
Propeller Niagara v. Cordes et al.

appellees that the schooner is responsible for failing to carry a light. In the case of the *Osmanli*, (7 Notes of Cases, 507,) the learned judge of the admiralty says: "That no question has been more mooted and left more unsettled than this—whether it is the duty of a sailing vessel at night to show a light? Beyond all doubt, it has been determined there is no such general obligation; at the same time, there have been occasions on which, for the sake of avoiding a misfortune, which was in all human probability likely to occur, it became the duty of a vessel to show a light." In the present case, we have not been able to discover any fact that imposed the obligation upon the schooner to do so. The night was moonlight; and though the light was occasionally obscured, the evidence does not show that it was so, to a degree that rendered the navigation of the bay at all dangerous, if care, skill, and vigilance, had been employed upon the different vessels.

The court is of opinion that the schooner was discerned from the steamer in sufficient time, and that the latter might have avoided the collision by the exercise of proper care.

Decree affirmed.

Mr. Justice DANIEL dissented, for want of constitutional power in courts of the United States in admiralty.

THE PROPELLER NIAGARA, HER ENGINE, &c., ANSEL R. COBB
AND OTHERS, CLAIMANTS AND APPELLANTS, *v.* JOSEPH H.
CORDES.

THE PROPELLER NIAGARA, HER ENGINE, &c., ANSEL R. COBB
AND OTHERS, CLAIMANTS AND APPELLANTS, *v.* LESTER SEX-
TON AND OTHERS.

Where a general ship, employed in navigating the lakes, receives goods under a contract of shipment, corresponding in terms to the usual bill of lading for the transportation of goods on inland navigable waters, her liability must be determined by the rules of law applicable to carriers of goods upon such inland waters.

A common carrier by water, as on land, is responsible for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy,

Propeller Niagara v. Cordes et al.

or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.

Amongst the duties imposed upon carriers by water, one is to see that the vessel is provided with a competent and skillful master.

The act of Congress, passed on the 3d of March, 1851, (9 Stat. at L., 635,) limiting the liability of ship owners, does not apply to the present case.

After a vessel is stranded, there is still an obligation upon the master to take all possible care of the cargo. His duties in that respect are not varied by that event, and proof merely of reasonable care and diligence will not excuse him from liability.

Where a vessel put into Presque Isle at night, in a storm, upon Lake Huron, the evidence does not justify this court in adjudging that the master could have kept on his course, nor in holding the vessel responsible for an error in judgment in the master, in the measures which he adopted after he had succeeded in entering the harbor.

But after the vessel was stranded, he was guilty of culpable negligence in not protecting the cargo with sufficient care, and in returning home and allowing the cargo to remain in the vessel during the remaining part of the winter, and until a late day in the spring.

A master must not abandon his ship and cargo upon any grounds, so far as the goods are concerned, when it is practicable for human exertion, skill, and prudence, to save them from the impending peril.

THESE two cases were appeals in admiralty from the District Court of the United States for the district of Wisconsin.

Both cases were founded upon the same facts, which are fully stated in the opinion of the court.

In the first case, that of Cordes, the District Court decreed that the libellant should recover \$3,763.76, with costs; and in the other case, that Sexton should recover \$4,964.50, with costs. The owners of the propeller appealed to this court in both cases.

They were argued by *Mr. Haven* for the appellants, and by *Mr. Russell* for the appellees.

The evidence cannot be reported upon the questions of fact, such as—

1. Whether the vessel was staunch, well manned, provided, and furnished.
2. Whether she was carefully and properly stowed.
3. Whether she was too heavily loaded.

Propeller Niagara v. Cordes et al.

4. Whether there was a want of care or lack of judgment in going into Presque Isle.

5. Whether the propeller was stranded by mere force of winds and waves and dangers of navigation.

6. Whether the goods were wetted by the leak so produced.

After discussing these questions of fact, as they appeared from the evidence, the counsel for the appellants made the following point of law, viz:

Here, the appellants claim, the extraordinary liability of the respondents as carriers ended, and a new rule of responsibility commenced. Their responsibility, after this period, was for damages arising from want of diligence and proper exertion towards saving and delivering the goods on board, and the proper standard of diligence henceforward was "*such a line of conduct as a prudent man of intelligence would have observed in taking care of his own property similarly situated.*" This rule is quoted from *Smyrle v. Niolen*, 2 Bailey S. Carolina Rep., 421, cited in Angell on Carriers, sec. 187, p. 187.

Again. In cases of necessity or calamity during the voyage, the master is by law created an agent from necessity, for the benefit of all concerned; and what he fairly and reasonably does, under such circumstances, in the exercise of a sound discretion, binds all parties in interest in the voyage, whether owners, or shippers, or underwriters.

See Smith's Mercantile Law, 292, note and cases cited. Abbott on Shipping, 453, at bottom, *et seq.*, Story & Perkins's edition.

1 Story C. C. Rep., 342, 353.

2 Kent Com., 212.

5 Johnson's Rep., 262.

Searls & Adams v. Scoville, 4 Johnson's C. Rep., 218.

3 Robinson, 240.

1 Salkeld, case 34.

Miston v. Lord, 1 Blatchford's Rep., 354.

A request and authority are necessarily implied, when the master exercises his discretion and judgment fairly.

Douglass v. Moody, 9 Mass. Rep., 550.

7. With navigation closed, no ability to tranship, and noth-

Propeller Niagara v. Cordes et al.

ing that could be done but keeping the goods at Presque Isle, what was the duty of the respondents?

The answer is found in the case in 2 Bailey, 421, above cited.

Angell on Carriers, sec. 187.

Bowman v. Teal, 23 Wendell's Rep., 306.

Story on Bailment, secs. 509, 512.

1 Gray's Rep., 263, and cases there cited.

8. By the discretion of Captain Mallon, Jones, his mate, Captain Gibson, and Fargo, the goods were left on board, as the best that could be done for them.

See authorities on last point.

9. The master could have done nothing else—no storage on shore—could not get goods on shore—mode of stowage—crates—casks—dunnage below—well stored and full of above—ventilation, &c.

10. The propeller was got off at the earliest possible time in spring, repaired, and the goods delivered to the consignees.

11. The principle on which the extraordinary responsibility of common carriers is founded does not require that that responsibility should extend to the time occupied in transportation. That principle is the danger of robbery and embezzlement by collusion or fraud on the part of the carrier.

Parsons v. Hardy & McCormick, 14 Wend., 215.

The principle does not extend beyond the ultimate delivery of the goods; it does not extend to the condition in which they are delivered, provided they are all delivered.

The carrier may excuse *delay of delivery*, by accident or misfortune, is decided in the case last cited; and why not excuse *injury* by the same means, if by the ultimate delivery they show there has been no robbery or embezzlement by collusion or fraud?

Bowman v. Teal, 23 Wend., 306, 310.

See *Forward v. Pittard*, 1 Term Rep., 27, as giving reasons on this point.

Story on Bailment, secs. 490, 509, 512.

McHenry v. Phila., Wil., and Balt. R. R. Co., 4 Harrington, 448.

12. When the goods are *actually delivered* at the place of des-

Propeller Niagara v. Cordes et al.

mination, and the complaint is only of a *late delivery*, the question is simply one of *reasonable diligence*, and accident or misfortune will excuse the carriers, unless they have expressly contracted to deliver the goods within a limited time.

Wibert v. N. Y. and Erie R. R. Co., 2 Kernan, 245—250,
citing Harmony v. Brigham, same book, p. 99.

Parsons v. Hardy, 14 Wend., 215.

Angell on Carriers, sec. 213, and particularly note 2.

Same book, secs. 289, 328.

The argument and references made by the counsel for the appellees, upon the questions of fact above stated, are omitted. The argument upon the point of law respecting the liability of the master, after the vessel was stranded, was as follows:

The master was guilty of want of ordinary care of the interest of the shippers, in deserting the vessel after she was stranded; in making no efforts to remove the libellants' goods from their place of stowage, either ashore, or to some part of the vessel where they would have escaped damage by water.

1. The law is well settled, that it is the duty of the master to adopt every reasonable and practicable method to take care of the goods during such interruptions, by unlading and storing, to prevent wetting, and drying if already wet, so that his contract to deliver in good order may be fulfilled; and a peril of the sea, imposing such duty upon him, will not be regarded as the proximate cause of alleged damage, if he was delinquent in this regard.

Chouteaux v. Leach, 18 Pa. S. R., 224, 6 Harr., 224.

Bowman v. Teal, 23 Wend., 306.

Shepherd v. King, 3 Story, 349.

The Barque Gentleman, Olcott, 118.

Bird v. Cromwell, 1 Miss., 38.

Harrington v. Niles, 2 Nott and McCord, 88.

Fland. Mar. Law, 155.

S. B. Co. v. Beeson, Harper, 262

Marvin's Law of Wreck and Salvage, 21.

a. There is no variation in the duty or liability of the master and owners after stranding.

Abb. Shipp., 454 n. (1.)

Propeller Niagara v. Cordes et al.

King v. Shepherd, 3 Story, 349.

Marvin's Law of Wreck and Salvage, 21.

b. The rule is analogous to that which, in France and America, *compels* a master to preserve and tranship in case of disabling.

Shipton v. Thornton, 9 Ad. and E., 314.

Tronson v. Dent, 36 Eng. L. and Eq., 41.

Hugg v. Ins. Co., 7 How., 604.

Saltus v. Ins. Co., 12 Johns., 107.

Bryant v. Ins. Co., 6 Pick., 131; 1 Arnould, 187.

By the English law, it is in the *discretion* of the master. This exhibits the *leaning* of our law to hold the master strictly.

c. Also to the rule in cases of salvage claimed by seamen, (Hobart v. Drohan, 10 Pet., 127,) and cases of capture, (Cheviot v. Brooks, 1 Johns., 367.)

2. No effort *whatever* was made to rescue the libellants' goods from what was not only apparent and probable, but almost certain, damage and destruction. And it does not lie in the mouth of the appellants to say that, by possibility, the damage might have happened even if they had resorted to any or all expedients of prevention; in such cases of careless and cowardly abandonment, the law will *presume* that well-directed efforts would have been successful.

Garrett v. Davis, 6 Bing., 716.

19 Eng. C. L., 714.

Williams v. Grant, 1 Conn., 492.

Fland. Shipp., 303, 261, 269, 199, n. (1.)

a. After the vessel began to make water, the pumps were used for an hour or two, until they were choked with sand; the wooden hand-pumps were in good order, but not used; the master was informed of the pumps of the Albany, near by, but made no effort to procure them. It was apparent, at first, that the water could have been lowered, so as to remove the goods from the hold. The ice was about to form, evidently, strong enough to admit of removal of goods over it. After the ice went away, a bridge could have been built, or the scow could have been used which was in the vicinity. It is clear the master felt satisfied on the question of *removal*, or else he

Propeller Niagara v. Cordes et al.

would not have looked for places to store the property on shore.

If the master and mates had remained, it is evident they might have taken out the perishable articles, fish, fruits, &c., and thus have prevented them from being essentially damaged themselves, or at least from damaging the dry goods of Sexton. If a *part* had been removed, the remainder could have been secured on the vessel.

To say the very least, there is good reason to believe that the houses on shore, and the means of erecting more, might have been used to afford safe storage on shore.

b. It is no reply to say that the master took advice of other masters. It does not appear that they gave such advice with any personal knowledge of the depth of the water, the mode of stowage, the character of the goods, or any of the necessary *data*. Gibson made no examination; the master and mate do not agree as to the depth of the water; and the opinions of advisers were doubtless based upon a false or imperfect statement of facts.

However, the advice of the best-informed men would make no difference. It must be clear *to the court* that the master's conduct was proper.

Tronson *v.* Dent, *ubi supra*.

Lawrence *v.* Minturn, *ubi supra*.

Marvin's Law of Wreck and Salvage, 20, 21.

c. The hatches were kept closed, although the liability of a part of the cargo to decay was known, until the stench, in March, compelled the keepers to open them; and all the dampness and filth of the hold was permitted to come in contact with the dry goods of Sexton.

d. The master left on the third day, leaving no subordinate officer with instructions, but taking those officers with him, and giving no orders to the keepers whatever.

e. Is not this question decisive: "Would the master have acted as he did, if the goods had been his own?" There can be but one answer; nor is there any doubt as to his duty, as the agent of shippers, owners, and insurers, to take at least such care as he would of his own goods.

Propeller Niagara v. Cordes et al.

Mr. Justice CLIFFORD delivered the opinion of the court.

These are appeals in admiralty from the District Court of the United States for the district of Wisconsin.

Libels were filed in these cases at a special term of the District Court of the United States, begun and held at the city of Milwaukie, on the first Monday of November, 1855. They are drawn in the usual form of libels *in rem*, and respectively allege a breach of contract of affreightment. Both suits grew out of contracts for the transportation of goods by the steam propeller Niagara, on her last trip during the season of 1854, from the port of Buffalo, in the State of New York, to Chicago, in the State of Illinois. They were argued together in this court, and it was conceded at the argument, by the counsel on both sides, that they depended substantially upon the same state of facts. All the testimony respecting the liability of the steamer was first taken and filed in the case last named, and was subsequently admitted and read in evidence at the hearing in the other suit, under a stipulation of the parties, and the pleadings are substantially the same in both cases. On the part of the libellants, it is alleged, among other things, to the effect that on or about the twenty-eighth day of November, 1854, the libellants caused certain goods, particularly described in the respective libels, to be shipped in good order and condition on board the propeller Niagara, to be transported from Buffalo to Milwaukie, in the State of Wisconsin, and that the master, Hugh Mallon, received the goods on board, and in consideration of certain freight, to be paid in that behalf by the respective libellants, undertook and promised to convey the goods from the port of shipment to the port of destination, and there to deliver the goods, (the dangers of navigation, fire, and collision, only excepted,) in like good order and condition to the libellants or their respective agents.

And they further allege that the steamer shortly thereafter departed on her voyage, but that the master, not regarding his duty, nor his promise and undertaking, did not so convey the goods, although no danger of navigation, fire, or collision, prevented him from so doing, and that the goods, or a large portion of them, through the mere carelessness, negligence, and

Propeller Niagara v. Cordes et al.

improper conduct, of the master, his mariners, or servants, became wetted, heated, or stained, and greatly damaged, or wholly lost to the libellants. Answers in the usual form of pleading were duly filed in each case on the twenty-fourth day of May, 1855, admitting the jurisdiction of the court, and setting up substantially the same grounds of defence. They are alike in all their material allegations, so far, at least, as respects the questions discussed at the bar, and all the matters involved in the judgment of the court. In both cases the answers admit the contract to transport the goods, as per bill of lading, the dangers of navigation, fire, and collision, excepted, and that certain packages, under each of the contracts, were accordingly shipped on board the steamer for that trip, leaving it to the libellants in each case to make such proof of the kind, quantity, and value of the goods, as they might be advised was material, and aver that the steamer, when she departed on the voyage, on the twenty-ninth day of November, 1854, was tight, staunch, seaworthy, and well manned, and that her entire cargo was well, safely, and securely stowed. And the respondents, denying every allegation in the libels, of carelessness, negligence, and improper conduct, on the part of the master and his mariners, aver the fact to be that they were vigilant, competent, and skilful in the premises, and did what it was their duty to do under the circumstances in which they were placed. They admit, also, that a part of the cargo was damaged, but allege and insist that the damage was occasioned by a danger of navigation within the exception of the bill of lading, for which they are not, and ought not, in any manner to be held responsible. And they further allege that the steamer was, by stress of weather, compelled to make the harbor of Presque Isle, and by the snow and the force of the storm and wind, which was very severe, the steamer dragged her anchor, went ashore, and was dashed upon the beach, from which cause, and the necessary detention of the goods on board, the damage, whatever it is, occurred; and that in the month of May, 1855, which was as soon thereafter as it was possible to repair the steamer and for her to proceed on her voyage, the goods, or so much of them as belonged to the respective libellants, were

Propeller Niagara v. Cordes et al.

transported to Milwaukie, and there delivered to them, and were by them respectively received, with a full knowledge of the damage, if any, and of its cause, and with an agreement not only to share the damage, but that the goods should be charged with and pay their proportion of a general average of the losses thus occasioned; and the respondents claim that the libellants, in each case, are liable "for a large amount of the average and damage" to the steamer, which they aver to be the sum of two thousand dollars.

This statement from the libels and answers embraces the substance of the pleadings in both cases, so far as respects the several matters discussed at the bar, and the real merits of the controversy. Testimony was taken on both sides in the court below, and after a full hearing a decree in each case was entered for the libellants, and the respondents appealed to this court. No additional testimony has been taken since the appeal, and it seems to be conceded that the rights of the parties depend chiefly upon certain questions of fact to be determined from the evidence, which is conflicting, and in some particulars very contradictory. That remark, however, applies more particularly to that part of the testimony which relates to the conduct of the master after the steamer was stranded, and the means at his command to secure and preserve the goods from damage. Many of the facts and circumstances connected with the voyage, as well as those attending the disaster, are involved in much less difficulty, and some of those most material to be ascertained are satisfactorily proved, without any contradiction whatever. On the one side, no question is made that the goods were regularly shipped at Buffalo on the twenty-eighth day of November, 1854; and on the other, it is admitted that in the contract of shipment the dangers of navigation, fire, and collision, were duly excepted in the usual form of such an exception in bills of lading. All of the goods were shipped in good order and condition, and were to be delivered at Milwaukie, as alleged by the libellants. They consisted in the one case of groceries, and in the other of dry goods; and it is conceded that they were carefully and properly stowed. On the day following the shipment, the Niagara

Propeller Niagara v. Cordes et al.

left Buffalo, and proceeded on her intended voyage. She was a steam propeller, of four hundred and fifty tons burden, and at the time of her departure was a good, tight, stanch vessel, every way suitable for the navigation in which she was engaged, and was well furnished with ground tackle, including two anchors and two chains. One of her anchors weighed fourteen hundred pounds, with an inch and an eighth chain of sixty fathoms, and the other weighed seven hundred pounds, with a chain of the usual size and length. Her whole company consisted of twenty-two men, constituting a full complement of officers and crew for the voyage in a steamer of that description. Having proceeded on the usual route for that voyage, she arrived in Lake Huron on the second day of December, at four o'clock in the morning, in perfect safety, and crossed Saginaw bay in the afternoon of the same day. About eight o'clock in the evening of that day, it commenced snowing, with a light wind, which by twelve o'clock at night freshened to a gale, and the storm continued without any abatement, blowing a heavy gale from a northeasterly direction, or east-northeast, till the day after the steamer was stranded.

After crossing Saginaw bay, however, she continued on her regular course, and made Thunder-bay light at one o'clock, and proceeding onward on her voyage, arrived off Presque Isle, and made the light at that place at four o'clock in the morning, without having suffered any damage or met with any difficulty except that the master testifies that she rolled heavily, and that for a half or three-quarters of an hour before he made the light, he had to keep her off her course two points, to ease her in the sea. Her course from Thunder bay had been north-northwest for a short time, then west by north, and then north-west; and the mate of the steamer testifies, that when they first saw Presque Isle light, the steamer was a mile or two east of the light, and was in the usual course. At that time she was in no want either of wood or water, and it does not appear that she was in any worse condition to proceed on the voyage, unless prevented by the storm, than at the moment when she left the place of her departure. Her cargo was a general assortment of merchandise, consisting of teas, sugars, coffee, fish,

Propeller Niagara v. Cordes et al.

liquors, molasses, crates of crockery, bales of sheeting, boxes of dry goods, and various other articles, specified in the record. All of the liquors, molasses, and some of the boxes, were stowed on the ground-tier in the lower hold. Heavy goods were placed at the bottom, and light goods on top, and the hold was full, and battened down. Most of the light goods, such as boxes of merchandise, teas, sugar in barrels, and bales of sheeting, were on deck, and there were some willow wagons on the hurricane deck. None of her deck load had been washed away or injured, and it does not appear that it had been in any manner displaced or thrown into disorder by the rolling of the vessel.

These considerations tend strongly to show that there could not have been any urgent necessity to change the course of the steamer on account of the violence of the storm or the motion of the vessel, and, consequently, affect the credit of the master, and corroborate the statement of the mate, that, at the time the light was discovered, the steamer was pursuing her usual route. Both the master and the mate were on deck when they made the light, and the master gave the order to run into Presque Isle. In entering the harbor, they steered west-southwest, and then doubled inside of a small shoal round to the southeast, in order to get to the pier. What purpose was to be accomplished by getting to the pier, it is not easy to perceive, as the mate testifies that they knew that the sea was so heavy that the steamer could not lie at the dock. They, however, came round to the southeast, and so near to the pier that the mate says he could see the snow on the beach, and then let go the large anchor, and the wind immediately caught the steamer on the larboard bow, and she commenced dragging the anchor. When they found that the steamer dragged, and that there was danger that she would go ashore, instead of casting the other anchor, their first endeavor was to get rid of the one already cast, in order, if possible, to work her off, and make another effort to get up to the dock; and, finding that they could not heave the chain with the windlass, their next effort was to slip it; and while they were endeavoring to unshackle the chain the steamer struck, and went on to the beach stern first, and

Propeller Niagara v. Cordes et al.

immediately swung round broadside to the shore. No attempt was made to let go the small anchor, although it was hanging at the bow, and the mate admits that the steamer dragged more than a quarter of a mile before she struck. They presently tried the pumps, and it was found that she did not leak. Shortly after, she commenced pounding, and it was then ascertained that she was making water freely, when they started the engine-pump, but it choked with sand, and they were obliged to desist. At the place where the steamer lay the water was seven or eight feet deep, and she filled to the level of the water outside in two or three hours, so that the water in the hold was four or five feet deep above the top of the keelson. It was about five o'clock in the morning of the third of December, 1854, that the steamer went on to the beach, and the master and all hands remained on board till ten o'clock in the forenoon, when he and the mate went on shore for the purpose, as he testifies, of ascertaining whether there were any facilities for storing the goods, and whether it would be possible to unload the steamer, and get her off. When he got on shore, he found the steamer Plymouth, bound down the lake, lying there, fastened at the dock, she having touched at Presque Isle for wood four or five hours before the arrival of the Niagara, and remaining there on account of the storm. Having made certain inquiries of the residents, and consulted with the master of the Plymouth, he came to the conclusion that it was the safest way to leave the goods on board, as more of them, in his judgment, would be protected in that mode than by removing them on shore; and on the morning of the sixth of December, the master, other officers, and all the crew of the Niagara, except three, took passage in the Plymouth, leaving the watchman, wheelsman, and porter, in charge of the steamer, with the hatches fastened down, and the goods in the condition in which they were when the steamer was stranded. During the night of the fourth of December, the storm subsided; but the following day was very cold, so that the steamers were frozen in, and persons walked on the ice from the pier to the place where the Niagara lay, which was more than a half mile. It moderated, however, during the night, and on

Propeller Niagara v. Cordes et al.

the following morning the ice went out of the harbor, and two other steamers, the Republic and Kentucky, came in before the Plymouth left, and the former took the place of the Plymouth at the dock after she started on her voyage down the lake. Several witnesses testify—and among the number the master of the Plymouth—that the sixth of December, the day he left, was a fine day, although, he says, there was so much ice about his boat, where she lay at the dock, that he had to cut her out in the morning before he started.

One of the witnesses for the libellants, who resides at Presque Isle, testifies, that after the Plymouth left, it was clear, and made ice, but did not blow, and that not long after there was a thaw, which continued till the thirteenth of January, and that after the thaw there were two or three weeks of very nice weather. Navigation, however, closed in a few days after the Plymouth left, and the Niagara remained on the beach, where she was stranded, until the mate, who is now the master of the Niagara, returned to Presque Isle, on the twenty-seventh day of April, 1855. When he returned, he found her where he left her, in charge of the watchman. He immediately pumped her out with a steam-pump, according to his account, and lightened her off with a steamboat, and, after she was lightened, got the steamboat to take her up to the dock, where he removed the residue of the goods, and then took her to Detroit and had her repaired. After she was repaired, he returned to Presque Isle, in the month of May, 1855, and conveyed the goods, or so much of them as had not been destroyed, to the place of destination. Some of the goods were in good condition or were slightly injured, while others were greatly damaged or wholly worthless. Those stowed below had remained entirely without ventilation from December to March, and then the hatch at midships only had been opened. They were heated, discolored, and stained, and one of the witnesses testifies that sugar, coffee, and dried fruit, were all soaked together, and that the water pumped up was dark, exhibiting the appearance of the soakings of coffee and codfish, and that the goods had the offensive smell of dead water. They were taken out about the first of May, so that those stowed in the

Propeller Niagara v. Cordes et al.

lower hold, not more than four or five feet above the keelson, had been submerged in bilge-water for nearly five months, and some of those above the water had been moistened by the dampness and become mouldy. Damages to the amount of three thousand seven hundred and sixty-three dollars and seventy-six cents were allowed by the district judge, in the case first named, and in the other, four thousand nine hundred and sixty-four dollars and thirty cents, and it is not pretended in the argument that the respective amounts were either extravagant or unreasonable. It is not upon any such ground that the appellants seek to reverse the respective decrees in the court below. They deny that they are liable at all for any amount, and set up the first exception in the contract of shipment or bill of lading, and their counsel insist upon the following propositions:

I. That the damage to the goods resulting from the stranding of the steamer was wholly occasioned by the dangers of navigation, the risk of which was not taken by the master or owners of the steamer.

II. That after the Niagara was stranded and filled with water, and disabled from proceeding on her voyage, the appellants were responsible only for the ultimate delivery of the goods, and for reasonable care in preserving them from the effect of storms, bad air, leakage, and embezzlement.

III. That the master, after the steamer was stranded, and the goods wetted, became and was the agent of the shippers of the goods as well as of the owners of the vessel, and as such, under the circumstances of this case, is responsible only for due and proper care and diligence, and that it cannot be successfully contended, from the evidence, that such care and diligence were not exercised.

These propositions, whether taken separately or collectively, necessarily involve mixed questions of law and fact, which in a case like the present must be determined by the court, acting instead of a jury, to find the facts, and as a court to determine the law. Such propositions, therefore, must be considered in connection with all the legal evidence exhibited in the record, and their accuracy must be tested by the true state of

Propeller Niagara v. Cordes et al.

the facts as found by the court from the evidence, and by the rules of law applicable to that state of the case. According to the admitted or undisputed facts of the case, the Niagara was enrolled and licensed for the coasting trade, and was employed by the owners in transporting goods, under contracts for freight, upon navigable waters between ports and places in different States, and at the time of the disaster she had a full cargo of merchandise, of various descriptions, on board, consigned to merchants or parties residing either at her port of destination or at Milwaukie, and other intermediate ports or places along the course of her voyage. She was a general ship, laden with goods to be transported for hire; and the goods in question having been received and taken charge of, as goods under a contract of shipment, corresponding in terms to the usual bill of lading for the transportation of goods on inland navigable waters, the question of liability in this case must be determined by the rules of law applicable to carriers of goods upon such inland waters. A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. In all cases where there is no special agreement to the contrary, he is entitled to demand the price of carriage before he receives the goods; and if not paid, he may refuse to receive them; but if he take charge of them for transportation, the non-payment of the price of carriage in advance will not discharge, affect, or lessen his liability as a carrier in the case, and he may afterwards recover the price of the service performed. When he receives the goods, it is his duty to take all possible care of them in their passage, make due transport and safe and right delivery of them at the time agreed upon; or, in the absence of any stipulation in that behalf, within a reasonable time. Common carriers are usually described as of two kinds, namely, carriers by land and carriers by water. At common law, a carrier by land is in the nature of an insurer, and is bound to keep and carry the goods intrusted to his care safely, and is liable for all

Propeller Niagara v. Cordes et al.

losses, and in all events, unless he can prove that the loss happened from the act of God, or the public enemy, or by the act of the owner of the goods.

Common carriers by water, like common carriers by land, in the absence of any legislative provisions prescribing a different rule, are also, in general, insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading. A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a seaworthy vessel, tight and staunch, and well furnished with suitable tackle, sails, or motive power, as the case may be, and furniture necessary for the voyage. She must also be provided with a crew, adequate in number and sufficient and competent for the voyage, with reference to its length and other particulars, and with a competent and skilful master, of sound judgment and discretion; and, in general, especially in steamships and vessels of the larger size, with some person of sufficient ability and experience to supply his place temporarily, at least, in case of his sickness or physical disqualification. Owners must see to it that the master is qualified for his situation, as they are, in general, in respect to goods transported for hire, responsible for his acts and negligence. He must take care to stow and arrange the cargo, so that the different goods may not be injured by each other, or by the motion of the vessel, or its leakage; unless, by agreement, this duty is to be performed by persons employed by the shipper. In the absence of any special agreement, his duty extends to all that relates to the lading, as well as the transportation and delivery of the goods; and for the faithful performance of those duties the ship is liable, as well as the master and owners. A clean bill of lading, in general, imports, unless the contrary appear on its face, that the goods are to be safely and properly secured under deck. (Fland. on Ship., sec. 192.)

In the case of a parol shipment, the master is allowed to show a local custom to carry the goods on deck in a particular trade.

Propeller Niagara v. Cordes et al.

It must, however, be a custom so generally known and recognised, that a fair presumption arises that the parties in entering into the contract agreed that their rights and duties should be regulated by it. Having received the goods for transportation, in the absence of any stipulation as to the period of sailing, the master must commence the voyage within a reasonable time, without delay, and as soon as the wind, weather, and tide, will permit. After having set sail, he must proceed on the voyage, in the direct, shortest, and usual route, to the port of delivery, without unnecessary deviation, unless there has been an express contract as to the course to be pursued; and where the vessel is destined for several ports and places, the master should proceed to them in the order in which they are usually visited, or that designed by the contract, or, in certain cases, by the advertisement relating to the particular voyage. A deviation from the direct route may be excusable if rendered necessary to execute repairs for the preservation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates, or for the purpose of obtaining necessary supplies of water and provisions, or, in the case of a steamer, to obtain necessary supplies of wood or coal for the prosecution of the voyage, or for the purpose of assisting another vessel in distress.

As agent of the owner, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by some cause arising from irresistible force, over which he has no control, and which cannot be guarded against by the watchful exertions of human skill and prudence. When the vessel is wrecked or otherwise disabled in the course of the voyage, and cannot be repaired without too great delay and expense, he is at liberty to tranship the goods and send them forward so as to earn the whole freight; and if another vessel can be had in the same or a contiguous port, or at one within a reasonable distance, it becomes his duty under such circumstances to procure it and transport the goods to their place of destination, and in that event he is entitled to charge the goods with the increased freight arising from the hire of the vessel so procured. That rule, however,

Propeller Niagara v. Cordes et al.

is not obligatory in cases where the goods are not perishable, provided the ship can be repaired in a reasonable time. In that state of the case he may, if he deems it best, retain the goods until the repairs are made, and forward them in his own vessel; and upon the same principle, and for the same end, if he have no means to tranship the goods, it is his duty to repair his own vessel, when capable of being repaired, provided it can be done within a reasonable time, and he has the means at his command; and if not, and the means cannot be obtained from the owner, or upon the security of the ship, he may sell a part, or hypothecate the whole, and apply the proceeds to execute the repairs, in order that he may be enabled to resume the voyage and carry the goods, or the residue, as the case may be, to the place of destination; and he is not entitled to recover for freight if he refuses to tranship the goods, unless he repairs his own vessel within a reasonable time, and carries them on to the place of delivery. Most of the rules of law prescribing the duties of a carrier for hire, and regulating the manner of their exercise, have existed for centuries, and they cannot be modified or relaxed except by the interposition of the legislative power of the Constitution. Time and experience have shown their value and demonstrated their utility and justice, and they ought not and cannot be changed by the judiciary. Some new and important provisions have been introduced into the law of carriers by water, by the act of the third of March, 1851, entitled "An act to limit the liability of ship-owners." Owners of ships under that act are not held liable for loss or damage to the cargo by reason of fire happening to or on board the vessel, unless the fire was caused by the design or neglect of such owner, except in cases where there is a special contract between the owner and the shipper, whereby the former assumes that risk. They are declared not liable as carriers for precious metals, precious stones, or jewels, or for the bills of any bank or public body, unless at the time of their lading a note in writing of their true character and value be given to the owner or his agent, and the same be entered on the bill of lading; and in no case where that act applies will the owner be liable for the articles therein enumerated beyond the amount

Propeller Niagara v. Cordes et al.

so notified and entered. It contains other provisions also of very great practical importance, and among the number the following: That for embezzlement, loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of the owner, his liability shall in no case exceed the amount or value of his interest in the vessel and the freight then pending. No part of the act, however, applies to the owner of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.

A question may arise, whether the lakes bordering on a foreign jurisdiction are or are not excluded from the operation of the act under the term inland navigation; but it is not necessary at the present time to determine or consider that question, as the first exception in the contract of shipment is the only one set up in this case, and there is no pretence that there has been any transfer of the steamer under the fourth section of the act for the benefit of the libellants.

Carriers by water are liable at common law, and independently of any statutory provision, for losses arising from the acts or negligence of others, to the same extent and upon the same principles as carriers by land—that is to say, they are in the nature of insurers, and are liable, as before remarked, in all events, and for any loss, however sustained, unless it happen from the act of God, or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading. Duties remain to be performed by the owner, or the master as the agent of the owner, after the vessel is wrecked or disabled, and after he has ascertained that he can neither procure another vessel nor repair his own, and those, too, of a very important character, arising immediately out of his original undertaking to carry the goods safely to their place of destination. His obligation to take all possible care of the goods still continues, and is by no means discharged or lessened, while it appears that the goods have not perished with the wreck, and certainly not where, as in this case, the vessel is only stranded on the beach. Such disasters are of frequent occurrence along the seacoast in certain seasons

Propeller Niagara v. Cordes et al.

of the year, as well as on the lakes, and it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied, or in any manner lessened, by the happening of such an event. Safe custody is as much the duty of a carrier as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce, and over which he has no control, as by the stranding of the vessel, he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill, and prudence. An effort was made by able counsel, in *King v. Shepherd*, (3 Story C. C., 358,) to maintain the proposition, assumed by the respondents in this case, that the duties of a carrier after the ship was wrecked or stranded were varied, and therefore that he was exempted from all liability, except for reasonable diligence and care in his endeavors to save the property. Judge Story refused to sanction the doctrine, and held that his obligations, liabilities, and duties, as a common carrier, still continued, and that he was bound to show that no human diligence, skill, or care, could save the property from being lost by the disaster. Anything short of that requirement would be inconsistent with the nature of the original undertaking, and the meaning of the contract, as universally understood in courts of justice. Admit the proposition, and it is no longer true that, where there is no provision in the contract of affreightment varying the liability of the carrier, he cannot relieve himself from liability for injuries to goods intrusted to his care, except by proving that it was the result of some natural and inevitable necessity superior to all human agency, or of a force exerted by a public enemy. Kent, Chief Justice, said, in *Elliott v. Russell*, (10 Johns., 7,) decided in 1813, that it has long been settled that a common carrier warrants the delivery of the goods in all but the excepted cases of the act of God and public enemies, and there is no distinction between a carrier by land and a carrier by water; and the same learned judge also held that the character, duty, and responsibility of a carrier continues to attach to a master as long as he has charge of the goods. A master,

Propeller Niagara v. Cordes et al.

says a learned commentator, should always bear in mind that it is his duty to convey the cargo to its place of destination. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty is an act for which both he and his owners may be made responsible. His duties as carrier are not ended until the goods are delivered at their place of destination, or are returned to the possession of the shipper, or kept safely until the shipper can resume their possession, or they are otherwise disposed of according to law. (*King v. Shepherd*, 3 Story C. C., 349; *Abbot on Ship.*, 8th ed. Perk., 478.) These authorities are sufficient, it is believed, to demonstrate the proposition, that where a loss or damage is shown, it is incumbent upon the carrier to bring it within the excepted peril in order to discharge himself from responsibility. It is not sufficient, without more, to show that the vessel was stranded, to bring the goods within the exception set up in this case. Had the goods perished with the wreck, it would be clear that the loss was the immediate consequence of the stranding of the vessel; and assuming that the disaster to the vessel was the result of the excepted peril, or of some natural and inevitable accident, then the carrier would be discharged. All the evidence, however, in this case, shows the fact to be otherwise; that the goods did not perish at the time the steamer was stranded; and the damage having since occurred, the rule of law to be ascertained is the one applicable in cases where the injury complained of arises subsequently to the disaster to the vessel. Such interruptions to a voyage are of frequent occurrence, and the rule of law is just and reasonable which holds that the master is bound to the utmost exertions in his power to save the goods from the impending peril, as it is no more than a prudent man would do under like circumstances. In great dangers great care is the ordinary care of prudent men, and in great emergencies prudent men employ their best exertions; so that the difference in the rule contended for, and the one here laid down, is much less than at first appears. Nevertheless there is a difference, and in a question of so much

Propeller Niagara v. Cordes et al.

practical importance it is necessary to adhere strictly to the correct rule. Losses arising from the dangers of navigation within the meaning of the exception set up in this case are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertions, and which cannot be prevented by human skill and prudence. When such efforts fail to save the goods from the excepted peril, the ultimate loss and damage in judgment of law results from the first cause, upon the ground that when human exertions are insufficient to ward off the consequences, the excepted peril may be regarded as continuing its operation. Such, it is believed, is the nature of the contract between a carrier and shipper, so far as it becomes necessary to examine it in the cases under consideration. Carriers may be answerable for the goods, although no actual blame is imputed to them; and after the damage is established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they are exempted in the contract of shipment or bill of lading. (Clark *v.* Barnwell, 12 How., 272; Rich *v.* Lambert, 12 How., 347; Chitt. on Carriers, 242; Story on Bail, secs. 528, 529; 3 Kent Com., 213; 1 Smith Lead. Cases, 313; Choteaux *v.* Leech et al., 18 Penn., 233; Fland. on Ship., sec. 257; Marvin on Wr. and Salv., 21; Parsons's Mer. L., 348; Smith's Mer. L., 3d ed., 386.)

Applying these principles of law in the consideration of the case, we will proceed to a brief review of the evidence, in connection with that already given, bearing upon the questions of fact presented for decision. It has already appeared that the steamer made the light at Presque Isle on the third day of December, 1854, at four o'clock in the morning. At that time she was on the usual course, and was heading northwest. She had met with no difficulty up to that time, and was tight, stanch, and strong, and in no want either of wood or water. Her master says, however, that he found it would be a great risk to haul her off to get round the point, doubtless referring to his previous statement that he had kept her off her course to ease her in the sea. She was then sailing northwest, and her course up to the straits would have been, as the witnesses

Propeller Niagara v. Cordes et al.

say, either west-northwest, or northwest by west half west, and there is no difference of opinion among them that the course was direct and the wind was a fair wind for steamers; and one witness says that in a conversation with the mate, while he was at Presque Isle, he heard him say that they need not have entered the harbor. All or nearly all the witnesses agree that there is no difficulty in entering that harbor in the daytime, and that the anchorage, though rather limited in space, is safe and quite good just northwesterly of the end of the pier and out towards the light-house, and that the harbor affords a good shelter to vessels in a storm, except when the wind is blowing from a northeasterly direction or east-northeast, and then that its course is directly into the harbor, which fact must have been well known to the master and mate at the time they decided to make the attempt. Many of the witnesses say that it is more difficult to go in during the night, and several testify positively that it is dangerous, and some of the more experienced navigators say they would not risk the attempt in a dark night. One witness, the master of the Plymouth, called by the respondents, testified that the steamer did not come right in; that she broached to so near the mouth of the harbor, that she was detained at least a quarter of an hour. She, however, succeeded in entering the harbor, and cast her anchor as before stated. Four experienced navigators testify to the effect that she should have kept on her course; that it was not proper to enter the harbor. On the other side, one witness says, that whether it was good seamanship or not would depend upon the position of the vessel; and that if she was near in, he thinks it was prudent, and that he should have entered. Another says that if he had considered either vessel or cargo in danger, he should have gone in by all means; and the mate says that they concluded that it was better to go in. One witness, called by the libellants, says he heard the mate say, after the disaster, that it was unnecessary.

These are the principal facts bearing upon the question, whether the master exercised a sound judgment and discretion in entering the harbor. Most of the facts in evidence respecting the acts of the master after he entered the harbor, as they

Propeller Niagara v. Cordes et al.

appear to the court, have already been stated, and need not be repeated. Experts were called and examined upon the question whether the master evinced proper skill and judgment in the attempt he made to anchor, and on that point three or four witnesses, who are experienced navigators, were called and examined by the libellants. They testify to the effect that a master of a steamer about to enter a harbor under the circumstances of this case ought to have both anchors ready, so that if one will not hold the vessel, he can cast the other; and they express the opinion that such precautionary steps are no more than ordinary prudence; and one of them says that it is customary to let go the small anchor first, and if that will not hold, then to let go the large anchor. On the other side, the mate of the steamer testifies that they had not time to let go the small anchor; and another witness expresses the opinion, that if the large anchor and the engine would not hold, then there was nothing that could be done; and the master of the Plymouth says that he knows of nothing else that could have been done, except to cast the anchor.

Numerous witnesses were examined on the question whether it was practicable to have removed the goods and stored them; and whether, if it had been done, it would have afforded any better protection to the goods. On this point the testimony of the witnesses is very conflicting. All that can be done is to state the principal facts, as they appear to the court.

Nineteen men were residing at Presque Isle at the time of the disaster, mostly temporary residents, in the employment of Frederick Barnham, a witness for the respondents. There were four dwelling-houses there in which people lived, and two unoccupied, and there were two barns and a vacant shop; all or nearly all the dwellings were built of logs, and were rudely finished. Three of those dwellings were within a half mile of the place where the steamer lay, which was within a quarter of a mile of a road extending round on the beach from the pier, where the Plymouth lay, with her officers and crew on board. Several days previously, the steamer Grand Turk had been wrecked, twelve miles distant from Presque Isle, and her officers and crew were there, consisting in all of

Propeller Niagara v. Cordes et al.

eight or nine men. There was a large scow in the harbor, in good order, anchored near the pier, and not in use, which several witnesses testify might have been obtained to lighten the steamer; and one witness testifies that the same scow was used by the mate in the spring following to carry the goods from the steamer to the dock, before she was taken off by the tug. Nine pumps, such as are used on board vessels, and brought up to use on the other disabled steamer, were lying on the beach, within a half mile. All the witnesses agree that the master of the Niagara never applied to any one of them for any assistance, either in respect to the goods or the steamer; and the mate admits that they had made up their minds to leave, the evening of the day after the disaster. Some of the witnesses offered assistance, and it was declined. Courtwright testifies that he heard a conversation between the master and the mate, in presence of fifteen or twenty persons, in reference to taking out the cargo of the steamer. The mate said to the master that they could get the goods out of the steamer, and get her alongside of the dock; to which the master replied, that it was too late in the season to do anything with her; that he was bound to go home; that he would not stop there for the steamer and all that was in her. Other declarations of the master, equally expressive of his determination to return home, are also in evidence; and being a part of the *res gestae*, are clearly admissible to explain the motives of the master, in connection with his acts. Many witnesses on the side of the respondents express the opinion that the goods could not have been removed; and an equal or greater number called by the libellants express a contrary opinion, and suggest various modes by which it might have been accomplished in a very short time. Such opinions, however, cannot have much weight in determining the question. One important fact is clearly proved, namely, that the ice went out of the harbor the night before the Plymouth left, and it was mild weather after that, for the most part, till near the middle of January, 1855.

Our conclusions upon these several questions may be briefly stated. In respect to the one first presented, it is proper to remark that it depends upon the proof whether the act of the

master, in seeking shelter in the harbor, was reasonably necessary; and if it was, then he is not in fault on that account. None of the circumstances exhibit such clear and decisive indications as would justify the conclusion that he did not think at the time that it was the most expedient course to be pursued. That he was without much experience as a master of a steamer of this description, does not seem to be denied; and it is equally clear that he had a strong preference for a sailing vessel, as is made evident by his own remarks, as well as in another fact proved in the case, that he has resumed his more favorite employment upon the water, for which, perhaps, he is better qualified than for the one in which he was then engaged. He says, in effect, that he found it would be dangerous to proceed on the voyage, and the mate says they concluded that it would be better to go into Presque Isle; and on their own opinions thus expressed, and the proofs as to the violence of the storm, his vindication mainly rests. Strong doubts are entertained whether he acted wisely in departing from the course of the voyage, and yet the evidence is not so full and clear in the case as to induce the court to place the decision upon that ground. Whatever dangers there were in entering the harbor, he succeeded in surmounting, and he cannot be held responsible for any accident which did not happen. Masters have a right, and oftentimes it is their duty, to seek shelter from a storm; and the fact that it would have been better to have kept on the course, may be more apparent now than it could have been to any one at the time. Something must be deferred to the judgment and discretion of the master on such occasions, so that although the circumstances tend strongly to prove that he misjudged, or was wanting in that fearless, prudent energy which he ought to have displayed, still they are not of that decisive character which incline the court to make the decision turn upon that ground; and the same remarks also apply to his acts, and endeavors to anchor the steamer after he entered the harbor. Knowing, as he did, that the wind was blowing directly into the harbor, it is difficult to see why it was that he brought the steamer round to the position in the wind, so as to expose her to the danger which finally

Propeller Niagara v. Cordes et al.

overcame his efforts to accomplish the purpose for which he says he sought the harbor. He knew the course of the wind and the difficulties of the undertaking before he entered, and ought to have been prepared to encounter them with the best precautions in his power to make. When he found that the anchor dragged, a great majority of the witnesses say he ought to have let go the other. His own description of what took place on the deck of the steamer after she entered the harbor, as well as that given by the mate, evinces an indecision and want of energy quite unsuited to the emergency in which he was placed, and tends strongly to show that he was wanting in the proper qualities of a skilful and well-instructed master. These considerations create strong doubts in the mind of the court, whether the respondents are faultless in this particular, and yet the court is disinclined to place the decision entirely on that ground, as several witnesses, of some nautical skill, have testified that they are unable to see that anything more could have been done.

On the remaining ground of complaints against the master, we are all of the opinion that he was guilty of gross negligence. His steamer lay within ten or fifteen rods of the beach, and within a little more than a half mile of the settlement, the number of whose residents was temporarily augmented by the presence of the officers and crew of the steamer Plymouth and those of the Grand Turk; and yet all he did, so far as appears, to secure or recover the large amount of property he had on board, was to go on shore, consult with one or more of the residents, advise with the master of the Plymouth, and then came to the conclusion that nothing could be done, and that it was best to leave the goods on board, under the charge of three of his crew. He remained, however, for two or three days, until the storm had subsided and the weather had moderated; and after two other steamers had arrived in the harbor, he took passage on the Plymouth, and returned home, without having made any effort himself, or requested the aid of others, either to get off the steamer, or to remove and store the goods. We are satisfied from the evidence that the goods might have been removed between the time he left and the middle of January,

Union Insurance Company v. Hoge.

and we are not satisfied that it could not have been done or successfully commenced during the time he remained in Presque Isle. A removal of a part would have enabled him to protect the residue on board; and there is no sufficient ground from the evidence to conclude that he would have encountered any serious difficulty in finding places enough for storing to have enabled him to remove from the steamer all of that class of goods exposed to damage, and store them on shore. At that time the goods had not received any considerable injury, and most of them, in all probability, none whatever. Prompt attention would have saved the property and protected the shipper from loss. It must not be understood that a master can abandon his ship and cargo upon any such grounds as are proved by the evidence in this case, or, indeed, upon any other, so far as the goods are concerned, when it is practicable for human exertions, skill, and prudence, to save them from the impending peril.

This view of the evidence renders it unnecessary to consider the other grounds of defence set up by the respondents.

The decrees, therefore, of the District Court in the respective cases are affirmed, with costs, in each case for the libellants.

THE UNION INSURANCE COMPANY, PLAINTIFFS IN ERROR, *v.* JOHN BLAIR HOGUE.

Under a general act of the Legislature of New York, passed on the 10th of April, 1849, which authorized the incorporation of insurance companies in the State under it, held that the eighth section in the charter of a mutual insurance company formed under the general act, which provided for the payment of cash premiums, at the election of the insured, as well as premiums secured by notes, was authorized by the general act, and that a policy issued upon a payment of the premium in cash was legal and valid.

This case was brought up, by writ of error, from the Circuit Court of the United States for the northern district of New York.

It was an action brought by Hoge upon a policy of insurance upon a paper-mill in Virginia. The insurance company were