BARRATRY: ITS ORIGIN, HISTORY AND MEANING, IN THE MARITIME LAWS

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MARITIME LAWS.

OPINION BY CHIEF JUSTICE DALY.

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Introductory.

An opinion of Hon. Charles P. Daly, Chief Justice of the Court of Common Pleas, (rendered in a case which will appear in the official reports of that Court), treats of maritime barratry, and is of special interest, not only to scholars, but to those engaged in the practical administration of commerce.

The point discussed is one of no little commercial importance, and which has become somewhat confused by careless or superficial application and consideration. And to the discussion of it, in this case, there has been applied rare scholarship, and philological research, as well as a nice discrimination of authorities with the valuable result, that an ancient and important rule of maritime law, is restored from undeserved doubt and obscurity.

In this view, the necessary permission has been obtained, for publication of the opinion in pamphlet form.

OPINION.

DALY, Chief Justice.—Among the risks insured against was barratry of the master and mariners, and the question presented in the case is, whether the ninety bales of cotton were lost through an act which the law would denominate barratry on the part of the master.

These ninety bales were stowed upon deck, and were jettisoned in a storm. They were a part of 202 bales covered by the policy, which, by the plaintiff's order, were shipped from Augusta, Georgia, to Charleston, South Carolina, by railroad, thence to be shipped to Liverpool by the barque Victoria, the master giving a clear bill of lading for the 202 bales, the plaintiff's agent having engaged freight for the whole by that vessel. For want of room in the Victoria the captain sent seventy-seven of the bales by another vessel, the Albert, which arrived safely in Liverpool. Thirty of the bales were stowed in the hold of the Victoria, and the remaining ninety were carried upon her deck, and in a violent storm were thrown overboard for the preservation of the vessel.

Before the Victoria sailed, a merchant in Charleston, whose firm was acting as agents for the vessel, discovering that the captain was stowing cotton on deck, opposed it and wanted him to send the cotton by another vessel. He advised the captain of the responsibility he was assuming, and told him substantially, that, as he had signed clear bills of lading, he was bound either to carry the cotton under deck, or to provide for it on deck by extra insurance; that the insurance taken on a clear bill of lading would not cover cotton on deck. But the captain, notwithstanding this remonstrance, stowed the cotton upon the deck.

This, it is claimed, amounted to barratry on the part of the master within the legal meaning of that term, in the comprehensive sense in which it has been defined by Lord Hardwicke, as "an act of wrong done by the master against the ship and goods." Lewin *v.* Suasso Posthelwhaite's Dict'y Assurance, which is commended by Arnold as the tersest and perhaps best definition of the word. *Arnold on Insurance*, 821, note *h*.

This definition of Lord Hardwicke is too general to be of much practical value in determining whether the act of the captain in stowing these ninety bales of cotton upon deck, without providing for the increased peril by extra insurance, was or was not barratry. It was an act of negligence for which he or the owner of the ship may have been responsible, and in that sense was a wrong to the goods or the ship within the language of Lord Hardwicke; but it does not necessarily follow from this that it was what the law denominates barratry. What was said by Lord Hardwicke, moreover, has not the weight of a decision. It was but a general observation. The question in the case was not whether barratry had been committed, for the captain there was the general owner of the ship, which he had bottomried and mortgaged, but of which he had the control and navigation; and the point determined by the court, so far as can be gathered from the imperfect report of the case in an elementary work, was that the owner of a ship could not, either at law or in equity, be guilty of a barratry concerning the ship.

In the solution of the question before us, therefore, we must look beyond this definition to get a clear idea of the exact legal meaning of barratry, and the inquiry is by no means easy, for the question is one that has greatly perplexed the courts, and from what has been said respecting it, in comparatively recent cases, the meaning of it has become nearly as uncertain now as when the question was

first agitated in Westminster Hall one hundred and fifty years ago.

It was first considered by the English courts in 1724, in the case of Knight v. Cambridge, reported in the eighth volume of the Modern Reports, 230, afterward in the second of Ld. Raym. 1349, and again in Strange, 481. In the first report, in the eighth Modern Rep., the court is put down as saying that "Barratry is a word of more extended signification than only to include the master's running away with the ship; it may well include the loss of the ship by his fraud *or negligence*;" but in the second edition of the volume it is stated in the margin, that fraud *or negligence* would not have been good; but this was afterwards omitted in the fifth edition, known as the corrected and standard one of the Modern Reports.

In Lord Raymond's report of the case, which is a very brief one, he states that the ground was taken, that, as the owner of the goods has his remedy against the owner of the ship for any prejudice he receives through the fraud or negligence of the master, there is the less reason that the insurer should also be liable to him for the act, as an act of barratry, and that if barratry imports fraud, it does not import neglect; the allegation having been that the ship was lost through the fraud *and neglect* of the master, a point which the court met by saying, "Barratry imports fraud, and he that commits a fraud may properly be said to be guilty of a neglect, viz.: of his duty;" to which the court added the general observation that barratry was not confined to the running away with the ship "because it imports any fraud." The report in Strange is still more brief, but if correct, more important, because it states that the objection taken was, that the allegation, fraud *and negligence* of the master was more general than the word *barratry*, and was, therefore, not *within* the *policy*, and that the court said: "*The negligence certainly* is not, but the *fraud* is." * *

It further appears in respect to this case, from the argument of Justice Buller, and the statement of Lord Mansfield in Vallejo *v.* Wheeler, Cowp. 143, that the act of the master in Knight *v.* Cambridge was sailing without paying the port duties, which Buller argued might have been by accident as well as by design, but which, as it subjected the ship to forfeiture, was held to be barratry. Lord Ellenborough afterward referred to a manuscript note of Mr. Ford, in respect to the question in this case of Knight v. Cambridge, which, after stating that fraud was barratry, added: "If the master sail out of the port without paying port duties, whereby the goods are forfeited, lost or spoiled, that is barratry." This Lord Ellenborough thought was probably the question decided upon the trial, and at the argument (Earl v. Rowcraft, 8 East, 126), and the act of the captain may possibly have been regarded as coming under the category of fraud, upon the ground that the design or effect of it was to defraud the government of the port duties.

The next case was Stamma v. Brown, Strange, 1173, in which it was held, that a deviation from the voyage by the master for the benefit of the owners was not barratry, although it led to the destruction of the ship and the loss of the goods insured, the court holding, according to the report in Strange, that to make it barratry, *there must be something of a criminal nature*, as well as a breach of contract. In a further account of this case, it is stated that Chief Justice Lee defined barratry to be, "some breach of trust in the captain *ex maleficio*," and said (it being a policy upon goods) "barratry must be *ex maleficio* with intent to destroy, waste or embezzle the goods," per Lord Ellenborough in Earle v. Rowcraft, *supra*.

The next case was Elton v. Bridgen, Strange, 1264, in which the crew compelled the captain to return, contrary to his orders. It was *held*, that this was not barratry for