

a fund insufficient to meet the claims of both. Presumably, therefore, in the absence of fault or privity on his part, and of negligence on the part of his servants, he would rank equally with the cargo owner.

### XIII. EFFECT ON GENERAL AVERAGE CONTRIBUTION.

1. *Shipowner v. Cargo owner*.—It has been settled by the Supreme Court of the United States in *The Irrawaddy* that, while the Harter Act declared the vessel owner not to be responsible for the negligence of his servants in the navigation or management of the vessel, he could not recover from the cargo owner any contribution in general average for his own losses, caused by negligence of his servants, as stated.<sup>59</sup> In other words, while the Act so relieved the vessel owner from liability, it gave him no affirmative relief against the cargo for the results of such negligence, because, "had Congress intended to grant the further privilege now contended for, it would have expressed such intention in unmistakable terms."

In England, different views on the subject prevail, and the decision in *The Irrawaddy* has not been followed.

In England, as is pointed out in Carver,<sup>60</sup> the fault which takes away the right to contribution must be one which gives the right of action to the person, who might otherwise be liable to contribute, either as being a tort, or as a breach of contract: so that if unseaworthiness or negligent navigation are, by contract of carriage, not to be counted as faults against the shipowner, his right to contribution cannot be lost, on the ground that unseaworthiness or bad navigation made the sacrifice necessary. The view adopted by the English courts is that the default or wrongful act, which is to bar a person from claiming contribution, "must be something which is wrongful in the eyes of the law, that is to say, something which constitutes an actionable act."<sup>61</sup>

59. *The Irrawaddy* (1898) 171 U.S. 187, 192.

60. Section 373(b).

61. *Kennedy, L.J.*, in *Greenshields, Cowie & Co.* (1908) 1 K.B., p. 51.