The Strathairly

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Judgement :

The Strathairly - 124 U.S. 558 (1888)
U.S. Supreme Court The Strathairly, 124 U.S. 558 (1888)

The Strathairly

Argued February 1, 1888

Decided February 13, 1888

124 U.S. 558

APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE DISTRICT OF CALIFORNIA

SYLLABUS

The fine imposed upon the master of a vessel, by Rev.Stat. § 4203, for a violation of that and the preceding section, is, by § 4270, made a lien upon the vessel itself, which may be recovered by a proceeding *in rem,* but it is the same penalty which is to be adjudged against the master himself, in the criminal prosecution for misdemeanor, and payment by either is satisfaction of the whole liability.

Section 4264 of the Revised Statutes, as amended by the Act of February 27, 1877, 19 Stat. 240, 250, subjects vessels propelled in whole or in part by steam, and navigating from and to, and between the ports herein named, to the provisions, requisitions, penalties and liens included within Rev.Stat. § 42; 15, as one of the several sections of the chapter relating to the space in vessels appropriated to the use of passengers.

A penalty imposed upon a master of a vessel arriving at a port of the United States for a violation of the provisions of Rev.Stat. § 4266, is not charged as a lien upon the vessel by the operation of Rev.Stat. § 4264, as amended by the Act of February 27, 1877, 19 Stat. 240, 250.

The case, as stated by the Court, was as follows:

This is a libel of information *in rem,* filed in the District Court of the United States for the District of California, July

Page 124 U. S. 559

1, 1882, on behalf of the United States against the British steamer *Strathairly.* The claimant having interposed peremptory exceptions, a decree in the district court was entered August 30, 1882, sustaining the exceptions and dismissing the libel. From this decree the libellant appealed to the Circuit Court of the United States for the District of California, in which October 3, 1882, a decree was entered sustaining the exceptions and dismissing the libel. From that decree the libellant has appealed.

The libel contains three counts. The first is for the recovery of $16,300 for an alleged violation of the provisions of §§ 4252 and 4253 of the Revised Statutes. In

this count, it is alleged that the steamship *Strathairly* was a British vessel owned by citizens of Great Britain, and propelled in whole or in part by steam; that W. B. Fenwick, the master thereof, brought on said steamer, from Hong Kong, China, 326 steerage passengers in excess of the number fixed by law in proportion to the space or tonnage of said vessel; that by reason thereof, Fenwick, the master of said ship, became liable to a fine of $50 for each of said 326 passengers, amounting to $16,300, which amount, it is alleged, is made a lien by the laws of the United States on said vessel, her tackle, furniture, engines, and apparel. It is further alleged in the same count that prior to the promoting of said libel, a criminal information was filed in the District Court of the United States for the District of California charging Fenwick, the master, with the offense of unlawfully bringing from said port of Hong Kong into the port of San Francisco the said 326 passengers in excess of the number that he could lawfully bring on said vessel; that said Fenwick was duly arraigned on said information and pleaded guilty to the offense of bringing on said vessel 223 steerage passengers in excess of the number than he could lawfully bring on the same; that thereupon said Fenwick was duly sentenced to pay a fine of $50 for each of said 223 passengers, amounting in all to the sum of $11,150. To this count, McIntyre, the claimant of the ship, filed a peremptory exception on the ground that the facts stated were not sufficient to constitute, create, or give rise to a lien on said vessel under any law or statute of the United States.

The second count of the libel is for the recovery of the sum of $5,280 for an alleged violation of the provisions of § 4255 of the Revised Statutes. In this count it is alleged that on April 17, 1882, at Hong Kong, China, there were taken on board of said steamship Strathairly 1,056 steerage passengers for transportation to the port of San Francisco, California; that said 1,056 steerage passengers were by said vessel transported to and landed at said port of San Francisco; that said vessel, at the time said steerage passengers were so transported From Hong Kong to San Francisco, did not have the number of berths required by law for the accommodation of said passengers, nor were said berths constructed in the

manner required by law, by reason whereof the master of said ship, and the owners thereof, became liable to a penalty of $5 for each of said 1,056 passengers, amounting in all to $5,280, no part of which had been paid, and that the same constitutes a lien upon said vessel. To this count the claimant also excepted, first because the facts stated therein were not sufficient to constitute, create, or give rise to a lien on said vessel under any law or statute of the United States; second, because the ship *Strathairly,* being at the time a vessel propelled in whole or in part by steam, neither the master nor owners thereof are subject or liable to the penalty provided for by § 4255 of the Revised Statutes, and that no lien does or can attach on said vessel under § 4270 of the Revised Statutes.

The third count of the libel is for the recovery of the sum of $1,000 for the alleged violation of the provisions of § 4266 of the Revised Statutes, taken in connection with § 2774. In this count it is alleged that W. B. Fenwick, the master of said steamship, on April 17, 1882, took on board of said ship at Hong Kong, China, 1,056 steerage passengers, and transported them in said ship to the port of San Francisco; that on arriving at said last-named port, the said master neglected and refused to deliver to the collector of customs at said port of San Francisco a list of all the passengers taken on board of said vessel and brought in her to the port of San Francisco; also that said Fenwick knowingly and willfully made out and delivered to said collector of customs a false list

Page 124 U. S. 561

of said passengers in which he reported that the whole number brought was 829, and no more, instead of 1,056, the number alleged to have been actually brought and landed, by reason of which said Fenwick became liable to a fine of $1,000, which, it is alleged, is also a lien upon said vessel. To this count the claimant excepted on the ground that the facts stated were not sufficient to constitute, create, or give rise to a lien on said vessel under any law or statute of the United States.

Page 124 U. S. 567

MR. JUSTICE MATTHEWS, after stating the facts as above, delivered the opinion of the Court.

The first question for consideration is whether the fine imposed upon the master of a vessel by § 4258 of the Revised Statutes, for the violation of that and the preceding section, is a lien upon the vessel itself, to be recovered by a proceeding *in rem.* Section 4252 of the Revised Statutes provides that

"No master of any vessel, owned in whole or in part by a citizen of the United States or by a citizen of any foreign country shall take on board such vessel at any foreign port or place other than foreign contiguous territory of the United States passengers contrary to the provisions of this section with intent to bring such passengers to the United States, and leave such port or place and bring such passengers, or any number thereof, within the jurisdiction of the United States."

It then prescribes the number of passengers which may be lawfully carried by reference to the tonnage and space of the vessel. Section 4253 declares that whenever the master of any such vessel shall carry and bring within the jurisdiction of the United States any greater number of passengers than is allowed by § 4252, he shall be deemed guilty of a misdemeanor, and shall, for each passenger taken on board beyond such limit, be fined $50, and may also be imprisoned for not exceeding six months. Section 4270 is as follows:

"SEC. 4270. The amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels shall be liens on the vessel violating

Page 124 U. S. 568

those provisions, and such vessel shall be libeled therefor in any circuit or district court of the United States where such vessel shall arrive."

It is argued that the penalties referred to in § 4270 do not include the fine imposed by § 4253. There are other provisions following § 4252 and prior to § 4270, it is said, imposing penalties which are embraced by § 4270, exclusive of all others. Of

these, the first is mentioned in § 4255, which particularly prescribes the number and construction of the berths for the use of passengers on any such vessel and provides that for any violation of the section,

"the master of the vessel, and the owners thereof, shall severally be liable to a penalty of $5 for each passenger on board of such vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive or depart."

This, it is argued, is a penalty *eo nomine,* for which not only the master, but the owners of the vessel are liable, and to be recovered not in a criminal prosecution, but in a civil action, and is thus distinguished from the case of the fine imposed by § 4253.

Section 4259 also imposes a penalty of $200 upon the master and owner of any such vessel which shall not be provided with the house or houses over the passage ways, or with ventilators, or with cambooses or cooking ranges, with the houses over them, required by previous sections, for each and every violation of or neglect to conform to each of these requirements, to be recovered by suit in any circuit or district court of the United States within the jurisdiction of which such vessel may arrive, or from which she may be about to depart, or at any place within the jurisdiction of such courts, wherever the owner or master of such vessel may be found.

So § 4263 provides for maintaining discipline and habits of cleanliness among the passengers for the preservation and promotion of their health by the master, who is required to cause the apartments occupied by such passengers to be kept at all times in a clean, healthy state, and the owners of every such vessel are required to construct the decks and all parts of the apartments so that they can be thoroughly cleansed, and to provide a safe and convenient privy or water closet for the

exclusive use of every 100 of such passengers. The master is also required to disinfect the quarters for the passengers. The section then further provides:

"And for each neglect or violation of any of the provisions of this section the master and owner of any such vessel shall be severally liable to the United States in a penalty of fifty dollars, to be recovered in any circuit or district court within the jurisdiction of which such vessel may arrive, or from which she is about to depart, or at any place where the owner or master may be found."

The contention is that the penalties embraced by § 4270 are those, and those only, referred to under that name in §§ 4255, 4259, and 4263, thus excluding from § 4270 the fines imposed upon the master by § 4253, as well as the fine imposed by § 4262. This last-named section provides that every master of such vessel who willfully fails to furnish and distribute provisions in the quantity and cooked in the manner required by law shall be deemed guilty of a misdemeanor and shall be fined not more than $1,000, and imprisoned for a term not exceeding one year, with the proviso that

"the enforcement of this penalty, however, shall not affect the civil responsibility of the master and owners to such passengers as may have suffered from such default."

It is suggested that there is a line of distinction between the punishments provided by §§ 4253 and 4262, which are confined to the master alone for what seem to be violations of a personal duty charged upon him by the law and in which it is assumed that the owners of the vessel do not participate, and those penalties imposed by the other sections upon the master and owners for faults of construction and management, where blame may be justly imputed to the owners as well as the master. This construction of the statute was adopted by Judge Hoffman in the United States District Court of California in the case of *United States v. Ethan Allen,* reported in 3 Amer.Law Rev. 372. Analyzing the Act of Congress of March 3, 1855, 10 Stat. 715, 720, entitled "An act to regulate the carriage of passengers in steamships and other vessels," now carried into the Revised Statutes in the sections under consideration, he said:

"It would seem, therefore,

Page 124 U. S. 570

that Congress intended to distinguish between the 'fines' which, on conviction of a misdemeanor, the master might be sentenced to pay, and the 'penalties' which, in a civil action, are made recoverable from the owners as well as the master. The offenses for which the master is made criminally liable are willful violations of the law in which the owners have no complicity. The infractions of the act for which the owners are made responsible in a civil suit relate to houses over passageways, to ventilators, cambooses, or cooking ranges, water closets, etc., and other arrangements for the comfort and health of the passengers which it is the owners' duty to provide. For the omission to do so the owners and the vessel are justly made responsible."

His conclusion was that these, and these alone, are the penalties which are made liens on the vessel.

The same view was taken by Judge Lowell in *The Candace,* 1 Lowell 126, decided in 1867. He sums up his statement of the question, referring to the Act of March 3, 1855, 10 Stat. 715, 720, as follows:

"When, therefore, I consider the kind of penalty mentioned in the first section, which may be partly imprisonment, the person upon whom it is imposed, being the master only, the mode of its enforcement by a criminal trial and sentence, the absence of allusion to any responsibility of the owner or vessel, in all which respects it differs from the mere pecuniary civil penalties imposed by the other sections, and further that the ordinary office of a lien is to be security for a debt or civil liability, and the great difficulty of applying it in fact in aid of the criminal responsibility of a third person, and find that there are in the statute many civil pecuniary forfeitures or penalties to which the fifteenth section, giving these liens, is properly and exactly applicable, and that to the only other criminal penalty mentioned in the act is cannot possibly be applied before conviction of the master, because the amount is not fixed until then -- I am constrained to conclude that it

does not give a lien upon the vessel for the fines which may be imposed upon him for a violation of the first section of the act."

It is to be observed, however, that in the original Act of

Page 124 U. S. 571

March 3, 1855, the first section of which corresponds with §§ 4252 and 4253 of the Revised Statutes, the fine thereby imposed on the master is also spoken of as a penalty. The language is that

"Every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof, before any circuit or district court of the United States, shall, for each passenger taken on board beyond the limit aforesaid, or the space aforesaid, be fined in the sum of fifty dollars, and may also be imprisoned at the discretion of the judge before whom the penalty shall be recovered not exceeding six months."

In § 4253 of the Revised Statutes, the phrase in which the word "penalty" occurs in the original act is omitted for the sake of condensation, but without any change in the sense. The phrase, however, is retained in § 4262, where the fine and imprisonment prescribed as a punishment for the misdemeanor of the master is spoken of as a penalty, the enforcement of which shall not affect the civil responsibility of the master and owners to the passengers who may have suffered by the fault. The word "penalty" is used in the law as including fines, which are pecuniary penalties. The language of § 4270 includes all that may be properly designated as penalties imposed by any of the previous provisions regulating the carriage of passengers in merchant vessels. It is the amount of these penalties which, being imposed by the foregoing provisions, are declared to be liens on the vessel violating those provisions, and in view of that section the vessel is considered and treated as itself violating those provisions, whether the act constituting the offense be the act of the master alone or that of the master and owners. In other words, this section of the statute does not point to any distinction such as that now insisted on, but seems intended to embrace as liens upon the vessel itself the amount of every penalty imposed by a previous section of the

statute for every offense against its provisions.

The fact that the master is also liable, as a part of his punishment, to be imprisoned does not constitute any such incongruity as to make the construction now put upon § 4270 unreasonable. It is the fine that is referred to as the penalty, as is distinctly pointed out in the language of § 4270 when it

Page 124 U. S. 572

speaks of the amount of the several penalties -- that is to say, the pecuniary sum which may be awarded as a penalty. Neither is it an insurmountable inconvenience affecting this construction of the law that the extent of the lien declared by § 4270 cannot be ascertained until after a conviction of the master and the assessment of the amount of the fine imposed upon him. This is undoubtedly true in respect to § 4262, because there the fine is only made ultimately certain by the sentence of the court, to whom the discretion is confided of imposing any amount not in excess of $1,000. Neither is there anything in the nature of the master's offense, as described in §§ 4252, 4253, and 4262, which should constitute the fines assessed under those sections exceptions out of the provision for a lien contained in § 4270. There is nothing in the nature of the case to exonerate the owner of the vessel from responsibility for the acts of the master in overcrowding the vessel with passengers contrary to law. By § 4260 and § 4261, the owner is expressly made responsible for the act of the master in not putting on board for the use of the passengers a sufficient supply of provisions and water, and the owner, as well as the master, is by § 4261 made expressly liable to the extent of $3 a day for each passenger put on short allowance in consequence of a failure of the master to supply the proper quantity and quality of provisions and water as required by law.

It seems to us, therefore, that the direct and express meaning of § 4270 is to make the vessel liable *in rem* as itself guilty of the offense for every pecuniary penalty that may be assessed for a violation of any of the previous provisions of the statute regulating the carriage of passengers in merchant vessels.

The second count of the libel is for the recovery of the penalty provided by § 4255. That section is as follows:

"No such vessel shall have more than two tiers of berths. The interval between the lowest part thereof and the deck or platform beneath shall not be less than nine inches, and the berths shall be well constructed, parallel with the sides of the vessel, and separated from each other by partitions, as berths ordinarily are separated, and shall be at least six feet in length, and at least two feet in width, and each such berth shall be

Page 124 U. S. 573

occupied by no more than one passenger; but double berths of twice the above width may be constructed, each berth to be occupied by no more and by no other than two women, or by one woman and two children under the age of eight years, or by husband and wife, or by a man and two of his own children under the age of eight years, or by two men, members of the same family. For any violation of this section, the master of the vessel and the owners thereof shall severally be liable to a penalty of five dollars for each passenger on board of such vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive or depart."

This § corresponds with § 2 of the Act of March 3, 1855. Section 10 of the same act was as follows:

"That the provisions, requisitions, penalties, and liens of this act, relating to the space in vessels appropriated to the use of passengers, are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this act named, and to such vessels and to the masters, and so much of the act entitled "An act to amend an act entitled *An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes,'" approved August thirty, eighteen hundred and fifty-two, as conflicts with this act, is hereby repealed,*

and the space appropriated to the use of steerage passengers in vessels so as above propelled and navigated is hereby subject to the supervision and inspection of the collector of the customs at any port of the United States at which any such vessel shall arrive or from which she shall be about to depart, and the same shall be examined and reported in the same manner and by the same officers by the next preceding § directed to examine and report."

The Act of August 30, 1852, referred to in this section, provided for the inspection of steam vessels and their equipment by inspectors appointed for that purpose, on whose favorable report a license was issued without which it was unlawful for

Page 124 U. S. 574

the vessel to engage in navigation. One object of the inspection was to determine whether the vessel had suitable accommodations for her crew and passengers, and in the certificate of inspection to be furnished by the inspectors to the collector of the district they were required to state the number of state rooms, the number of berths therein, the number of other permanent berths for cabin passengers, the number of berths for deck or other passengers, the number of passengers of each class for whom she has suitable accommodations, and, in case of steamers sailing to or from any European port or to or from any port on the Atlantic or Pacific, a distance of 1,000 miles or upwards, the number of each she is permitted to carry, and, in case of a steamer sailing to any port a distance of 500 miles or upwards, the number of deck passengers she is permitted to carry. The evident purpose of § 10 of the Act of March 3, 1855, was to make the provisions of that act relative to the inspection of vessels applicable to all vessels propelled in whole or in part by steam which were within the provisions of the Act of August 30, 1852, so as to have but one system of inspection in the particulars specified, applicable to vessels of every description. The Act of March 3, 1855, by its terms, did apply to all vessels, including steamers as well as sailing vessels, but not to vessels enrolled and licensed for the coasting trade; the latter were provided for by the Act of August 30, 1852, and the tenth section of the Act of March 3, 1855, was evidently introduced, as we have said, for the purpose of establishing uniformity in respect to regulations for the accommodation and safety of steerage passengers

in all vessels engaged in the business of carrying such passengers, whether between ports in the United States or between them and foreign ports. This section, however, was omitted in the revision of the statutes, and that omission was supplied by the Act of February 27, 1877, 19 Stat. 240, 250, c. 69, amending § 4264 of the Revised Statutes by adding thereto the substance of the provisions of the omitted § 10 of the Act of March 3, 1855, so as to restore the law in that particular to the condition in which it was under the last-named act. That amendment is in the following language:

"The provision, requisitions,

Page 124 U. S. 575

penalties, and liens enumerated in the several sections of this chapter relating to the space in vessels appropriated to the use of passengers are hereby extended and made applicable to all spaces appropriated to the use or steerage passengers in vessels propelled in whole or in part by steam and navigating from, to, and between the ports and in manner as herein named, and to such vessels and to the masters thereof, and the space appropriated to the use of steerage passengers in vessels as above propelled and navigated is hereby made subject to the supervision and inspection of the collector of customs in any port in the United States at which any such vessel shall arrive or from which she shall be about to depart, and the same shall be examined and reported in the same manner and by the same officers directed in the preceding section to examine and report."

It is now argued that the only sections of this chapter relating to the space in vessels appropriated to the use of passengers are §§ 4252, 4253, and 4254, which correspond with the first section of the Act of March 3, 1855. The reason assigned in support of this view seems to be that they are the only sections which refer expressly to spaces appropriated to the use of passengers. Section 4252 declares that the spaces appropriated for the use of such passengers, not occupied by stores or other goods not the personal baggage of such passengers, shall be in certain proportions -- that is to say, on the main and poop decks or platforms, and in the deck houses, if there be any, one passenger for each sixteen

clear superficial feet of deck, if the height or distance between the decks or platforms shall not be less than six feet, and on the lower deck, not being an orlop deck, if any, one passenger for each eighteen clear superficial feet if the height or distance between the decks or platforms shall not be less than six feet, but so as that no passenger shall be carried on any other deck or platform nor upon any deck where the height between decks is less than six feet. But on two-deck ships, where the height between decks is seven and one-half feet or more, fourteen feet of superficial deck shall be the proportion required for each passenger. Section 4253 imposes the penalty upon the master for carrying any greater number of

passengers than in the proportion to the space or tonnage prescribed in the preceding section. Section 4254 authorizes, for the safety or convenience of the vessel, portions of the cargo to be placed or stored in places appropriated to the use of passengers on certain conditions, but requires that the space thus occupied shall be deducted from "the space allowable for the use of passengers." It also authorizes the construction of a hospital "in the spaces appropriated to passengers" to be included "in the space allowable for passengers," not to exceed one hundred superficial feet of deck or platform. Then follows § 4255, above quoted, on which the second count of the libel is founded, which has reference to the construction of the berths to be occupied by the passengers. It prescribes the interval between the lowest part of any tier of berths and the deck or platform beneath to be not less than nine inches; that the berths shall be well constructed, parallel with the sides of the vessel, and separated from each other by partitions, and shall be at least six feet in length and two feet in width, and specifies how they shall and shall not be occupied by passengers. It is quite true that in § 4255 there is no express reference to spaces appropriated to the use of passengers, and that phrase does not occur in it, but nevertheless the section does plainly relate to the space in vessels appropriated to the use of passengers. It describes how the berths in which the passengers sleep shall be constructed, separated, and occupied. These berths are within the space which by the previous sections must be allowed for and allotted to the use of passengers; they constitute a part of that

very space, and are included in it. The language, therefore, of § 4264, as amended by the act of February 27, 1877, 19 Stat. 240, 250, applies directly so as to subject vessels propelled in whole or in part by steam, and navigating from and to and between the ports therein named, to the provisions, requisitions, penalties, and liens included within § 4255 as one of the several sections of the chapter relating to the space in vessels appropriated to the use of passengers.

It is true that the contrary construction of these sections of the act was adopted by MR. JUSTICE BLATCHFORD, then district

Page 124 U. S. 577

judge in the Southern District of New York, in the case of *The Manhattan,* 2 Ben. 88, whose decision was affirmed on appeal in the circuit court, in October, 1868, by Mr. Justice Nelson, and that case was followed as an authority, in the case of *The Devonshire,* 13 F. 39, by Judge Deady, in 1882. In the latter case, the district judge seems to have been influenced in some degree by the consideration that the enactment by Congress of the omitted § 10 of the Act of March 3, 1855, as an amendment to § 4264 of the Revised Statutes by the Act of February 27, 1877, must be considered to have restored the section with the judicial construction which had been given to it in the case of *The Manhattan.* We do not, however, consider this circumstance as entitled to the weight given to it by him, and which we are asked in the argument by counsel to give in the present case. It is certainly not sufficient, in our judgment, to overcome what seems to us to be the clear meaning of the statute derived from its language and its reason. This view, indeed, is forcibly presented by the learned district judge in the case of *The Devonshire,* where he says (p. 213):

"The argument of the district attorney in favor of the libel is that the provisions in § 2 are regulations relating to the 'space' appropriated to passengers, and therefore made applicable to steam vessels by the operation of § 10, because by them the 'space' between each berth, and that appropriated to each passenger therein, is prescribed, and when we consider that the evils intended to be prevented by § 2 are as likely to exist in the case of steerage passengers carried in steamships as

those against which § 1 is intended to guard, it is not without force. There is quite as much need that a steerage passenger shall have the 'space' and privacy provided in § 2 when he lies down to sleep or is prostrated with sickness as that he shall have the general moving and breathing 'space' between decks provided in § 1, and although the word 'space' is not used in § 2, still that is the subject of it, and its division and appropriation among passengers for the purpose of berths are thereby carefully and minutely regulated."

We think these considerations are conclusive in support of the sufficiency of the second count.

Page 124 U. S. 578

The third count of the libel is for an alleged violation of § 4266 of the Revised Statutes. That section provides that the master of any vessel arriving in the United States from any foreign place whatever at the same time that he delivers a manifest of the cargo, or makes report or entry of the vessel pursuant to law, shall also deliver a report to the collector of the district in which such vessel shall arrive, and a list of all the passengers taken on board of the vessel at any foreign port of place, verified by his oath, in the same manner as directed by law in relation to the manifest of the cargo. In that list he is required to designate particularly the age, sex, and occupation of the passengers, respectively, the part of the vessel occupied by each during the voyage, the country to which they severally belong, and that of which it is their intention to become inhabitants, and whether any, and what number, have died on the voyage, and the refusal or neglect of the master to comply with the provisions of this section is subjected to the same penalties, disabilities, and forfeitures as are provided for a refusal or neglect to report and deliver a manifest of the cargo. The penalties, disabilities, and forfeitures referred to in this section are those imposed by § 2774, which declares that every master, who shall neglect or omit to make either of the reports and declarations thereby required shall for each offense be liable to a penalty of $1,000.

This § does not subject the vessel itself to any liability for this penalty, and we are not referred to any general provision of the statute imposing such a liability on the vessel, akin to that contained in § 3088, making the vessel liable whenever her owner or master is subject to a penalty for a violation of the revenue laws of the United States. It follows that the penalty imposed for a violation of § 4266 cannot be charged as a lien on the vessel, under the third count of the libel, unless that section is made applicable to vessels propelled in whole or in part by steam. This can be only on the supposition that this effect is given to it by the amendment to § 4264. We find it impossible to adopt the construction that makes § 4266 one of those sections relating to the space in vessels appropriated to the use of passengers, which, by the amendment

Page 124 U. S. 579

to § 4264, are extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam and navigating from, to, and between the ports and in manner as therein named, and to such vessels and to the masters thereof. Doubtless one of its useful purposes was to enable the collector of the district to ascertain, from the verified list of passengers which it required to be furnished, whether the provisions of the statute had been complied with which limited the number of passengers according to the tonnage and space allowed in the vessel for steerage passengers; but we think it would be a strained construction of the act for that reason to include the section under consideration in those made applicable to steam vessels, because they relate to the space in such vessels appropriated to the use of steerage passengers.

The only construction of the law which would subject the vessel to the lien of the penalty referred to in § 4266, by virtue of § 4270, would be that which made all the provisions of the chapter applicable to vessels propelled in whole or in part by steam, as well as to sailing vessels, on the ground that the language of the various sections makes no distinction as to vessels on account of their propelling power. It is certainly true that the language of all the sections is large enough to include steam vessels as well as sailing vessels, but to give that application to this

legislation is to deprive of its whole effect the original § 10 of the Act of March 3, 1855, and the corresponding amendment introduced by the Act of February 27, 1877, to § 4264. That section extends and makes applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, navigating from, to, and between the ports, and in the manner as in the act named, and to such vessels and to the masters thereof, the provisions, requisitions, penalties, and liens of the act relating to the space in vessels appropriated to the use of passengers. If, without that section, all the provisions of the act were applicable to steam vessels, then the section itself would have no meaning. To give it any effect whatever, it is necessary to suppose that it was the intention of Congress that no provisions of the act

Page 124 U. S. 580

of March 3, 1855, should apply to steam vessels except those that were made applicable to them by § 10. By extending to them the particular provisions named in the section, the inference is unavoidable that all other provisions are thereby excluded from a similar application. This view is strengthened by the fact that, the section having been omitted from the revision, it was restored by the act of February 27, 1877. By omitting § 10 from the revision, it was probably the view of the revisers that the whole chapter should apply to steam vessels as well as sailing vessels. It seems to have been the intention of Congress to correct this view by restoring the original § 10 as an amendment to § 4264. We are therefore of opinion that § 4266 does not apply to vessels propelled in whole or in part by steam, and that the third count of the libel cannot be sustained.

Our conclusion, therefore, on the whole case is that the libel sets out a sufficient cause of action, and entitles the United States, upon proof of the facts, to recover under the first and second counts, but that it must be dismissed as to the third. Under the first count, that recovery must be limited to the amount adjudged as a penalty against the master by way of fine upon the criminal information against him. The penalty recoverable against the vessel, and which by § 4270 is made a lien upon it, is not an additional penalty, but is the same penalty which by § 4253 is to be adjudged against the master himself in the criminal persecution for the

misdemeanor, and payment on the part of either is satisfaction of the whole liability. It is the amount of that fine so assessed that is made a lien on the vessel. Under the second count, it does not appear that any proceeding for the penalties therein sought to be recovered had been previously taken against the master. The difficulty of further proceeding under that count, however, is removed by a stipulation between the parties contained in the record. This stipulation provides that the liability, if any, of the master of the steamship for the penalties provided for in §§ 4255 and 4266 of the Revised Statutes may be ascertained on the trial of the cause itself as fully and with the same force and effect as if the same were ascertained on a

Page 124 U. S. 581

trial of a proceeding against the master to recover the penalty, and a judgment therefor had been rendered against him, and all exceptions to the libel that the liability of the master, if any, had not been ascertained on a proceeding against him prior to the filing thereof were thereby waived.

For the reasons assigned, the decree of the circuit court is

Reversed, and the cause remanded, with directions to take further proceedings therein in accordance with this opinion.