proof rested upon the claimant to show that the leak, which was the direct cause which led to the damage of the goods by sea water, occurred by the danger of the sea, and that in the absence of any such proof the presumption of the law is that the damage was occasioned either from the unseaworthiness of the steamer, or from the carelessness or negligence of the officers and crew on board. In either event the claimant and the steamer would be liable. The decree of the district court is affirmed, with costs.

THE CITY OF CLARKSVILLE.

(District Court, D. Indiana. May 4, 1899.)

No. 422.

1. SHIPPING—LOSS BY FIRE—EFFECT OF STATUTE.
   Rev. St. § 4282, governing the liability of vessel owners for loss by fire "happening to or on board the vessel," has no application to a case where goods were destroyed by fire after they had been unloaded from the vessel onto a wharf boat.
2. CARRIERS—CONTRACT LIMITING COMMON-LAW LIABILITY.
   The provision of section 196 of the Kentucky constitution, prohibiting common carriers from contracting for relief from their common-law liability, does not prevent a carrier from stipulating where goods shall be delivered, nor from contracting that, after they had been so delivered for transshipment by a connecting carrier, its common-law liability as a carrier shall cease.
3. ADMIRALTY JURISDICTION—MARITIME CONTRACTS—CONTRACTS TO PROCURE INSURANCE.
   A contract by a carrier by water to procure insurance on goods received for transportation is not a maritime contract, creating a maritime lien, and a court of admiralty has no jurisdiction of a suit for its breach.

This is a libel in rem, in admiralty, on an alleged contract, civil and maritime, against the steamboat City of Clarksville, her boats, tackle, apparel, and furniture, and against all persons lawfully intervening, for their interests therein. The amended libel articulately propounds in substance as follows:

(1) That the steamboat is enrolled at the city of Evansville, Ind., and is of more than 20 tons burden, and is engaged in commerce upon the navigable rivers of Kentucky and Indiana, and has been so engaged for a long time, in carrying freight, and in making contracts therefor, from Bowling Green, Ky., to Evansville, Ind., and to other places upon the navigable waters of the United States.

(2) That on or about April 1, 1896, libelants had a quantity of tobacco which they desired to ship to the firm of Kendrick and Ryan, doing business under the name of the "Central House," in Clarksville, Tenn. That on or about February 1, 1896, the steamboat, by its duly-authorized agent, solicited libelants to ship their tobacco by and upon it from Bowling Green, Ky., to the Central House, at Clarksville, Tenn., and then and there agreed with them, in consideration of shipping on this steamboat, and of the money to be paid for the carriage of the tobacco, that it would cause the tobacco to be insured against loss by fire in the consignee's open fire policy from the time such tobacco was received by the steamboat until the same was delivered to the consignee at Clarksville, Tenn. That in pursuance of said agreement, on or about April 7, 1896, libelants delivered to the steamboat at Bowling Green, Ky., seven hogsheads of tobacco, of the value of $150 each, to be carried by

the steamboat and delivered to the consignee. That thereupon the steamboat, by its master duly authorized thereunto, delivered to libelants three bills of lading, one of which is as follows:

"Steamer City of Clarksville.

"Shipped in apparent good order and condition, by N. C. [meaning libelants], on board the good steamer the City of Clarksville, the following articles described below, which are to be delivered in like order, without unavoidable delay, the dangers of navigation, fire, explosion, and collision excepted, on the wharf boat or landing at the port of Evansville, Indiana, twenty feet from the water's edge, where carrier's responsibility shall cease, with privilege of lightering, towing, storing, reshipping unto Clarksville, Tennessee, or assigns, he or they paying freight for said goods at the rate of 15 cents per hundred pounds, and charges, $2.00. But not responsible for breakage of castings, or glassware; mud, wet, and old damaged baggaging; nor for the leakage or breakage of liquor or decay of perishable articles; nor for unavoidable accidents to, or escape of, stock. No claim for damages after freight leaves the levee.

"In testimony whereof the owner, clerk, or master of said boat hath affirmed to —— bills of lading, all of this tenor and date, one of which being accomplished, the other stands void. Dated at Bowling Green, Ky., this 8th day of April, 1896.

"Marks and Consignments.	Articles.
"N. C.	1 Hhd. Tobacco.
"Central House, Clarksville, Tenn.	17#
"Insured in consignee's open fire policy.	W. W. Server, Master.

"April 8, 1896."

That each of said three bills of lading is a copy of the other, except as to date and number of hogsheads of tobacco described therein. That the master, being duly authorized thereunto, in pursuance of the verbal agreement above stated, indorsed in writing upon each bill of lading, before delivering the same to libelants, the words, "Insured in consignee's open fire policy," and signed the name, "W. W. Server, Master" of said steamer, to such indorsements.

(3) That, at and before the time the contract of affreightment was made, the constitution of Kentucky, in which state said contract was made, contained this provision: "Sec. 196. No common carrier shall be permitted to contract for relief from its common-law liability." That the court of appeals of Kentucky, which is the highest court of judicature of said state, by its decisions since the adoption of said constitution, holds that the above-quoted constitutional provision is self-executing, and that it became of full force and operative as the law of Kentucky as soon as the constitution was adopted, and that it is, and remains, in full force, and applies to all contracts made by common carriers since the adoption of said constitution.

(4) That the steamboat took possession of the tobacco for the purpose of shipment, and carried the same to the port of Evansville, Ind., and landed the same on the wharf boat at said port for the purpose of being transshipped on another steamer to Clarksville, Tenn. That while the tobacco was on said wharf boat, and on or about April 15, 1896, it was totally destroyed by fire. That the undertaking by said steamboat to insure said tobacco in the consignee's open fire policy was without any authority whatever from said consignee, and said consignee had no policy of fire insurance upon said tobacco, and said tobacco was never insured in any open fire policy or otherwise of said consignee, and said steamboat altogether failed to perform its undertaking to have said tobacco insured. That said tobacco was shipped by them upon said steamboat solely in consideration of said undertaking on the part of said steamboat that said tobacco would be insured in said consignee's open fire policy, and, had it not been for such agreement, libelants would not have shipped said tobacco on said steamboat. By reason of the premises, the libelants have sustained damages in the sum of $1,050, and interest on said sum since April 15, 1896.

(5) That all and singular the premises are true. Wherefore process is prayed against the steamboat, etc., and that the damages be decreed to be paid, etc.

The master and owners of the steamboat filed answer and exception in substance as follows:

(1) They admit the allegations of article 1 of the libel to be true.

(2) They admit that the steamboat, at the times mentioned in the libel, received certain tobacco from the libelants at Bowling Green, Ky., consigned to Clarksville; that the steamboat issued to libelants certain bills of lading, as described in the libel; that said bills of lading bore an indorsement as stated in the libel, which indorsement was put on by respondents' agent; that said tobacco was carried to the port of Evansville, and while lying at said port, awaiting transshipment to Clarksville, the same was destroyed by fire; that respondents received from libelants the stipulated price for carriage.

(3) As to all other matters alleged in said libel, they deny that the same are true, and state that the facts attending the shipment were as follows: Neither the steamboat nor respondents had any agent to solicit freight from libelants; that, if any one did solicit freight from them for the steamboat, it must have been a teamster, who represented his own business, and not respondents or their steamboats; that the first respondents knew about this tobacco was from the libelants themselves, who asked respondent Server to give them the rate to Clarksville; that Server gave them the rate, and libelants delivered to the steamboat, at her landing in Bowling Green, the tobacco in the libel mentioned, for shipment under the terms of Server's offer; that nothing was said to respondents, or to any agent of the steamboat, about insurance till after the delivery of the tobacco to the boat; that after such delivery libelants requested respondents' agent to make the indorsement set out in the libel on said bill of lading, so that the libelants might have insurance; tha the indorsement was made after the contract of affreightment had been completed, and was no part thereof, and was no promise or agreement of respondents or their boat, and was wholly without consideration; that the indorsement was made because there is a general custom among tobacco shippers for the consignee to carry open insurance, for which the consignor is charged by him, but for the consignor to obtain the benefit of such insurance it is necessary for the bills of lading, when delivered by the boat to the shipper, to bear the indorsement stating, in effect, that the shipper claims such insurance, and signed by the master of the boat.

(4) Respondents say the court has no jurisdiction of the matters contained in the libel, the same not being matters of admiralty and maritime jurisdiction, the said libel being filed to enforce a claim for damages arising out of the nonperformance by said steamboat, its owners and agents, of a contract to procure insurance, which is not a maritime contract, and respondents and exceptants pray the same advantage thereof as if the same were separately and formally pleaded to said libel.

The master heard the cause, and found and reported the facts substantially as set out in the libel, and recommended a decree in favor of libelants for $1,050, with interest thereon from April 15, 1896. The respondents have filed numerous exceptions to the finding and report of the master, but, after an attentive examination of the evidence, I am satisfied with his finding and report of the facts. If the libel states a good cause of action within the jurisdiction of a court of admiralty, I am of opinion that the same is made out by the evidence, and that there ought to be a decree for the libelants, as recommended by the master.

Gilchrist & De Bruler, for libelants.
Posey & Chappell and R. J. Meyler, for respondents.

BAKER, District Judge (after stating the facts as above). Two grounds of liability are relied upon by the libelants: First. It is insisted that the steamboat could not limit its liability as a com-

mon carrier by reason of the prohibition in the constitution of the state of Kentucky above quoted, and that it is responsible as such common carrier. Second. It is further insisted that the steamboat is responsible on the ground that it became an insurer of the tobacco from the time of its delivery, and remained responsible for its loss by fire until it was delivered to the consignee at Clarksville.

The first section of the act of congress (Rev. St. § 4282) approved March 3, 1851, does not apply to the facts of this case. This section is copied from the second section of Act 26 Geo. III. c. 86, which received a judicial interpretation by the court of queen's bench in Morewood v. Pollok, 18 Eng. Law & Eq. 341. It was there held that the act did not extend to the case of a fire occurring on a lighter in which cotton was being conveyed from the vessel to the shore. This decision is in conformity with the language of the act which limits its operation to a fire happening to or on board the vessel. Without a departure from the plain reading of the words of the act, I cannot extend it to a fire happening on board of the wharf boat lying alongside the shore. The constitution of the state of Kentucky would be inoperative in any case to which the above statutory provision extended. The act of congress was passed in pursuance of an express grant of power, and such act is valid and operative, anything in the constitution or laws of the state of Kentucky to the contrary notwithstanding. The act of congress, however, is inapplicable to the present case, because the loss did not happen from a fire to or on board the vessel. It is equally evident that the provision of the constitution of the state of Kentucky relied upon does not apply because the loss happened after the delivery of the goods on the wharf boat, where the libelee's responsibility as a carrier was at an end, and its only responsibility was that of a wharfinger or warehouseman. This is the express agreement contained in the bill of lading. The constitutional provision does not attempt to limit the right of a carrier to stipulate where the delivery of the goods shall be made, nor does it prohibit the making of a contract for relief from its common-law responsibility as a carrier when it has made a delivery of the goods pursuant to the terms of its bill of lading. There is no allegation in the libel imputing the loss to the negligence or want of care of the libelee. It does not proceed on the theory of a loss arising from want of care.

If any recovery can be had, it must be upon the ground of a breach of the contract to procure insurance, or on the ground of a false representation that the tobacco had been insured. There is no claim that the respondents were, or were to become, themselves the insurer. They were not in the insurance business, and never had been. Their business was only that of a carrier and forwarder. The bill of lading so imports. There was nothing in the circumstances or in the negotiations of the parties that gives any countenance to the idea that the steamboat or its owners meant to become the insurer themselves, or to charge the boat or its owners as insurers, nor anything in the libel or proofs to indicate that the libelants expected either the boat or its owners to become insurers of the tobacco. The libel alleges that it was agreed in consideration of shipping the

tobacco on the steamboat, and of the money to be paid for its carriage, that the steamboat would cause the tobacco to be insured against loss by fire in the consignee's open fire policy from the time that it was received at the landing at Bowling Green until the same was delivered to the consignee at Clarksville. It is then averred that, in pursuance of said agreement, the libelants delivered the tobacco to the steamboat for carriage. The breach of the contract is averred thus: That the undertaking by the steamboat to insure the tobacco in the consignee's open fire policy was without any authority from the consignee, that the consignee had no open fire policy, and that the tobacco was never insured in any open policy of the consignee or otherwise, and that the libelee wholly failed to perform its undertaking to have said tobacco insured. It is to be observed that the contract of affreightment had been fully performed by the carriage and delivery of the tobacco without damage on the wharf boat at Evansville, Ind., as stipulated in the bill of lading. No action could be maintained on the bill of lading for failure to deliver. The only thing left unperformed was in failing to insure in the consignee's open fire policy. The failure of libelants to allege or prove that the amount for which the tobacco was to be insured was stated or agreed upon is a circumstance tending to support the respondents' contention that it was libelants' duty to forward the bill of lading to the consignee and have him effect the insurance. I do not care, however, to dispose of the case on this ground.

The facts of this case clearly distinguish it from the case of Rosenthal v. The Louisiana, 37 Fed. 264. That was a libel for a failure to deliver pursuant to the contract of affreightment, and the verbal agreement to insure the goods before they were placed on board was incidental to the main contract for the breach of which the suit was brought. The agreement set out in the present libel is simply a contract or undertaking to procure insurance.

A contract of insurance effected on goods transported by water, whatever doubts may have been at one time entertained, is now firmly settled to be a maritime contract. Insurance Co. v. Dunham, 11 Wall. 1. But a contract to procure insurance, such as this contract is alleged to be, is not a maritime contract, nor is it a contract of insurance. It is on the other side of the line dividing contracts which are maritime from those which are not maritime. A suit to recover damages for the breach of a contract to procure insurance is purely a common-law action, and is not within the jurisdiction of the admiralty. Marquardt v. French, 53 Fed. 603. Such a claim does not differ in principle, so far as concerns the jurisdiction of a court of admiralty, from a suit by a shipping broker to recover compensation for services in procuring a charter party (The Thames, 10 Fed. 848); or by an agent employed to solicit freight (The Chrystal Stream, 25 Fed. 575); or for compressing cotton preparatory to shipment (The Paola R., 32 Fed. 174); or for buying a ship, and traveling on her to look after the owner's interest (Doolittle v. Knobeloch, 39 Fed. 40); or from a contract with the owners to supply their ships for the period of one year with provisions (Diefenthal v. Hamburg-Amerikanische

Packetfahrt Actien-Gesellschaft, 46 Fed. 397); or from a contract for building a ship. In The Havana, 54 Fed. 201, 203, it is held that money loaned to a shipowner to enable him to pay necessary bills for advertising in newspapers the excursions of the steamer, in order to keep up her business, was not within the admiralty jurisdiction, because such advertising was not a service rendered directly to or upon the ship, but belonged to that preliminary class of services rendered wholly on land, and not deemed maritime, and hence not giving rise to a maritime lien.

In my opinion, the contract by the steamboat to procure insurance for the libelants in the consignee's open fire policy does not create a maritime lien, and hence is not within the jurisdiction of a court of admiralty. Nor can a court of admiralty entertain jurisdiction of a libel to reform a policy of marine insurance, nor to enforce the execution of a policy of marine insurance agreeably to the terms of an oral contract. Such reformation or enforcement can only be obtained in a court of equity, upon a bill filed for such purpose. A suit brought upon a policy of marine insurance, where loss occurs outside of the expressed limits of the policy, and where the libel is based upon alleged false and fraudulent representations leading up to the making of the policy, is not within the jurisdiction of a court of admiralty. Such a suit is one based upon false and fraudulent representations, by which the libelant was induced to accept the policy supposing he was insured when he was not. Williams v. Insurance Co., 56 Fed. 159. Under the facts set out in the libel, and supported by the proof, the agreement of the steamboat must be regarded as a contract to procure insurance, or as a false and fraudulent representation or warranty that it had procured insurance; and, in either aspect, it does not disclose a state of facts creating a maritime lien enforceable in rem, within the jurisdiction of a court of admiralty. Whether a libel in personam against the owners would lie it is unnecessary to determine.

The report of the master will be set aside, and the libel dismissed. So ordered.

THE STRATHDON.

(District Court, E. D. New York. April 29, 1899.)

1. SHIPPING—CONTRIBUTION IN GENERAL AVERAGE — LIABILITY OF CARRIERS.
The fact that the owners of a vessel cannot maintain an action against the owners of the cargo for contribution in general average for the ship's loss by fire because the fire was caused by the negligence of one of their crew, which is imputable to them, does not protect them from a similar action by the owners of the cargo for contribution.

2. SAME—EXCLUDING LOSS TO SHIP.
Although the owners of a vessel have been adjudged exempt from liability for damage to the cargo resulting from a fire due to the negligence of one of the crew, under section 3 of the Harter act, on the ground that they exercised due diligence to make the vessel seaworthy and in fit condition for the voyage, and were without personal negligence or fault, they cannot maintain an affirmative action against the owners of the

cargo for contribution in general average to the ship's loss; but where they are invited to such an adjustment by an action brought by the sole owner of the cargo, the ship's loss must be taken into consideration, as the effect of excluding it would be to make the same act for which they are acquitted of responsibility by the statute the basis of an indirect recovery of a part of the damage which was in issue in the direct action.

This is an action by the sole owners of the cargo of the steamship Strathdon to recover contribution from the ship owners to damage to the cargo resulting from a fire on the vessel during the voyage.

Black & Kneeland, for cargo owners.
Convers & Kirlin, for the Strathdon.

THOMAS, District Judge. On November 1, 1893, the ship Strathdon, bound from Java to New York, while passing through the Suez Canal, was set on fire between decks by the overheating of the donkey boiler, through the neglect of the man in charge thereof, and without the personal negligence of the ship owners. The means employed to extinguish the fire caused the losses which are the subject of adjustment in this action, which is brought by the owners of the cargo, which is a single interest, to recover contribution from the ship owners. The facts are fully stated in the action between the same parties, involving the question of the carrier's liability for the whole loss. See 89 Fed. 374. In that action the court adjudged that the claimants were free from negligence and liability. The present questions come up on exceptions to the report of a special commissioner, to whom all the issues in this action were referred. The commissioner determined: (1) That the questions in issue should be decided according to American law, although the ship was of English registry, and sailed under a charter party made in England, which stipulated for the application of the English law, and the observance for the purposes of average of the York-Antwerp Rules of 1890; (2) that the owners of the ship, on account of the negligent act of their servant, whereby the fire occurred, cannot recover contribution from the cargo owners for the ship's losses, and that, as a consequence, no action can be maintained against the ship owners for contribution towards the losses of cargo. The conclusion reached by the court renders it unnecessary to review the finding of the commissioner that the question in issue should be decided according to the American law. The following discussion relates (1) to the claimants' contention that no action whatever can be maintained against the ship owners for contribution towards the losses of cargo; (2) to the claim of the owners of the cargo that the losses of the ship owners must be excluded from the adjustment, in case one be directed. As to the first inquiry, the claimants' position is this: If the fire had not been caused by the negligence of the person in charge of the donkey boiler, the owner of the ship would have been liable to contribute in general average towards the losses of the cargo; but, as the fire was caused by the negligence of the person in charge of the donkey boiler, the carriers (owners of the ship), under The Irrawaddy Case, 171 U. S. 187, 18 Sup. Ct. 831, could not recover contribution for

their losses from the cargo, and that, as a consequence, the cargo owners cannot recover contribution towards cargo losses from the carriers. This contention of the claimants is not approved. It is true that under The Irrawaddy Case the carriers could not affirmatively demand contribution, because, notwithstanding the exculpation from the payment of damages for the loss of cargo accorded them by the fire and Harter acts, they are deemed guilty of constructive negligence when they seek to recover contribution for the ship's losses. But this imputed negligence does not exempt them from an action for contribution in general average at the instance of the cargo owner for cargo loss. The cargo owner has such action if the carriers be free from such imputed negligence; and can it be asserted logically that the carriers, when free from negligence, are liable to the cargo owners, but that this liability is discharged because the carriers are negligent, and such negligence caused the loss? According to such a contention, it is better to be negligent than unoffending. By it the carrier may plead his own wrong to escape an obligation that would be due from him, if he were without fault. The contention that a debtor may absolve himself from a debt by showing that his wrong was the occasion of the obligation violates essential principles, and cannot be otherwise than vicious. Without further discussion, the conclusion respecting the first inquiry is that the owner of the cargo may maintain an action for contribution for the losses of the cargo, although the carriers could not have maintained a similar action for the ship's losses. Thereupon the second inquiry arises: What losses should go into the adjustment,—the cargo losses alone, or both the ship's and cargo's losses? Now, the libelants' contention is that, as the carriers could not assert a claim for contribution, the owners of the cargo (there is a single ownership of the cargo) may invite an adjustment, and exclude the carriers from any beneficial participation, but, on the other hand, impose upon them the burden of contribution. This contention is based upon the theory that the status of the carriers is that of wrongdoers, whether they seek or are invited to a general average adjustment. For the purpose of reaching a correct conclusion the principles underlying general average may be considered briefly. When, in a sea adventure, the master of the ship, or some person of equivalent authority, voluntarily and necessarily makes a sacrifice of the ship or cargo, in whole or in part, for the purpose and with the result of saving the residue, or the lives of those on board, from a common, impending peril, the ship, cargo, and freight earned must contribute proportionally to the part thereof saved towards making good the loss suffered and the expenses necessarily incurred thereby. The contribution is called general, gross, or extraordinary average. The Star of Hope, 9 Wall. 203; 3 Kent, Comm. p. 232; Ord. de la Mar. (1683) bk. 3, tit. 7, and arts. 1–3; Birkley v. Presgrave, 1 East, 220, 228; Walthew v. Mavrojani, L. R. 5 Exch. 116, 120. The broad and equitable nature of the rule primarily contemplates ratable contribution from all interests saved towards all interests sacrificed. 1 Pars. Shipp. & Adm. p. 338; Ben. Adm. p. 166,

§ 295; Abb. Shipp. (13th Ed.) p. 635; Id. (5th Ed.) pp. 347, 348. The spirit and intention of this law is to place the persons interested, as far as may be, in the same relative position which they occupied before the peril was met, or "in order to recoup the loser, and place him once more on a footing with his co-adventurers." Macl. Shipp. (4th Ed.) p. 688. This intendment involves necessarily reciprocity of obligation and right, mutuality in taking and receiving payment. But, as stated by Judge Brown in Heye v. North German Lloyd, 33 Fed. 60, 64, while "reciprocity is undoubtedly the ordinary rule in general average," there are exceptions to this "reciprocity of right and obligation," as in the case of cargo carried on deck (The Paragon, 1 Ware, 322 [see annotations to same in 18 Fed. Cas. 1,085]; Triplet v. Van Name, 2 Cranch, C. C. 332, Fed. Cas. No. 14,176; Heye v. North German Lloyd, 33 Fed. 60, 65), goods shipped without the master's knowledge, the baggage of passengers, clothes of seamen, provisions for the ship, and munitions of war (Id.). These exceptions all turn upon the nature of the goods, the place or circumstance of their carriage. Is there another exception, based on the cause of the impending danger, and the relation thereto of the person whose goods are sacrificed? If the fault of the owner of the ship or cargo was the proximate cause of the peril, he could not invoke the benefit of the law of general average. But when he is brought in at the instance of the cargo owner, his fault, if it existed, was not formerly a matter of consideration. This happened for reasons now to be stated. In Carv. Carr. by Sea, § 373a, it is said:

"The earlier view appears to have been that, where there had been fault, the sacrifice was not to be regarded as a general average act; and, consequently, that no contributions were to be made, but the person in fault was to be looked to. This view is not now taken. 'The Rhodian law, which in that respect is the law of England, bases the right of contribution, not upon the causes of the danger to the ship, but upon its actual presence.' And thus innocent sufferers from a general average sacrifice, necessitated by neglect or other improper conduct, may claim contributions from other innocent co-adventurers."

The thought here conveyed is that the innocent cargo owner, damaged by sacrifice occasioned by the ship's negligence, is not required to find his remedy against the guilty ship before or instead of resorting to his innocent co-adventurers for contribution; but it is not implied, and probably was not in the writer's mind, that the ship owner could not be made a party to such contribution; nor was it considered whether he might participate in the average, if made such a party. The ship owner at fault was not included as one of the contributees, because he was liable for the whole loss, and therefore there was no occasion for considering his rights or duties in a general average adjustment instituted by his co-adventurers. When he paid the damages upon the theory that he was at fault, he was discharged from further payment in general average, and the sum paid by him was considered in any adjustment between the other co-adventurers. The City of Para, 69 Fed. 414; Pacific Mail S. S. Co. v. New York, H. & R. Min. Co., 20 C. C. A. 349, 74 Fed. 564, 569. If he did not pay,

and fault was ascribed to him, a general average suit was not the form of remedy, because thereby he would be called upon to pay only a portion of the damages for which he was liable. Hence it is not strange that occasion for decision of the question here involved has not arisen. Undoubtedly, the liability of the owners of the ship for sacrifices caused by her negligence precludes them from asserting affirmatively a right to recover contribution for her loss occasioned thereby. This is the former and present rule. The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831; The Nicanor, 40 Fed. 361, 44 Fed. 504; The Agathe, 71 Fed. 528; Snow v. Perkins, 39 Fed. 334. The libelants contend that, as a consequence of this rule, it must be held in the present case that the carriers, declared innocent by the statute, absolved from all liability by the statute, defended by the statute from all payment of damages based on a claim of breach of duty, and so adjudged by the court, must respond in damages, as if for breach of the same alleged duty, in an action for general average contribution; and that in so responding they are not only subject to the usual adjustment of all losses and savings, which is undoubted, but that they must be excluded from recovering any of their losses, and, on the other hand, contribute for the losses of their co-adventurers. That is to say: (1) Should A., cargo owner, sue B., ship owner, in a direct action to recover $2,000 total damage to cargo, he may not recover, because B. has been guilty of no breach of duty owing to A. (2) But A. may institute an action for general average, and recover from B. (a) whatever sum B. should contribute under the usual rules of reciprocity obtaining in general average; also (b) a certain additional sum upon B.'s nonexistent breach of duty, which recovery is effected by excluding B.'s losses from the average upon the theory that he is a wrongdoer. This last sum, so alleged to be recoverable in general average, is some portion of the sum which would be recoverable in a direct action if there had been an actionable breach of duty, and which is not recoverable in such direct action because there is no breach of duty whatsoever. Hence, by this theory, A. may recover in general average pro tanto on the theory of B.'s guilt what the public law declares that A should not recover at all, for the precise reason that B. is innocent. Hence, if B.'s loss is $2,000 and saving $2,000, and A.'s loss is $2,000 and saving $2,000, under the usual rules of reciprocity A. can recover nothing from B.; but if B. be regarded as at fault, and thereby excluded from participating, except to contribute, he must pay to A. one-third of his loss, or $666.66. This is just one-third of the whole sum that A. is not permitted to recover in a direct action. It is no answer to this palpable evasion of the statutes to say that A. is not recouped for all his losses by B., but only for a part of them. His recovery, so far as it extends, is based on a nonexistent legal wrong; and a general average action, which is declared not to be based on tort (Ralli v. Troop, 157 U. S. 386, 403, 15 Sup. Ct. 657), is so far based on a tort, which has no being in fact, as to allow A. to recover not only the usual average contribution, but additional damages based on B.'s alleged wrong. A clear evasion of the statute results from such doc-

trine. The proof of the evasion does not rest upon theory alone, but upon mathematical demonstration.

But it is urged that the libelants' claim is the logical outcome of The Irrawaddy Case. On the contrary, it is considered that the supreme court suggested no holding that supports any such perversion of the statutes. In The Irrawaddy Case, B., ship owner, sued A., cargo owner, for contribution. The old rule was invoked that B.'s sacrifice was caused by the negligence of B.'s servants. To this it was answered that the Harter act relieved B. from liability based upon the negligence of his servants. To this it was replied that the Harter act relieved B. from paying any damages based upon his servant's negligence, but did not authorize him to maintain an action for contribution to his own losses against his co-adventurers. In that case the ship owner was claiming (1) that the Harter act relieved him from the obligation to pay the cargo owner's losses, which no one disputed; (2) that the Harter act authorized him to initiate an action in general average to recover pro tanto the losses of his ship, which was denied upon the theory that relief from liability for the loss of the cargo owner did not give him a right to maintain an action to recover for the ship's losses. The decision is tantamount to this: The ship owner may use the Harter act to shield himself from any claim for damages made against him, based upon breach of duty, but may not use the act as the basis of an action in his own favor. The decision does not practically diminish the benefit of the Harter act. That act gives immunity, under suitable states of fact, from claims based on constructive negligence. It does not confer causes of action upon the ship, but deprives cargo owners of causes of action against the ship. The benefit of the act is left whole and sound by the supreme court. Now, it cannot matter in what form of action the cargo owner seeks to recover damages from a ship owner protected by the statutes. He can no more do so under the guise of an action for general average contribution than in a direct action, provided in the former case he seeks to exclude the ship owner from the situation of a creditor; otherwise, the Harter act is not left untouched, is not left whole and sound for the ship owner's protection, but is violated quite as obviously and grossly as if the action had been direct, save as respects the amount of the recovery. In such case the cargo owner asserts and establishes something besides general average. He asserts and establishes a particular average, in a general average proceeding, and recovers thereon. In The Irrawaddy Case the supreme court could declare that by its holding it left the Harter act in full effect, and the ship owner in full enjoyment of it, and in full protection from it. That is literally true. In the present case, if the libelants' contention prevail, the actual result would be that (1) the ship owner would be deemed guilty of actionable negligence; (2) by reason of such negligence an action could be maintained against him to recover a sum of money from the payment of which the statute acquits him. This court, in an action between the same parties, has decided that the claimants were not negligent, and that they shall pay no damages based upon an allegation of negli-

gence. The court is now asked to adjudge, in an action between the same parties, that the claimants were negligent, and should pay damages therefor. The judgment in the first action, until reversed, is forever an estoppel between the parties as to the fact of the claimants' negligence; and it is thought that no instance exists in jurisprudence of the anomaly presented by the libelants' contention that, notwithstanding the estoppel between the parties, the fact found by the judgment in the first case against the libelants may be disregarded, and the opposite thereof, viz. that the claimants were negligent, and that they should pay damages by reason thereof, should be found and invoked in their behalf. The supreme court in The Irrawaddy Case could say to the ship owner, "All that the Harter act gives you is reserved to you by this decision." Such could not be said if the libelants' views were adopted here; and because it cannot be said, and because the opposite view is practically consistent with The Irrawaddy Case, this court has arrived at the following conclusions:

1. The fire and Harter statutes intend to relieve ship owners, in case of compliance therewith, from any liability to cargo owners for injury to cargo.

2. Such statutes do not give the ship owner any new right to sue the cargo owner for injury to the ship caused by the peril.

3. The cargo owner cannot, under the guise of an action for contribution in general average, recover upon the basis of the ship owner's alleged constructive negligence a portion of the damages, which upon the same alleged grounds he could not recover in a direct action.

4. While the ship owner, freed from liability by the statutes, may not invoke an action for general average adjustment, to obtain payment of his own losses, the cargo owner may do so; but, as the statutes prevent his recovering any damages based upon the ship owner's alleged negligence, the cargo owner may not, in the adjustment invoked by him, derive any benefit from such alleged negligence.

5. In such case the usual rule of reciprocity of right and obligation exists, and the adjustment should be made as if there was no negligence in the case, there being none in fact on the part of the owners.

There is some contention respecting the valuation of the ship. This subject was not presented orally. A fuller history than that disclosed by the briefs is needed for intelligent decision, and the matter is left for further presentation. It is now decided that the libelants may maintain the action, and recover, if they shall show some balance due to them on an adjustment based on the property lost and saved by the ship owners and by the cargo owners, irrespective of any element of negligence by the officers and crew of the ship.

THE BARNSTABLE.

(Circuit Court of Appeals, First Circuit. May 11, 1899.)

No. 249.

SHIPPING—CONSTRUCTION OF CHARTER PARTY—RISK OF COLLISION.

A provision of a charter party that "the owners shall pay for insurance on the vessel," to be given any effect as between the parties, must be construed as requiring the owners to insure against all such losses as would otherwise fall on the charterer; and, where the owners failed to procure insurance, they made themselves insurers, and cannot cast upon the charterer the burden of paying damages recovered against the vessel for collision, against which they might have insured.

Appeal from the District Court of the United States for the District of Massachusetts.

J. Parker Kirlin, for appellant.
Charles T. Russell, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

WEBB, District Judge. Little need be added to the careful opinion of the district judge in this case (84 Fed. 895), which is a case of contract between the owners and the charterers of the steamship Barnstable. There can be no controversy as to the terms of the charter, for it is in writing and is in evidence. The difference relates to the twenty-second article of the charter, which is in these terms: "The owners shall pay for the insurance on the vessel." What are the obligations imposed by this provision of the contract?

In argument there has been some discussion concerning the mutual relations, under the charter, between the parties. The owners contend that the charterers were bailees, and held to all the liability of bailees, and this contention the charterers controvert. We do not think that the determination of that question will aid in the decision of the case; for whether or not, in the full and strict sense, the charterers were bailees, they would be, independently of this insurance clause, chargeable with some of the risks of the ship, while the owners would bear others. Assumption by the owners of insurance against risks affecting themselves alone would be of no advantage to the charterers, who would, in no event, be answerable for losses arising from such risks, and had no interest in insurance against such losses. The insertion of this clause in the charter has no meaning unless it be to make such insurance as would profit the charterers, which could only be effected by insurance against losses which would fall upon them, against all risks attaching to them. This insurance clause must have been intended for their protection, and could have been understood by them in no other way, and the agreement of the owners was not to partially, but wholly, protect them, and to relieve them of the expense of insuring themselves. In effect, it said to the charterers: "Your only responsibility will be to pay the hire of