

the risk involved merited an award of salvage of, at least, \$3,000. It is clear that the services of the Milwaukee were quite small as compared with those of the New Orleans, and that, if the amount of salvage to be allowed was \$3,000, the amount awarded to the New Orleans by the district court was by no means too great. The fact that the Milwaukee got more than she deserved by the concession of the owners of the Runnels cannot affect the amount which the New Orleans should receive. The New Orleans arrived upon the scene at the nick of time, and rendered very prompt service; and, while the risk of fire to her may not have been very great, yet the bringing of a vessel and cargo worth \$80,000 up to a burning steamer, and near enough to throw water onto the flames, must have in it some element of risk. Of course, the main reason for making the salvage substantial in this case was the certainty that there would have been a total destruction of all the property salvaged had it not been for the efficient aid rendered by the New Orleans. We have discussed somewhat more at length the elements which should enter into salvage in the case preceding this one, that of *The R. R. Rhodes v. Fay*, and it is not necessary to consider the matter further. The decree of the district court is affirmed.

CANADA SUGAR-REFINING CO. v. INSURANCE CO. OF NORTH AMERICA.

(District Court, S. D. New York. June 3, 1897.)

MARINE INSURANCE ON "PROFITS" — VALUED POLICY — CONSTRUCTIVE "TOTAL LOSS"—ABANDONMENT.

The libellant was insured in the respondent's company for \$15,000, on "profits" on a cargo of sugar, against "total loss only," valued at amount of insurance. Before insuring, the respondent had notice of a previous insurance of the same cargo by the Atlantic Mutual for \$163,145. The policy on "profits" was designed to cover the additional value of the cargo above the prior insurance upon a rise in the market price. The vessel was afterwards stranded, and but \$9,000 net was eventually saved out of the cargo, the salvage work being superintended by the agent of the Atlantic Mutual to whom the cargo was virtually abandoned; that company settled with the libellant as for a total loss, returning to the libellant on account, the cargo saved to the net value of \$9,000. *Held*: (1) That there was a constructive total loss of the cargo; (2) and an actual total loss of the "profits," the subject of the insurance in the respondent's policy, that is to say, the value of the cargo over and above the amount insured by the Atlantic Mutual, which both parties understood to be the subject of the respondent's policy; (3) that no act of abandonment to the respondent was required, because there was no possibility that any part of the subject-matter of this policy could remain after the stranding, the right of the Atlantic Mutual to the possession of the whole cargo being superior, and incompatible with any possible abandonment of the sugar to the respondent; (4) that the subsequent receipt of a part of the sugar on account in settlement with the Atlantic Mutual, was merely by way of payment of its liability, and in no way inured to the defendant's benefit; and the libellant was therefore *held* entitled to recover the amount insured.

Butler, Notman, Joline & Mynderse, for libellants.
Hand & Bonney, for respondents.

BROWN, District Judge. On April 29, 1893, the respondent company insured for the libellant's benefit:

"\$15,000 on profits on cargo sugar; against total loss only; valued at sum insured; shipped on board the British ship John E. Sayre at and from Iloilo to Montreal."

At that time the Sayre was at sea prosecuting the voyage. The libellant had 2,462 tons of sugars on board of her, amounting in value to \$181,000, and had just completed insurance of the sugars to the amount of \$166,145 in the Atlantic Mutual, of which insurance the respondent was informed before its insurance on profits was made. In July following, the Sayre stranded on the coast of Newfoundland, and all the cargo was lost excepting about 300 tons which was saved by the aid of salvors, of which one-half went to them as their agreed compensation. This agreement was originally made by the master soon after the stranding; but a few days afterwards the agent of the Atlantic Mutual appeared, to whom the master turned over the salvage operations. He confirmed the previous agreement with the salvors; reimbursed to the master the expenses already incurred by him, and thenceforward, with the libellant's consent and the defendant's knowledge and acquiescence, took the complete control and disposition of the cargo. The agent eventually bought from the salvors the moieties of the sugars allotted to them under the agreement, and then shipped all the sugar saved to the order of the insurers, to Montreal. The value of all the sugar that reached Montreal was about \$20,000, and the expenses and salvage charges paid by the Atlantic Mutual thereon and the additional freight to Montreal exceeded \$11,000, so that out of the whole cargo worth \$181,000 less than \$9,000 net was saved. The Atlantic Mutual settled with the libellant as for a constructive total loss, under its policy of \$166,145, and it turned over the sugars saved in part settlement of that sum, on about the basis of the average pro rata policy valuation. The respondent contests its liability upon the policy on profits on the ground chiefly that the receipt by the libellant of a portion of the sugars, viz. about \$20,000 in value, prevents the loss from being "total" within the terms of its policy.

The intention of both parties, I cannot doubt, was to insure under the designation of "profits" the interest of the libellant in this cargo over and above the sum of \$166,145, for which the sugars were already insured in the Atlantic Mutual. The excess of the market value over that sum was at that time equal to the insurance of profits. It was a valued policy; and the provision as to "total loss only" is the ordinary provision of those policies which admit abandonment when the loss exceeds one-half the value, and is not the special limitation to an "actual total loss," which requires the destruction of the entire property in order to entitle the assured to recover anything.

Upon the facts in proof, I cannot sustain the defense in any aspect of the case. The subject of this policy was "profits" alone. The facts show that by the stranding all "profits" were utterly destroyed, and very much more. There was clearly a total loss of the subject insured,

viz. profits. No notice of abandonment of profits was necessary as all possibility of "profits" was manifestly gone, and no remnant of profits remained which could be abandoned to the defendant.

As respects the sugars themselves moreover, there was a practical abandonment to the Atlantic Mutual, the insurers on cargo. On their policy there was a constructive total loss, since not one-tenth net value of their policy was saved. That company's rights as respects any abandonment, were superior; and the defendant company could not legally have any abandonment to itself as insurer on profits, except on payment to the insurer of cargo of the whole amount of the latter's liability—in this case an absurd alternative. A policy on profits in a case like this, precludes any possibility of an abandonment by the assured by his own act alone; and hence no attempt to abandon to the defendant was required. *Mumford v. Hallet*, 1 Johns. 433, 439; *Tom v. Smith*, 3 Caines, 245, 251.

The receipt of about one-eighth of this cargo by the libelant in the manner above described does not affect the libelant's right to recover as for a "total loss": (1) Because upon every pound of sugar rescued more than half its value had been paid in order to recover it, so that there was not only an actual total loss of "profits," but a constructive total loss of the sugar as well, and insurance on profits is subject to a constructive total loss. *Abbot v. Sebor*, 3 Johns. Cas. 39, 46. (2) Because none of the sugar ever came to the libelant in the ordinary course of the voyage, or through any delivery to the libelant as consignee by the carrier; but only through a delivery by the insurer of cargo, after a practical abandonment to the latter, and through a settlement by the insurer as upon a total loss, in which the sugar was received by the libelant upon an equitable basis in part payment, and as the equivalent of its value in cash, as any other property might have been received.

Decree for the libelant, with costs.

THE T. F. OAKES.

ROBINSON et al. v. THE T. F. OAKES.

(District Court, S. D. New York. October 4, 1897.)

SEAMEN—SHORT ALLOWANCE—CHANGE OF ROUTE BY CAPE HORN—NEGLECT TO CALL—SCURVY—SHIP LIABLE—REV. ST. § 4568.

The ship *T. F. Oakes*, sailing from Hong Kong for New York by the way of Cape of Good Hope, was at first driven several hundred miles to the eastward by bad weather, whereupon the master changed his route by way of Cape Horn, from 5,000 to 7,000 miles further. The supplies were sufficient for the former route, but plainly insufficient for the latter. The master made no attempt to obtain additional supplies, as he might easily have done at Honolulu, Chili, or Rio Janeiro. Most of the crew suffered from scurvy through insufficient quantity and variety of food, and some died, apparently from that disorder. *Held*, seamen entitled to recover their damages arising from the master's neglect to procure additional supplies, and the consequent short allowance, including the compensation provided by section 4568 of the Revised Statutes.

In Admiralty.

Geo. C. Bodine and George Whitfield Betts, Jr., for libelants.
Turner, McClure & Ralston, for defendant.

BROWN, District Judge. The above libels were filed by various seamen on the ship *T. F. Oakes*, to recover damages for their sufferings from scurvy, on a voyage from Hong Kong to New York in 1895 to 1896, through lack of a sufficient quantity and variety of food. Upon a criminal prosecution of the master for the same cause under section 5347 of the United States Revised Statutes, in May, 1897, in which it was necessary, in order to make out a criminal offense, to show that the negligence was willful and malicious, the master was acquitted. Upon the hearing of the above libels the same evidence has been introduced, with additional testimony. The issue here does not necessarily involve willful, or malicious negligence; but only the question whether there was an actual neglect to supply proper and sufficient food, and neglect to use reasonable endeavors to do so. Upon this issue, a careful consideration of all the testimony satisfies me that the libelants are entitled to recover.

The ship sailed from Hong Kong on July 4, 1895. She was reasonably provisioned for a voyage to New York by way of the Cape of Good Hope, which was the route expected to be taken, and for which the ship was fitted out. This voyage is usually made in from 130 to 180 days, but it is liable to be further prolonged. The *Oakes* had a supply of salt beef for 189 days; pork for 168 days; flour for 210 days; peas for 182 days; with ship bread, rice, tea, coffee and sugar for a longer period. This was sufficient for a voyage around the Cape of Good Hope. The general charge of bad quality I do not find sustained.

The proper course for the Cape of Good Hope was southerly through the China Sea, thence westerly through the Straits of Sunda into the Indian Ocean. Shortly after leaving Hong Kong, however, the ship was driven by storms several hundred miles to the eastward, across the China Sea, and a succession of calms and baffling winds still continuing, the master on July 19th, in longitude 123 E., determined to follow the easterly route by the way of Cape Horn. In the log of that date is the entry: "15 miles from Ballingtang Island, I take a new departure into the North Pacific Ocean." This route to New York was from five to seven thousand miles further than the route by the way of the Cape of Good Hope. The sailing qualities of the *Oakes* were of a very moderate order, and she was liable to make slow passages, as her master well knew. In the last passage around the Horn, the ship was 150 days in making New York from a point in about 7 degrees south latitude, off the coast of South America, the same time as on this voyage, and on this voyage she was 110 days in reaching that point. In all she was 260 days out, though she stopped at no intermediate port. In the principal articles of food she had plainly but a short supply of provisions for the route by way of Cape Horn, measured according to the captain's last trip with the *Oakes* by that route, and it was the obvious duty of the master therefore on changing to the longer route, after delays during two weeks, to obtain additional supplies at the first opportunity at some of the large and convenient

ports which lay along the route. There were several of these, such as Honolulu, Valparaiso and Rio Janeiro, where there would be no difficulty in obtaining the requisite additional food.

For this reason, although the circumstances in proof seem to me insufficient to show that the change to the longer route was likely to be a wise one, the log showing fair winds for a southerly course for several days from July 19th, I treat that question as being wholly within the master's judgment and discretion; but only because the needful additional supplies were easily obtainable. Had there been no such ports, or had the master intended to make no effort to get more supplies at any of them, I should have regarded the change of route as wholly unjustifiable, and in fact a blind disregard of duty, and a reckless exposure of the ship and crew. I cannot make out from the evidence just what the master really expected in this regard except to trust to luck and the chance of getting supplies from some vessels he might meet. He went near the Sandwich Islands; but he made no attempt to call there, or at any other port until near the Bahamas, which, he says, he was also unable to reach, again through baffling winds. This was many months after the crew had been put upon short allowance, and after some had died and most of the remainder were already suffering more or less from scurvy.

Upon a voyage from Hong Kong around the Horn, the master had no right to count on meeting vessels that could spare any such amount of additional supplies as he needed. He met in fact but one vessel that could give him any, viz. the Gov. Robie, on January 13th, and that a small amount only, until March 15, 1896, five days from New York, when the ship was taken in tow by the steamer Kasbeck, the crew being greatly reduced by sickness, exhaustion and distress. The voyage occupied, as I have said, 260 days; two of the crew, and perhaps a third, died from independent causes; three others died with symptoms indicating scurvy; and of the remaining sixteen men on board every one forward of the cabin had become ill; some incapable of any work, and others partially disabled. The general symptoms were sore and bleeding gums, teeth loosened and falling out, limbs swollen and discolored, with weakness and exhaustion. The physicians on shore, after the ship's arrival, had no hesitation in pronouncing the disorder to be scurvy; a disorder arising from one cause alone, viz. a lack of a sufficient quantity and variety of food. The log in noting the death of Thomas King, on December 26th, mentions his claim that the disease was scurvy. Others at that time made the same complaint. The provisions of the Revised Statutes are believed to be sufficient to make this disorder impossible, if they are observed; and scurvy, though formerly not uncommon on long voyages, is now rare in American vessels.

Complaints of a lack of sufficient food were made early on the voyage; three times before the end of September the crew went aft with their complaints. Upon their demand, the government allowance was for a time served out to them, or said to be served out; it is impossible upon the evidence to say whether it was fully served out or not. But the crew soon found themselves no better off than before;

and the majority after a few weeks voted to return to the master's "full and plenty," which they say was gradually diminished, resulting in renewed complaints. On October 24th, when 110 days out of Hong Kong and being then off the South American coast, in about 7 degrees south latitude, the master explained the short supply by saying, that from that point a previous voyage took 150 days, and that he must economize the food. The log makes no mention of this until December 11th, when it states that "the crew came aft complaining of the shortness of food" and were "half starved"; the log adds: "This is not so. * * * The ship through adverse chances has been a long time at sea with no means of replenishing her, and hence what remains on board is served out in such a manner as to economize for future contingencies."

No explanation is offered by the master of his failure to put into the Sandwich Islands or Valparaiso for necessary supplies, which he must have known would be needed. The voyage had been very slow up to each of these points; and he knew that the supplies could not hold out, except by many months of short allowance; and to this he had no right to subject the crew, when ports of relief were accessible. No case of negligence in this regard it seems to me could be more plainly made out.

It is a pleasure to state that Mrs. Reed, the master's wife, did, indeed, do all in her power to restore those who were ill, and to ameliorate their sufferings. But while she thus softened their hardships, and to some extent shared in the general distress, this in no way excuses the antecedent wrong and the neglect to obtain proper supplies. The ship must therefore make good to the seamen their actual pecuniary damages, taking account of the statutory allowance.

Upon all the circumstances and the evidence, I do not think the amount of the deficiency is clearly shown to have been more than one-third; so that the amount recoverable under section 4568 of the Revised Statutes will be 50 cents per day for each seaman during the time of the short allowance, which I reckon from October 1st to March 16th, upon the reasonable inference to be drawn from the testimony of the master as well as of the seamen. This was 166 days, and amounts to \$83 to each seaman.

Four of the original libelants, namely, Sandstrom, Gustavsen, Fromhold, and Bemeison, have executed releases of all claims. No question on this point is made as respects the last two. As respects the two seamen first named, it is contended that the settlement made with them was unfair and should be disregarded. The testimony on that point is, however, extremely full and circumstantial, showing that they were fully acquainted with the facts, understood that a claim had been made in their behalf against the ship, that they desired to make a full settlement, and accepted the moneys offered to them, and that they executed releases fully understanding that they were in discharge of all claims against the ship. This was also done at the office of the shipping commissioner. A settlement so fully understood at the time should not, I think, be set aside.

The remaining eight seamen are entitled to some additional compensation for the sickness, suffering and disability reasonably attribut-

able to the lack of proper food. It is by no means easy, however, to form any certain judgment upon this point from the probable fact that other circumstances and causes contributed to the illness or disability of some of the men, and it is impossible to separate fully these contributing causes. From the presence, however, of certain common symptoms in all these men occurring only during the latter part of the voyage, between Christmas and the arrival of the ship in March, there seems to be no reasonable doubt that there was sickness arising from scurvy, caused by the lack of proper food. All had soreness of the gums and looseness of the teeth. Hautel lost four teeth, Fraser two teeth, Weber two teeth and Peterson five teeth. All had swelling of the limbs with discoloration, and all were laid up in their bunks for different periods from two to five weeks, and all went to the hospital and were treated on their arrival. Dr. Baker, who examined each of them, states that in June last the symptoms of scurvy were still apparent and that the disabilities suffered would be to some extent permanent.

Upon as careful consideration as I am able to give to the circumstances testified to in relation to each, I award, besides the sum above mentioned, to Hautel, Fraser, Peterson and Larsen \$300 each; to Weber and Arro \$275 each; to Robinson and Anderson \$250 each; in all \$2,914.

A decree may be entered accordingly, with costs.

GILDERSLEEVE et al. v. NEW YORK, N. H. & H. R. CO. et al.

(District Court, S. D. New York. May 24, 1897.)

1. COLLISION WITH RIPRAP OF BRIDGE — ILLEGAL OBSTRUCTION — "DRAW 130 FEET IN THE CLEAR"—LOW-WATER MEASURE SUFFICIENT—APPROVAL BY SPECIAL TRIBUNAL.

In approaching the draw of the Connecticut river at Middletown, the libellant's barge ran upon the riprap foundation of the rest pier, which, below low-water mark, extended outward into the channel way. On the contention that the defendant was maintaining an illegal obstruction of navigation, it appeared that the bridge was built under the state act of June 17, 1868, confirmed by congress in 1869, which act required draws "not less than 130 feet in width in the clear," and that the bridge and draws be located and constructed in such manner and such places and upon such plans as should be approved by a competent board of engineers appointed by the superior court, etc. The bridge was built accordingly, under the supervision and approval of a board of three expert engineers thus appointed, two of whom were Gens. McClellan and Gilmore. The draw space was 130 feet wide in the clear between the abutments down to the level of low water. Below that, the riprap sloping outward diminished the clear space towards the bottom of the river. *Held*, that the contemporaneous construction of the act as requiring the full width down to the level of low water only, the projection of the riprap foundation below being approved by the board of engineers and confirmed by the court, was neither unreasonable nor so plainly contrary to the requirements of the act or the public needs as to render the bridge, approved as above, an unlawful structure; and that the determination of such questions was properly within the province of the special tribunal appointed to determine and to approve the plans.