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Star of Hope

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Appellant : Star of Hope

Judgement :

Star of Hope - 76 U.S. 203 (1869)
U.S. Supreme Court Star of Hope, 76 U.S. 9 Wall. 203 203 (1869)

Star of Hope

76 U.S. (9 Wall.) 203

APPEAL FROM THE CIRCUIT

COURT FOR CALIFORNIA

SYLLABUS

1. To constitute a voluntary stranding of a vessel, it is not necessary that there should have been a previous intention to destroy or injure the vessel, nor is such intention supposed to exist. It is sufficient that the vessel was selected to suffer the common peril in the place of the whole of the associated interests in order that the remainder might be saved.

1. The stranding is voluntary whenever the will of man does in some degree contribute thereto, though the existence of the particular reef or bank on which the vessel grounds was not before known to the master and though he did not intend to strand the vessel thereon, provided it sufficiently appear that in making the exposure of the vessel. he was aware that stranding was the chief risk incurred by him and that it was not wholly unexpected by him.

3. These principles applied to the facts of this case, and the stranding held to be voluntary, so as to render the damage to the ship thereby caused, and all costs and expenses consequent thereon, a subject of general average contribution.

4. As a general rule, the contributory value of the ship, when she has received no extraordinary injuries during the voyage and has not been repaired on that account, is her value at the time of her arrival at the termination of the voyage. But where, as in this case, the ship has sustained injuries during the voyage and undergone repairs, her contributory value is her worth before such repairs were made. In the absence of other proof on this point, her value in the policy of insurance at the port of departure is competent evidence. From this, however, should be made a just and reasonable deduction for deterioration.

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5. The expenses of an *ex parte* adjustment made by the charterers of a ship at the port of delivery are not chargeable in admiralty on the ship or freight unless the results were adopted and used in the court below by the commissioner who stated the adjustment made under order of the court.

6. Repairs cannot be made by the master unless he has means or credit, and if he has neither and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose if it is necessary for him to do so in order to raise the means to make the repairs. Sacrifices made to raise such means are the subject of general average, and the rule is the same whether the sacrifice was made by a sale of a part of the cargo or by the payment of marine interest.

In November, 1855, the firm of Annan, Talmage & Embury chartered at New York the ship *Star of Hope,* the master, officers, and crew being all employed by the owners. They received on board of her, at the port just named, a large quantity of merchandise on freight deliverable at San Francisco, and also merchandise their own property. They received also, on freight, payable to them for and on account of the owners, two hundred and forty-four tons of coal. Among the merchandise shipped by the charterers and the other shippers (not the owners), were five hundred casks and packages of brandy and other spirituous liquors, stowed next the coal, and one barrel and forty-eight kegs of gunpowder, prepared as "patent safety fuses."

With this cargo on board, the ship sailed from New York in February, 1856, for San Francisco, being in all respects during the voyage kept tight, staunch, well fitted, tackled, and provided with every requisite, and with necessary men and provisions -- all which the charter party bound the owners that she should be -- except as hereinafter set forth.

During the voyage, about the middle of April, 1856, the ship being then on the east side of the southern end of South America, and in about latitude 46 S., longitude 53 W., the weather squally and the sea rough, great quantities of smoke and vapor were observed issuing from the fore and after hatches. After as full an examination as was possible between

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decks and otherwise, all on board had every reason to believe the ship on fire below, originating as was supposed in the coal by spontaneous combustion. The hatches were immediately fastened down and everything made tight in order to check as much as possible the progress of the fire at least until a port of succor could be reached. It was known that among the cargo were large quantities of spirituous liquors, and of the prepared gunpowder already described, all which were believed by everyone on board to be highly inflammable and explosive. Great alarm was felt in consequence, and the destruction of the ship, officers, and crew was apprehended by all.

The crew refused to continue the voyage, and the captain determined *properly* to make for the Bay of San Antonio, on the southeast coast of Patagonia, as the nearest anchorage. In about four days, during which the signs of fire continued to increase, she arrived off that bay, and *set the usual signal for a pilot.*

In making ready the anchors and getting up the chains from below, these were found quite hot, and there were other signs of fire which greatly heightened the general alarm.

Meantime the weather was such, the wind blowing the ship right on shore, with a heavy sea running, that she could not haul off. The shore being very rocky and precipitous, she could not have gone on there without certain and almost instant loss of vessel, cargo, and all on board. The captain being very unwilling to run into a *bay unknown to him without a pilot, waited about three hours for one, but none came.* The place, it was evident, was *a wild and desolate bay, without sign of human life.* All this time the indications of fire below, as well as the weather, continued to grow worse. At length he determined, as the best thing to be done for the general safety, and especially for the preservation of the cargo and lives of those on board, to make the attempt to run in without a pilot, preferring all risks to be thereby incurred rather than to remain outside in the momentary apprehension of destruction to all. Under all the circumstances, the captain was *fully justified* in this.

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In attempting to enter the bay, the *lead was kept going, showing successively 8, 7, 6, 5, 4 1/2, and 4 fathoms, and immediately afterwards the ship grounded,* and after striking heavily remained fast. The reef or bank on which she grounded was not visible at the time, and the captain was not aware of its existence, *though her stranding was one of the chief risks he had assumed in undertaking to run in.* The result of the attempt was that before the ship could be got to sea again, she sprung a leak and sustained other very serious injuries in her bottom.

These were such as to fully justify the captain in turning back with her to Montevideo (as the nearest port) for examination and repairs, there being no inhabitants at San Antonio and no sign of human life, and the water taken in by the ship having apparently extinguished the fire below.

He arrived at Montevideo in the end of April, 1856, and on removing the cargo found marks of fire on various portions. *The necessary expenses incurred by the ship at this port to enable her to resume her voyage,* including repairs, unloading, warehousing, and reloading of cargo &c.;, were $100,000.

To defray these, the captain, being without credit or means either of his own or his owners (and there being at Montevideo very little market for such goods and merchandise as the ship had aboard), necessarily sold a considerable portion of the cargo. This sale, both as to the mode and the cargo selected, was managed with all due care for the interest of all concerned. Of the cargo thus sold, portions belonged to different parties shipping.

About the 11th September, 1856, the ship left Montevideo, no unnecessary delay having been made there, and arrived at San Francisco on December 7, 1856.

The goods and merchandise of the several shippers remaining on board were in due time and in good order delivered to them.

Upon her arrival at San Francisco, the said Annan & Embury, and one George Hazzard, who had become the assignees of Annan, Talmage & Embury, both as to the charter party and as to their portion of the cargo, and in all respects

the successors in interest of Annan, Talmage & Embury, claimed and obtained the control of the ship and her cargo until the delivery of the latter was completed, and they alone collected and received of the several consignees the freight therefor. Messrs. Annan, Embury & Hazzard delivered to the several owners the goods and merchandise respectively, first obtaining from them the amount of their several contributions to the general average, and they also received so much of the cargo

as was deliverable to themselves.

Of $36,000, the price and hire fixed in the charter party, $9,822.20 was paid either by the charterers or their assignees.

The expenses properly and necessarily incurred by the ship from the day when her course was first changed for San Antonio until the day she resumed her voyage, the freight due at San Francisco on the several portions of the cargo not delivered there to the several owners, the value at San Francisco of the ship and of the entire cargo, as well as of the portion delivered there, were matters which were all agreed upon by the parties, though the value of the ship at Montevideo was not known.

In this state of facts, Annan, the charterers, and fourteen other parties, shippers, and a sixteenth party, Embury, filed, in March and April, 1857, in the district court, libels against the ship, then in the port of San Francisco, Annan & Co. for $44,700, and Embury & Co. for $10,115.

The libels, except the last, were in the same form, and were for the nondelivery at San Francisco by the ship of certain quantities of merchandise shipped upon her at New York, to be delivered, at the former port to the several libellants respectively, but which were sold in the course of the voyage by the master at Montevideo to pay for repairs at that port made necessary by the stranding of the ship at the Bay of San Antonio.

The answers to all the libels except to that of Embury & Co. set up substantially that the stranding at the Bay of San Antonio took place under circumstances which made the damage and all expenses consequent thereon a subject

of general average contribution by the ship, freight, and cargo.

The libel of *Embury et al.* was for the alleged amount paid by them as the consignees of the ship at San Francisco, as the expenses of an average adjustment, made or attempted to be made by them at that port after her arrival,

and of an attempted collection of the same.

To this last libel the claimant of the vessel demurred on the ground that the matters alleged did not constitute a cause of contract within the admiralty jurisdiction. He then proceeded to deny the principal allegations of the libel and set up that the adjustment in question was made by the libellants on their own account, as the assignees of the charterers of the ship (Annan & Co), and not on account of the ship or her owners, and was defective, erroneous, and worthless; that at all events the cost of the adjustment should come into the general average, and the ship be liable only for her share in the contribution. That the libellants having, as charterers and consignees of the ship, delivered the cargo to the several consignees thereof without collecting the average thereon, should bear the loss. That the average actually collected by them, and the sum of $30,000 balance remaining unpaid on the charter of the ship, should be set off.

The court referred the case to a commissioner to report an adjustment, upon the assumption that the loss and expenses caused by the stranding of the ship were general average. He did so report. But in his report:

1. He charged the ship or freight with the expenses of the adjustment made at San Francisco by Annan, Embury & Hazzard.

2. He assumed as the basis of his estimate of the contributory value of the ship her valuation in the policy of insurance at Boston, deducting what the repairs at Montevideo cost.

3. He brought into particular average or subject to a deduction of "one-third new for old" certain expenses at Montevideo, which, though incidental to the repairs of the ship, were either not themselves a permanent benefit to her or were not incurred for that purpose. Such as expenses of

1. Surveys, orders, estimates, reports &c.;

2. Preparations for making the repairs; labor in heaving her down; wear and tear of materials used therein; anchors, cordage, blocks &c.; boat hire &c.;

3. Building staging and use of materials therein &c.;

4. Expenses of raising funds (*i.e.,* loss on sale of cargo) &c.;

Upon the coming in of the report, exceptions were filed by both parties -- by the libellants on the ground mainly that the loss and expenses were not general average; by the claimant upon grounds affecting the details just mentioned of the report.

Upon these exceptions and the case stated, the matter was argued before the district court, which decided that the damage caused by the stranding of the ship and the loss and expenses consequent thereon (including the cost of the repairs at Montevideo) was a subject of particular average, and not of general average, as contended on behalf of the ship, and held her liable as contended for by the libellants. Its view apparently was that to make the case one for general average, the stranding should have been the result of an intention to effect that particular object. That court also held the ship liable under the last of the libels -- namely that of Embury, for the expenses of the adjustment made by the consignees -- and decreed accordingly. The circuit court affirmed the decree of the district court.

Subsequently, and before the appeal to this Court, it was discovered that a serious error had been committed in the amount inserted in the decree upon the first libel, $26,469. It had been stipulated between the parties that from any sum found due to the libellants, Annan, in their libel, should be deducted $26,177.80, the balance due by them as the charterers of the ship, and the decree entered for the difference. But a small portion of this balance was in fact deducted, so that the decree, instead of being for $26,469, should have been but for $4,291.13.

On behalf of the ship, a motion was made to correct this error of figures. The court, however, refused to correct the

decree on the ground of the great lapse of time since the entry of the decree in the district court, and because the alleged error, if it existed, might be corrected on appeal in this Court.

It appeared also that another large sum, about $14,000, which should have been deducted from the same judgment for averages received by the same libellants was never deducted.

Both these errors of figures were attributable to the adjuster who made up the adjustment for Embury and to whom the casting up of the amounts awarded in the decree had been subsequently committed by the ship's agent at San Francisco.

The case was now brought to this Court on these grounds:

1. That the damage to the ship caused by her stranding at the Bay of San Antonio and the loss and expense consequent thereon were a subject of general average, and not of particular average, as decided by the court below.

2. That even if this were not so and they were a subject of particular average, then the exceptions to the commissioner's report should have been sustained.

3. That the error of figures in entering the decree in favor of Annan *et al.* should be corrected, by reducing the same to $4291.13.

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MR. JUSTICE CLIFFORD delivered the opinion of the Court.

These are appeals in admiralty brought here by the claimants of the ship *Star of Hope* from a decree of the circuit court rendered on appeal from a decree of the district court in four suits *in rem* instituted against the ship in the latter court, three being for the nonperformance of a contract of affreightment and the other for services rendered and liabilities and expenses incurred as consignees of the vessel. Twelve other suits were also instituted against the ship by other shippers for the nondelivery of their respective shipments, in which no appeals were taken,

as the amount in controversy in the several cases was less than two thousand dollars.

1. Reference to one of the libels for the nonperformance of the affreightment contract will be sufficient, as they all contain substantially the same allegations. Take the first one, for example, which was filed by the charterers. They describe the intended voyage as one from the port of New York to the port of San Francisco; they also allege that the goods were shipped on board the vessel; that she sailed on the tenth of February, 1856, from the port of shipment; that on the eighteenth of April following, in entering or attempting to enter the port of San Antonio, she accidentally

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grounded or stranded upon a bank or shoal there situated; that she thereby received such injuries that she was obliged, in order that she might be able to continue the voyage, to put back to Montevideo for repairs; that the master, after the vessel arrived there, being without money, credit, or other means to execute the repairs, sold a valuable portion of the goods shipped by and belonging to the libellants, of the value of forty-four thousand seven hundred dollars, and with the proceeds thereof paid for the said repairs; that the repairs having been thus made, the ship resumed her voyage and arrived safely at her port of destination; that by reason of the sale of their goods, the libellants lost the whole amount sold, and that the master and owners of the ship neglect and refuse to make restitution.

2. Prior to the filing of the answer, the fifteen affreightment suits were consolidated and leave was given to the claimants of the ship to file one general answer to all those libels and also to file one general stipulation therein for costs and expenses.

Pursuant to that leave, the claimants filed their answer, in which they allege that the injury and damage to the ship at the Bay of San Antonio were incurred by the master voluntarily and deliberately for the general safety, and especially for the safety of the cargo and the lives of those on board, and that consequently all loss and damage sustained by the ship at that bay, and all costs and expenses of the

subsequent repairs, and all other necessary costs and expenses incurred while at Montevideo and in getting to sea again, together with the costs and expenses incurred for the wages and provisions of the master, officers, and crew, to the time when the ship resumed her voyage, are, of right and according to law, a subject of general average contribution, to be borne by the ship, her freight, and her cargo and also by the owners thereof in their just proportions. They also allege that the goods of the libellants having been sold by necessity to execute the repairs, are, of right, to be included in the general average, together with all loss and damage to the libellants in consequence of the sale at the port of distress.

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3. Brief reference must also be made to the libel filed by the consignees of the ship, as the fourth appeal under consideration is from that part of the decree relating to that suit. Annexed to the libel is a schedule setting forth the particular expenses and liabilities incurred for which the suit is brought, and the appellants, in response to that claim, allege in the answer that if any such disbursements were made or any such expenses or liabilities were incurred as is therein supposed, the same are a portion of the general average upon the ship, her freight, and cargo, to be borne by them all ratably, as alleged in the answer to the other libels.

Both parties consenting, the cause was referred to a commissioner to take and state an account and adjustment upon the basis that the damage, loss, and expenses incurred by the ship are a subject of general average contribution, as contended by the claimants. Subsequent to that order and before the hearing, the parties filed the agreed statement of facts set forth in the record. Although filed subsequent to the order of reference, still it is quite evident that it was drawn up and agreed to prior to the order, as one of the conditions of the order is that it shall not affect prejudicially the agreements of the parties as contained in the agreed statement.

Other evidence was introduced in addition to what is contained in the agreed statement, and the commissioner, having heard the parties, reported his

conclusions in writing to the court as directed in the order of reference. Exceptions to the report were duly taken by both parties, and they were again heard in support of the same, but the court being of the opinion that the damage, loss, and expenses incurred by the ship, as described in the answer and in the agreed statement, are not the proper subject of general average contribution, sustained the exceptions filed by the libellants, overruled those filed by the claimants, and entered the decree set forth in the transcript. Appeal was taken by the claimants from that decree to the circuit court, where the decree of the district court was in all things affirmed. Dissatisfied

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with the decree as affirmed, the claimants appealed to this Court, and still insist that the damage, loss, and expenses incurred by the ship are the proper subject of general average between the ship, her cargo, and freight, as alleged in the answer, which is the principal question presented for decision.

4. Much less difficulty will attend the solution of the question than is usual in cases of this description, as all the facts material to be considered in deciding the case are set forth in the agreed statement signed by the counsel of the respective parties.

Part of the cargo was furnished by the charterers, but large quantities of goods were also shipped by the libellants in the other libels, numbered from two to fifteen, inclusive, and the owners of the ship also, by the consent of the charterers, shipped two hundred and forty-four and a half tons of coal on their own account. They were not interested in the other shipments, nor is it necessary to describe the goods composing the residue of the cargo except to say that among the merchandise shipped were five hundred casks and packages of spirituous liquors, and forty or fifty kegs of gunpowder, prepared as "patent safety fuses," and the agreed statement shows that the spirituous liquors were stowed next to the coal shipped by the owners.

With a full cargo on board, the ship sailed for her port of destination on the day alleged in the pleadings, and during the voyage, to-wit, on the fourteenth of April following, it was discovered that great quantities of smoke and vapor were issuing from the fore and after hatches of the ship. She was proceeding on her voyage, at the time the discovery was made, in latitude forty-six degrees south, longitude fifty-three degrees west, but the weather was squally and the sea was rough. Precautions such as are usual on such occasions were immediately adopted: the hatches were fastened down and "everything made tight" in order to check as much as possible the progress of the fire, at least until a port of succor could be reached.

Great alarm was felt, and the fears of all were much increased

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by the fact, well known to all, that the cargo contained prepared gunpowder and large quantities of spirituous liquors. Under the circumstances, the crew refused to continue the voyage, and the master determined, very properly, as the parties agree, to make for the Bay of San Antonio, on the southeast coast of Patagonia, as the nearest anchorage, and at the end of four days the ship arrived off that bay, and set the usual signal for a pilot.

Throughout that period, the signs of fire continued to increase, and in getting up the chains so as to be ready to cast anchor without delay, they were found to be quite hot, and there were other indications of fire, which greatly heightened the general alarm. Unwilling to run into a bay unknown to him, without a pilot, the master set his signal as aforesaid and waited three hours for one, but no one came, and it became evident that none could be expected, as the coast was wild and desolate.

Something must be done, as the alarm increased as the impending peril became more imminent. Haul off the master could not, as the wind and waves were against any such movement. He could not resume the voyage for the same reason, and also because the crew utterly refused their cooperation; nor could he with safety

any longer attempt to "lie to," as the ship was gradually approaching the shore and because she was exposed both to the impending peril of fire on board, and to the danger, scarcely less imminent, of shipwreck from the wind and waves. Nothing, therefore, remained for the master to do which it was within his power to accomplish but to run the vessel ashore, which it is agreed by the parties would have resulted in the "certain and almost instant loss of vessel, cargo, and all on board," or to make the attempt to run into the bay without the assistance of a pilot. Evidently he would have been faithless to every interest committed to his charge if he had attempted to beach the vessel at that time and place, as the agreed statement shows that the weather was rough, that the wind was high and blowing towards the land with a heavy sea, and that the shore was rocky and precipitous.

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What the master did on the occasion is well described by the parties in the agreed statement, in which they say he at length determined, as the best thing to be done for the general safety, and especially for the preservation of the cargo and the lives of those on board, to make the attempt to run in without a pilot, preferring all risks to be thereby incurred rather than to remain outside in the momentary apprehension of destruction to all, and the parties agree that he was fully justified in his decision as tested by all the circumstances, although the ship in attempting to enter the bay grounded on a reef, and before she could be got to sea again sprung a leak and sustained very serious injuries in her bottom.

Great success, however, attended the movement, notwithstanding those injuries, as the water taken in by the ship extinguished the fire, and the ship remained fast and secure from shipwreck until the winds subsided and the sea became calm.

Repairs could not be made at that place, and the parties agree that the injuries to the ship were such as fully justified the master in returning to Montevideo for that purpose, as that was the nearest port where the repairs could be made. He arrived there on the twenty-seventh of the same month, and it appears by the agreed statement that the just and necessary expenses incurred by the ship at that port to

enable her to resume the voyage were one hundred thousand dollars, including repairs, unloading, warehousing, and reloading of the cargo, and that the master, being without funds or credit, was obliged to sell a considerable portion of the cargo to defray those expenses.

Repaired and rendered seaworthy by those means, the ship, on the eleventh of September in the same year, resumed her voyage and arrived at her port of destination on the seventh of December following, and the master, without unnecessary delay, delivered the residue of the shipments in good order to the respective consignees, as required by the contract of affreightment.

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5. General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to general average are usually 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 ship and cargo. [Footnote 1]

Common justice dictates that where two or more parties are engaged in the same sea risk and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure. [Footnote 2]

Where expenses are incurred or sacrifices made on account of the ship, freight, and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, but in

order to constitute a basis for such a claim, it must appear that the expenses or sacrifices were occasioned by an apparently imminent peril; that they were of an extraordinary character; that they were voluntarily made with a view to the general safety; and that they accomplished or aided at least in the accomplishment of that purpose. [Footnote 3]

Authorities may be found which attempt to qualify this rule and assert that where the situation of the ship was such that the whole adventure would certainly and unavoidably

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have been lost if the sacrifice in question had not been made, the party making it cannot claim to be compensated by the other interests, because it is said that a thing cannot be regarded as having been sacrificed which had already ceased to have any value, but the correctness of the position cannot be admitted unless it appears that the thing itself for which contribution is claimed was so situated that it could not possibly have been saved, and that its sacrifice did not contribute to the safety of the crew, ship, or cargo. Sacrifices where there is no peril present no claim for contribution, but the greater and more imminent the peril, the more meritorious the claim for such contribution if the sacrifice was voluntary and contributed to save the associated interests from the impending danger to which the same were exposed. [Footnote 4]

Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice. Much is deferred in such an emergency to the judgment and decision of the master, but the authorities everywhere agree that three things must concur in order to constitute a valid claim for general average contribution:

First, there must be a common danger to which the ship, cargo, and crew were all exposed, and that danger must be imminent and apparently inevitable, except by

incurring a loss of a portion of the associated interests to save the remainder.

Secondly, there must be the voluntary sacrifice of a part for the benefit of the whole, as for example a voluntary jettison or casting away of some portion of the associated interests for the purpose of avoiding the common peril or a voluntary transfer of the common peril from the whole to a particular portion of those interests.

Thirdly, the attempt so made to avoid the common peril to which all those interests were exposed

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must be to some practical extent successful, for if nothing is saved, there cannot be any such contribution in any case. [Footnote 5]

Equity requires, says Emerigon, that in these cases those whose effects have been preserved by the loss of the merchandise of others shall contribute to this damage, and commercial policy as well as equity favors the principle of contribution, as it encourages the owner, if present, to consent that his property or some portion of it may be cast away or exposed to peculiar and special danger to save the associated interests and the lives of those on board from impending destruction, and if not present, the moral tendency of the well known commercial usage is to induce the master to exercise an independent judgment in the emergency for the benefit of all concerned. [Footnote 6]

Masters are often compelled in the performance of their duties to choose between the probable consequences of imminent perils threatening the loss of the ship, cargo, and all on board and a sacrifice of some portion of the associated interests in their custody and under their control as the only means of averting the dangers of the impending peril in their power to employ. The must elect in such an emergency, and if they, in the exercise of their best skill and judgment, decide that it is their duty to lighten the ship, cut away the masts, or to strand the vessel, courts of justice are not inclined to overrule their determinations.

Owners of vessels are under obligation to employ masters of reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency what, after the event, others may think would have been best. From the necessity of the case, the law imposes upon the master the duty, and clothes him with the power, to judge and determine at the time whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a

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portion of the associated interests indispensable for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property entrusted to his care, and if he is a competent master, if an emergency actually existed calling for a decision whether such sacrifice was required, and if he appears to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment, with no unreasonable timidity, and with an honest intent to do his duty, it must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made. [Footnote 7]

Controversies respecting the allowance or adjustment of general average more frequently arise in cases where the sacrifice made consisted of a jettison of a portion of the cargo than in respect to any other disaster in navigation. [Footnote 8]

Explanations and illustrations upon the subject, therefore, whether found in treatises or in judicial decisions, are usually more particularly applicable to cases of that description than to a case where the vessel was stranded, but the leading principles of law by which the rights of parties are to be ascertained and determined in such cases are the same whether the sacrifice made consisted of a part of the cargo or of a part or the whole of the ship, as the controlling rule is that

what is given for the general benefit of all shall be made good by the contribution of all, which is the germ and substance of all the law upon the subject.

Doubts at one time were entertained whether a loss occasioned by a voluntary stranding of the vessel, even though it was made for the general safety and to avoid the probable consequences of an imminent peril to the whole adventure, was the proper subject of general average contribution, but

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those doubts have long since been dissipated in most jurisdictions, and they have no place whatever in the jurisprudence of the United States.

Where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and she is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding, says Mr. Arnould, is to be made good by general average contribution, and the writer adds that there is no rule more clearly established than this by the uniform course of maritime law and usage. [Footnote 9]

Sustained as that proposition is at the present day by universal consent, it does not seem to be necessary to refer to other authorities in its support, nor is it necessary to enlarge that rule in order to dispose of the present controversy, but to prevent any misconception as to the views of the Court, it is deemed proper to add that it is settled law in this Court that the case is one for general average, although the ship was totally lost, if the stranding was voluntary and was designed for the common safety and it appears that the act of stranding resulted in saving the cargo. [Footnote 10]

Undoubtedly the sacrifice must be voluntary and must have been intended as a means of saving the remaining property of the adventure and the lives of those on board, and unless such was the purpose of the act, it gives no claim for contribution, but it is not necessary that there should have been any intention to destroy the thing or things cast away, as no such intention is ever supposed to exist. On the contrary it is sufficient that the property was selected to suffer the

common peril in the place of the whole of the associated interests, that the remainder might be saved. [Footnote 11]

6. Suggestion is made that the act of stranding of the vessel in this case was not a voluntary act, as the reef where

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she grounded was not visible at the time and was unknown to the master, but the agreed statement shows that in undertaking to run into the bay, the master knew that the chief risk he had to encounter was the stranding of the ship, and the precautions which he took to guard against that danger show to the entire satisfaction of the Court that the disaster was not altogether unexpected. As the ship advanced, the lead was constantly employed, showing eight fathoms at first, then seven, then six only, and so on, the depth continuing to diminish at each throw of the lead until the ship grounded and remained fast.

Grant that the master did not intend that the ship should ground on that reef, still it is clear that he was aware that such a danger was the chief one he had to encounter in entering the bay, and the case shows that he deliberately elected and decided to take that hazard rather than to remain outside, where, in his judgment, the whole interests under his control, and the lives of all on board were exposed to imminent peril, if not to certain destruction. Under these circumstances, it is not possible to decide that the will of man did not in some degree contribute to the stranding of the ship, which is all that is required to constitute the stranding a voluntary act within the meaning of the commercial law. [Footnote 12]

Suppose the storm outside the bay was irresistible and overpowering, still it does not follow that there was no exercise of judgment, for there may be a choice of perils when there is no possibility of perfect safety. [Footnote 13]

Destruction of all the interests was apparently certain if the ship remained outside, but the master, under the circumstances, elected to enter the bay without the assistance of a pilot, knowing that there was great danger that the ship might ground in the attempt, but his decision was that it was better for all concerned to

make the attempt than to remain where he was, even if she did ground, and the result shows that he decided wisely for all interests, as damage resulted

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to none except to the ship, and she would doubtless have been destroyed if she had continued to remain outside of the bay. [Footnote 14]

Guided by these considerations, our conclusion is that the loss and damage sustained by the ship at the place of the disaster, and the costs and expenses of the repairs, and all the other costs and expenses as charged in the adjustment, are the proper subject of general average contribution, as alleged by the claimants in their answer.

Details will be avoided, as the decree must be reversed and the cause remanded for further proceedings.

7. Apart from the error in the principle of the decree, there is a manifest error in the amount allowed in the first case, but inasmuch as there must be a new hearing and a new decree, the correction of the error can best be made in the circuit court.

Brief consideration must also be given to the exceptions, taken by the claimants, to the report of the commissioner, which were overruled by the court. They are three in number, and they will be considered in the order in which they were made.

i. That the commissioner erred in charging the ship or freight with any part of the expenses incurred by the charterers in the *ex parte* adjustment procured by them prior to the order of reference to the commissioner.

Unusual difficulty attends the inquiry on account of the indefinite character of the exception and the uncertain state of the evidence, but the conclusion of the Court being that the case is one for general average, it seems to the Court that those expenses constitute a matter to be adjusted between the charterers and the libellants, irrespective of the controversy presented in this record, unless the results of that adjustment were adopted and used by the commissioner. Influenced by these suggestions, the exception is sustained, but the matter is left open for

further inquiry when the mandate is sent down.

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ii. That the commissioner erred in assuming that the valuation of the ship as given in the policy of insurance is the proper basis of her contributory value in the statement of the amount for general average.

As a general rule, the value of the ship for contribution, where she was received no extraordinary injuries during the voyage and has not been repaired on that account, is her value at the time of her arrival at the termination of the voyage, but if she met with damage before she arrived, by perils of the sea, and had been repaired, then the value to be assumed in the adjustment is her worth before such repairs were made. Neither party gave any evidence as to the value of the ship prior to the disaster except what appears in the policy of insurance, and under the circumstances it is difficult to see what better rule can be prescribed than that adopted by the commissioner. [Footnote 15]

Strictly speaking, the rule is the value of the ship antecedent to the injuries received, but as that requirement can seldom be met the usual resort is her value at the port of departure, making such deduction for deterioration as appears to be just and reasonable. [Footnote 16]

No proofs on that subject except the policy of insurance was offered by either party, and inasmuch as ships are seldom insured beyond their actual value, the exception is overruled.

iii. That the commissioner erred in carrying into particular average certain expenses incurred by the master at the port where the repairs were made, which should have been regarded as the proper subject of general average.

Considerable difficulty also attends this inquiry for the want of a more definite statement of the grounds of the complaint. We think it plain, however, that the exception must be sustained, as some of the matters charged as particular average, in whole or in part, ought clearly to have been included

at their full value among the incidental expenses necessarily incurred in making the repairs, but in view of the circumstances, we shall not attempt to do more than to state the general principles which should regulate the adjustment in the particulars involved in the exception, and leave their application to be made in the case by the court below, where the parties, if need be, may again be heard.

8. Whatever the nature of the injury to the ship may be, and whether it arose from the act of the master in voluntarily sacrificing a part of it or in voluntarily standing the vessel, the wages and provisions of the master, officers, and crew from the time of putting away for the port of succor, and every expense necessarily incurred during the detention for the benefit of all concerned, are general average. [Footnote 17]

Repairs necessary to remove the inability of the ship to proceed on her voyage are now regarded everywhere as the proper subject of general average. Expenses for repairs beyond what is reasonable necessary for that purpose are not so regarded, but it is not necessary to examine the exceptions to the rule with any particularity in this case, as the parties agree that all the expenses incurred were necessary to enable the ship to resume her voyage.

The wages and provisions of the master, officers, and crew are general average from the time the disaster occurs until the ship resumes her voyage, if proper diligence is employed in making the repairs. [Footnote 18]

Towing the ship into port and extra expenses necessarily incurred in pumping to keep her afloat until the leaks can be stopped are to be included in the adjustment. [Footnote 19]

Surveys, port charges, the hire of anchors, cables, boats, and other necessary apparatus for temporary purposes in making the repairs are all to be taken into the account as

well as the expenses of unloading, warehousing, and reloading the cargo after the repairs are completed. [Footnote 20]

Repairs in such a case cannot be made by the master unless he has means or credit, and if he has neither, and his situation is such that he cannot communicate with the owners, he may sell a part of the cargo for that purpose if it is necessary for him to do so in order to raise the means to make the repairs. Sacrifices made to raise such means are the subject of general average, and the rule is the same whether the sacrifice was made by a sale of a part of the cargo or by the payment of marine interest. [Footnote 21]

Governed by these rules, it is believed the rights of the parties may be adjusted without serious difficulty or danger of mistake.

Decree reversed in respect to each of the four cases before the Court.

[Footnote 1]

Arnould on Insurance 770; *McAndrews v. Thatcher,* 3 Wall. 365

[Footnote 2]

2 Parsons on Insurance 210; *ib.* 277; 1 Parsons on Shipping 346; *McAndrews v. Thatcher,* 3 Wall. 366.

[Footnote 3]

2 Phillips on Insurance 61.

[Footnote 4]

Maude & Pollock on Shipping 320; MacLachlan on Shipping 356; *Barnard v. Adams,* 10 How. 270.

[Footnote 5]

Barnard v. Adams, 10 How. 303; *Patten v. Darling,* 1 Clifford 262; 2 Parsons on Insurance 278.

[Footnote 6]

Emerigon 467.

[Footnote 7]

Lawrence v. Minturn, 17 How. 110; *Dupont v. Vance,* 19 How. 166; *Patten v. Darling,* 1 Clifford 264.

[Footnote 8]

Birkley v. Presgrave, 1 East 227.

[Footnote 9]

2 Arnould on Insurance 784; *Lewis v. Williams,* 1 Hall, 440.

[Footnote 10]

Columbian Insurance Company v. Ashby, 13 Pet. 331; *Caze v. Reilly,* 3 Washington C.C. 298; *Sims v. Gurney,* 4 Binney 513; *Gray v. Waln,* 2 S. & R. 229; 1 Parsons on Shipping 372; *Merithew v. Sampson,* 4 Allen 192.

[Footnote 11]

1 Parsons on Shipping 348.

[Footnote 12]

2 Arnould on Insurance 785; Emerigon 324.

[Footnote 13]

Sims v. Gurney, 4 Binney 525; 2 Parsons on Contracts (5th ed) 325, and note *y* .

[Footnote 14]

Rea v. Cutler, 1 Sprague 136.

[Footnote 15]

Hopkins on Average (3d ed) 104; 2 Arnould on Insurance 812; *Patapsco Insurance Co. v. Southgate,* 5 Pet. 604; *Clark v. United States Insurance Co.,* 7 Mass. 370; *Dodge v. Union Insurance Co.,* 17 *id.* 471.

[Footnote 16]

1 Parsons on Shipping 448; *Mutual Safety Insurance Co. v. Ship George,* Olcott, Rep. 157.

[Footnote 17]

Abbott on Shipping 601; *Plummer v. Wildman,* 3 Maule & Selwyn 482; *Walden v. Le Roy,* 2 Caines 262; *Henshaw v. Insurance Co., ib.,* 274; *Nelson v. Belmont,* 21 N.Y. 38; *The Brig Mary,* 1 Sprague 18.

[Footnote 18]

Padelford v. Boardman, 4 Mass. 548; *Potter v. Ocean Insurance Co.,* 3 Sumner 27.

[Footnote 19]

2 Phillips on Insurance (3d ed) 1326; *Orrok v. Commonwealth Insurance Co.,* 21 Pickering 469.

[Footnote 20]

Potter v. Ocean Insurance Co., 3 Sumner 42; *The Brig Mary,* 1 Sprague 18; *Stevens & Benecke* 76.

[Footnote 21]

Orrok v. Commonwealth Insurance Co., 21 Pickering 469, 1 Parsons on Shipping 400.

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