sounds in covenant throughout; it is clearly not an assign-
*46] ment of the property to the plaintiff, *pro hâc vice*: *The master finds the crew, pays them, provides for them, and has the whole management of the vessel: he must, therefore, be considered as owner for the voyage. In *Vallejo* v. *Wheeler*, the charter-party is not set forth, but it is stated in the case, that the freighter employed the master and crew, and paid the crew; the court said, it would be different, if it were not a general freighting. Here, the plaintiff was not a general freighter. Loft, who also reports the case of *Vallejo* v. *Wheeler* (Loft 641), says, that where the master employs and pays the crew, &c., the charter-party seems to be rather a covenant, and does not make the freighter owner for the voyage. *McIntire* v. *Browne*, 1 Johns. 229; *Hallet* v. *Columbian Insurance Company*, 8 Ibid. 272; *Hooe* v. *Groverman*, 1 Cr. 214.

Harper, in reply.—The question as to barratry is, who had the beneficial interest in the vessel, during the voyage. There can be no doubt, that the beneficial interest was in the plaintiff. It is of no importance, as it regards the ownership of the vessel, by whom the crew was furnished, provided for, &c. The freighting of a vessel, where the crew and other necessaries for the voyage are provided by the general owner, is merely like hiring a house, ready furnished, instead of hiring it empty, where the temporary ownership is no less in the hirer, in the former case, than in the latter.

Thursday, February 17th, 1814. (Absent, Washington, J.) STORY, J., delivered the opinion of the court, as follows:—The plaintiff in this case contends, that there was a total loss, which authorized an abandonment by both of the perils stated in the declaration viz: 1st. By the perils of the seas; and 2d. By barratry of the master.

*47] And first, as to a total loss by the perils of the seas. *It seems now clear, that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination. In such case, although the ship be in a capacity to perform the

voyage, yet if the voyage be not worth pursuing, or the thing insured be so damaged and spoiled as to be of little or no value, the assured has a right to abandon the projected adventure, and throw upon the underwriter the unprofitable and disastrous subject of insurance. It has, therefore, been held, that if a cargo be damaged, in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of a total loss. It does not, however, appear that the exact *quantum* of damage which shall authorize an abandonment as for a total loss, has ever become the direct subject of adjudication in the English courts. The celebrated treatise Le Guidon, ch. 7, art. 1, considers that a damage exceeding the moiety of the value of the thing iusured, is sufficient to authorize an abandonment. This rule has received some countenance from more recent elementary writers ; and from its public convenience and certainty, has been adopted as the governing principle, in some of the most respectable commercial states in the Union ; and perhaps, is now so generally established as not easily to be shaken. 1 Johns. Cas. 141 ; 1 Johns. Rep. 335, 406 ; Marsh. Ins. 562, note 92 (Am. edit. 1810) ; Park 194, 6th edition.

But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is, to protect the underwriter from all partial losses ; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine, that nothing short of a total extinction, either physical or in value, of memorandum articles, at an intermediate port, would entitle the assured to turn the case into a total loss, where the voyage is capable of being performed. And perhaps, even as to an extinction in value, where the commodity specifically remains, it may yet be deemed not quite settled whether, *under the like circumstances, it would authorize an abandonment for a total loss. *Dyson* v. *Rowcroft*, 3 Bos. & Pul. 474 ; *Maggrath* v. *Church*, 1 Caines 212 ; *Cocking* v. *Fraser*, Marsh. 227 ; Park 152, 6th edition. [*48

The case before the court is of a mixed character. It embraces articles of both descriptions ; some within, and others without, the purview of the memorandum. If, in such a case, a deterioration exceeding a moiety in value, be a proper case of technical total loss, it will follow, that in many cases, the underwriter will, indirectly, be rendered responsible for partial losses on the memorandum articles. Suppose, in such a case, the damage of the memorandum articles were forty per cent. and to the other articles ten per cent., in the whole amounting to half the value of the cargo, the underwriter would be responsible for a technical total loss, and thereby made to bear the whole damage, from which the memorandum meant to exempt him. Indeed, cases might arise in which the damage might exclusively fall on memorandum articles ; and if it exceeded the moiety in value of the whole cargo, might load him with the burden of a partial loss, in manifest contravention of the intention of the parties. A construction which leads to such a consequence cannot be admitted, unless it be unavoidable. And we are entirely satisfied, that such a construction ought not to prevail. The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles ; and in order to effectuate this right, it is necessary, where a technical total loss is sought to be maintained, upon the

mere ground of deterioration of the cargo, at an intermediate port, to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles. Upon this principle, on a cargo of a mixed character, no abandonment for mere deterioration in value, during the voyage, can be valid, unless the damage on the non-memorandum articles exceed a moiety of the value of the whole cargo, including the memorandum articles. The case is considered, as to the underwriter, the same as though the memorandum articles should exist in their original sound state. In this way, full effect is
*49] given to the contract of the parties. The underwriter *is never made responsible for partial losses on memorandum articles, however great; and the technical total losses for which alone he can be liable, are such as stand unaffected by the perishable nature of the commodity which he insures.

In the present case, the facts alleged by the plaintiff do not show a depreciation of a moiety in value, excluding the memorandum articles. There is no evidence of the *quantum* of depreciation of any part of the cargo. The forced sales at Antigua could not, under the circumstances, constitute a medium by which to ascertain it. Admitting, therefore, the rule to be correct, that the party had a right to abandon, where the depreciation exceeds a moiety of the value, the plaintiff has not brought himself within that rule, as applied to a cargo of a mixed character like the present. The court below were right, therefore, in deciding that there was no total loss proved by the perils of the seas.

The next question is, whether there was a total loss by the barratry of the master? And this depends exclusively upon the consideration, who was owner of the brig for the voyage; for it is conceded, on all sides, that the conduct of the master was barratrous, if he was in a situation to commit that offence. Barratry is an act committed by the master or mariners of a ship, for some unlawful or fraudulent purpose, contrary to their duty to their owners, whereby the latter sustain an injury. It follows, therefore, from the very terms of the definition, that it cannot be committed by a master, who is owner for the voyage; because he cannot commit a fraud against himself. But it may be committed against a person who is owner for the voyage, although he may not be the general owner of the ship. A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command and navigation of the ship. Such is understood to have been the case of *Vallejo* v. *Wheeler*, Cowp. 143. But where the general owner retains the possession, command and navigation of the ship, and contracts to carry a cargo on freight, for the voyage, the charter-party is considered as a mere affreightment, sounding in covenant, and the freighter is not clothed with the char-
*50] acter *or legal responsibility of ownship; such was the case of *Hooe* v. *Groverman*, in this court (1 Cr. 214). In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case, the responsibility rests on the general owner. On examining the charter-party in the present case, there can be no doubt, from the terms and stipulations, that it falls within the latter class of cases. The master, who was the general owner, retained the exclusive possession, command and management of the vessel, and she was navigated at his expense during the voyage. The whole charter-party, except the introduc-

tory clause, sounds merely in covenant. The ownership was not divested by the covenant of affreightment, and consequently, the master was incapable of committing barratry. There was, then, no total loss on the second count in the declaration.

The opinion of the circuit court on this exception must be sustained. But there are other exceptions on the record, in which it is admitted by the parties that the circuit court erred. The points intended to be raised in these exceptions have, in effect, being decided by this court in *Caze and Richaud* v. *Baltimore Insurance Company*, at February term 1813. (7 Cr. 358.) For the errors in these exceptions, the judgment must be reversed, with directions to the circuit court to award a *venire facias de novo*.

Judgment reversed.

Hall *v.* Leigh *et al.* (*a*)

Principal and factor.

If two joint-owners of merchandise consign it to a merchant for sale, and inform him that each owns one moiety; and if they give separate and variant instructions, each for his own moiety; one of the consignors alone may maintain a separate action against the consignee, for a violation of his separate instructions.

This case is so fully stated in the opinion of the court that it is deemed unnecessary to add more than that *Harper* and *Pinkney*, for the plaintiff in error, did not argue the case, as there was no appearance for the defendants in error, but simply stated, that they contended that the separate instructions of each owner severed the joint interest, and cited 1 Esp. 117, and Watson on Partnership 233–34.

*February 18th, 1814. Livingston, J., delivered the opinion of the court, as follows:—This cause comes here on a writ of error to the [*51 Circuit Court of the United States for the district of Maryland. This action was brought by the plaintiff, who was also plaintiff below, to recover the proceeds of one hundred bags of cotton, which had been shipped to the defendants, and by them sold on commission.

At the trial, it appeared, that the plaintiff, together with William Potts & Co., in 1807, made a joint shipment of two hundred bales of cotton to the address of the defendants, who resided at Liverpool, to make sale thereof for their joint benefit. This cotton belonged, one-half to the plaintiff, and the other half to William Potts & Co. The shipment was accompanied by two letters to the defendants, the one written by the plaintiff, bearing date 14th February 1807, in which, after advising them of the shipment, he adds, "Mr. Potts has written you on the subject of his interest in this adventure; for myself, I have to request that you will, after covering me in cost and charges, make such disposition of my one-half the shipment as your own judgment may think best for my interest."

The other letter was written by William Potts & Co., and is dated 5th February 1807, in which they also advised the defendants of the shipment which they say is "for account of Mr. Hall and ourselves, each one-half," and after directing what is to be done with their moiety, they observe, that

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(*a*) February 12th, 1814. Absent, Washington, Justice.