copy of it, meets the rule of good pleading which we have above stated, with the reasons for its requirement. In Daniell, Ch. Pr., it is said that "it is usual to refer to the instrument in some such words as the following, viz., 'as by the said indenture, when produced, will appear,' and the effect is to make the whole document a part of the record." 1 Daniell, Ch. Pr. (5th Ed.) 367; Id. (1st Ed.) 476. But this does not say that the bill in such a case shall not, by proper allegation, inform the defendant of the nature of the document, but is a rule to give the plaintiff the benefit of the averring part without reciting it *in hæc verba*, or exhibiting it, as the author says; and in the very next text he condemns the inconvenience of this indulgence, and says: "It is always necessary in drawing bills to state the case of the plaintiff clearly, though succinctly, upon the record; and, in doing this, care should be taken to set out precisely those deeds which are relied upon, and those parts of the deeds which are most important to the case." 1 Daniell, Ch. Pr. (5th Ed.) 368; Id. (1st Ed.) 476.

It is true that on the motion for injunction the letters patent were filed as evidence, and the document is before us, among the papers in the case. But it is not a part of the record. Not even the loose reference mentioned above is contained in this bill to make it a part of the pleading, which alone is the technical record. Reference to it is gained by implication only, from the fact that its existence is stated. It is not pleaded at all. So found in the papers, it cannot aid this pleading.

Demurrer sustained.

MONROE *v.* BRITISH & FOREIGN MARINE INS. CO., Limited.

SAME *v.* UNION MARINE INS. CO., Limited.

(*Circuit Court of Appeals, First Circuit.* October 5, 1892.)

Nos. 7, 8.

1. MARINE INSURANCE—"ABSOLUTE TOTAL LOSS"—ABANDONMENT.
   Under a marine policy insuring against "absolute total loss only," a partial loss cannot be converted into a constructive total loss, and evidence of abandonment is immaterial.

2. SAME.
   A shipment of cattle insured against "absolute total loss only" was in part jettisoned, the vessel having struck upon a reef. Part of the jettisoned cattle reached shore, and were taken possession of and sold by a salvors' association, which had been employed by the underwriters to go to the wreck and act for the interests of all concerned, with an agreement that they should have a lien on the property saved, with power of sale for their reimbursement, but it did not appear for what reason the sale was made. *Held*, that the owner of the cattle could not recover on the policy, in the absence of proof that the underwriters directed an unauthorized sale, or that salvage was actually claimed and the sale made in satisfaction thereof, and that he could not by due diligence have discharged the lien of the salvors, and thus secured the remnants of the cargo.

3. SAME—JETTISON OF CARGO.
   A jettison of cargo, either to lighten ship or for the purpose of being saved, does not of itself constitute an "absolute total loss," within the meaning of a marine insurance policy, when part of the goods are in fact saved.

4. SAME—ADJUSTMENT BY AGENTS—EXTENT OF AGENCY—EVIDENCE.
In an action on marine insurance policies issued by British companies through their agents in Boston, when nothing is clearly proven as to the extent of the agents' authority except that they were empowered to issue the policies, receive the premiums, and represent the underwriters in legal proceedings in Massachusetts, it cannot be presumed that they have authority to adjust a loss occurring on the British coast, under a policy issued by them.

5. TRIAL—DIRECTING VERDICT—FEDERAL COURTS.
A federal court may direct a verdict for either party whenever, under the state of the evidence, it would be compelled to set aside one returned the other way.

In Error to the Circuit Court of the United States for the District of Massachusetts.

These two actions were brought by Albert N. Monroe against the British & Foreign Marine Insurance Company, Limited, and the Union Marine Insurance Company, Limited, both being British corporations, on policies of insurance issued by them, respectively. The cases were tried together in the circuit court, and in each case a verdict was directed for defendant. Separate writs of error were sued out by the plaintiff, and the cases were argued together in the circuit court of appeals. Judgments affirmed.

The property covered by the policies consisted of 264 cattle shipped on the steamship Missouri at Boston, and consigned to James Nelson & Son, Liverpool. The bills of lading also provided that, "if animals are landed at Birkenhead, consignee is to take delivery of them there." The contracts of insurance were alike, except that one was for $16,000 and the other $17,000. Plaintiff had a general blanket policy issued by each company through their agents in Boston, Endicott & Macomber, under which his shipments of cattle from time to time were insured. This was effected in each case by the issuance of a "domestic certificate" in the following form:

"This is to certify that on the 18th day of February, 1886, this company insured, under and subject to the conditions of policy No. 10,550, for A. N. Monroe, for account of whom it may concern, sixteen thousand dollars, on 264 head of cattle valued at $33,000, per Str. Missouri, at and from Boston to Liverpool. Loss, if any, payable to the order of A. N. Monroe in funds current in the city of Boston, at the office of Endicott & Macomber, upon the surrender of this certificate.

[Signed] "ENDICOTT & MACOMBER, Attorneys.

"Premium, ———."

On the margin of each certificate was printed the following:

"Against absolute total loss of vessel and animals only, but this company to be liable for its proportion of the assured's assessment in general average levied upon all interests."

The policies contained the so-called "sue, labor, and rescue clause," as follows:

"And, in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, factors, servants, and assigns, to sue, labor, and travel for, in and about the defense, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance: nor shall the acts of the insured or insurers, in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment."

Also the "jettison clause," in the following terms:

"In all cases of loss by jettison, the same shall be settled on the principles of general average only."

Early on the morning of March 1, 1886, the ship went ashore on the Welsh coast at a place called Port Darfach, a few miles from Holyhead, and finally became a total wreck. In the attempts to get her off, many of the cattle were jettisoned by order of the master, some of which swam ashore or were towed ashore by salvors. Owing to injuries, it was necessary to butcher some of these, and only 108 were left. Soon after the vessel went ashore the Liverpool Salvage Association, an association of seven underwriters, of whom two were officers in the defendant companies, was requested by the underwriters to send an agent to the vessel "either to take charge of the property, or to advise the master or owners, and to act in reference thereto as may be considered best for the interests of all concerned." It was also agreed "that the association is to have an absolute lien upon all property saved and taken charge of by it, and its proceeds, for the amount to become due under this agreement, with power of sale for or towards their reimbursement." The agent of this association arrived early at the scene, and the cattle, when landed, were in his charge. The consignees, James Nelson & Sons, had sent one Thomas Colebourn to the wreck, and by an arrangement with the salvors' association the cattle were placed in his charge, and sent to Birkenhead, and thence to Liverpool, consigned by the association of salvors to James Nelson & Sons, who sold them, and accounted to the association for the proceeds, in whose possession they still remain. In all that was done by Nelson & Sons, they acted apparently as the consignees of the salvors, and not as the consignees of the plaintiff under the bills of lading.

Plaintiff testified as to certain interviews had by him with the Boston agents, Endicott & Macomber, immediately on learning of the wreck, tending to show that he verbally abandoned the property to the underwriters, and demanded his insurance, and that they made statements to the effect that the money would be paid, or that "it would be all right."

Thomas P. Proctor and *Chas. Theo. Russell, Jr.*, for plaintiff in error.

The court ought not to order verdict for the defendant if plaintiff has offered any evidence to sustain the allegations in his declaration. *Lamb* v. *Railroad*, 7 Allen, 98; *Todd* v. *Railroad*, Id. 207; *Witherby* v. *Sleeper*, 101 Mass. 138. In these cases the order of the court was based upon the fact that there was not a *scintilla* of evidence, or that there were no facts in dispute. "There does not seem to us to be even a *scintilla* of evidence to prove any act of delivery or acceptance." *Denny* v. *Williams*, 5 Allen, 1, 9. "If the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions." Id. 5.

The plaintiff contends that there was evidence for the jury of an absolute total loss of vessel and animals, within the meaning of the contract of insurance, and places his contention upon five grounds:

First. The drowning or jettison of all the insured cattle took them, by peril insured against, out of plaintiff's possession or control, even if some of them were landed and sold by salvors. As there was no restitution, or offer of restitution, to plaintiff, the loss to him is absolute and total.

Second. There was evidence for the jury that the defendants, through their agents, so acted in taking, selling, and retaining the proceeds from the sale of the wrecked cattle that they thereby accepted the loss as total.

Third. There was evidence for the jury that the defendants, by their agents Endicott & Macomber, agreed to pay the loss in suit, in consideration of plaintiff's continuing his insurance upon other shipments of cattle, and defendants thereby waived all defense.

Fourth. There was evidence for the jury of an absolute total loss by the necessary sale of the wrecked and damaged cattle by and for the salvors.

Fifth. Under the contract of insurance the plaintiff can recover, upon his proof of notice of abandonment, a constructive total loss, if more than one half of the cattle were drowned.

(1) Three fifths of plaintiff's cattle were drowned in the ship. About two fifths were jettisoned to lighten ship, got ashore, and were taken and retained by salvors. The wreck ended the voyage and the contractual relation between vessel and cattle. The cattle ceased to be a consignment, and the remnant became merely salvage. The latter were either in the possession of the defendants' agents or of an independent salvor, with a paramount lien for the salvage service. The evidence is clearly to the effect that they were sent to Liverpool, not to complete the voyage under the bill of lading, but merely as salvage, to be disposed of for the salvage association, and they were sold by their agent for them. No freight was paid for the carriage of the cattle, and they were taken by the salvors and sent to their broker without delivery of any bill of lading. The cattle were merely flotsam and jetsam.

This, then, was evidence for the jury that there was an absolute total loss of the cattle to the plaintiff. The test is not annihilation, but deprivation. The defendants contracted that no peril of the sea or jettison should prevent the arrival of the ship in Liverpool, not as salvage covered with salvage lien, but as a consignment of use to and under the control of the plaintiff. If none of the cattle arrived at their destination, as property of the plaintiff, with the right of possession in him, they were as absolutely lost as though they sank with the ship in mid-ocean. The loss is total in the absence of proof not only of rescue, but of restoration, or offer of restoration, to the insured.

An absolute total loss is defined in the leading case of *Roux* v. *Salvador*, 3 Bing. N. C. 286, by Lord ABINGER: "But if the goods were damaged by the perils of the sea, and necessarily landed before the termination of the voyage, and are by reason of that damage in such a state, though the species be not utterly destroyed, that they cannot with safety be reshipped; * * * if, though imperishable, they are in the hands of strangers, not under the control of the insured; if, by any circumstance over which he has no control, they can never, or within no assignable period, be brought to their original destination,—in any of these cases the circumstance of their existing *in specie* at that forced termination of the risk is of no importance. The loss is in its nature total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle."

Mr. Parsons says: "Goods are totally lost as to the insured when he has lost all possession of, or power or control of, them, although they may continue to exist *in specie* as before. It is this lost condition to the insured that is usually intended when total loss is spoken of. * * * Actual total loss occurs either if the thing insured is wholly destroyed as that thing, or if the

property insured, while remaining *in specie* what it is, is wholly lost to the insured, which means that it is entirely out of his power or that of the insurer to recover the property." 2 Pars. Ins. pp. 68, 74; 2 Arn. Ins. p. 952.

Says Mr. Phillips: "A total loss of a subject of insurance is where, by the perils insured against, it is destroyed, or so injured as to be of trifling or no value to the assured for the purposes and uses for which it was intended, or is taken out of the possession and control of the assured, whereby he is deprived of it, or where the voyage or adventure for which the insurance is made is broken up by the peril insured against." 2 Phil. Ins. § 1485.

So, if some of the goods are landed and stolen at the place of destination, the loss is nevertheless total, because "the portions of the goods which were saved from the wreck, though got ashore, never came again into the hands of the owners. It is therefore a total loss to them." *Bondrett* v. *Hentigg*, 1 Holt, 149. So, if the insured vessel is sold for salvage, the loss becomes total to the owner by reason of the consequent deprivation. *Cossman* v. *West*, L. R. 13 App. Cas. 160.

"A total loss, in one sense, means where goods go to the bottom of the sea, or where the goods are burnt or utterly destroyed; in another sense, a total loss means that the man who owns the goods is deprived of them in some way or other." MARTIN, B., in *Stringer* v. *Insurance Co.*, L. R. 5 Q. B. 605.

So seizure by government: "It is quite certain that the insured may claim as for actual total loss if the property or interest insured be taken from him, although there may be hope of recovery." 2 Pars. Ins. p. 900.

There was evidence for the jury of this deprivation that constitutes an absolute total loss. The only cattle saved were held and sold by the salvage association, without notice to the plaintiff, and the proceeds retained by the association, two sevenths of which association is made up of defendants' representatives. The broker employed by them to sell the cattle says: "The salvors declined to give up the cattle to Mr. Monroe or any one else. The salvors had possession of the cattle, and did not ask any person's consent." Any demand by plaintiff was therefore useless. Moreover, he was kept from making any such demand by the assurance of the agents in Boston that the loss would be paid. There is no evidence as to the expenses or salvage claimed by the salvage association. They have made no claim upon plaintiff, have rendered him no account, but have simply kept and still keep the entire proceeds from the sale. The presumption from the retention of the salvage proceeds is that the salvage association is entitled to the entire net sum to pay the expenses incurred. Not only has there been no restoration to plaintiff of the salved remnant of the insured property, and no proffer of restoration, but the salvage proceeds are actually in the possession of defendants' salvage association.

The cattle, then, were totally lost to the plaintiff by perils of the sea. Both ownership and possession were taken from him. "The goods were in the hands of strangers, not under the control of the insured." The insured "had lost all possession of, or power or control of, them, although they may continue to exist *in specie* as before." "They were taken out of the possession and control of the assured." Authorities cited *supra*.

(2) The plaintiff claims that there was evidence for the jury that, after the loss, the defendants, acting as they necessarily must, through their agents, regarded and accepted the loss as total, and so led the plaintiff to believe.

The defendants, by the terms of the policies, had the undoubted right "to sue, labor, and travel for, in, and about the defense, safeguard, and recovery" of, the cattle; "nor shall the acts of the insured or insurers in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment." The right conferred by this "sue and labor" clause is well settled. It enables either party, as the at-

torney of the other, to take, without prejudice, proper steps to preserve and save the insured property. It is a power of attorney. The underwriter can do what is necessary to preserve the property; but if he goes beyond his agency, and does any act assertive of ownership in, or title to, the insured goods, as by pledging or selling, or agreeing to the pledge or sale, of them, then the underwriter takes it as his salvage, and thereby assumes the loss to be total.

Under the "sue and labor" clause the defendants could take possession to save and restore. But if, instead of saving and restoring, they did any act implying or asserting ownership, and, *a fortiori*, if they sold or pledged the insured property, they assumed the loss to be total, and are estopped to deny its totality. *Wood* v. *Insurance Co.*, 6 Mass. 479; *Insurance Co.* v. *Chase*, 20 Pick. 142; *Reynolds* v. *Insurance Co.*, 22 Pick. 191; *Copelin* v. *Insurance Co.*, 9 Wall. 461.

"I think it may be laid down, as a general proposition, that whenever the underwriter does any act, in consequence of an abandonment, which can be justified only under a right derived from it, that act is of itself decisive evidence of an acceptance; and cases may even be put where the act of the underwriter will in law prevail over his express declaration. As if, after an abandonment, he shall proceed to sell the vessel, with an express protest against the acceptance, and a declaration that he did it for the benefit of the owner, his act would nevertheless conclusively bind him in point of law." STORY, J. *Peele* v. *Insurance Co.*, 3 Mason, 81; *Peele* v. *Insurance Co.*, 7 Pick. 254; *Insurance Co.* v. *Younger*, 2 Curt. 322; 2 Arn. Ins. (2d. Ed.) p. 969.

The question is wholly one for the jury. "Any act of the underwriter, in consequence of an abandonment, which could be justified only under a right derived from it, may be decisive evidence of an acceptance. * * * The question for the jury was whether upon the evidence, taken in connection with the provisions of the policy, there were any such acts." FULLER, C. J. *Richelieu & O. Nav. Co.* v. *Boston Marine Ins. Co.*, 136 U. S. 433, 10 Sup. Ct. Rep. 934; *Shepherd* v. *Henderson*, L. R. 7 App. Cas. 49; *Northwestern Transp. Co.* v. *Thames & M. Ins. Co.*, 59 Mich. 214, 26 N. W. Rep. 336.

So far as concerns the question of acceptance, the principle must be the same in cases of actual as in cases of constructive total loss. In each the question is purely one of fact. Did the underwriters assert ownership, or do any act which the insured would be justified in believing was assertive of title? If so, the underwriters have taken the salvage, and are bound to pay the loss.

The evidence shows that the defendants did, by their agents, so deal with the salved cattle as to assert title, and make the loss an absolute total loss with salvage.

There was no consent or participation on the part of plaintiff, or any agent of his, to this sale and assertion of title.

What right had the defendants on March 3d, after knowledge that some of the cattle had got ashore, to interfere with plaintiff's property, and without his assent to put a lien upon it, unless they recognized the loss as total, and were protecting their salvage?

(3) The plaintiff contends that there was evidence that the defendants, through their agents, Endicott & Macomber, agreed to pay the loss in consideration of the plaintiff's effecting his future insurances with them.

(4) The plaintiff contends that there was evidence for the jury that the loss became an absolute total loss by the necessary sale of the salved cattle. Whether the authority for the sale came from the salvage association or the defendants, or from the master of the vessel, it certainly did not come from the plaintiff or from his agent.

The law as to what constitutes total loss by necessary sale is defined in this circuit in *Hall* v. *Insurance Co.*, 37 Fed. Rep. 371: "I have come to the conclusion, after very full consideration, that the only test of the power of the master to sell is to inquire whether the vessel was in such a situation that to sell her was the only prudent and wise course. It is said in the cases that the sale must be by necessity; but I do not understand that, in order to show a necessity for a sale, the master must show that no other course was open to him. It is sufficient if he show that there was no other prudent course." CARPENTER, J.

There was evidence for the jury of such necessity: (1) The salved cattle were sold as wrecked cargo; (2) they were in a maimed and damaged condition; (3) they could be fed and kept for the salvage lien only at great and disproportionate expense; (4) the defendants consented to the sale, and are estopped to deny its necessity.

(5) Under the contract of insurance plaintiff can recover a constructive total loss on proof of a loss exceeding one half the cattle and seasonable abandonment to the defendants.

The term in the margin of the certificate, "Absolute total loss of vessel and animals," means merely, "Actual total loss," and does not exclude a constructive total loss. "It is to be borne in mind that a constructive total loss is as much a total loss in law as if the subject of insurance had been actually annihilated. A policy, therefore, against total loss only, covers a constructive loss also, unless the parties, if they intend to exclude this, do so by some such words as, 'without benefit of abandonment.'" Arn. Ins. (6th Ed.) p. 951.

As 156 head of the shipment of 264 cattle were drowned in the ship, there can be no doubt that the loss exceeded half the value. Monroe made a seasonable oral abandonment, and gave notice to defendants' agents in Boston.

This was sufficient notice of abandonment. It need not be in writing, and no particular form is required. Anything that conveys to the underwriters or their agents the information or understanding that the insured surrenders to them the goods saved, is sufficient. 2 Phil. Ins. § 1678; *Insurance Co.* v. *Southgate*, 5 Pet. 604; *Insurance Co.* v. *Ashby*, 4 Pet. 139; *Same* v. *Catlett*, 12 Wheat. 383.

An insurance contract "covers a constructive total loss based on damages exceeding one half the insured value from perils insured against, and an abandonment, although the cargo subsequently arrives at the port of discharge *in specie*, and very little diminished in quantity." *Mayo* v. *Insurance Co.*, 152 Mass. 172, 25 N. E. Rep. 80.

John Lowell and *Henry M. Rogers*, for defendants in error.

The judge of the circuit court was right to order verdicts for the defendants. There is no evidence reported in the transcript which would have warranted the jury in finding verdicts for the plaintiff. The rule of the federal courts is that "the judges are no longer required to submit a case to a jury, merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence. Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that before the evidence is left to the jury, there is, or may be in every case, a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon which the burden of proof is imposed." *Commissioners* v. *Clark*, 94 U. S. 278, 284, per Mr. Justice CLIFFORD.

In the very early case of *Pawling* v. *U. S.*, 4 Cranch, 219–222, MARSHALL, C. J., says: "The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw, the court ought to draw." *Carter* v. *Carusi*, 112 U. S. 478–484, 5 Sup. Ct. Rep. 281, and cases there cited by the court. So, also, in the state courts, the rule is the same. *Denny* v. *Williams*, 5 Allen, 1; *Brooks* v. *Somerville*, 106 Mass. 274, 275; *Connor* v. *Giles*, 76 Me. 132–134; *Pray* v. *Garcelon*, 17 Me. 145; *Head* v. *Sleeper*, 20 Me. 314.

In England the doctrine is the same. *Jewell* v. *Parr*, 13 C. B. 909, 915, 916; quoted with approval by HAND, J., in *Claflin* v. *Meyer*, 75 N. Y. 260–266. MAULE, J., says: "When we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established."

At the outset of the case, the court will have to interpret the clause in the policies, "against absolute total loss of vessel and animals only." What rule of interpretation, what principle, shall be applied to determine the question, was there an absolute total loss or not? The court in *Kemp* v. *Halliday*, 6 Best & S. 723–752, answers this question clearly and fully:

"The question of loss, whether total or not, is to be determined just as if there was no policy at all. If the subject-matter is, by the underwriter's peril, put in such a situation that, supposing there was no policy, it would be totally lost to the owner, then, as between the assured and the underwriter, there is a total loss; not otherwise. And the question whether the thing is lost to its owner is to be treated in a practical business-like spirit, and if the thing cannot be saved by any means which the owners or their representative, the captain, can reasonably use to save it, it is a total loss; but if, by any reasonable means which were reasonably within their reach, they might redeem the subject-matter, and do not do so, the total loss is not attributable to the perils which cast the subject-matter of insurance into that position, but to the neglect of the owner to take those reasonable means. If they do not take those means, they cannot make the loss total by their own neglect." *Kemp* v. *Halliday*, 6 Best & S. 723–752; *Irving* v. *Manning*, 1 H. L. Cas. 287–306.

We may quote, too, from the language of MATHEWS, J., in the case discussed later in our brief, (*Brooke* v. *Insurance Co.*:)

"No injustice takes place, no violence is done to the principle of equity and natural right, by interpreting contracts according to the legal and ordinary import and meaning of the words used in making them, as arranged in grammatical construction,—such meaning as every person acquainted with the structure of language would attach to them." 5 Mart. (N. S.) 546.

What is meant by absolute total loss?

The clause of this policy, "against absolute total loss of vessel and animals only," is to be interpreted naturally, in accordance with the clear, obvious, and ordinary meaning of the words. There is no mystery attaching to the words, "an absolute total loss," or as it is sometimes called, "an actual total loss," in law or in fact. The text writers and the courts are in entire harmony with each other and with the common and accepted views of business men.

"An actual total loss occurs when the subject insured wholly perishes, or its recovery is rendered irretrievably hopeless." McArthur, Ins. 138; Arn. Ins. (4th Ed.) 844; (1887,) Arn. Ins. (6th Eng. Ed.) p. 951; 2 Pars. Ins. 68.

"Total loss of maritime property under insurance is either actual (or, as it is sometimes called, 'absolute,') or constructive, (or, as it is sometimes called, 'technical.')"

"For the purposes of practice, and of insurance law, a vessel is totally lost when it is lost as a vessel, and goods are totally lost when they are lost as goods; and either vessel or goods are totally lost, as to the insured, when he has lost all possession of, or power or control of, them, although they may continue to exist *in specie* as before."

"If," says Lord ABINGER, "in the course of the voyage, the thing insured becomes totally destroyed or annihilated, or if it be placed by the perils insured against in such a position that it is totally out of the power of the assured or the underwriter to procure its arrival, the latter is bound by the very terms of his contract to pay the whole sum insured." *Roux* v. *Salvador*, 3 Bing. N. C. 266.

"There must be no rational hope, no practicable possibility, of recovering possession of the property, and prosecuting the adventure to its termination; for only when such hope and possibility have ceased is it an actual total loss." 2 Pars. Ins. 68, 69.

"Whenever the thing insured is, by the operation of a peril insured against, reduced to such a state as to be no longer capable of use under its original denomination, there is an actual total loss." *Wallerstein v. Insurance Co.*, 44 N. Y. 209; *Burt* v. *Insurance Co.*, 78 N. Y. 400.

The phrase "total loss" simply, which is the phrase commonly used in insuring what are known as "memorandum articles," since it does not contain the word "actual" or "absolute," is satisfied by a constructive total loss, with a seasonable abandonment. No case in which the word "absolute" or "actual" is not used, and no case in which there has been an abandonment, is pertinent to the inquiry in this cause; but there are several cases in which, the insured having failed to abandon, the courts have inquired whether, as a fact, the loss was absolutely or actually total. These cases are pertinent, and they decide the law to be such as we have already stated, namely, in cases of a ship, when the ship has ceased to be a ship, and in cases of goods, when the goods have become utterly lost *in specie*, or entirely valueless, or would have become so if conveyed to the port of destination. *Chadsey* v. *Guion*, 97 N. Y. 333; *Burt* v. *Insurance Co.*, 78 N. Y. 400; *Kemp* v. *Halliday*, *supra*; *Hills* v. *Assurance Corp.*, 5 Mees. & W. 569.

We submit that this whole case was decided on the 1st day of March, 1886, when 108 cattle out of the 264 that had been shipped by the plaintiff at Boston, were safely landed, or, if not then, when they were transferred by the authority of the master to the port of destination.

We submit, further, that it is impossible for the plaintiff even to state his case accurately, and bring it within the above definition of an absolute total loss, for it is undisputed that, of the 264 head of live cattle that were shipped by the plaintiff at Boston, 108 were landed alive at Birkenhead, the port of destination. He cannot show that these 108 animals were to all intents and purposes worthless, for it is admitted they were sold by the consignees themselves at the port of destination, for the benefit of somebody, for upwards of £20 sterling a head, or for £2,195 13s. 8d. in all; or show that the plaintiff ever lost possession of them, or power of control over them, for he asserts that he never made any attempt to get them into his possession, and has made no application to have the proceeds of their sale paid to him, notwithstanding the fact that the evidences of title, to wit, the bills of lading, are in his hands, and have been so since March 1, 1886, the very day of the disaster. *Biays* v. *Insurance Co.*, 7 Cranch, 415; *Morean* v. *Insurance Co.*, 1 Wheat. 219.

The plaintiff, failing to show an absolute total loss, is forced to contend that there was a constructive total loss of his cattle.

Upon this point we submit:

(1) the word "absolute" in our policy is used not only as including "actual," but also as excluding "constructive." It means, therefore, without privilege of abandonment. We are contending for the clear, ordinary, and obvious meaning of the word "absolute" in our policy of insurance.

(2) In cases where the right exists to claim for a constructive total loss, there must first be an abandonment by the assured to the underwriters. But, where the insurance is against absolute total loss only, there is no necessity for nor right of abandonment. *Burt* v. *Insurance Co.*, 78 N. Y. 400.

(3) The object of an abandonment is to turn into a total loss that which otherwise would not be so, and an abandonment must be made seasonably, *i. e.*, before any portion of the goods have arrived at their port of destination. *Forbes* v. *Insurance Co.*, 1 Gray, 371; *Pierce* v. *Insurance Co.*, 14 Allen, 320, 322, per GRAY, J.; *Gracie* v. *Insurance Co.*, 8 Johns. 183; *Marcardier* v. *Insurance Co.*, 8 Cranch, 39; *Saltus* v. *Insurance Co.*, 14 Johns. 138; *Chadsey* v. *Guion*, 97 N. Y. 333.

(4) Even if this were a case where there existed the right of abandonment, no abandonment as a fact has been made. As to what constitutes a legal abandonment, see McArthur, Ins. pp. 145, 146, 147.

The further contention of the plaintiff, as we understand it, is as follows: That when the insured cattle went into the sea they were an absolute total loss to the plaintiff, even though they swam ashore, or were towed ashore, and were afterwards sold, alive and well, in the market at Liverpool, the port of destination.

Against this construction it is to be noticed that by the terms of the policy it is provided that "in all cases of loss by jettison the same shall be settled on the principles of general average only." Again, in the policy, the obligations resting upon the insured under the "sue, labor, and travel" clause would preclude the possibility of the assumption that when insured animals are wet they are drowned, or when landed thereafter alive and well they are dead. If the plaintiff failed to do what he was bound to do he cannot claim for a total loss, for the law is settled that the owner of a shipment cannot make the loss total by his own neglect. *Irving* v. *Manning*, 1 H. L. Cas. 287–306.

The bills of lading are still in the hands of the plaintiff. He says he has never done anything about his cattle; never heard anything about them; never claimed anything from those in whose possession they were; nor claimed the proceeds from any one.

The further contention of the plaintiff is that the defendants, either by their own acts, or by the acts of their duly-constituted agents, have exercised such control over the property of the plaintiff as, in effect, to assert their ownership of it, so as to dispossess him; that they have in law, at least, acknowledged an abandonment by the plaintiff to them, and a constructive total loss; or that there has been a recognition of an absolute total loss, and that it is too late for them to change their legal position, and that, consequently, they are liable under the policies. It is an elaborate assumption, but it is only an assumption, and rests only on such "stuff as dreams are made of."

If it be conceded that the salvage association did take possession of the plaintiff's cattle, and there is no doubt it did, it only took possession of them as salvor, and there is no law of any country that makes a salvor the owner of the property saved, or a thief for saving. Salvors, at best, have only their lien for expenses. No one ever doubted that salvors should be encouraged. They are the special wards of courts of admiralty, and in high honor, and their

possession of property is a legal and authorized possession, and the owner or consignee can always obtain his goods by paying salvage. It was the duty of the consignees, in this case as agents of the owner, so to take his cattle and pay the expenses, and, by neglecting to do so, the loss cannot be thrown upon the insurance companies.

The consignees cannot plead ignorance of what was going on, for they were in close conference with the Liverpool Salvage Association, and acting with and for it, under written agreements not produced. All the evidence shows that the salvage association was as much the agent of the plaintiff's consignees as of anybody.

It is certain that the defendants had nothing to do with the sale of the cattle, nor did they ever receive any money from the sale of the cattle, or interfere with it in any way.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. In *North Pennsylvania R. Co.* v *Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. Rep. 266, the supreme court said as follows:

"There is no doubt of the power of the circuit court to direct a verdict for the plaintiff upon the evidence presented in a cause where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be determined by the jury. Such a direction is eminently proper, when it would be the duty of the court to set aside a different verdict if one were rendered. It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way."

In *Railroad Co.* v. *Converse*, 139 U. S. 469, 11 Sup. Ct. Rep. 569, this was affirmed. The court, page 472, 139 U. S., and page 570, 11 Sup. Ct. Rep., said:

"But it is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it."

In *Railway Co.* v. *Cox*, 145 U. S. 593, 606, 12 Sup. Ct. Rep. 905, the court said:

"The case should not have been withdrawn from the jury unless the conclusion followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."

Although this did not state in terms that a verdict might be directed for either party whenever the court would be compelled to set aside one returned the other way, yet in view of the above citations, and especially in view of the expression in the yet later case, (*Meehan* v. *Valentine*, 145 U. S. 611, 618, 12 Sup. Ct. Rep. 972,) it cannot be questioned that this test is still a proper one. Courts cannot be expected to stultify themselves by taking verdicts which in a sound judicial discretion they should immediately set aside. Applying this to the cases at bar, the direction of the court below to return a verdict for each defendant must be sustained.

The plaintiff put in conversations with Endicott & Macomber, the agents of the defendants, and claimed that as the result of them the defendants had accepted a total loss, or were estopped from disputing it. The court, however, regards these conversations as irrelevant. They took place at Boston, part on the day of the wreck and the remainder within a day or two after, necessarily in ignorance of the true condition of facts on the other side of the Atlantic, as plaintiff, of course, should have well understood; and they promised nothing except that everything "would be all right," which was wholly indefinite. The plaintiff failed to prove that Endicott & Macomber had an agency so broad as to authorize them to adjust a loss of this nature occurring in England, where the defendant corporations were themselves present and had their habitat. Nothing is proven clearly, except that Endicott & Macomber had authority to issue the policies, receive the premiums, and represent the underwriters in legal proceedings taken in Massachusetts. If the plaintiff claims more than this he should have called out the agents' powers of attorney or other written authority, or pointed out to the court some local statute clearly and specifically applicable. It is inadmissible to presume that local attorneys or agents have power to interfere with the adjustment of losses occurring abroad, especially in the country of the residence or domicile of the insuring corporations. To encourage a rule of that nature would be very unreasonable, in view of the fact that local agents rarely, if ever, have the knowledge necessary to enable them to deal with such matters.

It seems to the court that the question of the lack or existence of an abandonment is also of no consequence. The loss cannot be converted from a partial to a constructive total one with any effect in this case, and an abandonment has no use except for that purpose. This is sufficiently explained in *Stringer* v. *Insurance Co.*, L. R. 4 Q. B. 676, and L. R. 5 Q. B. 599, approved in *Cossman* v. *West*, L. R. 13 App. Cas. 160.

Neither did jettison of the cattle create an absolute total loss. Whether they were jettisoned for the purpose of being saved, or to lighten the ship, is unimportant. Even derelict does not constitute an absolute total loss, if brought into a port of safety within a reasonable time, and if also the salvage charges are paid by the underwriters, or if under such circumstances that a prudent owner ought to pay them. *Cossman* v. *West*, *ubi supra*.

Carr v. *Insurance Co.*, 109 N. Y. 505, 17 N. E. Rep. 369, cited by plaintiff, lays down the following rule:

"The underwriters having elected to take possession of the vessel under the rescue clause, it is plain, we think, that they could neither sell the vessel voluntarily nor permit it to be sold under judicial process in satisfaction of a lien which they had created, without thereby making the loss to the plaintiff an 'actual total loss,' whatever may have been its original character."

This divides into two branches:

First. A voluntary sale of the vessel by the underwriters. Undoubtedly the underwriters may so deal with property in peril as to convert what otherwise would be a partial loss into an absolute total one, or so

as to bar themselves from denying that such a loss has accrued. But when the assured has obtained the benefit of a low premium by covering absolute total loss only, then in view thereof, and also in view of the fact that public policy requires that all interested should be encouraged to use the sale and labor or rescue clauses to the fullest extent, whatever may be done in that direction by the underwriters, as well as by the owners, in unintentional excess of power, should not be made a trap.

Second. As to the effect of permitting property to be sold under judicial process, *Carr* v. *Insurance Co.* does not seem to state all proper qualifications. When a vessel or other property is taken possession of by captors or salvors, of course the owner is dispossessed, at least for the time being, and, unless he can restore his possession by reasonable efforts, the loss becomes absolutely total; but he is bound to use such efforts. In *Carr* v. *Insurance Co.* the vessel was in fact sold for a much less sum than the amount the underwriters agreed to pay the wreckers, so that a prudent owner would not have interfered to prevent a sale. And, inasmuch as the underwriters did not return the wreck free from salvors' liens, the misfortune was, as a matter of fact, converted into an absolute total loss. So in *Cossman* v. *West*, *ubi supra*, the property saved was of less value than the salvage services, and the underwriters did not discharge the lien. The fact must appear that the sale was under such circumstances that a prudent owner would not interfere to prevent it. In short, if the property passes into the possession of captors or salvors, and the owners are thus in fact dispossessed, the loss becomes total, provided the owners cannot in either case recover the possession except by disproportionate exertions, expense, or hazard; otherwise it does not.

It is plain that in the case at bar the underwriters properly asked the intervention of salvors. The vessel and property aboard were in such condition that it was beyond the power of the master, owners, or underwriters to rescue her or her cargo, and the aid of salvors was necessary. Although the salvors were employed at the outset by the underwriters, and although they constituted an association in which the underwriters had shares or other interests, yet after their employment they ceased to be agents of the underwriters, and took and held possession in their own right for the benefit of whom it might concern. They did not differ in this respect from other salvors whose position and rights remain generally the same, whether they come to the assistance of a wreck as volunteers or at the request of the interests concerned. Having thus taken possession, it must, for the purposes of this writ of error, be conceded in behalf of the plaintiff that the salvors sent the cattle to Liverpool or Birkenhead, consigning them to themselves, and ordered them sold by James Nelson & Sons; that though this firm were the consignees the sale was for the benefit of the salvors and on their account; that, according to Nelson's statement, the salvors declined to give them up; and that they did not ask anybody's consent to the sale. Also it is true that the written employment of the salvors, though perhaps signed by

one of the underwriters after the rescued cattle were sold, really took effect from its date, and before they arrived at Birkenhead or Liverpool, and that it authorized the salvors to sell in order to effectuate their lien; and it may be that, if it had been made to appear that they did sell for that purpose, and that the underwriters had no lawful right to thus empower them, the result would have been a conversion authorized by the underwriters, sufficient to bar them from denying an absolute total loss.

For the reasons already stated, it rested on the plaintiff to show this, or that the sale of the cattle could not have been prevented by him with due diligence. But he has not even put in evidence the written directions from the salvors to James Nelson & Sons to make the sale, nor shown for what reason the sale was made, nor when it took place, nor how much time intervened after the arrival of the cattle at Liverpool or Birkenhead. Neither has he made to appear whether any salvage was claimed, or, if claimed, what the amount was, or that it was tendered or offered, or that the salvors were told that the plaintiff or his consignees would pay it, or would pay what was justly due. The statement of the witness Nelson, that the salvors declined to give up the cattle, was too general to be strictly admissible as evidence, and, being unsupported by detail, has no weight, although the point of its admissibility was not raised. On the other hand, it does appear beyond question that part of the consignment did arrive at Birkenhead, which, as well as Liverpool, was a place of delivery under the bill of lading. It also appears that the plaintiff was not unrepresented there, because James Nelson & Sons were his consignees and had the bill of lading; and, although the witness Nelson protests that they did nothing on account of their consignor, yet they were in position to act. It was also his duty not to be unrepresented.

On the whole, if the plaintiff claims to bring himself within the exceptional rule of *Cossman* v. *West*, *ubi supra*, and to excuse himself from the general principles stated in *Thornely* v. *Hebson*, 2 Barn. & Ald. 513, it was for him to bring out all the facts necessary therefor. As part of the cattle arrived at Birkenhead, an absolute total loss cannot be made out, unless, as already said, the plaintiff shows that the underwriters directed an unauthorized sale, or that, with due diligence, he could not have discharged the claim of the salvors, and thus secured the remnants of the consignment. On important elements making essential parts of this proposition, he has failed to furnish any proofs; and on that account the circuit court would unavoidably have set aside a verdict in his favor upon this necessary branch of his case.

The point taken by the plaintiff, that no notice was sent him of an intention to sell the cattle, is not valid, inasmuch as his consignees actually sold them, and therefore knew they were to be sold. The further proposition, that the sale was a legal or physical necessity, is also ineffectual; because the record fails to show that there was not sufficient time and opportunity to discharge the lien of the salvors, and take possession of the cattle, before the time of any necessary sale could arrive.

In this respect the conditions were essentially unlike those which appeared in *Bondrett* v. *Hentigg*, Holt, N. P. 149, where the goods were stolen on a barbarous coast; for, in the cases at bar, the courts and laws were in the same full vigor where the property arrived as in the United States, and presumably the consignees had opportunity for enforcing all legal rights.

On the whole, the suits turn on the circumstances of the sale at Birkenhead or Liverpool of the remnants of the consignment. The rules applied by us are elaborated in Arnold on Marine Insurance, (6th Eng. Ed.) in the opening of chapter 6, and in chapter 7, vol. 2, pp. 951, 952, and page 988 and sequence, and are reinforced by the conclusions in *Thornely* v. *Hebson*, *ubi supra*. The expression of Lord TENTERDEN (ABBOTT, C. J.) in this case is very apt:

"If, in this case, it had appeared that the owners had used all the means in their power, and were still unable to have paid this salvage, it would have been very different; but that is not so, and I am therefore of opinion that the assured is not entitled to recover for a total loss."

Copelin v. *Insurance Co.*, 9 Wall. 461; *Richelieu & O. Nav. Co.* v. *Boston Marine Ins. Co.*, 136 U. S. 408, 10 Sup. Ct. Rep. 934; and *Shepherd* v. *Henderson*, L. R. 7 App. Cas. 49,—cited by the plaintiff,—reiterate, for the sake of applying them to the pending facts, rules of law fundamental and well known as applicable to abandonments under policies which cover constructive total losses, but have no close relation to the suits at bar.

We understand the proposition that the policies should be treated as effecting a separate insurance for each head of cattle, so that the loss of any one created a claim against the underwriters for an absolute total loss so far as that one was concerned, is not now insisted on.

The judgment of the court below in each case is affirmed.

MCKEAN v. ARCHER.

(Circuit Court, D. Indiana. October 28, 1892.)

No. 8,748.

1. LIMITATION OF ACTIONS—CONSTRUCTION OF STATUTE.
Act Ind. April 7, 1881, provides that actions must be brought within the times named, as follows: "Upon promissory notes, bills of exchange, and other contracts for the payment of money, hereafter executed, within ten years: provided, that all such contracts as have been heretofore executed may be enforced, under this act, within such time only as they have to run before being barred under the existing law," etc. *Held*, the words "existing law" apply to laws existing when the contract was made, and not when the suit was brought; and therefore contracts executed prior to the act are still enforceable within 20 years, as before.

2. SAME—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.
The fact that the statute continues in force one period of limitation for past contracts, and provides a different period for future contracts, does not render it invalid, as lacking a uniform operation, or being in the nature of special legislation, for it is general and uniform upon all persons or things, under the same circumstances.