the omission to notify the agents of the vessel of the condition of the sale before the delivery of the merchandise on board. Nor does it appear that they were aware that the vendee had anything to say to the agents of the vessel in respect to the shipment.

There is still less reason to censure the plaintiffs for an omission to notify the agents of the vessel that the sale was a conditional one, when it is observed that the defendant delivered bills of lading to the vendee before the merchandise was actually on on board the vessel, and that an advance of $11,000 had been obtained thereon by the vendee from third parties on the same day that they were obtained.

It appears also that the vendee was in insolvent circumstances for some years. This was a circumstance calling for caution by all parties who were dealing with him when he required credit.

It would seem that the agents of the vessel relied exclusively upon their knowledge of the character of the shipper (Woodhull) for integrity and fair dealing, and that they delivered the bills of lading to him in the trust and confidence which they had that he would ship the merchandise as agreed, and surrender the shipping receipt when requested. This confidence was misplaced, and they have suffered loss from that cause, and not for the reason that the plaintiffs did not inform them of the terms upon which the merchandise was agreed to be sold ; a notice wholly unusual, and which the defendant could not expect.

It is urged that the custom above mentioned is invalid, among other reasons, because it tends to establish the negotiability of a new and unusual instrument in writing. Some of the witnesses state the custom to be that the bills of lading are delivered to the party who presents the shipping receipts, but the statement more accurately given, I think, by the other witnesses, is that the custom is to give the bills only to the party on the surrender of the receipts. Sometimes the surrender of the receipts is waved where the responsibility of the parties are well known. Such instances are like the present one where confidence or credit is given to some well-known party.

Some of the witnessess state that the bills are given to the person who presents the receipts unless suspicion is awakened.

There can be no conclusion drawn from the whole evidence that the receipts are negotiable, or that the holder of them is entitled to bills, without further question as to the right of the holder. The receipts amount to a strong presumption that the holder is entitled to bills of lading for the merchandise mentioned in the receipt, but the presentation of them does not preclude further inquiry.

On the other hand, if the shipper, or any other person demanding bills, were unable to exhibit and surrender the shipping receipt, it would present a strong case for suspicion, and the owners or agents should make inquiry before delivering the bills.

The custom seems to be uniform, well known, and not unreasonable.

It does not invalidate the custom, because the vessel cannot be compelled to give receipts, or the shipper to take them.

The shipper may still insist that he will ship only by such vessels as will give receipts, and the vessel may also refuse to receive freight unless the shipper will receive receipts, or conform to the custom. It is a custom that tends to the protection of the shipper as well as the shipowner. The safeguard might be increased to shippers and owners by inserting in the receipt a clause declaring that bills of lading shall be required only upon the surrender of the receipts.

There was no error in admitting the evidence of the custom mentioned, or in the submission of the case to the jury, so far as the defendant is concerned.

Evidence of the insolvency of Woodhull was material to ascertain whether credit was given by the plaintiffs to him in respect to the possession of the merchandise, or by the defendant in respect to the delivery of the bills of lading.

This, taken with other evidence in the case, afforded some ground to enable the jury to determine whether the one party or the other had given credit to Woodhull.

In the absence of any new inducement the plaintiffs would not probable abandon the condition for which they had stipulated in making the sale to an insolvent purchaser.

The agents of the vessel had given credit to an insolvent dealer with them to a certain extent, in agreeing to rely upon him to deliver a large amount of merchandise covered by the bill of lading and had bound themselves to give him the exclusive right to ship a particular kind of merchandise for the ensuing voyage. They might have had faith in his personal character for integrity, inducing them to overlook his want of pecuniary responsibility, with slender additional security, but there is no reason to believe, from the evidence, that the plaintiffs had any such faith.

The exception in this respect is not well taken.

The defendant gave evidence of the amount of the freight that would have been earned had the merchandise so put on board been carried to its destination, and the loss and expense arising from the delay of the ship in taking it out, and restoring the cargo which had been displaced in removing the plaintiffs' merchandise.

The Judge was requested at the trial to charge that the defendant Champion was entitled to be allowed for these items, if the jury should find for the plaintiffs upon their claim for the merchandise so shipped. The judge declined so to charge, and the accepted to the ruling.

The voyage has not yet commenced. The ship has not yet broken ground.

The question does not appear to be free from doubt, whether a shipper who has contracted for freight may not remove his shipment under such circumstances without payment of any freight affording only a full indemnity to the vessel for the breach of his contract for freight. The vessel might fill up with cargo on the same or better terms, and sustain little or no damage.

The following cases are adverse to the claim of the vessel: 3 Gray R. 92, Bailey v. Damon; 5 Binn. R. 392, 401, Clewson v. Long.

In the present case there was no contract between the plaintiffs and the vessel or her owners. The plaintiffs were willing, and offered to permit the merchandise to be carried by the vessel for their account on the same terms as it had been received. The defendant, Champion, however, refused to recognize the title of the plaintiffs, or to deliver them bills of lading. The plaintiffs claim of title has been sustained by the jury, under the charge of the court.—The defendant was wrong in denying the plaintiffs' ownership.

The plantiffs were under no obligations to permit their merchandise to leave the port or to remain in the vessel, while their title was denied.

Under such circumstances there can be no legal foundation for demanding freight, damages for breach of any freight contract, or for the delay of the vessel, or the reasonable expenses to which the vessel or her owners were subjected by the plaintiffs, in recovering the possession of their merchandise, unjustly withheld. This exception was not well taken.

The sum of $2,000, part of the advance obtained by Woodhull on the bills of lading delivered to him, was afterwards paid to other parties on general account, and by them paid to the plaintiffs without knowledge of the source from whence it was obtained and has been by the plaintiffs applied on account of other indebtedness.

The refusal of the judge to charge so as to give the defendant Champion the benefit of this payment was correct, and the exception in that respect is not well taken

The defendant has no ground of complaint as to the rulings at the trial or the manner of the submission of the case to the Jury.

In some respects the charge was more favorable to the defence than the Judge was required by law to make.

The judgement should be affirmed with costs.

The result to which we have here arrived is not in harmony with the former decision General Term in this case (reported 28 Barb 217), but the evidence in respect to custom was not then before the Court; and as that is a material and controlling fact in the case as now presented, we do not consider the former conclusion as authority controlling our present views.

D Lord, for the appellant ; G Dean, for the respondents.