

job of repairing the schooner, he would be obliged to wait for his pay until the schooner had earned the money, and that to this Mathis agreed. Mathis denies that he did so agree, but I think his denial relates to any express agreement on his part; for I am satisfied that the understanding of the parties was that the repairs should be paid from the earnings of the schooner, as has been their custom in previous dealings. It is not by any one alleged that at this meeting, when the repairs were ordered, anything was said by which it was agreed or suggested that the repairs should be a lien upon the boat. After being repaired, the schooner was permitted to leave the shipyard, and upon her voluntary return there, some months afterwards, this libel was filed. In *The Havanna*, 87 Fed. 487, Judge Butler said that, "where repairs are made in a foreign port on the order of owners, the presumption is against the existence of a maritime lien, and the burden is on the libelant to clearly show a contract." In the case of *The Havanna*, the home port of the vessel was Philadelphia. The repairs were made at Baltimore. The alleged lien was for a balance on repairs ordered by the managing owner. The repairs were charged to the vessel. In the absence of evidence tending to show express agreement for lien, the libel was dismissed. In the case under consideration, the same state of facts exists. The record fails to disclose any evidence of express contract for lien, and the only circumstance from which it could be inferred is the refusal of the managing owners to pledge their personal credit for the repairs. I think such inference, however, unwarranted, in view of the evidence relating to the agreement of the libelant to accept payment for repairs to the schooner out of the earnings as they accrued. In accordance with the principles laid down in *The Havanna*, 87 Fed. 487, affirmed 92 Fed. 1008, and the other cases therein cited, the libel will be dismissed.

RICHARD et al. v. HOGARTH et al.

(District Court, D. New Jersey. May 23, 1899.)

ADMIRALTY JURISDICTION—MARITIME CONTRACTS—SUIT FOR SERVICES IN PROCURING CHARTER.

A court of admiralty is without jurisdiction of a suit to recover compensation for services rendered in procuring a contract of affreightment for a vessel, the contract for such services not being maritime, but merely preliminary to a maritime contract; and it does not become maritime because of a provision of the charter party for the payment of the broker's commission and reciting that it is due by the vessel.¹

This was a suit in admiralty to recover for services rendered for procuring a contract of affreightment for a vessel owned by respondents.

Corbin & Corbin, for libelants.

Convers & Kirlin, for respondents.

¹ For admiralty jurisdiction as to matters of contract, see note to *The Richard Winslow*, 18 C. C. A. 347, and note to *Boutin v. Rudd*, 27 C. C. A. 530.

KIRKPATRICK, District Judge. This libel was filed by Oscar L. Richard and others, composing the firm of C. Richard & Co., against John Doe and Richard Roe, composing the firm of J. Hogarth & Co., to recover compensation for effecting a contract of affreightment for the steamship Folbridge, belonging to respondents. The answer of the respondents admits the rendition of the service by the libelants, but alleges that this court has no jurisdiction over the subject matter of the libel. This objection I consider well taken, and in entire conformity with the practice and decisions of our courts. In *Cox v. Murray*, Fed. Cas. No. 3,304, Betts, District Judge, said:

"Undertakings which are merely personal in their character, or which are preliminary to maritime contracts, do not seem ever to have been recognized as within the admiralty jurisdiction."

In *The Thames*, 10 Fed. 848, the court recognized this distinction between maritime contracts and those for preliminary services leading thereto, and distinctly held that a shipping broker had no lien on a vessel in admiralty for services in procuring a charter party. Services which incidentally benefit the voyage do not thereby become maritime. They acquire that quality only when the matters performed enable or aid the vessel to conduct the same. This doctrine is reaffirmed in *The Crystal Stream*, 25 Fed. 575, and by the circuit court of appeals for the Second circuit in *The Harvey*, and *Henry*, 30 C. C. A. 330, 86 Fed. 656.

It is insisted upon the part of the libelants that, because a clause for payment of broker's compensation was inserted in the charter party, the contract for its payment thereby became maritime in its nature. In this view I cannot concur. The question of jurisdiction does not depend upon the form of the contract, but the substance of the undertaking. The court regards the subject-matter. In order to give the court jurisdiction, the substance of the whole contract must be maritime. "It is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature." *Plummer v. Webb*, Fed. Cas. No. 11,233.

It is also urged that there is jurisdiction in admiralty because, by the terms of the contract, it is stipulated that "a commission is due by the vessel in signing this charter party." This stipulation, however, in my opinion, can impose no additional liability on the vessel, and can confer no jurisdiction on the court which it would not otherwise possess. *Torices v. Winged Racer*, Fed. Cas. No. 14,102.

Let a decree be entered dismissing the libel for want of jurisdiction.

FAIRGRIEVE et al. v. MARINE INS. CO. OF LONDON.

(Circuit Court of Appeals, Eighth Circuit. April 10, 1899.)

No. 1,144.

1. ADMIRALTY JURISDICTION—SUIT BETWEEN FOREIGNERS.

The admiralty courts of the United States have jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature, and the ship or party to be charged is within the jurisdiction of the court. It is a jurisdiction the court may decline to exercise if for some special reason it appears to be inexpedient to exercise it, but a suit by a foreign marine insurance company against a vessel within the jurisdiction of the court, based on a right claimed under a policy of insurance issued in the United States, is one of which the court is not justified in declining jurisdiction.

2. PARTIES TO SUIT FOR COLLISION—SUIT BY UNDERWRITERS.

Where a marine insurance company has paid the full value of an injury to a vessel by collision caused by the fault of another vessel, so that there are no other claimants entitled to sue for the tort, it is subrogated to the right of action of the insured, and may maintain a suit against the offending vessel in its own name; but, when the value of the property destroyed exceeds the insurance money paid, the suit must be brought in the name of the insured, who may recover for the entire loss, as trustee for the insurance company as to the amount it has paid, and in his own right as to the remainder.

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

The Marine Insurance Company, Limited, of London, England, the appellee, libeled the Canadian steamer *Arabian*, in the Fifth division of the United States district court for the district of Minnesota. The libel alleged, in substance, that the insurance company issued a policy of insurance on the Canadian schooner barge *Minnedosa*; that, as the *Minnedosa* was going down the Welland Canal, the *Arabian* was going up the canal, and was so negligently managed that she inflicted on the *Minnedosa* damages to the extent of \$15,000 and more; that the policy contained a clause by the terms of which, in the event of loss or damage paid by the insurance company to the owners, the claim of the insured against any third party liable for the damage was assigned, to the extent of the amount paid, to the insurance company; and that, of the \$15,000 and upwards of damage, the libellant had paid to the owners \$8,051.20, and so by the terms of the policy, and because of such payment, became subrogated and entitled to sue in its own name for that part of the damages which libellant had paid. Before answering the libel, the claimants, J. B. and Hugh Fairgrieve, the appellants, citizens of the dominion of Canada, made protest and application to the district court to decline to entertain jurisdiction, because all the parties were British subjects; the subject-matter, the locality of the tort, and the parties being foreign to this country, and all citizens of the same foreign jurisdiction in which the tort occurred and the property belonged. The *Arabian* being within the jurisdiction of the court, this application was denied, and thereupon the appellants filed their claim and answer. Article 10 of the libel reads: "Tenth. That, under the terms of said policy of insurance, and because of the payment of said sum of \$8,051.20 to the said Montreal Transportation Company on account of said loss, the libellant became subrogated to the rights and claim of said Montreal Transportation Company against said steamer *Arabian*, and became thereby authorized and empowered to file this libel against the said steamer." The answer to this article of the libel is as follows: "(9) Your respondents deny the allegations of article tenth of the libel, and expressly deny the right, either by the terms of the contract or otherwise, of the libellant to file said libel in its own name against the said steamer *Arabian*. (10) Your respondents deny that by reason of the premises, by reason of the allegations in the libel, or for any reason, the libellant is entitled to recover and