

*WILLINKS *v.* HOLLINGSWORTH *et al.**Recoupment of damages.*

H. and others, merchants, in Baltimore, consigned a vessel and cargo to W. and others, merchants, in Amsterdam, with instructions to them respecting her ulterior destination, which showed, that on the failure of getting a freight to Batavia, or of selling the vessel at a price limited, she was to proceed to St. Petersburg, and there take in a return-cargo of Russian goods for the United States, but with instructions to the master, committing to him the management of the ulterior voyage. No freight to Batavia could be obtained, and the vessel could not be sold for the price limited, at Amsterdam, and W. and others purchased, in Amsterdam, with the concurrence of the master, a return-cargo of Russian goods, partly with the money of H. and others, and partly with money advanced by themselves. On the return of the vessel to Baltimore, H. and others objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and gave notice to W. and others, of their determination to hold them responsible for all losses sustained in consequence of this breach of instructions ; but received the goods and sold them. W. and others brought an *assumpsit* against H. and others, to recover from them the moneys advanced ; the declaration contained the three usual money counts : *Held*, 1st. That the plaintiffs had a demand in law against the defendants, which could be maintained in this form of action : 2d. That whether the plaintiffs could, or could not, be made responsible in any form of action which might be devised, for the possible loss resulting from the breaking up of the intended voyage to St. Petersburg, the defendants were not entitled to a deduction from the plaintiffs' demand, for the amount of such loss.

THIS was an action of *assumpsit*, brought in the Circuit Court of Maryland, by the plaintiffs, who were merchants of Amsterdam, to recover from the defendants, merchants of Baltimore, a sum of money advanced by the plaintiffs, in Amsterdam, for the *cargo of the Henry Clay, a vessel [*241 belonging to the defendants, which had been consigned by them to the plaintiffs, with an outward cargo, and with orders respecting her ulterior destination, which showed, that on the failure of getting a freight to Batavia, or of selling her at Amsterdam, she was to go to St. Petersburg, and there take in a return-cargo of Russian goods for the United States. The plaintiffs purchased, in Amsterdam, with the concurrence of the master, a return-cargo for the Henry Clay, partly with the money of the defendants, and partly with money advanced by themselves. On her arrival at Baltimore, the defendants objected to the purchase of this cargo in Amsterdam, as being contrary to express orders, and immediately gave notice to the plaintiffs, of their disapprobation of the transaction, and of their determination to hold them responsible for all losses sustained in consequence of this departure from instructions. They, however, received the cargo, and sold it.

The declaration contained three counts : the first, for money lent and advanced to the defendants ; the second, for money laid out and expended for their use ; and the third, for money received by them for the use of the plaintiffs.

On the trial of the cause, in the circuit court, the defendants prayed the court to instruct the jury, that upon the whole evidence, which was spread on the record, "the plaintiffs have not any demand in law against the defendants, which can be maintained in this action ; but that, if they have, the defendants *are entitled to a deduction from the same, of the amount [*242 of the loss which the jury shall find the said defendants sustained, by reason of the alteration aforesaid, in the destination to St. Petersburg, of the said ship, and the loading her as aforesaid at Amsterdam." On this

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motion, the judges were divided in opinion, and the division certified to this court.

The evidence principally consisted of two letters, dated the 29th of April 1815, written by McKim, one of the defendants, addressed, the one to the plaintiffs, the other to the master of the Henry Clay. That to the plaintiffs was as follows :

"Gentlemen : The owners of the ship Henry Clay having appointed me the ship's husband for this voyage, and from the introduction of our mutual friends, Robert Gilmor & Sons, I have been directed by the owners, to consign the ship to your house, also that part of her cargo which I consider belongs to her owners jointly, agreeable to the invoice, amounting to \$13€3.40. You will find, that the owners of the ship have shipped tobacco, on their separate accounts ; the proceeds are to be placed to the credit of John McKim, Jun., to remain a fund for the purpose of loading the ship, if she should proceed to St. Petersburg. The freight and primage, and also Captain Charles Gantt's bills, which are now inclosed, drawn on you for the sum of 6550 guilders, are to constitute part of the funds for the loading of the ship. Our wish is, in the first place, if a good freight or charter can be *243] had for the ship to Batavia, that *she should proceed there, in preference to any other place. And secondly, if the ship can be sold for 8000*l.* sterling, you will dispose of her, rather than send her to St. Petersburg." The letter then proceeded to give such a description of the ship as might enhance her value in the estimation of a purchaser, and then added, "If the Henry Clay proceeds to St. Petersburg, we must depend on your placing funds there, to purchase a cargo of iron, hemp and other goods. If the funds we have placed in your hands should fall short of loading her, Messrs. Gilmor & Sons have written you to make us any advances that may be deficient. Agreeable to the estimate, what we have ordered from St. Petersburg, will not exceed \$45,000, and you may rest assured, that any sum advanced us will be remitted to you as soon as we know the amount." The letter to the master was in these words :

"Dear Sir : The ship Henry Clay is given you in charge, that you proceed with all possible dispatch for Amsterdam, and it is recommended, that you sail north about, at this fine season of the year. The owners of the ship have the greatest confidence in your good management ; that you will take care that your disbursements in every foreign port may be as moderate as possible ; that you will purchase every article yourself, on the lowest terms, that may be required for the ship ; that you will use the greatest economy in all your expenditures. After your arrival at Amsterdam, your *244] first object is a *good charter for Batavia, and if what you know to be a good charter is obtained, you will, of course, accept it in preference to anything else. And if a good freight cannot be had to Batavia, and the ship can be sold for 8000*l.* sterling, you have orders to sell her, and we confidently expect that she will bring more, as she cost upwards of 14,000*l.* sterling, and never made one voyage. I hope that every exertion will be made to proceed to St. Petersburg immediately, if you do not go to Batavia, and the ship cannot be sold ; as the season is far advanced, no time must be lost. The same industry must be used to get away from St. Petersburg, for fear that you might be detained there all the winter. The owners must also depend on your attention at St. Petersburg, that the hemp is good that

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you receive." The letter then gave instructions respecting pilots, protests, &c., and then added, "Messrs. Willinks will, of course, endeavor to consign the ship to a friend of theirs at St. Petersburg, but we have great confidence in a house recommended by Mr. Cumberland D. Williams, Messrs. Meyer & Buxner, and we could wish you to consign the ship to them. If any freight should offer from St. Petersburg to Baltimore, of course, you will accept of it, and if any goods for Philadelphia or New York should be there, you can inform the shippers how easy they may be sent," &c.

It was also proved, that no freight to Batavia could be obtained, and that the vessel could not be sold at the price limited.

February 23d. **Harper and Winder*, for the plaintiffs, argued :

1. That the present action could be maintained by the plaintiff for [*245 the moneys advanced by them at Amsterdam, for the purchase of the return-cargo received by the defendants, at Baltimore. Even supposing that the defendants might have refused to receive it, yet having actually sold it, and received the proceeds of the sale, this raises an *assumpsit* to pay the money thus received. In the case of *Manella v. Barry*, 3 Cranch 415, foreign merchants sent, by their general agent, written orders to their factor in this country, to purchase goods here, upon their account, but to ship the goods in the name of the factor, and by those orders, the factor was referred to the verbal communications of the general agent, who undertook to order the goods to be shipped in the name of another person, and declared, that he had authority from the foreign merchants thus to control and vary their orders ; the factor was held to be justified in obeying the new orders of the general agent, though contrary to the first written orders. So, here, the consignment of the ship to the plaintiffs was limited to her transactions at Amsterdam, and the control of her ulterior movements was left to the master. The learned counsel here entered into a minute examination of the correspondence, to show that this was its import.

2. The defendants cannot claim a deduction from the plaintiffs' demand, of the amount of the supposed loss sustained by the alteration of the intended destination *of the vessel to St. Petersburg, and the loading [*246 her at Amsterdam. This question depends not on the English statute of set-off, but on the act of assembly of Maryland, of November 1785, c. 46, § 7. This act provides, "That in case any suit shall hereafter be brought on any judgment, or on any bond, or other writing sealed by the party, and the defendants shall have any demand or claim against the plaintiff, upon judgment, bond or other instrument under seal, or upon note, agreement, *assumpsit*, or account proved as by this act is allowed the defendant, or otherwise, according to law, shall be at liberty to file his account in bar, or plead discount to the plaintiff's claim, and judgment shall be given for the plaintiff for the sum only which remains due, after just discount made ; provided, the sum which shall remain due after such discount be sufficient to support a judgment in the court where the cause may be tried, according to its established jurisdiction ; and in all cases of suits upon simple contracts, the defendant may file an account in bar, or plead discount of any claim he may have against the plaintiff, proved as aforesaid, or otherwise proved according to, which may be of an equal or superior nature to the plaintiff's claim, and judgment shall be given as aforesaid." Unliquidated damages cannot

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be admitted by way of discount, according to the very letter of the law, and the uniform decisions of the local courts of Maryland. But even the English statute has received the same construction. Montagu on Set-Off 21, and the authorities there cited; *Brown v. Cuming*, 2 Caines 33, *247] and note a; *Winchester v. Hackley*, 2 Cranch 341. Damages for *a breach of the implied contract of an agent are, and necessarily must be, unliquidated. If then such damages cannot be set off, under the statute, neither can they be admitted incidentally, by way of deduction, upon the equitable principles of an action for money had and received. It would be an evasion of the law, to permit such an equitable deduction, which sounds rather in tort than contract. The policy of the law is to prevent two distinct issues, involving controverted questions, from being tried at the same time, thus confounding the simplicity of actions and of proceedings in a court of law.

Pinkney and *D. B. Ogden*, contra:—1. Insisted, that the action could not be maintained by the plaintiffs, there having been a manifest breach of instructions on their part, not justified by the pretended approbation of the master.

2. The defendants have a right to a deduction for the loss sustained by them in breaking up the intended voyage to St. Petersburg. No part of the money for which the action is brought, can be said to be received to the use of the plaintiffs, which, by the very nature of their claim, ought in conscience to be applied to the indemnity of the defendants against the breach of contract which originated the plaintiffs' demand. The claim of the plaintiffs arises from a breach of their duty to the defendants. That breach of *248] duty forced the money in question into the hands of the *defendants. If the plaintiffs should obtain a judgment for the whole of this money, it cannot be doubted, that chancery would enjoin execution, until the extent of the injury inflicted upon the defendants, by the acts which produced the judgment, could be ascertained by a jury. And surely, in this action for money had and received, a court of law will proceed with the same view, if the existence of the defendants' right to complain is ascertainable (although the exact *quantum* of the injury is not) by the same evidence, and through the same circumstances, which properly belong to the case of the plaintiffs. The acknowledged nature of the action for money had and received will otherwise cease, and it will differ in nothing from any other form of action. If we are not to inquire, in this action, how, and under what circumstances, money was received, in order that we may determine whether, *ex æquo et bono*, the defendants may retain the whole, or any part of it; and if nothing can prevent a recovery of the whole, but a plea of discount, or a notice of set-off, or such other defence as in ordinary actions may be competent, the character given in the books of the action for money had and received, is a perfect delusion. The case of *Dale v. Sollet*, 4 Burr. 2133, goes the whole length of this doctrine. The deduction there claimed might, perhaps, have been used as a discount or set-off, under the statute; although, as the claim was not a liquidated one, it probably could not; but at any *249] rate, it was not so used, and consequently, as a discount or set-off, *no advantage could be taken of it at the trial. Why then was it allowed in that case? Because of the equitable nature of the plaintiff's action, and

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of the intimate connection between the claim and the defence, out of which arose the conclusion, that the defendant might retain, or stop so much of the money, although it was, in fact, the plaintiff's money which he received, and although there was no precise contract that it should be stopped out of the money received. The right in that case to stop a reasonable compensation (which the parties had not defined) out of the whole sum which had come to the defendant's possession, was exactly such a right as we now insist upon. It stood, as ours does, upon the qualities of that sort of suit which the plaintiff had instituted, and upon the union of the claim and the defence. The defence, indeed, was less complicated in that case, than it is in the present one: but so, too, was the plaintiff's demand. And besides, a defence is not the less a good defence, or an examinable defence, because it does not depend upon a single fact, or does depend on many facts. A jury can deal with it, nevertheless, and does deal with such defences every day: and there would be a defect of justice, if they did not. The defence in this case rests, incontestibly, upon contract, as it did in that. The deduction claimed was in that, as in this, unliquidated in amount. The right to the deduction arose in that, out of the whole circumstances of the case; it does so equally in this. The amount was, in that case, as well as in this, part of the case itself, as respected the demand of the plaintiff. Evidence was necessary on the *part of the defendant, to ascertain there the *quantum* of the [*250 deduction, as much as it is here. What case could the plaintiffs in [*250 this cause have shown, upon any of the counts in their declaration, without exposing, or letting in an exposition, of the whole matter on which the defendants rely? Of necessity, the entire transaction was before the jury, and it is upon that, as in *Dale v. Sollet*, that we contend for the admissibility of a defence which the entire transaction brings under the notice of the court and jury. And it should seem to be monstrous, that when the whole is regularly and necessarily presented, and the result is, that the defendants ought, in conscience and equity, to be permitted to retain an ascertainable part of the money received by them, for their own use, they should be turned round to a cross-action against persons, who appear in their writ to be foreigners, and are not therefore amenable to our judicatures, or that (being probably remediless at law, if they are compelled to part with the whole of the money in their hands) they should be driven into chancery for an injunction, upon grounds of equity, equally available, as we are taught by the authorities, in an action for money had and received. The cross-action, to which the other side refer us, must, in truth, try the present action over again; and a verdict for the present defendants, in such an action, could scarcely be reconciled with a verdict in this cause, for the whole amount of the plaintiffs' claim. A cross-action, which is to unravel the action now *sub judice*, and which, upon the same circumstances, is to establish that the present plaintiffs *ought not to have what it is now contended they ought [*251 to have, seems to be supererogation at least. When a cross-action is unavoidable, the necessity must be submitted to; and it *is* unavoidable, where the matters of inquiry are not combined in their nature. But where so combined, an action for money had and received opens the entire investigation, and can do ample justice, without other assistance. Indeed, it cannot do justice at all, on such occasions, without exhausting the whole investigation. And to affect to administer equity, by shutting out one-half

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of the real case (upon which the equity of the other half depends), would be a mere mockery. Cross-actions are always avoided, when it is possible ; and here it is not only possible, but absolutely required by the facts.

March 8th, 1821. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the facts, proceeded as follows :—On the first branch of the question certified from the circuit court, no doubt can be entertained. The defendants having received the cargo of the Henry Clay, and sold it, are accountable for the proceeds, although the cargo should be considered as the property of the plaintiffs. Whether the defendants are liable for the moneys actually advanced in Amsterdam, or for the net amount of sales in Baltimore, considering the goods as the property of the plaintiffs, still they are liable for something ; and, of consequence, the action is sustainable.

*252] *In deciding on the second branch of the instructions which were required, it becomes material to examine the orders which were carried out by the Henry Clay, on her voyage from Baltimore to Amsterdam, contained in the letters of the 25th of April, the one to the plaintiffs, the other to the master.

It is admitted, that no freight to Batavia could be obtained, and that the vessel could not be sold at the limited price ; consequently, the only deviation from orders alleged by defendants is, the purchase of the Russian goods for the return-cargo, at Amsterdam, instead of sending the Henry Clay to St. Petersburg. That the orders of the defendants to send their ship to St. Petersburg, in the event which had occurred, were positive ; and that no authority was given to purchase her return-cargo at Amsterdam, under any circumstances, are too apparent for controversy. That this purchase, thus made, without authority, whether with, or without, the consent and concurrence of the master, must have been made at the risk of the plaintiffs, is also too clear for argument. But the liability of the plaintiffs for any loss which the defendants may have sustained by the breaking up of the voyage to St. Petersburg, depends on the question, whether the control of that voyage was committed to them, or to the master. In considering this question, it is proper to take into view all the instructions which were given, and to compare the two letters written by the defendants with each other.

*253] In the commencement of the letter written by *Mr. McKim, on the part of the defendants, he says, "I have been directed by the owners to consign the ship to your house, also that part of the cargo which I consider belongs to the owners jointly." Whether this consignment was limited to the transactions in Amsterdam, or extended to any subsequent voyage in which the Henry Clay might be directed to engage, depends on other parts of the letter. Mr. McKim then proceeds to direct, that certain parts of the outward cargo should "remain as a fund, for the purpose of loading the ship, if she should proceed to St. Petersburg." These orders are precise and explicit, with respect to the funds which are to remain in the hands of the plaintiffs for the purchase of the cargo in St. Petersburg, but are silent respecting any agency of the plaintiffs in making that purchase. After communicating the desire of the defendants, that a freight should be obtained for Batavia, the letter proceeds to say, "And secondly, if the ship can be sold for 8000*l.* sterling, you will dispose of her rather than send her to St. Petersburg." This part of the letter may indicate, that in some other part

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of it, might be found an express order to send the Henry Clay to St. Petersburg, if the primary objects of the defendants should be unattainable, but does not in itself amount to such express order. The writer does not say, "we request you, if the vessel cannot be sold, to send her to St. Petersburg;" but, "you will dispose of her, rather than send her to St. Petersburg;" as if there were some authority *not communicated by these words, to which they have allusion. There is no such authority, [*254 unless it be implied in the general consignment of the vessel.

That consignment is completely satisfied by the agency which was to be exercised in Amsterdam. If it was designed to extend it to the eventual voyage to St. Petersburg, the Messrs. Willinks would naturally expect to find some instructions respecting that voyage; respecting the articles of which the cargo was to consist, and their conduct in the purchase of them; but they could find no such instruction. In a subsequent part of the letter, Mr. McKim states the estimated value of the cargo he had ordered, and is explicit in his request, that they would advance the necessary funds for laying it in, should those placed in their hands be insufficient; but he is entirely silent with respect to their having any other agency in the voyage. It was impossible for these gentlemen to read this letter, without, at least, doubting their power to interfere further, with respect to the voyage to St. Petersburg, than to advance the money which might be required for the cargo to be purchased at the place. The letter contains all the information, and all the power which was necessary for this purpose, but contains neither information nor power, for any other purpose.

It was natural for the Messrs. Willinks to require further information on this subject, and to seek it from the master. He could have no motive for withholding his letter of instructions from them, and in that, they would find, that the management of the *voyage was committed to him, and that the utmost confidence was reposed in his intelligence and integrity. [*255 "I hope," says McKim, "that every exertion will be made to proceed to St. Petersburg immediately, if you do not go to Batavia, and the ship cannot be sold." These exertions were to be made by the master; he was to proceed immediately to St. Petersburg; and as no reference is here made to the Messrs. Willinks, the fair inference seems to be, that he was expected to proceed, not in consequence of any orders he should receive from them, but in consequence of the orders he had received from the owners. "The same industry," he is told, "must be used to get away from St. Petersburg." The letter then adds, "the owners must also depend on your attention at St. Petersburg, that the hemp is good that you receive." But the part of the letter which seems to be conclusive on this point, is that which relates to the consignment of the ship. "The Messrs. Willinks," says the writer, "will of course endeavor to consign the ship to a friend of theirs at St. Petersburg, but we have great confidence in a house recommended by Mr. Cumberland D. Williams, Messrs. Meyer & Buxner, and we wish you to consign the ship to them." The owners then did not suppose, that they had empowered the plaintiffs to order the ship to St. Petersburg. They did not suppose, that their original consignment of the Henry Clay to the Messrs. Willinks, implied a control over her, after the transactions at Amsterdam should be terminated. Had *such a control existed, those gentlemen would not have consigned her to one of their friends. But these words show [*256

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conclusively, that the defendants themselves directed the consignment of the ship from Amsterdam to St. Petersburg, and in executing their orders, the master is not merely directed to proceed, without consulting the Messrs. Willinks, he is directed to disregard their advice should it be offered.

The plaintiffs could not compare this letter with that addressed to themselves, without perceiving that, with respect to the voyage to St. Petersburg, every order was given directly to the master, without reference to them, further than to show, that their interference, with respect to the consignment of the ship, was to be disregarded; and that their agency was confined to advancing the necessary funds for the purchase of the return-cargo. Both the master and the Messrs. Willinks appear to have acted on this construction of their respective powers. The correspondence between them contains no indication of an opinion in either, that the voyage to St. Petersburg depended on the orders of those gentlemen. The master does not require their orders, but asks their advice; they do not attempt to order, they only advise. This advice may have been dictated by their best judgment, or may have been dictated by a view to personal interest; still it is mere advice, and was both given and received as advice.

The conduct of the parties, then, is full proof of the opinion each entertained of the authority of each; and the first letters written after they had met in *Amsterdam, show that free communications had taken place *257] between them. In a letter of the 19th of June, addressed to Captain Gantt, the Messrs. Willinks say, "we have not received yet the promised note of the Russian goods that would be wanted for the Henry Clay." And in the master's letter from the Helder, of the 18th of June, he says, "herewith, I annex you a copy of the order for Russian produce, which the owners of the Henry Clay wish to constitute her return-cargo." These letters strengthen the probability, that in the verbal communications which were made at Amsterdam, the master had stated his orders relative to the voyage to St. Petersburg; at any rate, they show, that the note for the cargo, which had not been transmitted to the Messrs. Willinks, had been intrusted to him. There is an expression in the last letter of the plaintiffs to the defendants, which seems to have some bearing on the question, whether the master had communicated to them his letter of instructions. They say, "you cannot expect, gentlemen, that we shall enter here into all the details of this business, which has been conducted by us, *bonâ fide*, with a view to your greatest benefit and advantage, faithfully relying on your promises, and considering the incomplete state of your instructions to us, that your captain was furnished with more particular orders."

There is a vagueness in these expressions, arising, probably, from the unskilfulness of the translation, if they were not written in our language, *258] which *leaves it, in some measure, uncertain, whether the plaintiffs meant to assert, that the master was furnished with more particular orders, or that they inferred this fact, from the incomplete state of the instructions to themselves. If the case depended entirely on the question, it might, perhaps, be proper to refer to the original; but we do not think, that the right of the defendants to the deduction they claim from the demand, depends entirely on the fact, that their orders to their master were shown to the plaintiffs. Their letter to the plaintiffs was, at best, equivocal; and any evidence showing that the construction which the plaintiffs put on that let-

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ter, conformed to the intention of the defendants, will justify the plaintiffs, although that evidence was not in their possession, pending the transaction. The defendants cannot be permitted to say, "It is true, we did not intend to consign the Henry Clay to you, further than was necessary to your agency in Amsterdam. We did not intend to give you any control over her voyage to St. Petersburg. We had committed that whole subject to our master, and had given him precise orders respecting it. We had even gone so far as to direct him to disregard your consignment of the vessel, should you endeavor to make one. But you did not see these orders, and we will, therefore, make you responsible for not having understood our letter to you, as creating a duty which we did not intend it should create." This, certainly, cannot be permitted. As little can they be permitted to charge the Messrs. Willinks, in consequence of the *advice they gave, with the profits [*259 which might possibly have been made on the voyage to St. Petersburg. Although the orders were broken, with their advice, still they were broken by the master, to whom their execution was confided, not by the Messrs Willinks, to whom their execution had not been confided.

Were it even possible, that the Messrs. Willinks could be made responsible, in any form of action which could be devised, for the possible loss resulting from the breaking up of the voyage to St. Petersburg, they cannot, we think, be made responsible in this. Having loaded the Henry Clay, at Amsterdam, clearly without authority, the cargo was shipped at their risk. The defendants might have refused it altogether; but they have sold it, and received the money; this creates an *assumpsit* to pay the money received. This action, then, so far as respects the count for money received by the defendants to the plaintiff's use, is founded on the transactions in Baltimore; and, were it even possible, which we are far from admitting, that the defendants could be allowed to make a deduction of this supposed loss, from the sum to be recovered on the count for money laid out and expended to their use, provided that count could be supported, yet they cannot be allowed to make that deduction from the sum to be recovered on the count for money had and received to the use of the plaintiffs, for goods sold as the goods of the plaintiffs.

*CERTIFICATE.—This cause came on to be heard, on the transcript [*260 of the record of the circuit court, for the fourth circuit and district of Maryland, and on the question on which the judges of said court were divided, and was argued by counsel: On consideration whereof, this court is of opinion, that the plaintiffs have a demand in law against the defendants, which can be maintained in the action now depending in the circuit court, and that the defendants are not entitled to a deduction from the same, for the amount of any loss which may have been sustained by them by reason of the alteration in the destination of the ship Henry Clay to St. Petersburg, and the loading her at Amsterdam. Which opinion is directed to be certified to the circuit court.