The City of Norwich

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Appellant : The City of Norwich

Judgement :

The City of Norwich - 118 U.S. 468 (1886)
U.S. Supreme Court The City of Norwich, 118 U.S. 468 (1886)

The City of Norwich

Argued November 16-17, 1886

Decided May 10, 1886

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED

STATES FOR THE EASTERN DISTRICT OF NEW YORK

SYLLABUS

In a case of collision occasioned by the negligence of the officers or hands of one of the vessels, without any neglect, privity, or knowledge of her owner, and where said vessel took fire and sank with loss of cargo, and never completed her voyage nor earned any freight, but was afterwards raised and repaired, and was then libeled and seized on behalf of the owners of her cargo, and claimed and bonded at her then value by her owner, who filed an answer and a petition for limited liability, and where it further appeared that the owner received certain moneys for insurance of the ship against loss by fire, *held:*

(1) That the owner was entitled to a limitation of liability to the value of his interest in ship and freight under the act of 1851. Sections 4282-4287 Rev.Stat.

(2) That the point of time at which the amount or value of the owner's interest in ship and freight is to be taken for fixing his liability is the termination of the voyage on which the loss or damage occurs.

(3) That if the ship is lost at sea or the voyage be otherwise broken up before arriving at her port of destination, the voyage is then terminated for the purpose of fixing the owner's liability.

(4) That in the present case, the voyage was terminated when the ship had sunk, and that her value at that time was the limit of the owner's liability, and that the subsequent raising of the wreck and repair of the ship, giving her an increased value, had nothing to do with the liability of the owner.

(5) That no freight except what is earned is to be estimated in fixing the amount of the owner's liability.

(6) That insurance is no part of the owner's interest in the ship or freight within the meaning of the law, and does not enter into the amount for which the owner is held liable.

(7) That the limitation of liability is applicable to proceedings *in rem* against the ship as well as to proceedings *in personam* against the owner; the limitation extends to the owner's property as well as to his person.

(8) That the right to proceed for a limitation of liability, is not lost or waived by a surrender of the ship to underwriters.

In this case, although an application for limitation of liability had been originally

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overruled by the district court, and an interlocutory decree had been rendered in favor of the libellants for their entire damage, with a reference for proofs and a report by the master, yet the court, after the decision of this Court in *Norwich Co. v. Wright,* 13 Wall. 104, relating to the same collision, and the promulgation of the additional rules adopted by this Court, received a new petition and ordered a new appraisement to ascertain the value of the ship whilst lying sunk, and made a decree limiting the liability of the owner to the value at that time. *Held* that the district court had jurisdiction to receive such new petition and to take such proceedings.

The case was stated by the Court as follows:

This case arose out of a collision which occurred on Long Island Sound, opposite Huntington, on the 18th of April, 1866, between the steamboat *City of Norwich,* belonging to the Norwich and New York Transportation Company, the appellees, and the schooner *General S. Van Vliet,* belonging to William A. Wright and others, appellants, by which the schooner and her cargo were sunk and lost, and the steamboat was set on fire and sunk, and her cargo lost. The owners of the schooner filed a libel *in personam* in the District Court of the United States for the District of Connecticut against the owners of the steamboat, and obtained a decree for about $20,000 for the schooner, and about $2,000 for her cargo, with interest. Before the decree was passed, the respondents filed a petition stating that proceedings *in rem* had been commenced against the steamboat in the District Court of the United States for the Eastern District of New York for the recovery of damages for the loss of the cargo on board said steamboat, and they prayed leave to show the whole amount of damages sustained by all parties, and the value of the steamer and her freight then pending, and that the libellants might

have a decree for only such proportion of damages sustained by them as the value of steamer and freight bore to the whole amount of damages sustained by all parties by the collision, this claim being made under the Limited Liability Act of 1851. The district court denied the prayer of this petition, holding that it had no jurisdiction to give relief. On appeal to the circuit court, the decree was affirmed and the petition for limitation of liability was denied on the ground that cases of collision were not within the act. The case then

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came to this Court, and we held first that the act of 1851 adopted the general maritime law in reference to limited liability, as contradistinguished from the English law measuring the liability by the value of ship and freight after, instead of before, the collision; secondly, that the act embraced cases of damage received by collision as well as cases of injury to the cargo of the offending ship; thirdly, that the district courts of the United States, as courts of admiralty, have jurisdiction to administer the law; fourthly, that the proper court to hear and determine the question is the court which has possession of the fund -- that is, the ship and freight, or the proceeds and value thereof. And in view of the want of rules of procedure and of any uniform practice on the subject, we directed that proceedings should be suspended in the District Court of Connecticut in order to give the respondents an opportunity of making the proper application to the District Court of the Eastern District of New York, which had possession of the steamer, or a stipulation for her value in lieu of the steamer itself. We also adopted some general rules of practice for the aid and guidance of the district courts in such cases. *Norwich Co. v. Wright,* 13 Wall. 104.

The libel *in rem,* filed in the District Court for the Eastern District of New York, was filed by George Place and Charles Place (now appellants here), in August, 1866, after the steamboat had been raised and carried to the shore of Long Island, and repaired. The Norwich and New York Transportation Company appeared as claimants, and filed an answer, and a petition to have the benefit of the act of 1851 for a limitation of their liability to the value of the steamboat and freight pending at the time of the collision and fire. Other libels were also filed by other owners of

cargo. The steamer as repaired was appraised at $70,000.

On the 13th day of June, 1872, after the decision of this Court was rendered in the case of *Norwich Co. v. Wright,* 13 Wall. 126, the company, by leave of the court, filed a new petition in the District Court for the Eastern District of New York for the benefit of limited liability under the act of 1851, comformable to the rules adopted by this Court.

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The petition stated the various claims against the vessel arising out of the collision (amounting to nearly $150,000), the previous proceedings that had been taken, the libels that had been filed, the circumstances of the loss, the raising and repair of the vessel, etc., and prayed for a new appraisement in accordance with the decision of this Court, a monition to claimants, etc., as will more fully appear in the finding of facts made by the circuit court, hereinafter stated.

Orders for publication and appraisement were made pursuant to the prayer of the petition, and the commissioner appointed to make the appraisement reported as follows, to-wit:

"In ascertaining the value of the steamboat *City of Norwich,* as directed by the order of reference herein, I have followed what I understood to have been the decision of the Supreme Court of the United States in the case of *Wright* against the owners of this boat, 13 Wall. 104, and have ascertained her value in the situation and condition she was in after the collision, and before she was raised, and I find from the testimony taken before me that she was at that time of the value of $2,500. I have arrived at such value by taking the testimony as to her value in New York after she was raised by her owners and brought there, which shows that she was then and there worth the sum of $25,000, and I have deducted from that amount the sum of $22,500, being the sum which, according to the testimony, it had actually cost to raise her and bring her to New York, which leaves $2,500 to be her value, as I have above stated."

Exceptions were taken to the report, first that the former appraisement of $70,000 was binding on the parties and the court; secondly that the appraisement should have been for the value of the steamer immediately before the collision; thirdly that it should have been for the value immediately after the collision, before the occurrence of damage by the fire; fourthly that there should have been no deduction for the expenses of raising the steamer; fifthly that the sum of $600 should have been added for the pending freight; sixthly that the money received for insurance on the vessel should have been added, amounting to $49,283.07.

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The exceptions were overruled, and a decree was made authorizing the petitioners to pay into court the sum of $2,500, the value of the steamer, and directing a monition to issue, citing all parties interested to appear and prove their claims, restraining the further prosecution of all suits, and appointing a commissioner to take proof of claims. On the subsequent report of the commissioner, a final decree was made in January, 1879, distributing the fund in court and discharging the petitioners from further demands. The case was appealed to the circuit court, and argued before Mr. Justice Strong, who, in October, 1879, affirmed the decree of the district court, but the decree of affirmance was not entered until July 3, 1882. That decree is now before us for review.

The finding of facts by the circuit court is substantially as follows:

1. It states the fact of the collision and that

"it was caused by the negligence of the steamboat's officers or hands, without any design, neglect, privity, or knowledge of her owners. Very soon, within half an hour after the collision, the boat took fire, her deck and upper works were burned off, and she sunk in about twenty fathoms of water. The fire was the direct consequence of the collision, and inseparable from it. It was caused by the rushing of the waters through the broken hull of the boat, whereby the fire was driven out of the furnaces upon the woodwork, and the boat sank by reason of her filling with

water."

"2. At the time of the disaster, the boat had a cargo of merchandise on board belonging to different freighters, all of which was totally lost. The freight then pending amounted to $600, but none of it was earned or received by the ship owners."

"3. Sometime after the steamboat was sunk and her cargo destroyed, she was raised by salvors, and taken to the Long Island shore, within the port of New York, where she was repaired."

4. It states the suit by Wright & Co., in the District Court of the United States for the District of Connecticut, and the decision of the supreme court in that case.

5. It states the proceedings upon libel filed by George and

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Charles Place in the District Court for the Eastern District of New York, the appraisement at $70,000, and the release of the vessel to the complainants (the Norwich & New York Trans. Co.), upon their giving stipulation therefor, adding:

"The stipulation purported to be for the security not only of the Messrs. Place, but also for the benefit of all persons who might, by due proceedings in said court, show themselves entitled to liens upon the vessel by reason of said collision. The appraisement was of the value of the vessel as it was after she had been raised and repaired. It was returned into the court on the 11th of March, 1867, and the stipulation in the amount of the appraisement was filed on the 29th day of the same month. On the 20th day of December, 1869, the district court ordered decrees to be entered in favor of the libellants in all the suits commenced against the steamer as aforesaid."

"6. Such was the condition of the litigation when the present petition was filed in July, 1872, after the rendition of the judgment by the supreme court in the case of the libel of William A. Wright *et al.* in the District Court of Connecticut. The petition prayed that, in conformity with the act of Congress, the decision of the

Supreme Court, and the admiralty rules made in pursuance thereof, the court would cause an appraisement to be made of the value of the interest of the petitioners in the steamboat, and her freight for the voyage in which she was employed, for which they were liable, and that an order should be made for paying the amount of such valuation into court, or for giving a stipulation therefor, with sureties. It prayed further for a monition against all the persons claiming damages arising out of the said collision and fire, citing them to appear and make proof of their claims, and it prayed also for a restraining order against the further prosecution of all or any suits against the steamboat or the petitioners for any damage caused by the collision, fire, and loss. There was also a prayer for general relief. The monition was issued, the appellants appeared, and an order was made for an appraisement of the amount of value of the interest of the petitioners as owners, respectively, of said steamboat and her freight, pending for the voyage upon which she was employed, for which the petitioners

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were liable. A restraining order, as prayed for, was also made. Pursuant to the direction of the court, an appraisement was made. The appraiser ascertained and reported the value of the steamboat as she lay immediately after the collision and fire and before she was raised, to have been $2,500, and the district court confirmed the report, and ordered the amount to be paid into the registry, which was accordingly done."

"7. The value of the interest of the petitioners in the steamboat, as she was immediately after the disaster, was $2,500, and no more."

"8. The value of that interest immediately before the collision was $70,000."

"9. When the collision occurred, the steamboat was insured against fire (not against marine disaster), and upon the several policies the petitioners, as owners, have recovered from the underwriters the sum of $49,283.07; that part of said sum was recovered by the petitioner herein in an action brought by it in the Circuit Court of the United States for the District of Connecticut, on one of said five

policies, against the Western Massachusetts Insurance Company. One of the defenses in that action was that the loss and damages were occasioned by the collision (which is the same mentioned in these proceedings), while the petitioner herein claimed that the greater part of the loss was by fire. The court held in that case that there were two classes of losses: one, the damage done the steamer by the collision itself, and the other caused by the fire. The damages caused by the collision were proved at $15,000. The damages caused by the fire were determined to be $69,000. The said insurance company moved for a new trial, but the motion was denied."

"10. The steamboat itself has never been surrendered or transferred to a trustee for the persons injured by her fault."

The conclusions at which Justice Strong arrived upon these facts were 1st, that the value of the steamboat immediately after the collision and fire, as she lay at the bottom of the Sound, with her pending freight, was the measure of the owners' liability, and the amount to be apportioned; 2d, that insurance is not an interest in the vessel within the meaning

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of the third section of the act of 1851, or 4283 of the Revised Statutes; 3d, that the limitation of the owners' liability under the act is as applicable when the proceeding is *in rem,* as when it is *in personam,* so that if the owner's liability is only the amount of the vessel's value when at the bottom of the Sound, the vessel's liability, after being raised and repaired, is no greater.

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MR. JUSTICE BRADLEY, after stating the case as above reported, delivered the opinion of the Court.

The first ground of error which we shall notice is the alleged want of jurisdiction in the district court to allow a reappraisement of the steamboat for the purpose of fixing her value as the limit of the owners' liability after her value had once been

appraised at $70,000 and she had been delivered to the claimants upon their stipulation for that amount. This ground cannot be maintained, because the question had not then been decided what particular time was to be taken for fixing the value of the vessel in reference to the limited liability of the owners. They wished to have possession of her, and were willing to give a stipulation for her full value at that time in order to obtain such possession. Had the vessel remained in custody until the final petition for a limited liability was filed, the court would have been at liberty then to determine the time at which the value of the vessel should be taken for that purpose and to order a new appraisement if necessary. The stipulation given merely stood in place of the vessel itself, and did not deprive the court of any of its power. The subsequent trial on the merits, the interlocutory decree in favor of the libellants, and the report of the commissioner showing the amount of their damage did not preclude the claimants from exercising their right to proceed for a limitation of their liability under the rules of procedure adopted by this Court. The trial on the merits resulted in determining which vessel was in fault, and in liquidating the amount of damage sustained by the libellants, to be used as a basis of their *pro rata* share in the fund which might ultimately be decreed subject to their claim and the claims of other parties. It did not settle the amount of that fund, nor the extent of the liability of the owners of the steamer. In the case of *The Benefactor,* 103 U. S. 239 , this matter was fully considered, and we held that

"the amount recovered, whether before the limitation proceedings are commenced or afterwards, and whether in the court of first instance or an appellate court, will stand as the recoveror's basis for *pro rata* division when the condemned fund is distributed. In all other respects, the proceedings for obtaining a

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limitation of liability may proceed in the ordinary course."

In view of the want of any settled practice on the subject, this Court, in its opinion in the case of *Norwich Co. v. Wright,* suggested the precise course which was taken by the petitioners. 13 Wall. 126. We think it was the proper course, and that

the district court had jurisdiction to entertain the petition and to order a new appraisement.

The next question to be considered is at what time ought the value of the vessel and her pending freight to be taken, in fixing the amount of her owners' liability? Ought it to be taken as it was immediately before the collision, or afterwards? And if afterwards at what time afterwards?

The first question has been repeatedly answered by the decisions of this Court. We held in *Norwich Co. v. Wright,* and have held and decided in many cases since, that the act of Congress adopted the rule of the maritime law as contradistinguished from that of the English law on this subject, and that the value of the vessel and freight after, and not before, the collision is to be taken. But at what precise time after the collision this value should be taken has not been fully determined so as to establish a general rule on the subject. That is a question which deserves some consideration. In the case of *The Scotland,* 105 U. S. 24 , the collision occurred opposite Fire Island Light, and the steamer being much injured, put back in order, if possible, to return to New York; but was unable to get further than the middle ground outside and south of Sandy Hook, where she sunk, and nothing was saved but a few strippings taken from her before she went down. We held that these strippings were all of the ship that could be valued, although she had run thirty or forty miles after the collision. The value was taken, not as it was or as it might have been supposed to be immediately after the collision, but as it was after the effects of the collision were fully developed in the sinking of the ship.

An examination of the statute will afford light on this subject. Section 4283 declares that the liability of the owner of any vessel (for various acts and things mentioned) shall "in no case" exceed the value of his interest in the vessel and her

freight then pending. When it says "in no case," does it mean that for each case of "embezzlement, loss, destruction, collision," etc., happening during the whole

voyage, his liability may extend to the value of his whole interest in the vessel? Twenty cases might occur in the course of a voyage, and all at different times. Does not the provision made in 4284, for compensation *pro rata* to each party injured, apply to all cases of loss and damage happening during the entire voyage -- happening, that is, by the fault of the master or crew, and without the privity or knowledge of the owner? Pending freight is of no value to the ship owner until it is earned, and it is not earned, if earned at all, until the conclusion of the voyage. Does this not show that every "case" in which the principle of limited liability is to be applied means every voyage? We think it does. It seems to us that the fair inference to be drawn from 4283 is that the voyage defines the limits and boundary of the cases or case to which the law is to be applied.

This is rendered certain by the language of 4284, which is:

"Whenever any such embezzlement, loss, or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, *on the same voyage,* and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses."

There may be more than one case of embezzlement during the voyage, and more than one case of loss and destruction, and they may happen at different and successive times, yet they are to be compensated *pro rata.* This shows conclusively that it must be at the termination of the "voyage" that the vessel is to be appraised, and the freight (if any be earned) is to be added to the account for the purpose of showing the amount of the owner's liability.

This conclusion is corroborated by 4285, which declares that it shall be a sufficient compliance with the requirements of the law if the owner shall transfer his interest in the vessel and freight to a trustee for the benefit of the claimants. In most cases, this cannot be done until the voyage is ended, for until

then, the embezzlement, loss, or destruction of property cannot be known.

And this was manifestly the maritime law, for by that law, the abandonment of the ship and freight (when not lost) was the remedy of the owners to acquit themselves of liability, and, of course, this could only be done at the termination of the voyage. If the ship was lost and the voyage never completed, the owners were freed from all liability. Boulay-Paty, Droit Com.Mar. tit. 3, sec. 1, pp. 263, 275, &c.; Emerigon, Contrats a la Grosse, c. 4, sec. 11, 1, 2; Valin, Com. lib. II, tit. VIII, art. II; Consolato del Mare, cc. 34 (141), 186 (182), 227 (194), 239; 2 Pardessus, Collection des lois Maritimes anterieur au XVIII Siecle; Cleirac, Nav. de Rivieres, art. XV.

If, however, by reason of the loss or sinking of the ship, the voyage is never completed, but is broken up and ended by causes over which the owners have no control, the value of the ship (if it has any value) at the time of such breaking up and ending of the voyage must be taken as the measure of the owners' liability. In most cases of this character, no freight will be earned; but if any shall have been earned, it will be added to the value of the ship in estimating the amount of the owner's liability. These consequences are so obvious that no attempt at argument can make them any plainer.

If this view is correct, it follows as a matter of course that any salvage operations undertaken for the purpose of recovering from the bottom of the sea any portion of the wreck after the disastrous ending of the voyage as above supposed can have no effect on the question of the liability of the owners. Their liability is fixed when the voyage is ended. The subsequent history of the wreck can only furnish evidence of its value at that point of time. And it makes no difference in this regard whether the salvage is effected by the owners or by any other persons. Having fixed the point of time at which the value is to be taken, the statute does the rest. It declares that the liability of the owner shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending. If the vessel arrives in port in a damaged condition

and earns some freight, the value at that time is the measure of liability; if she goes to the bottom and earns no freight, the value at that time is the criterion. And the benefit of the statute may be obtained either by abandoning the vessel to the creditors or persons injured, or by having her appraisement made, and paying the money into court, or giving a stipulation in lieu of it and keeping the vessel. This double remedy given by our statute is a great convenience to all parties. It does not make two measures or standards of liability, for the measure is the same whichever course is adopted, but it enables the owner to lay out money in recovering and repairing the ship without increasing the burden to which he is subjected.

It follows from this that the proper valuation of the steamer was taken in the court below -- namely the value which she had when she had sunk and was lying on the bottom of the sea. That was the termination of the voyage.

The next question to be considered is whether the petitioners were bound to account for the insurance money received by them for the loss of the steamer as a part of their interest in the same. The statute, 4283, declares that the liability of the owner shall not exceed the amount or value of his *interest in the vessel and her freight,* and 4285 declares that it shall be a sufficient compliance with the law if he shall transfer his *interest in such vessel and freight,* for the benefit of the claimants, to a trustee. Is insurance an interest in the vessel or freight insured, within the meaning of the law? That is the precise question before us.

It seems to us at first view that the learned justice who decided the case below was right in holding that the word "interest" was intended to refer to the extent or amount of ownership which the party had in the vessel, such as his aliquot share if he was only a part owner, or his contingent interest if that was the character of his ownership. He might be absolute owner of the whole ship, or he might own but a small fractional part of her, or he might have a temporary or contingent ownership of some kind or to some extent. Whatever the extent or character of his ownership might be -- that is to

say, whatever his interest in the ship might be -- the amount or value of that interest was to be the measure of his liability. This view is corroborated by reference to a rule of law which we suppose to be perfectly well settled, namely that the insurance which a person has on property is not an interest in the property itself, but is a collateral contract, personal to the insured, guaranteeing him against loss of the property by fire or other specified casualty but not conferring upon him any interest in the property. That interest he has already by virtue of his ownership. If it were not for a rule of public policy against wagers, requiring insurance to be for indemnity merely, he could just as well take out insurance on another's property as on his own, and it is manifest that this would give him no interest in the property. He would have an interest in the event of its destruction or nondestruction, but no interest in the property. A man's interest in property insured is so distinct from the insurance that unless he has such an interest independent of the insurance, his policy will be void.

This rule of law manifests itself in various ways. If a mortgagor insures the property mortgaged, the mortgagee has no interest in the insurance. He may stipulate that the policy shall be assigned to him, and the mortgagor may agree to assign it; and if it be assigned with the insurer's consent, the mortgagee will then have the benefit of it; or, if not assigned according to agreement, the mortgagee may have relief in equity to obtain the benefit of it.

So where property is sold, the insurance does not follow it, but ceases to have any value unless the insurer consent to the transfer of the policy to the grantee of the property. In other words, the contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred.

It is hardly necessary to cite authorities for a rule which has become so elementary. We will only refer to a few of them. Lord Chancellor King, in *Lynch v. Dalzell,* 4 Bro.P.C. 431; Lord Hardwicke in *Sadlers Co. v. Badcock,* 2 Atk. 554; *Carroll v. Boston Mar. Ins. Co.,* 8 Mass. 515; *Columbia Ins. Co. v. Lawrence,* 10 Pet. 507, 35 U. S. 512 ; *Carpenter v. Prov.*

Wash. Ins. Co., 16 Pet. 495, 41 U. S. 503 ; *Aetna Ins. Co. v. Tyler,* 16 Wend. 386, 397; *Wilson v. Hill,* 3 Met. 68; *Powles v. Innes,* 11 M. & W. 13; *McDonald v. Black,* 20 Ohio, 185; *Plympton v. Ins. Co.,* 43 Vt. 497. *Carroll v. Boston Marine Ins. Co., Powles v. Innes,* and *McDonald v. Black* were cases of marine insurance, and the same rule was followed in those cases as in cases of insurance against fire.

It is not an irrelevant consideration in this regard that the owner of the property is under no obligation to have it insured. It is purely a matter of his own option. And being so, it would seem to be only fair and right, and a logical consequence, that if he chooses to insure, he should have the benefit of the insurance. He does not take the price of insurance from the thing insured, but takes it out of the general mass of his estate, to which his general creditors have a right to look for the satisfaction of their claims. They are the creditors who have the best right to the insurance.

Stress is laid upon the hardship of the case. It is said to be unjust that the ship owner should be entirely indemnified for the loss of his vessel, and that the parties who have suffered loss from the collision by the fault of his employees should get nothing for their indemnity. This mode of contrasting the condition of the parties is fallacious. If the ship owner is indemnified against loss, it is because he has seen fit to provide himself with insurance. The parties suffering loss from the collision could, if they chose, protect themselves in the same way. In fact, they generally do so, and when they do, it becomes a question between their insurers and the ship owner whether they or he shall have the benefit of his insurance. His insurers have to pay his loss; why should not the insurers of the other parties pay their loss? The truth is that the whole question, after all, comes back to this: whether a limited liability of ship owners is consonant to public policy or not. Congress has declared that it is, and they, and not we, are the judges of that question.

Having, as we think, ascertained the true construction of the statute, the point in dispute is really settled. It is a question of construction, and does not require an examination of the

general maritime law to determine it. If the rule of the maritime law is different, the statute must prevail. But from such examination as we have been able to make, we think that the weight of maritime authority is in accord with the disposition of our statute as we have construed it, and that the statute has adopted the maritime law on this point as well as on the question of time for estimating the value of the ship.

The contract of insurance is of modern origin. It is not mentioned in the early treatises or compilations of maritime law. It is but little noticed prior to the sixteenth century. On a question like the present, we naturally turn to the French writers, who are distinguished for their great learning and acumen on maritime subjects. The principal text law on which they rely prior to the Code of Commerce adopted in the present century is the Ordinance de la Marine of 1681. By this ordinance it is declared that the owners of ships shall be responsible for the acts of the master; but they shall be discharged therefrom by abandoning their vessel and freight. The Code of Commerce, Art. 216, has substantially the same provision. Beyond this general declaration (which is simply an announcement of the maritime law on the subject), the special rules applicable to particular cases, and necessary for securing the benefit of the general rule in all, have to be drawn from the general principles of the same maritime law. Whether, in abandoning the ship to the creditors, the owners are or are not obliged to abandon the insurance effected on the ship is a question which had to be decided by the application of the general principles referred to.

The history of opinion among maritime writers on this subject is briefly this:

Valin and Emerigon, two great French jurists, contemporaries and friends, wrote on the maritime law. In 1760, Valin published his New Commentary on the Ordinance of the Marine of 1681. In 1783, Emerigon published his Treatise on Assurances and Contracts of Bottomry (Traite des Assurances et Contrats a la Grosse) Emerigon furnished Valin a large portion of the materials of which the latter's commentary was composed. Both of them are regarded as great

authorities on maritime law. These jurists differed on the

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question we are considering. Valin thought that those who furnished materials and supplies for a ship, and those who labored on its construction or repair, should have the power of transferring their lien on the vessel to the insurance money received by the owner for its loss. He reasons that this should be so because the materialmen and the workmen helped to make the thing which forms the subject of the insurance, while he admits that the Parlement of Bourdeaux had decided otherwise as late as September, 1758. So that the views expressed by Valin seem to be his opinion of what the law ought to be, rather than what it was. Valin Com., Vol. I, 315, 316, lib. 1, tit. XII, art. III.

Emerigon strenuously opposes Valin's opinion. His reasons are that liens are *stricti juris,* and are not to be extended by construction; that if Valin's rule is well founded, a vendor on credit would have a lien on the price arising on a subsequent sale of the same thing by his vendee after the thing itself had ceased to exist, which was contrary to repeated decisions; that by stronger reason, materialmen and workmen have no lien on the assurance of a ship which never belonged to them, for there is nothing essentially common between the right of pledge and that of property; that the ordinance gives no privilege to the materialmen and workmen except on the ship, and therefore they have none on the insurance, according to the rule of strict construction already stated; that if the ship were represented by the insurance, it would be necessary to give the same privilege to the seamen and all other privileged creditors, which would destroy the whole object of insurance; that, on the same principle, insurance ought to be represented by reinsurance, which, it is well settled, cannot be done. Emerigon, Contrats a la grosse, c. 12, sec. 7.

The opinion of Emerigon was followed with but little dissent until a recent period. The most prominent writer who disagreed with him was Pardessus, who, in the first edition of his Droit Commercial, published in 1814 (Art. 663), after stating the general rule that the owner may discharge himself from responsibility by

abandoning the ship and freight, added: "If these things have been insured, he ought to abandon also

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his rights against the insurers." This sentiment is repeated as his personal opinion in the subsequent editions of his work (same art. 663), but he is obliged to concede that the law is otherwise. In the edition of 1841, art. 594, 2d, after asking the question whether a creditor, having a privilege or an hypothecation on a thing insured, could require a distribution of the insurance money as would be made of the price on a sale, he says,

"I think not; there is not the same reason. In the case of sale, the price must in the nature of things represent the thing sold, the owner parting with it only for that. In the case of insurance, the thing has perished; it has not been assigned in consideration of any price. The debtor has procured, it is true, a guarantee by the effect of which the insurer pays him the value of it, but this guarantee is the result of an agreement independent of the engagements of the assured with any particular creditors. The value paid does not represent the thing insured, except in the relations between the insurer and the insured; not in the relation between the latter and his creditors, except as an accession to the mass of his property, against which the creditors may prosecute their actions according to the principle of the civil law by which all the property of a debtor is the common pledge of his creditors; but without any preference, none of them having a peculiar right to a privilege on the contract of insurance which has caused the amount assured to be added to the assets of the common debtor. It would be otherwise undoubtedly if the debtor, in borrowing upon an hypothecation of a house insured, should at the same time assign to his creditor the contingent benefits of the insurance, to serve for his discharge to that extent, and if the creditor should duly notify the insurer,"

&c.;

This passage shows that even Pardessus admitted the law to be as Emerigon had declared it.

Boulay-Paty, the contemporary of Pardessus, who published his work on Maritime Commercial Law (Droit Commercial Maritime) in 1821, warmly espouses the views of Emerigon. His observations on the subject are exceedingly sensible and persuasive. After quoting the views of Valin and Emerigon, he says:

"We must agree that Emerigon's opinion is most

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conformable to principle, and that the transfer or subrogation of which Valin speaks is not admissible,"

that is, the transfer of the lien from the property to the insurance. He adds:

"The axiom *subrogatum tenet locum subrogati* should be understood as applicable when the thing has been changed into something else by the owner, who has received the other thing in its place, as in the case when the owner of a ship has sold it, it is certain that the lien is transferred according to undoubted law to the price. But when the thing is perished in the hands of the debtor, certainly all lien is extinct. L 8 ff, *quibus modis pignus vel hypotheca solvitur.* Is it possible to suppose that an insurance, which is an agreement foreign to the creditors holding liens, which has been effected between the owners and a third party, can have the effect to bring again into life the lien on the ship?"

Vol. I, p. 135.

He goes on to argue the question at great length and with much force, but it would extend this opinion too much to quote his argument at length. One more extract will suffice. After showing the difference between abandonment to the lien creditors and surrender to the insurers, and that the latter does not interfere with or prevent the former, he says:

"The product of the insurance is the price of the premium which the ship owner has paid to insure the ship. This premium is not bound as a security for debts and obligations contracted by the captain; the law expressly binds the ship and freight alone to that. The Code of Commerce gives to shippers a lien only on ship and

freight; consequently they have none on the insurance. In general, the ship is not represented by the insurance, which, after the loss of the ship, becomes a right existing by itself, which gives a direct personal action in favor of the insured."

"All these principals, besides, agree with equity and the well understood interests of commerce. Without this rule, indeed, insurances on the hull of a ship would become illusory for her owner, since he would have no way, even by stipulating for a guarantee against barratry of the master, which it is customary to do, to protect himself against any other loss than that of the premium, and yet this is both the object of insurance

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and the motive for which the premium is paid."

Vol. I, pp. 291-292.

During the seven years from 1827 to 1834, an animated controversy was carried on in France on the question whether article 216 of the Code of Commerce, in speaking of the "acts" (*faits*) of the master, meant to include his contracts lawfully made in the course of the voyage, or only his wrongful acts, and finally the matter came before the legislative body for solution. In 1841, that body modified article 216 so as to expressly embrace contracts of the master as well as other acts. It was at the same time sought to introduce a clause which should render it the owner's duty, in abandoning the ship and freight to obtain the benefit of limited liability, also to abandon his claim for insurance on them; but this provision failed to receive assent. The law remained as it had always been.

In 1859, two very able works were published in France in which the subject was again discussed, one by Edmond Dufour entitled "Droit Maritime" and one by J. Bedarride entitled "Droit Commercial," a commentary on the Code the Commerce.

Dufour attempted to renew the controversy, although he admitted that the views of Emerigon had been acquiesced in even by Pardessus, and that Valin stood alone. He says:

"Doctrine and jurisprudence, after some hesitation, pronounced themselves, as is well known, against the existence of a privilege or hypothecation on the indemnity due from the insurer, and in that way the general principle which Emerigon had adopted as the basis of his theory penetrated men's minds as an indisputable truth which ought thenceforth to govern all indemnities of insurance. Thus it is, for example, that M. Pardessus, speaking of this question in relation to maritime credits, comes back for its solution to the general principles relating to insurance, so that the opinion of Valin seems to be crushed under this imposing unanimity."

Dufour, Droit Maritime, Art. 261.

Dufour then devotes many pages to argue the question *ab origine,* persuading himself that he has established the correctness of Valin's views. But his admission at the beginning of his argument demonstrates that the maritime jurisprudence of France was in accordance with the opinion of Emerigon.

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In consequence, probably, of this effort to bring the matter again into question, Bedarride examined the subject with great care, both on principle and authority, and showed that the law was not only settled, but should not be disturbed. Bedarride, Droit Commercial, Art. 295. But the advocates of change persisted in their efforts until finally, on the 22d of December, 1874, on the passage of a law to render ships susceptible of hypothecation, they procured a section to be inserted (sec. 17) declaring that in case of loss or disablement of the ship, the rights of the creditors (that is, hypothecation creditors) may be enforced not only against the portions saved or their proceeds, but (in the order of registry) against the proceeds of any assurances that may have been effected by the borrower on the hypothecated ship. This law, however, does not extend to tacit liens or privileges.

For further authorities in the French law, to the same effect as Boulay-paty and Bedarride, *see* 2 Pouget, Principes de Droit Mar. vol. 2, pp. 415-419, ed. 1858; 3 Eloy et Guerrand, Des Capitaines, Mait. et Pat. vol. 3, art. 1894 (1860); Caumont, Dict. de Droit Mar. tit. "Abandon Mar." 54, 55; De Villeneuve et Masse, Dict. du

Contentieux Commercial, "Armateur," 20.

In Germany, the history of the question has been to some extent the reverse of what it has been in France. The Prussian Code, adopted in 1794, allowed ship owners to "free themselves from responsibility in all cases by a surrender of the ship, including all benefits of the voyage and their rights against the insurers." But Prussia was the only country that adopted this rule in relation to insurance. In 1856, a scheme was set on foot to have a conference to prepare a general commercial code for all the German states. Commissioners were appointed by the several states for this purpose, who held repeated sessions but came to no agreement on a general code until March, 1862. The Prussian commissioners strenuously urged the adoption of their law on the subject of subrogation to the claims for insurance. The arguments presented by them are spread before us to some length in one of the briefs of the counsel for the appellants. The convention, however, were not convinced, and rejected the proposition, and the Prussian commissioners were

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obliged to yield the point, and now all Germany, under this new commercial code, adheres to the old maritime law. It is only necessary to add that in the discussions of the convention it was conceded that the maritime law had never required the surrender of the insurance, but only that of the ship and freight. By the commercial code of Holland and the Ordinance of Bremen this rule is expressly formulated.

It appears, therefore, that the disposition of our statute is in conformity with the general maritime law of Europe, and that the recent legislation in France (1874) is an innovation upon that law.

It is next contended that the act of Congress does not extend to the exoneration of the ship, but only exonerates the owners by a surrender of the ship and freight, and therefore that the plea of limited liability cannot be received in a proceeding *in rem.* But this argument overlooks the fact that the law gives a two-fold remedy: surrender of the ship or payment of its value, and declares that the liability of the

owner in the cases provided for shall not exceed the amount or value of his interest in the ship and freight. This provision is absolute, and the owner may have the benefit of it not only by a surrender of the ship and freight, but by paying into court the amount of their value, appraised as of the time when the liability is fixed. This, as we have seen, enables the owner to reclaim the ship and put it into complete repair without increasing the amount of his liability. The absolute declaration of the statute that his liability shall not exceed the amount or value of the ship and freight, to-wit at the termination of the voyage, has the effect, when that amount is paid into court under judicial sanction, of discharging the owner's liability, and thereby of extinguishing the liens on the vessel itself and of transferring those liens to the fund in court. This is always the result when the owner is allowed to bond his vessel by payment of its appraised value into court or by filing a stipulation with sureties in lieu of such payment. The vessel is always discharged from the liens existing upon it when it has been subjected to a judicial sale by order of the admiralty court or when it has been delivered to the owner on his stipulation with sureties.

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The claim that the lien attaches to the repairs and betterments which the owner puts upon the vessel after the amount of his liability has been fixed is requgnant to the entire drift and spirit of the statute. In ordinary cases, it may be true, and undoubtedly is true, that a lien or privilege on the ship extends to and affects all its accretions by repair or otherwise; but in the case of a claim for limited liability under the statute, the dispositions of the statute are to govern, and these, as we have seen, fix the amount of liability at a certain time, and when that liability is discharged the lien is discharged, no matter what the then value of the ship may have come to by means of alterations and repairs.

The time when the amount of liability should be paid into court will depend upon circumstances. If the owner sets up his claim to limited liability in his answer, and does not seek a general concurrence of creditors, it will be sufficient if the amount is paid after the trial of the cause, and the ascertainment of the amount of liability

in the decree. Payment and satisfaction of the decree will be a discharge of the owner as against all creditors represented in the decree.

To say that an owner is not liable but that his vessel is liable seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated unless where, for public reasons, the law exempts particular kinds of property from seizure, such as the tools of a mechanic, the homestead of a family, etc. His property is what those who deal with him rely on for the fulfillment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a ship bound in bottomry, or subject to seizure for contraband cargo or illegal trade, and it may even be called "the guilty thing;" but the liability of the thing is so exactly the owner's liability that a discharge or pardon extended to him will operate as a release of his property. It is true that in *United States v. Mason,* 6 Bissell 350, it was held that in a

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proceeding *in rem* for a forfeiture of goods, the owner might be compelled to testify, because the suit is not against him, but against the goods. That decision however, was disapproved by this Court in the case of *Boyd v. United States,* 116 U. S. 616 , 116 U. S. 637 , in which it is said:

"Nor can we assent to the proposition that the proceeding [*in rem*] is not in effect a proceeding against the owner of the property as well as against the goods, for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited. In the words of a great judge: 'Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.' Vaughan, C.J., in *Sheppard v. Gosnold,* Vaugh. 159, 172, approved by Ch. Baron Parker in *Mitchell v. Torup,* Parker 227, 236."

But the argument is at war with the spirit as well as the text of our decisions on the subject of limited liability. The case of *The Benefactor* 102 U. S. 214 , is precisely in point. That was a case of libel *in rem* against the vessel in fault, and the proceeding for a limited liability was sustained. It is true that this particular point was not raised, but the parties in the case were represented by able and experienced counsel, and the point would certainly have been raised if they had regarded it as tenable.

We are not only satisfied that the law does not compel the ship owner to surrender his insurance in order to have the benefit of limited liability, but that a contrary result would defeat the principal object of the law. That object was to enable merchants to invest money in ships without subjecting them to an indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment. Now to construe the law in such a manner as to prevent the merchant from contracting with an insurance company for indemnity against the loss of his investment is contrary to the spirit of commercial jurisprudence. Why should he not be allowed to purchase such an indemnity? Is it against public policy? That cannot be, for public policy would equally condemn all insurance by which a man provides indemnity for himself

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against the risks of fire, losses at sea, and other casualties. To hold that this cannot be done tends to discourage those who might otherwise be willing to invest their money in the shipping business. It would virtually and in effect bring back the law to the English rule, by which the owner is made liable for the value of the ship before collision -- the very thing which, in all our decisions on the subject, we have held it was the intention of Congress to avoid by adopting the maritime rule. That this would be the result is evident, because all ship owners insure the greater part of their interest in the ship, and by losing their insurance they would lose the value of their ship in every case. No form of agreement could be framed by which they could protect themselves. This is a result entirely foreign to the spirit of our legislation.

When it was urged upon the Chamber of Peers of France in 1841 to pass a law requiring the abandonment of insurance as well as of ship and freight in order to relieve the owner from liability, the suggestion was not entertained. The opinion of the majority was that the relations between the ship owner and lenders or shippers ought to remain entirely independent of contracts of insurance which either could make; that an obligation to abandon insurance would have no other tendency than to prevent insurance by the owner, since he would be deprived of the benefit of it in case of loss. Bedarride, art. 295, vol. 3, p. 361.

The argument that to allow the owner to keep his insurance would encourage negligence and recklessness on his part can always be made in every case of insurance. It has been made and answered a hundred times. Generally a sufficient portion of the value of the thing insured remains uncovered by insurance to prevent indifference to loss, and if the temptation to wish it does exist in any case, the retributions are so fearful as to repress the thought. To the honor of human nature, the exceptions to the rule are exceedingly rare.

It is also contended that the right to proceed for a limited liability is waived and lost by a surrender of the vessel to the insurers, because it is then out of the owner's power to abandon the ship to the claimants who have liens upon her. This

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argument assumes that abandonment is necessary, which is not the case under our law. Payment of the ship's value into court or setting up the matter as a defense is quite as efficacious. But if abandonment were necessary, as it is by the maritime law, a surrender to the insurers does not interfere with or prevent a subsequent abandonment to the creditors. The insurers take the ship *cum onere,* and stand in no better plight than the original owners. The liens against the ship are not extinguished by the surrender to the insurers, but may be prosecuted by the creditors notwithstanding such surrender unless proceedings for a limited liability are instituted. This is fully shown by Boulay-Paty, vol. 1, pp. 293-297, and by Bedarride in Article 291 of his work before cited. The former, after showing that abandonment to the lien creditors may be made notwithstanding a previous

surrender to the insurers, and explaining the reason of it, says:

"It follows from thence that the owner may, by abandonment, turn the shippers [of cargo] over to the insurers [now become the owners by the surrender of ship and freight to them], and thus make abandonment and surrender at the same time."

1 Boulay-Paty, 295.

This disposes of all the important points in the case, and leads to the conclusion that the decree of the circuit court was right, and it is

Affirmed.

MR. JUSTICE MATTHEWS, with whom concurred MR., JUSTICE MILLER, MR. JUSTICE HARLAN, and MR. JUSTICE GRAY, dissented. Thjeir dissenting opinion will be found at page 118 U. S. 526 , *post,* after the opinion of the Court in *The Great Western.*