

by it; and that therefore it is not responsible for any bad stowage of the cargo.

Upon the general scope and meaning of the charter, however, and the mode in which the business under it has been actually managed by both parties, plainly the voyage was for the benefit of the respondent, and at its risk. The respondent was absolutely responsible for the payment of the whole charter hire; and the moneys to be derived from the freights, not having been settled for at Bremerhaven, became, when collected by Oelrichs & Co., the respondent's agents in New York, the moneys of the respondent. Had Oelrichs & Co. failed to account for this money, the loss would have fallen upon the respondent; their collection of the freights would not have been any offset against the charter hire due to the libelants.

Upon charters like the present, moreover, the captain, in signing the bills of lading, has been held to sign as agent of the charterers; and the latter, therefore, become liable thereon to the consignees. *Marquand v. Banner*, 6 El. & Bl. 232; *Schuster v. McKellar*, 7 El. & Bl. 704. In suing the respondent for the whole charter money, libelants have treated the freights collected by Oelrichs & Co. as the respondent's money, and the transportation as made on account of the respondent as principal. As the consignees of the damaged goods have, moreover, paid the freights in full, to the respondent, as charterer and carrier, they have a legal right of action against the respondent for the damage to their goods in transit; and for this the respondent has a right to indemnity from the ship, or her owners, so far as the same arose from bad stowage. *The Centurion*, 57 Fed. Rep. 412, 416. As the libelants are foreign, and without assets here, the defendant should not be required to pay over all the charter money, except on such security as may afford recourse, within this jurisdiction, for indemnity against reasonable and probable demands for which the ship and her owners are primarily responsible, and which it is within the power and the ordinary jurisdiction of this court to require. The principle is the same as in suits between part owners, as to the employment of the ship; or for freight upon the part delivery of cargoes. *Ben. Adm.* § 274; *Brittan v. Barnaby*, 21 How. 527, 534; *The Tangier*, 32 Fed. Rep. 230; *The Dixie*, 46 Fed. Rep. 403.

The libelants are entitled to a decree, without costs, upon giving such indemnity, the amount of which will be fixed by the court, if not agreed on by the parties.

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#### THE GULF STREAM.

#### INLAND & SEABOARD COASTING CO. v. THE GULF STREAM.

(District Court, S. D. New York. October 25, 1893.)

#### **COLLISION—MUTUAL FAULT—AGENT'S PURCHASE OF DAMAGE CLAIMS AT A DISCOUNT—ALLOWED FOR AMOUNT PAID ONLY.**

Where one of the parties before the court in a cause of collision, or his agent, purchases at a discount damage claims for injuries to cargo, and both parties are afterwards held to be in fault, the purchased claims will not be allowed in the subsequent assessment of damages for more than the amount paid, with interest. Neither party in

fault can make a profit out of the other by the purchase of such claims at a discount. Such a purchase by the ship's agents is, in effect, a purchase by the owner as their principal.

**In Admiralty.** Exceptions to commissioner's report.

Owen, Gray & Sturges, for libellant.

Robinson, Biddle & Ward, for claimants.

**BROWN, District Judge.** The above libel was filed to recover damages to the *E. C. Knight* and her cargo through collision with the *Gulf Stream*, whereby the *Knight* and her cargo became a total loss. Both vessels were found in fault. 43 Fed. Rep. 895. Upon a reference to compute the damages, the value of the *Knight* was fixed at \$10,000.

A further claim of damages to the amount of \$3,270, was allowed, besides interest, for the value of 765 barrels of flour on board the *Knight* belonging to Whittemore & Sons, who were paid that amount by the Atlantic Mutual Insurance Company, as insurers of the flour, on October 26, 1887, and who assigned all their claim for the damages to the insurance company. On March 20, 1890, this claim was purchased from the insurance company by B. F. Clyde, and assigned to him for \$1,000. One-half of another claim of \$500 for the value of certain furniture shipped on board the *Knight* by one Trimble, was assigned by him to William B. Clyde & Co. for \$150.

William B. Clyde & Co. were the general agents of the owners of the *Gulf Stream*; and B. F. Clyde was a member of that firm. All the above assignments were made after the libel was filed; the two latter, long after the cause was at issue and after the owners of the two vessels were before the court.

The claim in the libel being for the loss of the cargo, as well as of the ship, it was agreed, by stipulation between the parties, that B. F. Clyde and William B. Clyde & Co. should be treated as intervening for their interest. By this I understand that their claims are to be dealt with in the same manner as if they had sought payment of the assigned claims from both vessels found at fault. The respondent's proctors contend that Clyde, and Clyde & Co., are entitled to recover the full amount of the assigned claims with interest; the libellant contends that they are entitled to recover only what they paid, with interest.

1. As the *Knight* was a total loss, no recovery can be had by Clyde, or Clyde & Co., directly against her; but as the *Gulf Stream* is directly answerable for the whole loss of cargo, the one-half of whatever sum the *Gulf Stream* has paid, or may be liable to pay on account of cargo, should be offset against the amount decreed to the owners of the *Knight* against the *Gulf Stream* for the loss of the *Knight*. B. F. Clyde, and Clyde & Co., have not, in this suit at least, any direct claim against the *Knight* or her owners; it is only the *Gulf Stream* that, by way of recoupment, can offset against the amount payable to the libellant the one-half of what the *Gulf Stream* must pay for cargo upon the assigned claims. But Clyde & Co., and B. F. Clyde as a member of that firm, being the general agents of the *Gulf Stream* and her owners, stand in a fiduciary re-

lation to them, and can make no profit by the purchase of claims against them. *Rothwell v. Dewees*, 2 Black, 613; *Church v. Insurance Co.*, 1 Mason, 344; *Story*, Ag. § 210. Hence, they cannot enforce against the *Gulf Stream* any more than what they have paid for the assigned claims, with interest; and, as the owners of the *Gulf Stream* are not legally liable beyond the latter amount, they cannot recoup or offset against the libelant more than half the latter sum.

In the view of a court of admiralty, which acts on equitable principles, *Clyde*, and *Clyde & Co.*, as agents, hold the assigned claims virtually as trustees of the respondents. The adjustment of the account between the two vessels, as respects the whole loss arising from the collision through their mutual fault, should be treated, therefore, precisely the same as if the claims in question had been settled by the respondents, and the assignments made directly to them. Such an assignment, I cannot doubt, could not be enforced against the other vessel beyond one-half of the amount actually paid, with interest.

The foundation of the moiety rule in admiralty in cases of mutual fault, says Mr. Justice Bradley in *The Alabama*, 92 U. S. 697, "is for the better distribution of justice between mutual wrongdoers." While each is liable in solido to the innocent damage claimant, the right of each vessel to compel the other to bear half the burden is a substantial legal right, which, as the supreme court has repeatedly decided, must be carefully regarded and enforced whenever both vessels or their owners are before the court. *The City of Paris*, 14 Blatchf. 531, 538. See *The Hudson*, 15 Fed. Rep. 162, 164-166, and cases there cited. The practice inaugurated in the latter case, by which both vessels or their owners may always be brought into the cause when within the jurisdiction, was sanctioned by the supreme court in the enactment of the fifty-ninth rule, one of the objects of which was to make an equal distribution of the burden, so far as possible, as between the two vessels in cases of mutual fault. To permit one of the parties, equally answerable, to set up purchased claims for a larger amount than was paid for them, would not only be contrary to the principle and the equity of the moiety rule that each vessel shall bear half the burden, but would sometimes, as in this case, enable one of them to make an actual profit out of the other. If one-half of the original claims here presented are allowed as an offset against the libellant's demand on the *Gulf Stream*, the respondents would not only contribute nothing on account of these two items of cargo-loss, but would make out of them a profit of upwards of \$1,000. This is contrary to equity, and contrary to the principle and design of the moiety rule. *Story*, Eq. Jur. § 493.

In cases of a community of interest in a common title, such as that of two devisees, or tenants in common, the purchase of an outstanding incumbrance by one of the tenants in common, or even by the husband of a coheirress, has been held to be for the benefit of all the other interests, upon contribution to the consideration actually paid. *Van Horne v. Fonda*, 5 Johns. Ch. 407; *Lee v. Fox*,

6. Dana, 176; and these decisions were approved in *Rothwell v. Dewees*, 2 Black, 613, 619. The principle is equally applicable here; for here, as there, it is a common burden that has been, in effect, purchased by one of the parties in interest; and the legal right of each party to demand that the burden arising from the whole loss shall be shared equally and in common, so far as this is within the control of the court, must, therefore, preclude the respondents, or Clyde & Co. as their agents and trustees, from recouping against the libellant more than one-half of the amounts actually paid for the assigned claims, with interest.

2. The value of the Knight at the time of the loss was the subject of a remarkable conflict in the testimony. Considering, however, the age of the vessel, her antique model, the little call for such vessels ever since this collision, and the small earning capacity of her consort, as well as the conflict in the direct testimony as to her value, I think that \$8,000 will be a sufficient allowance for the Knight at the time of the loss. The other exceptions are overruled

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THE JACKSON.

THE REPUBLIC.

FEATHERSTON v. THE JACKSON AND THE REPUBLIC.

(District Court, S. D. New York. October 12, 1893.)

**COLLISION—FERRYBOAT—OBSTRUCTING SLIPS—CITY ORDINANCES—RUNNING INTO DANGER.**

Under the ordinances of the city of New York forbidding obstruction to the free course of ferryboats in and out of their slips, a tugboat is in fault for unnecessarily allowing her tow to drift across and into a ferry slip while engaged in business at the wharf and slip above; but where the ferryboat, in approaching her slip under such circumstances, instead of waiting a very short time to enable the boat to be hauled out, went on into the slip when there was not apparently reasonable space for her to enter without damaging libellant's boat, and collision ensued, *held*, that both were in fault, and the damages were divided.

In Admiralty. Libel for collision. Decree for libellant.

Hyland & Zabriskie, for libellant and The Republic.

Stewart & Macklin, for The Jackson.

**BROWN**, District Judge. The collision in the above case occurred as the Republic was entering her slip on the Brooklyn side. The libellant's canal boat hung by a short line of five or ten feet from the stern of the Randolph, the outer of four boats on the starboard side of the tug Jackson, which lay at the end of the pier that formed the upper side of the ferry slip. The Jackson and her tow were heading up against the ebb tide, until another boat could be taken on by the tug from the slip above. The northwest wind blew the libellant's boat around into the ferry slip; and at the time of the entrance of the Republic, as the weight of testimony shows, the libellant's boat had swung round nearly alongside the ferry rack. In that situation it was impossible for a ferryboat to reach the bridge landing in the upper slip without hitting the libellant's boat, and three of her planks were thus broken in. The above libel was

filed against the Jackson, and the Republic was afterwards made defendant on the Jackson's petition.

The pilot of the ferryboat says that after bringing his ferryboat to a stop a little way out in the stream, he started up again, when the libelant's boat was tailing nearly straight down river, across the slip, so that he thought he could get in astern of her, and that the latter swung in more, through the backing of the Jackson after he had started up, and after the ferryboat had got into such a position that he could not help going forward without the risk of greater damage to her by stopping. The weight of evidence, however, shows that at the time when the ferryboat started up to go into the slip, the libelant's boat was not in the position stated by her pilot, and that entrance could not be reasonably expected without collision; and that the libelant's boat was a dangerous obstruction.

Under such circumstances, both the tug and the ferryboat are to blame. The tug is to blame for voluntarily allowing the libelant's boat to obstruct the entrance of the ferry slip. Though the tug had proper business at the Washington street pier, in order to take on another boat, it was not necessary that she should let the libelant's boat swing from the end of the other boats alongside; and under the state statute, and the city ordinances, enacted thereunder, she was bound not to cause any such obstruction as was in her power to avoid by other methods of towing.

The ordinances forbidding such obstructions are of very long standing. See Consolidation Act 1882, c. 410, §§ 85, 86, subd. 35. Judge Betts, in the case of *The Relief, Olcott*, 109, which was decided in this court nearly 50 years ago, says that "the city government, which possesses full power over the subject, by its ordinances, interdicts all obstructions to the free course of ferryboats." See *Rev. Ord.* 1866, p. 293; *The John S. Darcy*, 29 Fed. Rep. 644, 647; *The South Brooklyn*, 50 Fed. Rep. 588; *The Express*, 1 C. C. A. 431, 49 Fed. Rep. 764.

I should feel bound to hold the Republic free from fault, if at the time when she started there was apparently a reasonable space for her to enter the slip without damaging libelant's boat. But the weight of evidence precludes that view; it shows, also, that the ferryboat had waited outside only a very short time, if at all; and that not more than a couple of minutes longer were required for the Jackson to get out of the way. The Jackson's work of picking up the other boat in the slip could have been easily seen by the pilot of the Republic,—if, in fact, it was not seen. Under such circumstances, if it be true that the Republic could not, without real danger of accident, make the lower slip instead of the upper one, she ought to have waited outside a few moments longer, and to have sought relief by the enforcement of the penalties against the Jackson, rather than by inflicting damage upon the libelant's boat, which was in no way responsible for the obstruction. I cannot distinguish the case in principle from that of *The Baltic*, 2 Ben. 452, in which Mr. Justice Blatchford held both vessels in fault. *The Roslyn*, 22 Fed. Rep. 687; *The Fanwood*, 28 Fed. Rep. 373, affirmed on appeal.

The libelant is entitled to a decree against both defendants.

## SHATTUCK v. NORTH BRITISH &amp; MERCANTILE INS. CO. OF LONDON AND EDINBURGH et al.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 294.

## 1. REMOVAL—NOMINAL PARTIES.

It is not necessary that merely nominal or formal defendants should join in the petition, where they have not appeared, and where there is no issue between them and the plaintiff upon which a verdict could have been rendered.

## 2. SAME—FOREIGN CORPORATION.

A petition, which shows that the defendant is a corporation chartered by the laws of a foreign country, need not allege negatively that it is not a citizen or resident of the state in which suit is brought, although it may have an office and do business in such state.

## 3. SAME—SUIT BY ASSIGNER—CITIZENSHIP OF ASSIGNOR.

If the citizenship of plaintiff's assignor is material, it need not be specifically alleged in the petition, when it sufficiently appears from other parts of the record.

## 4. VERDICT—CLERICAL ERRORS—APPEAL.

When merely formal defendants never appear, and the case proceeds against the only real defendant, the fact that the verdict is for "defendants," without specifying which of them, if a defect at all, is a mere clerical error, constituting no ground for reversal on writ of error.

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

S. W. Shattuck, Jr., for plaintiff in error.

Thomas Bates, (Fred W. Bentley, on the brief,) for defendants in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. This was an action at law commenced in the district court of Hodgeman county, Kan., on the 3d day of December, 1891, by S. W. Shattuck, Jr., the plaintiff in error, against the North British & Mercantile Insurance Company of London and Edinburgh, the First National Bank of Jetmore, Kan., and Frederick George. The complaint alleged, in substance, that the defendant insurance company verbally promised and agreed with Frederick George to renew a policy of fire insurance for the sum of \$2,700 on the latter's stock of merchandise in his storehouse in Jetmore, Kan., from the 14th day of June, 1891, at noon, to the 14th day of June, 1892, at noon; that on the 27th day of June, 1891, the property was destroyed by fire, and that thereafter the assured, Frederick George, assigned in writing to the plaintiff, as collateral security for a promissory note for the sum of \$2,232.40, which he owed the plaintiff, his cause of action against the insurance company for its failure and neglect to renew the policy. As to the defendants the First National Bank and Frederick George, the allegation of the complaint was that they and each "have or claim to have, adversely to said plaintiff, some interest in or lien upon the moneys due said plaintiff" from the defendant. There was