amendment of any process returnable to or before it, when the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues." That this power of amendment would extend to the affidavit, as well as to the writ which is based on it, we have already seen from *Tilton* v. *Cofield*, 93 U. S. 163, and no reason can be assigned why it should not apply in cases of attachment. It is not a sufficient reason that the courts of Michigan do not so apply a similar statutory provision for amendments, because the reasons on which these courts proceed do not apply to attachment suits in the courts of the United States. Those reasons are that the act of 1839 was a special statute of amendment, covering the case, and has been repealed, and that the affidavit in attachment, in the view of those courts, is a matter of jurisdiction and not of procedure. The power to amend conferred by section 948 is unconditional and positive, and cannot be limited by arbitrary qualifications. It applies, beyond doubt, to the distinctive and special proceedings in attachment authorized in favor of the United States against defaulting and delinquent post-masters, contractors, and other officers, agents, and employes of the post-office, as regulated by section 924, Rev. St. at Large. It would be a curious anomaly if it should not be held to apply in other cases of attachment under section 915. There seems to be no sufficient reason for making any difference between them. It is not necessary to say that the power to permit amendments in such cases is to be exercised according to the sound discretion of the court to whom the application is addressed; and it is not open to the observation that it will be authorized in any cases or circumstances except in those where right and justice require it. It results from these views that the leave heretofore granted to amend as prayed for is confirmed, and the motion to quash the writ of attachment is overruled.

WALLACE *v.* THAMES & MERSEY INS. CO. (TWO CASES.)

CUNNINGHAM *v.* MECHANICS' & TRADERS' INS. CO.

WALLACE *v.* BRITISH AMERICAN ASSUR. CO.

(*Circuit Court, E. D. Michigan.* 1884.)

1. MARINE INSURANCE—ABANDONMENT OF VESSEL.
   The right of abandonment does not depend on the high probability of a total loss either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense.

2. SAME—VALUATION—LOSS.
In ascertaining the value of the ship, and whether she is injured to the amount of half her value, the true basis of the valuation is the value of the ship at the time of the disaster; and if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss.

3. SAME—REPAIRS—DEDUCTION OF ONE-THIRD NEW FOR OLD.
The ordinary deduction in cases of a partial loss of one-third new for old, from the repairs, is inapplicable to the case of a technical total loss by an injury exceeding one-half the value of the vessel.

4. SAME—EXPENSES OF RAISING AND TOWING VESSEL.
The expense of raising and towing a sunken and disabled vessel to a port of repair, no matter by whom paid, should be considered as part of the loss, and it is immaterial that a part of this cost has been contributed upon an adjustment in the nature of general average by the cargo.

5. SAME—POLICY CONSTRUED.
Policy construed, and *held* that there was nothing in the special provisions thereof to preclude the insured from recovering for a constructive total loss after abandonment, when the amount of the repairs, deducting one-third new for old, added to the expense chargeable to it of raising and taking the vessel to the port of repairs, exceeded one-half its agreed value.

At Law.

MATTHEWS, Justice. These are actions upon several policies of marine insurance upon the schooner John Wesley, the respective plaintiffs being each the owner of one-fourth interest. The vessel was valued in the policies at $12,500. The amount of insurance is $10,000, each policy being for $2,500. The plaintiffs claim to recover for a constructive total loss. The defendants admit only a partial loss. The causes have been submitted to the court, the intervention of a jury being waived, upon a written stipulation as to the facts, as follows:

"(1) That while said policy was in full force, and on or about the twenty-fifth of September, 1883, said schooner, while on a voyage, as alleged in the declaration, was, by reason of the peril insured against by said policy, stranded and wrecked near Wind-mill Point, on the north shore of Lake Erie; that she had on board at the time a cargo of about 595 tons of iron ore. (2) That by reason of such stranding, and the perils incident thereto, said schooner was greatly injured and damaged, and that it was impossible to release her from her perilous situation without the assistance of wrecking tugs, divers, steam-pumps, lighters, etc. (3) That after such loss and stranding the owners of said schooner abandoned her to the underwriters; that notice of such abandonment was duly served, and that subsequently the insurers, by the means of steam-tugs, steam-pumps, and the usual wrecking outfit, succeeded in releasing the said schooner and cargo, and took them to the port of Buffalo, which was the nearest port at which said schooner could receive the necessary repairs; that the expense thereby incurred amounted to the sum of $5,367.60; and that the costs of repairing said schooner will be, according to the survey made, the sum of $3,998.70, one-third new for old having been deducted. (4) That an *ex parte* adjustment was made of the expenses of raising and wrecking said schooner, and taking her to said port of repairs; and that according to said adjustment said schooner was liable to pay the sum of $3,316.86. (5) That if the cost of rescuing said schooner and taking her to said port for repairs without deducting one-third therefrom is to be added to the costs of said repairs, then the plaintiff is entitled to recover as for a constructive total loss; otherwise, he is entitled under the policy to recover only for a partial loss."

The policies are substantially alike. Each of them contains, in usual form, the suing and laboring clause, with the provision that in all cases of loss or damage one-third new for old shall be deducted from the amount of actual cost of repairs, or estimates for same, except on anchors. They also contain the following:

"It is agreed that the acts of the insured or insurers, or their agents, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party. Further, the insured shall not have a right to abandon in any case, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss shall exceed half the amount hereby insured. Nor shall detention by the season, or by any other cause, be alleged or allowed as a cause of abandonment. * * * And the valuation of said vessel expressed in this policy shall be considered the value in adjusting total, partial or particular average losses covered by this policy, general and in the nature of general average, losses excepted."

It is claimed on the part of the plaintiffs, respectively, that the loss should be adjusted as a constructive total loss, entitling them to abandon and to recover the whole amount insured, as follows:

(1) Loss apportioned to the hull under the general average statement, - - -	$3,316 86	
Less owner's uninsured interest, - -	663 37	
		$2,653 49
(2) Net partial loss on hull, - - -	$4,998 38	
Less owners' uninsured interest, - -	998 38	
		4,000 00
Total loss, - - - - -		$6,653 49

—Which is more than one-half of the agreed value of the vessel.

On the other hand, it is admitted, on the part of the defendants, that the insurers are liable for the expenses of raising and taking the vessel from the place of the disaster to the port of repairs, so far as charged against the vessel in general average, and also for the net cost of repairs, deducting one-third new for old; but that the two separate charges cannot be added so as to convert the loss into a constructive total loss, or in the alternative, that if the two liabilities are to be added, then that one-third must be deducted, under the terms of the policy, from the cost of raising and taking the vessel to the port of repairs, in order that the adjustment may be as of a partial loss, in which event the whole amount will be less than one-half the agreed value, and therefore not enough to constitute a constructive total loss.

The principles of the law of marine insurance, which would regulate and determine the rights of the parties upon the facts of this case, leaving the special provisions of the policies sued on out of consideration, were authoritatively settled in the courts of the United States by the decision of the supreme court in the case of *Bradlie* v.

Maryland Ins. Co. 12 Pet. 378. Upon the subject of the right to abandon, it was then said:

"In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril, and the apparent extent of the expenditures required to deliver her from it, as to justify an abandonment, although by some fortunate occurrence she may be delivered from her peril without an actual expenditure of one-half of her value after she is in safety. Under such circumstances, if, in all human probability, the expenditures which must be incurred to deliver her from her peril are at the time, so far as any reasonable calculations can be made, in the highest decree of probability, beyond half value, and if her distress and peril be such as would induce a considerate owner, uninsured and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good."

And the statement of the doctrine by Chancellor KENT, 3 Comm. 321, was quoted with approval, that "the right of abandonment does not depend upon the certainty, but on the high probability, of a total loss, either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense." "In respect to the mode of ascertaining the value of the ship," it was further said by the court in that case, "and, of course, whether she is injured to the amount of half her value, it has, upon the fullest consideration, been held by this court (*Patapsco Ins. Co.* v. *Southgate*, 5 Pet. 604) that the true basis of the valuation is the value of the ship at the time of the disaster; and that if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss." And also: "It follows from this doctrine that the valuation of the vessel in the policy, or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one-half the value of the vessel or not. For the like reason, the ordinary deduction, in cases of a partial loss, of one-third new for old from the repairs, is equally inapplicable to cases of a technical total loss by an injury exceeding one-half of the value of the vessel." And it was held in that case that an amount found due to salvors for rescuing the vessel and cargo, and taking them into a port of distress and of repairs, and charged, in an adjustment of general average, upon the vessel as her contributory share, must be counted as an expenditure to be added to the cost of repairs, which, if in the aggregate they amounted to more than half the value of the vessel, entitled the insured to recover for a constructive total loss. That in that case this expense was paid under the name of salvage is immaterial. The expense of raising and towing the sunken and disabled vessel to a port of repairs, no matter by whom paid, would