## THE RAPID TRANSIT.

## DEMING *et al.* *v.* THE RAPID TRANSIT.

(*District Court, D. Washington, N. D.* October 3, 1892.)

No. 414.

1. ADMIRALTY PLEADING—DEPARTURE.
Under a libel *in rem* on a contract of affreightment to recover for cargo destroyed in extinguishing a fire, libelant may be allowed to shift his claim to a demand for a general average, when the facts alleged in the libel and answer are sufficient, taken together, to sustain the same. *Dupont de Nemours* v. *Vance*, 19 How. 178, followed.

2. SHIPPING—DAMAGE TO FREIGHT—FIRE.
A steamer with a cargo, chiefly of lime, took fire, and was scuttled by the city fire department, that being the only method of preventing a total loss of the vessel and cargo, whereby the lime was destroyed. *Held*, that under Rev. St. § 4282, which provides that no owner of a vessel shall be liable for any loss happening to the cargo by fire unless caused by his design or neglect, the purchaser has a complete defense against an action *in rem* against the vessel.

3. GENERAL AVERAGE—CARGO INJURED IN SUPPRESSING FIRE.
The owner of cargo which is damaged by water in suppressing fire is entitled to compensation in general average. *The Roanoke*, 46 Fed. Rep. 297, followed.

4. SAME—BASIS OF SHIPOWNER'S CONTRIBUTION—INSURANCE.
Insurance is not a part of an owner's interest in a ship, and in cases of general average the amount of insurance received by him should not be added to the value of what was saved, for the purpose of increasing the fund to be distributed. *The City of Norwich*, 6 Sup. Ct. Rep. 1150, 118 U. S. 468; *The Scotland*, 6 Sup. Ct. Rep. 1174, 118 U. S. 507; and *The Great Western*, 6 Sup. Ct. Rep. 1172, 118 U. S. 520,—followed.

5. ADMIRALTY—COSTS.
A libelant *in rem*, suing on the contract of affreightment to recover damages for loss of cargo, failed to sustain the allegations of his pleadings, and increased the expense of the case by introducing immaterial evidence. He was allowed, however, to recover in general average, but had not attempted an adjustment on that basis before commencing the suit. *Held*, that he was not entitled to full costs.

In Admiralty. Libel *in rem* by Deming, Burntrager, and others against the steamer Rapid Transit, Elmer E. Caine, claimant. Decree for general average.

*Applegate & Titlow*, for libelants.

*John H. Elder*, for claimant.

HANFORD, District Judge. On the 14th day of August, 1891, the steamer Rapid Transit, with a cargo consisting principally of lime on board, suffered damage by fire in the harbor of Seattle, and was, by the fire department of the city, beached and scuttled for the purpose of extinguishing the flames. The sinking of the steamer caused a total destruction of the lime, but that was the only method by which a total loss of the vessel, as well as the cargo, could have been prevented; and it was effective. The libelants owned the lime which was destroyed, and this suit was instituted by them to recover the full value thereof upon their contracts of affreightment.

Section 4282, Rev. St. U. S., provides that—

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by design or neglect of such owner."

The claimant purchased the vessel after the fire, and he claims the protection of this statute on the ground that if the former owners are, by its terms, shielded from liability upon their contracts, the vessel is also entitled to immunity from proceedings *in rem*. I find that there is in the proofs absolutely nothing to support an accusation against the owners of any intentional act or negligence which could have been the cause of the fire and consequent injury to the vessel and her cargo; therefore the statute affords a complete defense as against the claim originally put forth by the libelants.

The libelants, however, after a total failure to sustain their original claims for the full value of the lime because of the breach of the contracts of affreightment, have taken a departure, and now assert that they are entitled to recover a portion of their losses upon a basis of general average. All the facts essential to a recovery in general average, additional to the allegations contained in the libels, are set forth in the answer. The objection, therefore, that the allegations of the libelants are insufficient to make a case of general average is technical, rather than substantial. I hold that, although there has been a radical departure, the case as now developed is one in which the court may lawfully apportion the losses sustained among the losers. It is expedient for all the parties to have their differences growing out of the transaction alleged in the pleadings, and which are cognizable in a court of admiralty, fully determined in the present suit, rather than bear the additional expense and suffer the delay incidental to commencing anew; and it is competent for the court to decree "upon the whole matter before it, taking care to prevent surprise, by not allowing either party to offer proof touching any substantive fact not alleged or denied by him." *Dupont de Nemours* v. *Vance*, 19 How. 173.

There is a conflict of authority upon the question as to the right of an owner of merchandise which has been, while being carried as freight upon a vessel, destroyed or damaged by water in consequence of a fire happening on board the vessel, to partial compensation in general average. The arguments for and against the validity of such a claim are very concisely and clearly stated, and the authorities are collated in the learned opinion of Judge JENKINS in the case of *The Roanoke*, 46 Fed. Rep. 297. Rather than indulge in further discussion of the subject, I will rest my decision upon the authority of that case, and the decisions which it follows.

From the evidence I find that the value of the steamer immediately before the fire was $10,000, and the values of different portions of her cargo were as follows: Lime, $1,825; oats, $205; hose, $380; total value of vessel and cargo, $12,410. I also find from the evidence that the value of the steamer in her condition and situation, immediately

after the fire had been extinguished, was $2,000. In addition to this sum, the oats and hose were saved, making the total value of property saved $2,585. There was lost to the owners of the steamer by damages to the steamer $8,000; pending freight, $218.50. The libelants Deming & Burntrager lost 700 barrels of lime, worth $700; the Tacoma Trading Company, 1,000 barrels, worth $1,000; and the libelant A. L. Aiken, 125 barrels, worth $125; total amount of losses, $10,043.50. On this basis the adjustment will be decreed.

The libelants claim that the amount received by the owners of the steamer upon policies of insurance should be added to the value of what was saved to them, for the purpose of increasing the fund to be distributed. But this cannot be allowed. The supreme court of the United States has, after full consideration and due deliberation, in a series of decisions definitely held that insurance is not a part of an owner's interest in a ship. *The City of Norwich*, 118 U. S. 468, 6 Sup. Ct. Rep. 1150; *The Scotland*, 118 U. S. 507, 6 Sup. Ct. Rep. 1174; *The Great Western*, 118 U. S. 520, 6 Sup. Ct. Rep. 1172. Although four of the judges who participated in the disposition of these cases, in carefully prepared and well-reasoned opinions, dissented, the decisions are declarations of the law by the highest court of this country, and the question is now settled. *Butler* v. *Steamship Co.*, 130 U. S. 558, 9 Sup. Ct. Rep. 619. It would be unbecoming for this court to hear from counsel arguments questioning the justice of the law as it has been so declared. I therefore declined to hear arguments upon this point, for the reason that these decisions cannot be, by this court, overruled or disregarded.

Considering the failure of the libelants to sustain the allegations made in their pleadings, and the fact that the expenses of the case have been greatly increased by the introduction on their part of evidence which is wholly immaterial, and the further fact that no attempt was made to obtain an adjustment in general average before commencing the suit, it is my opinion that it would be unfair to award them full costs. The decree will require each party to pay all fees and expenses of his own witnesses. No proctor fee will be taxed, and the libelants will pay one third and the claimant two thirds of all the other fees and costs.

# THE MINNIE C. TAYLOR.

# THE F. H. WISE.

# MORAN *et al. v.* THE MINNIE C. TAYLOR.

# QUINLAN *et al. v.* THE F. H. WISE.

(*District Court, S. D. New York.* July 13, 1892.)

1. COLLISION—SAILING VESSEL AND TOW—CROSSING COURSES—WHEN DUTY TO ABANDON RIGHT OF WAY.
   The tug Wise, with two barges, one behind the other, in tow on a hawser, was proceeding along a channel in Vineyard sound by night, bound east. Some 200 to 600 feet off on her starboard hand, sailing free, and drawing ahead of the tow, was a sailing vessel. The schooner Minnie C. Taylor, bound west, was beating across the channel, and was on the starboard bow of the Wise. It was the statutory duty of the Taylor, in that situation, to keep her course, and of the sailing vessel and the tug to avoid her. The sailing vessel went across the bows of the Taylor, which always held her course, until she struck the hawser between the tug and the forward barge, and was then run into and cut down by that boat. The court found that the intention of the sailing vessel to cross the bows of the Taylor became evident to the latter when she was 800 feet from the line of the tug and tow, and had ample room to tack. *Held*, that in such situation, with the sailing vessel crossing her bows, and the tow almost directly ahead, and ample time for herself to have gone about, it was the duty of the Taylor, though she had the right of way, to have tacked, and that the pilot of the Wise was justified in thinking that the Taylor would do so; but that, when the actual course and intention of the Taylor not to tack became evident, the tug should have slackened her hawser, as she had abundant opportunity to do, and permitted the Taylor to cross it. *Held*, therefore, that both vessels were in fault, and the damages should be divided.

2. SALVAGE—AID RENDERED VESSEL IN COLLISION BY COLLIDING VESSEL.
   After the collision the tug towed the schooner into port. *Held*, that the tug, being partly in fault for the collision, could not maintain an action for salvage.

In Admiralty. Libel for salvage. Cross libel for damage by collision.

*Benedict & Benedict*, for the Minnie C. Taylor.

*Carpenter & Mosher*, for the F. H. Wise.

BROWN, District Judge. The above actions grew out of a collision which took place at about 2 A. M. of May 8, 1892, in Vineyard sound, between barge No. 55, in tow of the steam tug F. H. Wise, and the schooner Minnie C. Taylor, by which the schooner was seriously damaged. After the collision the schooner was towed by the tug into Vineyard haven. The owners of the tug, claiming that the collision was caused solely by the fault of the schooner, filed the libel first above named for salvage compensation for their aid to the schooner after collision. The cross libel was filed to recover damages to the schooner, on the contention that the collision was caused solely by the fault of the tug. If the latter contention is correct, the libel for salvage cannot be sustained.

The place of collision was in the channel way between Squash meadow and Hedge fence, a passage less than three fourths of a mile in width, as bounded by the range of the red light from Nobska point on the