

court is not, either in logic or law, a grant of immunity against liability, through some other procedure, not subject to such objections. The consideration of public policy extends only to the mischief to be averted. To give it a wider application would make it an instrument of injustice. An apt illustration of this limitation on procedure only is seen in the law which exempts cities, in the common-law court, from seizure of their property upon execution. But it has never been urged that, because of that, they were not suable at all, or that judgments entered against them were in no way enforceable.

My conclusion is that the city of Chicago, as owner, at the time of the collision, of the fire boat, is responsible to the libellant in an action in personam to the extent of the value of such fire boat for the injuries caused. I recognize that in this conclusion I depart from the case of *The Fidelity*, supra, but believe myself to be in consonance with the doctrine laid down in *The Siren*, supra, and *The Malek Adhel*, supra. A decree may be entered accordingly.

THE E. A. SHORES, JR.

MANEGOLD et al. v. THE E. A. SHORES, JR.

(District Court, E. D. Wisconsin. April 12, 1897.)

1. COSTS IN ADMIRALTY—DISCRETION OF COURT.

In admiralty, as in equity, the prevailing party is generally entitled to costs, but they do not necessarily follow the decree, and are always, in the exercise of a sound discretion, to be allowed, withheld, or divided according to the equities.

2. SAME.

Where a libel was not sustained on the primary issue, but was retained on a further issue, including a claim for general average, which was afterwards conceded and arranged by the claimants, *held*, that the cause was one for an apportionment of the costs, in the court's discretion.

This was a libel in admiralty by Charles Manegold, Jr., and others against the propeller E. A. Shores, Jr., to recover for loss of cargo by stranding.

Van Dyke, Van Dyke & Carter, for libellants.

M. C. Krause, for claimant.

SEAMAN, District Judge. The hearing upon this libel resulted in a decision that the stranding of the vessel was not due to want of diligence in respect of seaworthiness or equipment, and that the shipper was barred from a general recovery for loss of cargo by the act of February 13, 1893, called the "Harter Act," but the questions of liability for refusal to deliver the wheat at Racine and of allowance in general average were reserved for further hearing. *The E. A. Shores, Jr.*, 73 Fed. 342. After the taking of considerable testimony before a commissioner, these matters were adjusted by agreement of the parties, the claimants paying the stipulated amount and certain expenses incurred therein, leaving open

the question of allowance of costs on the libel now presented to the court for determination. In admiralty, as in equity, the prevailing party is generally entitled to costs; but they do not necessarily follow the decree, and are always, within the sound discretion of the court, to be allowed, withheld, or divided according to the equities of the case. The claimants assert their right to full costs under the general rule, because the libel was not sustained upon the primary issue. If recovery by the libelants had depended solely upon the question of liability for the general loss on the cargo, due proximately to the stranding of the vessel, the libel would have been dismissed; and clearly the claimants would have been the prevailing party. Even in such case the allowance of costs would not conclusively follow, as there are equitable considerations which should be taken into account. *The Sapphire*, 18 Wall. 51, 57. The libelants had suffered loss upon their cargo, whereof safe delivery was promised by the contract of affreightment, and for which there was prima facie liability against the carrier, unless the cause of the stranding came within the exemptions specified in the contract, or was limited by the Harter act. This could be determined only upon hearing the proofs, which were mainly, if not wholly, within the cognizance of the carrier. The circumstances of the stranding (upon a well-known reef, without stress of weather or fog) are such that there was at least some justification for filing the libel, and it is not clear that a dismissal would operate to condemn the libelant for all costs. *The Rapid Transit*, 52 Fed. 320; *The Olympia*, Id. 985. Without passing upon that question, it is sufficient here that the libel was retained because of a further issue, including an allowance for general average which has since been conceded and arranged, and a case is presented which calls for just discretion as to the costs. Each party will bear the expenses for the witnesses attending on its behalf, and each must pay one-half of the costs for clerk, marshal, and stenographer, no proctor's fees being allowed. It is so ordered.

MEMORANDUM DECISIONS.

THE ADVANCE. ATLANTIC TRUST CO. v. PROCEEDS OF THE ADVANCE et al. (Circuit Court of Appeals, Second Circuit. May 12, 1896.) No. 707. Appeal from the District Court of the United States for the Southern District of New York. Cary & Whibridge, for appellants. Carter & Ledyard, for appellee. Discontinued by consent.

THE ADVANCE. HARD et al. v. PROCEEDS OF THE ADVANCE. (Circuit Court of Appeals, Second Circuit. May 12, 1896.) No. 710. Appeal from the District Court of the United States for the Southern District of New York. Cary & Whibridge, for appellants. Carter & Ledyard, for appellee. Discontinued by consent.

THE ALLIANCA. COMMERCIAL UNION ASSUR. CO. v. THE ALLIANCA et al. (Circuit Court of Appeals, Second Circuit. December 19, 1895.) No. 516. Appeal from the District Court of the United States for the Southern District of New York. Butler, Stillman & Hubbard, for appellant. Carter & Ledyard, for appellees. No opinion. Decree affirmed, with costs, on opinion of the district judge. See 64 Fed. 871.

THE ALLIANCA. LONDON ASSUR. CORP. v. THE ALLIANCA et al. (Circuit Court of Appeals, Second Circuit. March 19, 1896.) No. 621. Appeal from the District Court of the United States for the Southern District of New York. Willard Parker Butler, for appellant. Carter & Ledyard, for appellees. Discontinued.

AMERICAN BUTTONHOLE, OVERSEAMING & SEWING MACHINE CO. v. BABCOCK. (Circuit Court of Appeals, Sixth Circuit. October 19, 1896.) No. 421. Submitted on briefs from the circuit court of the United States for the Eastern district of Michigan. George W. Radford, for appellant. Bowen, Douglas & Whiting, for appellee. No opinion. Judgment affirmed.

AMERICAN GROCERY CO. v. GODILLOT. (Circuit Court of Appeals, Third Circuit. February 22, 1897.) Appeal from the Circuit Court of the United States for the District of New Jersey. J. C. Clayton, for appellant. H. Aplington, for appellee. Before DALLAS, Circuit Judge, and BUTLER and WALES, District Judges.

PER CURIAM. The judges by whom this case was heard, including the late Judge WALES, had, some time previous to his death, all agreed upon the disposition to be made of it. The survivors of those who then constituted the court do not deem it necessary, under the circumstances, to do more than announce the judgment which had thus been unanimously determined upon. In accordance therewith the decree of the court below is affirmed.