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Mcandrews Vs. Thatcher

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SooperKanoon Citation : sooperkanoon.com/81315

Court : US Supreme Court

Decided On : 1865

Appeal No. : 70 U.S. 347

Appellant : Mcandrews

Respondent : Thatcher

Judgement :

McAndrews v. Thatcher - 70 U.S. 347 (1865)
U.S. Supreme Court McAndrews v. Thatcher, 70 U.S. 3 Wall. 347 347 (1865)

McAndrews v. Thatcher

70 U.S. (3 Wall.) 347

ERROR TO THE CIRCUIT COURT FOR

THE SOUTHERN DISTRICT OF NEW YORK

SYLLABUS

The liability of a cargo to contribute, in general average, in favor of the ship does not continue after the cargo has been completely separated from the vessel, so as to leave no community of interest remaining.

This principle illustrated in the following case:

A ship was stranded near her port of destination, and the underwriters upon her *cargo* sent an agent to assist the master in getting her off. The master and agent made all proper efforts to do this for two days, when not succeeding at all, and the water increasing in the vessel, they began to discharge the cargo in lighters, still making efforts to save the ship. This discharge of the cargo occupied four days, by which time the whole of it was taken off, and, with the exception of a very small fraction in the lower hold and not discovered, taken to the ship's agents, who subsequently delivered it to its consignees, they giving the usual

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average bond. By the time that the cargo was thus all got off, the vessel, not assisted by being lightened, was settling in the sand, with the tide ebbing and flowing through her as she lay. The agent considering her case hopeless, and the consignees of the ship having refused to authorize him to incur any further expense, now went away.

On the next morning, and while the master was yet aboard, the underwriters on the *vessel* sent *their* agent, who got to work to float the vessel. Soon after the new agent came, the crew refused to do duty. The agent got new bands, and the crew went away. They were soon followed by the master, he leaving the vessel after the new agent had been in charge of her for four days. After six weeks' labor, and an expenditure of money somewhat exceeding her value when saved, the new agent succeeded in floating and rescuing the ship. The remnants of the cargo, in a damaged state, were delivered to its consignees.

On a suit by the owners of the ship against the consignees of the cargo for contribution in general average for the expenses incurred after the master went away, *held* that the case was not one for contribution; there having been, as the court considered, no community of interest remaining between the ship and cargo after the master, in the circumstances of the case, had left the ship.

The ship *Rachel,* owned by Thatcher and others, of Boston, sailed from Liverpool for New York in July, 1859, with a cargo consisting, among other things, of four hundred and four boxes of licorice paste consigned to McAndrews in New York. The vessel, with her cargo, arrived in safety inside of Sandy Hook on the 21st of September, but in coming up the bay, struck in a gale on the west bank in the lower harbor and became fast.

Regarding the ship and cargo as in peril, the master accepted the services of a steamer which that same day came alongside to get her off. This steamer passed her hawser board and made fast, but, finding that her power was not sufficient to accomplish the object, she set a signal for another steam tug. Another immediately came to her aid. The power of both combined was tried, but they could not start the ship from the place where she lay imbedded in the sand. These steamers continued their efforts for several hours. During this time, a third steamer came alongside and made fast to the ship; but in her endeavor to start it parted her hawser, and all came to the conclusion that then efforts were fruitless.

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The master, at six o'clock the same afternoon, left the ship and went to the port for advice and assistance, but the mate and mariners remained on board. At four o'clock on the following morning, it appeared that there was fourteen and a half feet of water in the ship, and that this was fast increasing. The cargo was insured in New York and the ship in Boston. The underwriters of the cargo, with the knowledge and consent of the consignees of the ship, during the forenoon of the second day after the disaster, sent a steamer and their agent, a certain Captain Merrit, to the ship, for the purpose of saving, if possible, both it and the cargo. The steamer had a schooner in tow, and every necessary appliance -- such as steam pumps and wrecking apparatus -- to rescue the ship, or, if necessary, to discharge the cargo. These continued their efforts, under the direction of the master, who had returned to his ship, for two days, but, finding that they were unable to get the ship off, they got to work to *discharge the cargo into lighters, and transport it to its place of destination.* The discharge of the cargo occupied four days, *i.e.* till the 26th of September, during which time three hundred and ninety-one boxes of the

licorice paste were taken off.

The cargo so discharged and transported was placed in the custody of the *agents of the ship, who, upon receiving the usual average bond, delivered the same to the consignees.* Efforts to get the ship off were continued by these parties until the said twenty-sixth of September, when the steam pumps were taken down and carried away, having finished discharging the cargo. Before the agent left the vessel finally he went to New York and consulted with the consignees of the ship. These refused to authorize him to incur any further expense; the ship at that time, as positive testimony declared, having been settling in the sand, with the tide ebbing and flowing in her as she lay.

Intelligence of the disasters having reached the underwriters of the *ship,* they sent *their* agent, one Captain Morris, to the vessel. He went on board at one o'clock the next morning, after the other agent went away, and took charge

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of her; but the crew soon afterwards came aft and refused to do duty. Deprived of their services, he went immediately to New York and employed other men to supply their places, and the crew left the ship. The next two days were spent in procuring oil casks, and in attempts to buoy the ship by their use, but without any beneficial result, except to save some of the materials of the vessel. It was found, on the next morning (that of the 30th), after a storm, that the ship, at her hatches, had eighteen feet of water, and as the sea was breaking over her, and she was apparently going to pieces, her main topmast was, by order of Morris, cut away.

The master, unable to do more than he had done, now abandoned the ship, and left her where she lay, in charge of Morris, the agent of her underwriters. Not discouraged by her condition, Morris continued his endeavors until the 11th of November following, and on that day, by the assistance of two steamers, *succeeded in getting her free,* and towed her up to the Marine Railway, at Hunter's Point, for repairs. The value of the ship as saved was somewhat less than the expense of getting her off after Morris came on board. Examination made at

the Marine Railway showed that there were remnants of the cargo, in a damaged state, [Footnote 1] including eleven boxes of the licorice paste, not till then discovered, on board. These were discharged and delivered to the consignees. [Footnote 2]

The shipowners sued the consignees of the licorice paste in the District Court for the Southern District of New York, for $3,363.89, adjusted as in the note for their ratable proportion

of the expenses incurred in saving the ship after Morris came on board. The court below was of opinion that the claim was well founded in law, and charged accordingly.

Its opinion expresses so well one view which may be taken of the case that the reader will gain by having it entire:

"This is, perhaps, a close case, but we are inclined to think that, on principle, the cargo of the defendants is bound to contribute in general average to the expenses of saving the vessel. The fact that the vessel stranded near the port of destination has somewhat embarrassed the case, taken in connection with the circumstances attending the delivery of the cargo by lighters. It is open to the observation that the cargo was not only separated from the vessel and the common impending peril, before most of the expenses in relieving the latter were incurred, but that the separation took place at the instance and expense of the consignees of the cargo. This view, however, to the extent stated, is not sustained by the evidence. The cargo was discharged into the lighters to relieve the vessel, and the delivery then at the port of destination is attributable to the accident of the proximity of the port. The cargo was at the risk and responsibility of the ship until delivered by her consignees on receiving bound for average contribution."

"It is true, in a literal sense, that after the discharge of the cargo upon the lighters, and separation from the ship, the safety of the cargo no longer depended upon the saving of the vessel, and hence that there was no longer any common peril

impending or benefit derived from the expenses incurred. But is this true in a more general view of the facts of the case, or in contemplation of law? By the accident which occasioned the stranding of the vessel, both the vessel and cargo were exposed to one common danger, and the expenses incurred were incurred with a view to the safety of both, and of course for their common benefit. Steam tugs were employed, and efforts made to start the vessel from her sand bed -- steam pumps and wrecking apparatus used. These efforts failing, then commenced sending down yards and spars, and placing cargo into lighters. All these were expenses incurred, and efforts made by the master, who represented the interests of all concerned. These efforts were

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continued by the master until and after he was joined by Captain Morris, the agent sent by the underwriters of the ship, who then took charge of the business."

"The question, under these circumstances, is this -- was the cargo exempt from all expenses incurred in relieving the ship after it was placed in safety upon the lighters? We agree that, if the consignees of the cargo had accepted it thus delivered, at the sides of the stranded ship, the separation would have been complete, and it would have been no longer connected with the danger or its incidents. But this cannot be pretended. The cargo continued as a part of the adventure not yet terminated. It cannot be doubted but if any damage had happened to it in the transfer to the lighters, or in the conveyance to the port, the loss would have been the subject of general average, and the ship liable for its share. And in this sense the cargo is still interested in the safety of the ship. It is said the consignees of the cargo do not claim any average contribution. But their release or waiver cannot affect the question. The test is is the vessel legally liable?"

"There is certainly a difficulty in laying down any general rule by which to determine the measure of expense the master or owner, in case of a vessel stranded by a peril of the sea, may incur, and to which the cargo saved must contribute. That expenses may be incurred, indeed that it is oftentimes the duty of

the masters or owner to incur them, is not to be denied. We do not see but the measure of them must depend upon the exercise of sound judgment and good faith, under all the circumstances of the case. No fixed amount can be settled in advance. There may be abuses, as in every case where the rule of liability turns upon the exercise of the human judgment in the given case. The only remedy we know of consists in the supervision of the courts. We cannot say, in this case, that the owner should have ceased his efforts when the cargo was saved, or that he forfeited his right to the contribution by the continuance of them."

The jury having found in favor of the plaintiff for the $3,363.89 claimed, and judgment having gone accordingly, the case was now here on exceptions and error.

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MR. JUSTICE CLIFFORD delivered the opinion of the Court. [Footnote 3]

Views of the defendants are, that the case, as stated, is not a case for contribution in general average, and that the court erred in instructing the jury that the plaintiffs were entitled to recover.

Primary proposition maintained by the defendants is that expenses incurred in a voyage, although they were necessary and proper, are not to be carried into general average unless they were of an extraordinary character, nor unless it appears that they were incurred for the joint benefit of the ship and cargo, and that inasmuch as it appears in this case that the cargo had been stored in safety, at the place of destination, before the expenses, for which the suit was commenced,

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were incurred, the claim of the plaintiffs cannot be sustained.

Decision and judgment in the case must depend upon the question whether the several sums expended by the agent of the underwriters of the ship after he went on board and took charge of the vessel and the men and means employed to save

her were properly carried into the adjustment, because it is plain that if those sums are not properly included in the expenses of general average, the judgment should be reversed.

I. Sacrifices, voluntarily made in the course of the voyage, of part of the ship or cargo to save the residue of the adventure from an impending peril or extraordinary expenses incurred for the joint benefit of both ship and cargo, and which became necessary in consequence of a common peril, are usually regarded as the proper subjects of general average.

All losses which give a claim to general average contribution, says a standard writer upon the law of insurance, may be divided into two great classes:

1. Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing.

2. Those which arise out of extraordinary expenses incurred for the joint benefit of both ship and cargo. [Footnote 4]

Present case, if the defendants are liable at all, falls within the latter class, and consequently it will not be necessary to remark upon the former class, although cases of jettison are much more frequently presented for decision than cases growing out of the stranding of the vessel. Stranding in this case was involuntary, but it cannot be doubted that the ship and cargo were jointly exposed to a common peril and were in imminent danger of being wholly lost. Such being the fact, it is clear that the expenses of saving the ship and cargo were a proper subject of joint and ratable contribution in general average by vessel, freight, and cargo, provided the vessel and cargo were saved by the same series of measures

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during the continuance of the common peril which created the joint necessity for the expenses. [Footnote 5]

Undoubtedly the community of extraordinary peril commenced with the stranding of the vessel, but the question is where it terminated? Three theories may be

suggested:

1. That it terminated when the cargo was separated from the ship, and was transported to the port of destination and delivered to the consignee.

2. That it terminated when the master, acting in good faith as the agent of all concerned, yielded to the necessities of his situation and abandoned the endeavors to save the ship, and left her where she was stranded, in charge of the agent of her underwriters.

3. That it did not terminate until the ship was got off from the bank where she was stranded, and arrived at the marine railway for repairs in her port of destination.

Theory of defendants is substantially expressed in the first proposition, but the plaintiffs insist that the community of peril did not terminate until the arrival of the vessel at the port of destination, and if not, then the charge of the court was correct, and the judgment of the court must be affirmed.

Natural justice requires that where two or more parties are in a common sea risk, and one of them makes a sacrifice or incurs extraordinary expenses for the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure, or, in other words, the owners of the other shares are bound to make contribution in the proportion of the value of their several interests. [Footnote 6]

Courts universally admit that the Rhodian law was the parent of maritime contribution, although, in terms, it made no provision for any case of general average, except for that of jettison of goods as the means of lightening the vessel. But the rule, as there laid down, has never been understood as being confined to that particular case, but has always

been regarded as a general regulation, applicable in all cases falling within the principle on which it is founded.

Principle of the rule is that "what is given for the general benefit of all, shall be made good by the contribution of all," and hence it is that losses, which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo, are as clearly to be carried into the adjustment as those which arise from sacrifices of part of the ship or part of the cargo.

Settled rule, also, is that when a vessel is accidentally stranded in the course of her voyage, and by labor and expense she is set afloat, and completes her voyage with the cargo on board, the expense incurred for that object, as it produced benefit to all, so it shall be a charge upon all, according to the rates apportioning general average. [Footnote 7]

In case of accidental stranding, says Mr. Phillips, the expenses incurred for getting off the vessel, as far as they are incurred for the purpose of saving the ship, cargo, and freight, and are common to all those interests, are a subject of contribution by all. Expenses, however incurred for any separate interest, he says, are wholly chargeable to that interest, and there can be no doubt that the proposition, as stated, is correct as a general rule, and yet it is apparent that there will often be difficulties in its application. Foreseeing those difficulties, the same author attempts to obviate them by three practical illustrations, which it becomes important to notice:

1. That if the ship is got off without discharging the cargo or by discharging only a part of it, then the whole expense is general average unless the vessel needs repairs, but if she needs repairs, those are particular average.

2. That if the vessel does not float when the whole cargo is discharged, the subsequent expenses do not concern the cargo, but are particular average on the vessel in the same manner as repairs.

3. That goods, when landed from a stranded ship and delivered to the consignee, cease to be liable to contribute for expenses subsequently incurred.

Unquestionably the rule enunciated in the first illustration is correct, but grave doubts are entertained whether the second and third can be admitted in all cases without important qualifications.

Although the stranded vessel may not float as a consequence of the unlading of the goods, still she may be so lightened by the operation that the usual appliances at hand may be amply sufficient to enable the master to rescue the vessel without much expense or delay and put her in a condition to receive back the cargo and transport it to the port of destination, and in the case supposed it cannot be doubted that the expense of saving the vessel, as well as the expense of preserving and reloading the cargo, would be the proper subject of general contribution.

So where the cargo consists of various consignments and the vessel is stranded in the harbor of the port of destination, it will seldom or never happen that all the consignments will be delivered at the same time. On the contrary, some of necessity will be delivered before others, and yet if the unlading of the cargo has the effect to make the vessel float, and the whole adventure is saved by one continued, unremitted operation, under the directions of the master as the agent of all concerned, it would seem that the case was one falling directly within the equitable principle of general average, which requires that all the interests shall contribute for the expenses incurred to save the whole adventure from common peril. [Footnote 8]

Unless the rule is so, a new statement of the adjustment would be necessary upon each respective part of the cargo delivered as they successively reached a safe destination, which would be impracticable, and contrary to the usual course of adjusting such losses.

On the other hand, it is an undoubted rule that goods, or

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any interest, are not liable to contribute for any general average or expenses incurred subsequently to their ceasing to be at risk; because all that was not

actually at risk at the time the sacrifice was made or the expense incurred was not saved thereby, and no interest is compelled to contribute to the loss or expense which was not benefited by the sacrifice. [Footnote 9]

II. Light is shed upon this inquiry by referring to the duty of the master, who, in case the vessel is stranded, becomes the agent of all concerned. Duties remain to be performed by the master, as the agent of the owner or of all concerned, after the voyage is suspended by the stranding of the vessel. His duty is, if practicable, to relieve the ship and prosecute the voyage, and his obligation to take all possible care of the goods still continues, and is by no means discharged or lessened while it appears that the goods have not perished with the wreck. Safe custody is as much the duty of the carrier as due transport and right delivery, and when he is unable to carry the goods forward to their place of destination by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which human skill and prudence could prevent. [Footnote 10]

Conscious of the nature and extent of his obligations, the master accepted the services of the several steamers which went to the relief of the ship, and continued his endeavors to save both ship and cargo until the latter was safety delivered at the port of destination and until the consignees of the ship declined to authorize any further expense.

Evidence as reported is satisfactory that the master acted throughout in good faith, and there is not the slightest ground to conclude that he was wanting either in personal energy or in nautical skill. Take the circumstances as detailed in the statement of the case, and it is clear that he

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could not have been justified in doing less than he did; but the question is whether or not he was required to do more? Plainly his duty was not ended when the vessel was stranded, nor even when the cargo had been removed for the double purpose of saving it and of lightening the ship, as a part of the means adopted to

get her off.

Means devised on the occasion were such as are usually employed for the purpose, and not a doubt is entertained that if the master had been successful in saving the ship as well as the cargo, the whole expense, inasmuch as it was the result of one continuous, unremitted operation, would have been properly regarded as a general average expenditure. Where the ship is stranded, much is necessarily confided to the discretion of the master, and if the ship had been saved through the means which he employed, it is clear that the expenditure would have fallen directly within the definition of general average as given by the best writers upon the subject.

III. General average denotes that contribution which is made by all who are parties to the same adventure towards a loss arising out of extraordinary sacrifices made or extraordinary expenses incurred by some by them for the common benefit of ship and cargo.

Usual conditions annexed to such a loss, in order that it may be the object of such contribution, as generally stated, are that it must have been of an extraordinary nature, advisedly incurred, under circumstances of imminent danger, for the common benefit of ship and cargo, and it must have aided at least in the accomplishment of that purpose. [Footnote 11]

Suggestion is that the cargo was separated from the ship, but the mere fact that the cargo is unladen, although it is done in part for the purpose of saving the goods, yet if it is also done for the purpose of lightening the vessel and as a means of causing her to float and of saving her from the common peril, will not necessarily divest the transaction of

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its character as an act performed for the joint benefit of the ship and cargo.

Except when the disaster occurs in the port of destination or so near it that the voyage may be regarded as ended, the master, if the goods are not perishable,

has the right, and if practicable, it is his duty, to get off the ship, reload the cargo, and prosecute the voyage to its termination.

Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unladed and stored in safety are not relieved from contributing towards the expenses of saving the residue, nor is the cargo in that state of the case relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril and the whole adventure was saved by the master in his capacity as agent of all the interests and by one continuous series of measures.

Ship and cargo were in imminent danger from a common peril, and under those circumstances it was the duty of the master, as the agent of all concerned, to use his best endeavors and employ his best exertions to save the whole adventure.

Viewing the matter in that light, his first efforts were directed to the object of relieving the vessel by means of the steamers which came alongside; but, finding that the ship was too fast in the sand to be got off by those means, he commenced to discharge the cargo, to save the goods and lighten the ship as apparently the best possible measure which could be adopted to save the whole adventure.

IV. None of these propositions is controverted by the plaintiffs, but they insist that the subsequent expenses incurred by the agent of the underwriters of the ship should also be carried into the adjustment, and that the cargo saved by the master should be adjudged liable to contribute towards the expenses incurred by the agent of the underwriters of the ship in accomplishing, at the end of six weeks, what the master abandoned as hopeless and as a total loss.

Before the last-named agent came on board, the master, ascertaining that the consignees of the ship would not authorize

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any further expenditure, had dismissed the steamers that went to the aid of the ship and had sent back to the port all the steam pumps and wrecking apparatus he

had employed in his endeavors to save the ship as well as the cargo, and had, in fact, decided to abandon the ship as a total loss, and left her in charge of the agent of her underwriters.

Prior to that decision, the cargo, except a few remnants of small value, subsequently found in the lower hold, had been discharged into lighters and transported to the place of destination and had been delivered into the possession of the consignees.

Having saved the cargo, and finding that further efforts to save the ship with the means at his command were fruitless, he relinquished his endeavors and abandoned the undertaking.

Such are the undisputed facts of the case, and under the circumstances it is not possible to hold that the ship, as subsequently got off, was, as matter of fact, saved by a continuation of the same series of measures as those by which the cargo was saved.

Complete separation had taken place between the cargo and the ship, and the ship was no longer bound to the cargo nor the cargo to the ship.

Undoubtedly the doctrine of general average contribution is deeply founded in the principles of equity and natural justice, but it is not believed that any decided case can be found where the liability to such contribution has been pushed to such an extent as that assumed by the plaintiffs. [Footnote 12]

V. First case cited for the plaintiffs is that of *Bevan v. United States Bank,* [Footnote 13] which is the strongest reported case in their favor. Plaintiffs were the owners of the vessel, and the defendants were the owners of a certain quantity of specie, which constituted a part of the cargo. Voyage was

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from New Orleans to Philadelphia, and the vessel was stranded in Delaware Bay in a situation of imminent peril. Statement of the case shows that the specie was among the first articles landed, and it was immediately sent overland to the port of

destination, and on the following day was delivered to the defendants. Eight weeks afterwards the vessel reached the same port in safety with the remainder of the cargo, which had been discharged into lighters and was afterwards reshipped. Supreme Court of Pennsylvania held that the defendants were liable to contribute in general average to the charges and expenses incurred subsequently to the landing of the specie.

Much stress is laid in the opinion of the court upon the fact that the vessel and the residue of the cargo left on board, were subsequently brought into port by the extraordinary exertions of the master, and if the conclusion can be sustained at all, it must be upon the ground that the whole adventure was saved by a continuous series of measures prosecuted by the master as the agent of all concerned which commenced with the saving of the specie and ended with the saving of the vessel and the residue of the cargo. Stranding in that case was outside of the harbor of the port of destination, and there was no abandonment of the vessel nor any suspension in the endeavors of the master to save the entire adventure. But the statement of the case shows that the master and mariners remained on board and that they saved the ship, and having returned the residue of the cargo to the ship, the same was duly transported to the place of destination. [Footnote 14] Standard text writers have doubted the correctness of that decision, [Footnote 15] but it is unnecessary to determine the question at the present time, as it is clearly distinguishable from the case before the Court.

Second case cited is that of *Bedford Com. Ins. Co. v. Parker,* [Footnote 16] which can scarcely be reconciled with the preceding

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case. Insurers of the ship were the plaintiffs, and the defendants were the owners of the cargo. She was stranded nine miles from the port of destination. Part of the cargo was saved by men employed by the owners of the same, at their own expense. Other parts of the same were subsequently saved by the underwriters of the ship, and it appears that at one time the latter had a hundred men employed in efforts to save the cargo and the sails and rigging of the vessel. They afterwards

entered into a contract with a third party, and agreed to pay a certain sum if he would save the ship and the residue of the cargo.

Reported facts show that the contractor ultimately succeeded, and brought the ship and such part of the cargo as remained on board safely into the harbor, and the court held, and well held, that only that part of the cargo which was on board when the contract was made, was liable to contribute in general average to pay the amount as stipulated in the contract. Clear inference, from the statement of the case, is that the master had abandoned the ship, and that he had no participation in the previous endeavors to save the cargo. Decision was that everything which is saved in such a case, by common expense and labor, shall contribute to pay that expense in proportion to its value, but the court decided that the part of the cargo taken from the vessel by the owners, before the contract was made, was not saved by the successful efforts of the contracting party, and there can be no doubt that the decision was correct. [Footnote 17]

Earliest case upon the subject is that of *Shepherd v. Wright* [Footnote 18] which was an appeal from a decree in the Court of Chancery. Appellants shipped a part of the cargo, and were the owners of the ship, and the residue of the cargo belonged to the respondents. Ship sailed from Messina, bound to London, and on the voyage she was chased by an armed vessel into Malaga. Advised of the danger, the factor of the ship sent lighters to the master, to save what he could of the cargo;

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and as the goods of the respondents were silks, they were first carried on shore. Night came, and the armed vessel left, and as the danger no longer continued, the master forbore to land any more of the goods. Six days afterwards the armed vessel returned, and captured the ship and the goods on board, belonging to the appellants.

They brought the bill of complaint against the respondents, to compel contribution; but the chancellor dismissed the bill of complaint, and the decree was affirmed in

the House of Lords. Ground of the decree was that the appellants' loss did not contribute to the preservation of the respondents' shipment. Whole adventure was saved from the first peril, and the shipment of respondents was not exposed to the second, by which the ship and the appellants' goods were lost. Evidently the case was rightly decided, and it is perfectly consistent with the views herein already expressed. [Footnote 19]

Third case cited by the plaintiffs is that of *Nelson v. Belmont,* [Footnote 20] which has an important bearing upon the question under consideration. Plaintiff in that case being the owner of the ship, claimed general average contribution of the defendant, as the shipper of a certain amount of specie. Intended voyage was from New Orleans to Havre, but the ship was struck with lightning in the Gulf Stream, and was obliged to make a port of distress. Unable to extinguish the fire, the master signaled a vessel in sight, and accepted assistance. He transferred the specie to the other vessel, and the arrangement was that the other vessel should accompany the vessel in distress to Charleston, but after arriving in the harbor, and before the vessels reached the wharf, the master took back the specie, and subsequently deposited it in bank. Damage was done to the residue of the cargo by the fire, and the means adopted to extinguish the fire, after the vessel reached the wharf, caused her to sink, and the master was obliged to incur expense to raise the vessel, in order to prosecute the voyage. Judgment of the Court of Appeals was that the specie was liable, in

general average, for the amount paid for the services of the other vessel, and for the expenses incurred at the port of distress.

Precise doctrine advanced was that the liability to general average continues until the property has been completely separated from the rest of the cargo, and from the whole adventure, so as to leave no community of interest remaining. Majority of the court went farther and held that if the voyage is not abandoned, and the property, although separated from the rest, is still under the control of the master, and liable to be taken again on board for the purpose of prosecuting the voyage,

the common interest remains, and whatever is done for its protection, is done at the common expense. Correctness of that decision cannot be doubted, and yet the question may often arise in practice, whether in a given case the separation is, or is not so complete as to justify the conclusion that no community of interest remains. Close cases may doubtless arise, but it is believed that in general there will not be much difficulty in ascertaining the true line of distinction.

VI. Where a ship was stranded by perils of the sea, and in order to lighten the vessel, the cargo was discharged and forwarded in another vessel, and subsequently new measures were adopted, and additional expenses were incurred in getting the ship off and taking her into port for repairs, it was held that the expenses incurred from the misadventure until the cargo was discharged, constituted a general average, but that the subsequent expenses were particular average, and chargeable only to the ship. [Footnote 21]

Statement of facts shows that it became necessary to cut a channel for the vessel, and employ a steam tug in order to get the vessel off; and the view of the court was that the goods had been previously saved by a distinct and *completed operation,* and that afterwards a new operation began for the benefit of the shipowner.

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Judgment in that case was given by Lord Campbell, and in a subsequent case he repeated and enforced the reasons on which the former judgment rested. [Footnote 22] Voyage, in the last case, was from Liverpool to Callao. Ship was driven on a bank by a storm near the port of departure. Cargo was discharged and transported back to the port whence it came, and some days afterwards the ship was got off, taken to the port and repaired, and again took the cargo on board and proceeded on the voyage, and it was held that the saving of the ship and of the cargo was one continued transaction, and that the expenses were general average to which the ship, freight, and cargo must contribute. Considering that the goods remained under the control of the master until the ship was got off, repaired,

and was enabled to take the goods on board and prosecute her voyage, it is clear that the decision was correct and entirely consistent with the previous adjudication. [Footnote 23]

Applying those principles to the present case, we are of opinion that there was no community of interest remaining between the ship and the cargo when the master, as declared in the statement of the case, abandoned the ship and left her in charge of the agent of the underwriters after the consignees of the ship had declined to authorize the master to incur any further expense.

Judgment of the circuit court is therefore reversed and the cause remanded with directions to issue a new venire.

[Footnote 1]

One box had been lost overboard in discharging the cargo.

[Footnote 2]

The whole expenses on the saving of

vessel and cargo were $13,772.07

The expenses, after Morris came on board. . . 6,884.76

The ship as saved was valued at 6,758.00

The cargo (including sales of damaged)

$24,600 and $298.34 . . . . 31,754.66

The freight earned was. 978.06

The sales of the whole of the defendants'

consignment of 350 and 54 cases of

licorice was. 11,747.28

Of that delivered from the ship after she

got off, deducting charges. 132.50

The contribution of their consignment to

the whole expense as adjusted 3,363.89

[Footnote 3]

FIELD, J., not having sat.

[Footnote 4]

2 Arnould on Insurance 881.

[Footnote 5]

Benecke & Stevens on Average 96; Baily on Average 45, 71; *Birkley v. Presgrave,* 1 East 220; Addison on Contracts 490.

[Footnote 6]

2 Phillips on Insurance 65; Holt on Shipping 482.

[Footnote 7]

Bedford Commercial Insurance Company v. Parker, 2 Pickering 7; Benecke & Stevens on Average, 139.

[Footnote 8]

Benecke & Stevens on Average 141 and note.

[Footnote 9]

2 Phillips on Insurance 1407; 2 Arnould on Insurance 338.

[Footnote 10]

The Propeller Niagara, 21 How. 27; *King v. Shepherd,* 3 Story 358; *Elliot v. Russel,* 10 Johnson 7.

[Footnote 11]

M. & P. on Shipping 320; Maclachlan on Shipping 556; Smith's Mercantile Law, 6th ed. 336; *Barnard v. Adams,* 19 How. 270.

[Footnote 12]

Slater v. Rubber Co., 26 Conn. 129; *Nemick v. Holmes,* 25 Pa.St. 371.

[Footnote 13]

4 Wharton 301.

[Footnote 14]

Lewis v. Williams, 1 Hall S.C. 436; *Gray v. Waln,* 2 Sergeant & Rawle 239.

[Footnote 15]

Parsons' Mercantile Law 326; 2 Phillips on Insurance 1407.

[Footnote 16]

Pickering 1.

[Footnote 17]

Columbia Insurance Co. v. Ashby, 13 Pet. 331.

[Footnote 18]

Showers' Parliamentary Cases 28.

[Footnote 19]

Benecke & Stevens on Average 61.

[Footnote 20]

21 N.Y. 38.

[Footnote 21]

Job v. Langton, 6 Ellis & Blackburne 779: M. & P. on Shipping (3d ed) 322.

[Footnote 22]

Moran v. Jones, 7 Ellis & Blackburne 532.

[Footnote 23]

Maclachlan on Shipping 573, 576.

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