

as consistent with the nonexistence of a lien as with its existence. The libelants also point to the manner of making out their bills, and the correspondence respecting them. The bills, however were made out in conformity with the charges in the books, against the vessel and her owners. They would be, naturally, so made out whether a lien existed or not. The same must be said of the correspondence. I do not find anything in it inconsistent with the nonexistence of a lien and with Dempsey's testimony respecting his understanding. In one instance, at least, the libelants wrote for money on account of their bill "against the Havana"; generally they referred to their claim as for repairs to the Havana. Making the utmost of this language its meaning remains, at least, equivocal; whether there was or was not such an agreement as is set up, the claim might properly and I think naturally would be stated as the correspondence stated it. And besides the libelants at the time the bills were made out and the letters written had a claim, strictly against the vessel, as she was in their possession and could be held, at least until they were paid the proportion of their debt stipulated by the contract to be paid before delivery. I do not however attach importance to this last suggestion. It should also be noted that at the date of this correspondence very much of the work had been done and paid for; and it seems unreasonable to suppose that Dempsey would consider the special significance of the language referred to, and understand it to be an assertion of right to a lien, on his vessel; and therefore feel called upon to deny the assertion.

I will not pursue the subject. It is sufficient to say that a very careful examination of all the facts has satisfied me that they show nothing sufficient to prove the contract set up, and thus to repel the legal presumption before stated. If trivial or equivocal circumstances are held to be sufficient for this purpose the value of the rule founded on the presumption is lost.

The libel must be dismissed with costs.

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THE OTHA J. SAMPLE.

SCIPLE et al. v. THE OTHA J. SAMPLE.

(District Court, D. New Jersey. May 27, 1898.)

SHIPPING—REGULATIONS AS TO STEAM BOILERS.

Under Rev. St. § 4431, which provides that "every plate of boiler iron or steel made for use in the construction of steamboat boilers shall be so stamped in such places that the marks shall be left visible when such plates are worked into boilers," it is not necessary that the builder of a steamboat boiler furnish a name plate, showing the name of the manufacturer, place where manufactured, and the tensile strength of the boiler, in the absence of a special contract calling for same.

This was a libel in rem by H. M. Sciple and others against the steamship Otha J. Sample. Judgment for libelants.

George A. Vroom, for libelants.  
John F. Harned, for claimant.

KIRKPATRICK, District Judge. This libel is founded on a written contract for the balance due upon the purchase price of a boiler furnished by the libelants for the steam vessel Otha J. Sample. The contract calls for one vertical marine boiler of certain dimensions, which shall be subject to the tests and laws governing the building of marine boilers according to the United States laws; the said boiler to pass inspection by United States inspectors for 125 pounds steam, working pressure, and to be complete, with grates, water pan, and hood made of heavy sheet iron. The boiler was built and delivered, and passed an inspection of the United States inspectors for the 125 pounds steam, working pressure. In every respect that which was furnished complied with the requirements of the contract. The libelants, however, did not furnish the "hood" called for in the contract, but have made an allowance of seven dollars therefor, as they claim under an agreement made with Sample, the owner of the steam vessel. I am satisfied from the evidence adduced that such agreement was made. It is testified to by Mr. Toadvine and Mr. Sciple on the part of the libelants, and denied by the defendant Sample, but the conduct of Sample in regard to the several bills rendered by the libelants on which the credit of seven dollars for failure to supply the "hood" was entered and noted, which bills were accepted by Sample without protest or comment, lend strength to the position taken by the libelants that the rebate of seven dollars from the face of the bill had been agreed upon as the value of the "hood." The defendant claims an allowance for the failure of the libelants to furnish with the boiler a "name plate," showing the name of the manufacturer, the place where manufactured, and the number of pounds tensile strain it would bear to the sectional square inch. The 4431st section of the Revised Statutes requires "that every plate of boiler iron or steel made for use in the construction of steamboat boilers shall be so stamped in such places that the marks shall be left visible when such plates are worked into boilers." There does not seem to be any statutory requirement for a "name plate" such as defendant has demanded, nor is it called for by the contract. Judgment should be for the libelants in the sum demanded.

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

(Circuit Court of Appeals, Second Circuit. April 19, 1898.)

No. 95.

1. MARINE INSURANCE—PROFITS—TOTAL LOSS.

Under a contract of insurance of the profits on a cargo of sugar "against total loss only" there is no actual total loss of profits where any part, however small, of the cargo, is saved, and reaches the owner in condition to earn a profit; and in such case no recovery can be had.

2. SAME—CONSTRUCTIVE TOTAL LOSS—MOIETY RULE.

In the United States the owner may abandon ship or cargo, and treat the loss as constructively total, when the damage exceeds 50 per cent. of the total value.

3. SAME—ABANDONMENT.

In cases of constructive total loss, abandonment is indispensable to recovery of insurance, except when it could not possibly be of benefit to the insurer.

4. SAME.

Where insurance is upon the profits of a cargo, and not upon the cargo itself, a partial loss cannot be converted by abandonment into a constructive total loss.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel in personam by the Canada Sugar-Refining Company against the Insurance Company of North America to recover under a policy of marine insurance on profits on a cargo of sugar. The circuit court rendered a decree for libellant (82 Fed. 757), and the respondent has appealed.

Clifford A. Hand, for appellant.

Wilhelmus Mynderse, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The libel in this cause was filed to recover upon a contract of insurance with the libellant, evidenced by a certificate dated April 29, 1893, delivered by the appellant at Philadelphia, whereby the latter caused to be insured under its open policy No. 117,407, against perils of the sea, "\$15,000 on profits on cargo of sugar against total loss only, valued at sum insured, shipped on board the British ship John E. Sayre at and from Iloilo to Montreal." The policy contains the usual clause making the insurer responsible only for so much as the amount of prior insurance may be deficient towards fully covering the property at risk. The sugar was owned by the libellant, consisted of about 2,460 tons, was of the value of about \$181,000, and was insured for \$166,145 by the Atlantic Mutual Insurance Company. The insurance of the Atlantic Mutual Insurance Company covered the original cost price of the sugar to the libellant and an advance in market price since its purchase by the libellant; and when the insurance with the appellant was effected there had been a still further advance in market price, so that the insurance on profits really