

Argument for the United States.

UNITED STATES v. ATLANTIC MUTUAL INSURANCE CO.

CERTIORARI TO THE COURT OF CLAIMS.

No. 21. Argued October 18, 1935.—Decided May 25, 1936.

1. A claim of contribution in general average presented against the United States by suit in the Court of Claims filed more than six years after the claim first accrued, is barred by U. S. C., Title 28, § 262. P. 488.
2. The right to contribution in general average accrues when all the elements essential to its existence are present, regardless of whether the appropriate means of enforcement be a suit *in rem* or a suit *in personam*. P. 488.
3. The right to contribution in general average accrues and becomes enforceable upon the arrival of the ship at port of destination and delivery of the cargo, even though the amount of the required contribution has not then been liquidated. P. 489.
4. Claims against the United States for general average contribution are brought and adjusted in the Court of Claims under U. S. C., Title 28, § 250 (1). The claim may accrue and be sued on even though the damages sought be unliquidated. P. 490.
5. An adjuster, engaged by a ship-owner to make up a general average statement, is not an arbitrator nor is his statement binding, as an account stated or otherwise, upon his principal. P. 491.

80 Ct. Cls. 11, reversed.

CERTIORARI, 295 U. S. 727, to review a judgment for the Insurance Company upon its claim in general average contribution against the United States.

*Mr. J. Frank Staley*, with whom *Solicitor General Reed*, *Assistant Attorney General MacLean*, and *Mr. Paul A. Sweeney* were on the brief, for the United States.

A suit for a general-average contribution may be brought from the time the vessel arrives at its port of destination. A general-average statement is not a condi-

tion precedent. A general-average statement is not an account stated. The statute of limitations had run before the general-average statement was issued. Officers of the Government have no authority to issue an account stated, and revive an action which is barred.

The United States is not liable for contribution in general average in so far as public vessels are concerned. The case of *Johnson & Higgins v. United States*, 287 U. S. 459, expressly left this question open. An Army transport is part of the sovereignty to which she belongs and her liability is merged in that of her sovereign. Equitable principles would deny the application of the rule of general average to this case. The voyage here was part of a military operation and should not be classed as a common maritime venture.

The Court of Claims erred in rendering judgment in excess of the amount actually paid by the respondent. It was error to include interest.

*Mr. J. M. Richardson Lyeth* for respondent.

A claim for general average is cognizable in the Court of Claims.

Salvage claims, even in the absence of any express contract, fall within the scope of the Tucker Act. *United States v. Cornell Steamboat Co.*, 202 U. S. 184; *The Davis*, 10 Wall. 15; *McGowan v. United States*, 20 Ct. Cls. 147; *United States v. Morgan*, 99 Fed. 570. The similarity between claims for salvage, where no express contract has been made, and claims for general average has been recognized. *The Davis, supra*; *Abbott's Merchant Ships and Seamen*, 14th ed. (1901), p. 751.

The voyage of the *Logan* was subject to general average rules. It makes no difference whether the *Logan* was engaged in a military operation. In fact she was a public vessel, owned by the Government, and immune from attachment, seizure, or any proceeding *in rem*. The proposition that, because no liability *in rem* against

the vessel may be enforced, no liability *in personam* arises against the owner of the vessel is completely answered by this Court in *Workman v. New York City*, 179 U. S. 552, 572. See *United States v. The Thekla*, 266 U. S. 328; *In re U. S. Steel Products Co.*, 24 F. (2d) 657.

The cases generally recognize no distinction between the commercial or public character of the service upon which the vessel is engaged for the purpose of determining liability of the Government in general average, salvage, or collision. *Brown v. United States*, 15 Ct. Cls. 392; *Prince Line, Ltd. v. United States*, 61 Ct. Cls. 632; *United States v. Wilder*, 28 Fed. Cas. 16,694.

The cause of action is not barred. The period did not begin to run until the issue of the general average statement in 1926. *The Allianca*, 64 Fed. 871, *aff'd*, 79 Fed. 989; *Frederick H. Leggett & Co. v. 500 Cases of Tomatoes*, 15 F. (2d) 270; *Dupont v. Vance*, 19 How. 162; *The Eugenia J. Diacakis*, 1923 A. M. C. 305; *Wellman v. Morse*, 76 Fed. 573; *Det Forenede Dampskibs Selskab v. Insurance Co.*, 31 F. (2d) 658.

No action *in rem* could have been maintained against the transport *Logan*, because she was a public vessel. *Western Maid*, 257 U. S. 419; *The Siren*, 7 Wall. 152. Even if she had been a private vessel, we contend that the right of action which would have arisen at the time of the arrival of the vessel would have been in the nature of an action to obtain security by the enforcement of a lien, rather than a suit upon a liquidated obligation.

A cargo owner has two causes of action upon a general average sacrifice, one arising upon the arrival of the vessel, and the second arising upon the completion of the general average statement by the vessel owner.

The United States, as owner of the *Logan*, was under a duty to prepare or cause to be prepared the general average statement. *Johnson & Higgins v. United States*, 287 U. S. 459; *The Emilia S. De Perez*, 22 F. (2d) 585.

Until the vessel owner has expressed an intention to refuse to perform these obligations, or until he has failed to perform them after the lapse of a reasonable time, there is no basis or reason for the cargo owner to sue him *in personam*.

The rule that the statute of limitations in a suit brought upon the general average statement does not begin to run until the issue of the statement by the adjusters accords with commercial practice and business necessity.

The custom of deferring collection and distribution of general average payments until after the preparation of the statement is based not merely on convenience but on necessity. The facts which are the necessary basis for preparing a general average statement are numerous and complicated, and must be gathered frequently from widely separated and distant points.

The respondent as insurer was entitled to the full amount of the award, including interest.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This was a suit to obtain a contribution in general average by reason of the sacrifice of part of a ship's cargo for the benefit of the ship and cargo as a whole. The Court of Claims gave judgment for the claimant and the case is here on certiorari. The material facts, as shown by the findings below, are as follows:

In 1918 the *Logan*, an army transport owned and operated by the United States, left San Francisco for Manila with a cargo consisting of military supplies belonging to the United States, certain property belonging to the government of the Philippine Islands and its railroad, and other property belonging in large part to the American Red Cross and in lesser part to officers of the United States Army, none of which was being transported for

hire. During the voyage fire broke out in the hold from a cause free from negligence, and to prevent a loss of both vessel and cargo the master caused part of the cargo to be jettisoned and water to be let into the hold, whereby other parts of the cargo were damaged. After the fire was extinguished the transport continued the voyage and arrived at the port of destination January 19, 1919. All that remained of the cargo was then discharged and, with the master's assent, was delivered to its owners without obtaining from them any bond to secure payment of general average.

The part of the cargo belonging to the Philippine government and its railroad was insured against marine perils, including fire, by policies obtained before the voyage was begun. Substantial portions of this property were jettisoned or damaged at the time of the fire. April 12, 1921, the underwriter, in compliance with the policies, paid to the Philippine government and its railroad the amounts of their respective losses, and thereby became subrogated to their rights, if any, under the maritime rule respecting general average.

May 15, 1921, the underwriter presented to the War Department a claim for general average contribution based on the facts here stated, and the claim was denied. But the Judge Advocate General disapproved that ruling and gave an opinion that the claim was well grounded. Thereafter, on August 22, 1922, an administrative officer in the army transport service transmitted the files relating to the claim to a company doing business as an average adjuster and insurance broker at San Francisco and requested that the adjuster prepare "a statement of general average in order that the responsibility of the various parties concerned may be determined." The adjuster accepted that task and completed and rendered such a statement December 31, 1926. In this statement the adjuster computed the net contribu-

tion to be made by the United States to the underwriter by reason of the latter's subrogation to the rights of the Philippine government and its railroad at something over \$40,000; and also computed the contributions to be made to the underwriter by other cargo owners. On March 28, 1928, the accounting officers of the United States denied the claim for contribution, and on December 10, 1928, the Comptroller General, on review, sustained that ruling. The claimant brought the present suit in the Court of Claims February 18, 1929.

One of the defenses interposed by the government and rejected by the court is that the claim had become completely barred before the suit was begun. The statute<sup>1</sup> invoked by this defense declares:

"Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court . . . within six years after the claim first accrues."

The government contends that the claim first accrued on January 19, 1919, when the transport reached its destination and delivered what remained of the cargo to the cargo owners. On the other hand, the claimant insists the claim first accrued on December 31, 1926, when the adjuster completed and rendered the general average statement. The court rejected the government's contention and sustained that of the claimant. In this we think it erred.

The court recognized that the transport, had it been privately owned, would have become subject to a suit *in rem* for contribution in general average upon its arrival at destination and the delivery of the cargo, but held that as the transport was government owned and in the public service such a suit would not lie against it. We assent to this, but think the accrual of the right to contri-

---

<sup>1</sup> U. S. C., Title 28, § 262.

tribution did not depend upon whether it could be enforced by a suit *in rem* against the ship. Such a right accrues if and when all the elements essential to its existence are present, regardless of whether the appropriate means of enforcement be a suit *in rem* or a suit *in personam*. In this instance, as we shall show, a suit of the latter class was the appropriate means.

The law of general average is an ancient feature of the maritime law and proceeds on the equitable principle that that which is sacrificed by one for the benefit of all in the course of a common venture at sea should be made good by the contribution of all.<sup>2</sup>

Various means of enforcing such contribution have become well recognized, such as a suit *in rem* in admiralty against ship or cargo, a suit *in personam* in admiralty against ship owner or cargo owner,<sup>3</sup> and an action at law<sup>4</sup> or a suit in equity<sup>5</sup> against ship owner or cargo owner. Save for exceptional rulings afterwards disapproved, the courts in dealing with such suits and actions have regarded the right to contribution as accruing and becoming enforceable upon the arrival of the ship at the port of destination and the delivery of the cargo. In reason the rule could not well be otherwise, for every element of the right is then present. That the amount of the required

<sup>2</sup> *Barnard v. Adams*, 10 How. 270, 303; *Ralli v. Troop*, 157 U. S. 386; *Simonds v. White*, 2 Barn. & Cress. 805, 811.

<sup>3</sup> *Bark San Fernando v. Jackson*, 12 Fed. 341; *The Emilia S. De Perez*, 22 F. (2d) 585, 586; *Det Forenede Dampskibs Selskab v. Insurance Company of North America*, 31 F. (2d) 658 (certiorari denied, 280 U. S. 571); *Kohler & Chase v. United American Lines*, 60 F. (2d) 530. And see *Insurance Co. v. Dunham*, 11 Wall. 1; 1 Benedict on Admiralty, 5th ed. § 98.

<sup>4</sup> *Birkley v. Presgrave*, 1 East 220; *Price v. Noble*, 4 Taunt. 123; *Dobson v. Wilson*, 3 Camp. 480; *Strang, Steel & Co. v. A. Scott & Co.*, L. R. 14 App. Cas. 601, 606-607.

<sup>5</sup> *Sturgess v. Cary*, Fed. Cas. No. 13,572; 1 Story's Equity Jur. 14th ed. §§ 661 et seq.

contribution may then be unliquidated is no obstacle, for in proper sequence liquidation comes after accrual, and can be made in the suit or action wherein the right is presented for adjudication. In this regard a claim for contribution does not differ from many others where at the time of accrual the recoverable damages or amount due remains unliquidated. As was well said in a related case,<sup>6</sup> "The law is familiar enough in actions of tort and in many actions in contract, with liabilities which are presently due, although unliquidated."

The United States is not suable without its assent, and therefore a suit *in personam* against it as the owner of the vessel needed the support of a permissive statute. But there is such a statute,<sup>7</sup> which has been long in force. It in direct terms invests the Court of Claims with jurisdiction to hear and determine all claims against the United States founded—

"upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

It is under this statute that claims against the United States for general average contribution are brought and adjudicated in the Court of Claims. Obviously the statute contemplates that a claim may accrue and be sued on even though the damages sought be unliquidated.

For these reasons we think it quite plain that the present claim accrued January 19, 1919, when the ship reached its destination and the cargo was delivered.

<sup>6</sup> *Det Forenede Dampskibs Selskab v. Insurance Co. of North America*, 31 F. (2d) 658, 660 (certiorari denied, 280 U. S. 571).

<sup>7</sup> U. S. C., Title 28, § 250 (1).

The court below attached much importance to the statement in general average made by the adjuster at the request of an administrative officer in the army transport service. Indeed, the court treated the statement as being "in the nature of an account stated," and ruled that the right to contribution accrued when it was rendered. In this we think the court misconceived the functions of the adjuster and the nature of the statement. The adjuster was not an arbitrator,<sup>8</sup> nor was the statement anything more than a provisional estimate and calculation which his principal, the owner, was free to adopt or to put aside. In the absence of some stipulation on the subject, and there was none, his function was only that of aiding or assisting the owner in gathering and stating data and making appropriate calculations as a suggested basis for an adjustment to be made by the owner, or under the owner's direction. It is not shown that the owner adopted the statement or put it forth as an authorized statement. In this situation the statement had no binding force as a stated account or otherwise. As was explained by Lord Herschell when speaking for the Judicial Committee of the Privy Council in *Wavertree Sailing Ship Co. v. Love*, L. R., (1897) App. Cas. 373—

"The right to receive and the obligation to make general average contribution existed long before any class of persons devoted themselves as their calling to the preparation of average statements. It was formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons or indeed to employ any one at all. He might if he pleased make out his own average statement, and he may do the same at the present time if so minded. If he en-

---

<sup>8</sup> *The Alpin*, 23 Fed. 815, 819; *The Santa Anna Maria*, 49 Fed. 878, 879.

gages the services of an average stater, it is merely as a matter of business convenience on his part."

What we have said suffices to show that the claim accrued more than six years before the suit was begun, and therefore was barred by the statute.

*Judgment reversed.*

---

UNITED STATES *v.* ELGIN, JOLIET & EASTERN  
RAILWAY CO.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 660. Argued April 8, 9, 1936.—Decided May 25, 1936.

1. Legislative approval of a construction placed by this Court upon an Act of Congress is evidenced by failure to amend. P. 500.
2. The mere fact that all the shares of a railroad corporation and all the shares of a manufacturing corporation are owned by a holding company does not make transportation by the one of the products of the other unlawful under the commodities clause of the Interstate Commerce Act. P. 499.

*United States v. Reading Co.*, 253 U. S. 26, distinguished. Existence of power in the holding company to control the railway company, not exercised in the present case, did not make the railway company the *alter ego* of the holding company.

11 F. Supp. 435, affirmed.

APPEAL from a decree of the District Court of three judges, which dismissed a bill brought by the United States to enjoin the Railway Company from hauling the products of certain manufacturing companies in alleged violation of the commodities clause of the Interstate Commerce Act.

*Assistant Solicitor General Bell*, with whom *Solicitor General Reed* and Messrs. *Daniel W. Knowlton*, *M. S. Huberman*, and *Elmer B. Collins* were on the brief, for the United States.